Notes

FURTHERING DECOLONIZATION: JUDICIAL REVIEW OF COLONIAL CRIMINAL LAWS

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ABSTRACT

Most of the world today was once colonized by a European power. Great Britain was one of the most prolific colonizers, with more than 412 million people under its rule at its height. As part of its colonial enterprise, Great Britain transplanted criminal laws into its colonies and territories, to varying degrees. Across many former Commonwealth colonies, the criminal codes implemented by the British were similar or even identical. Today, these colonial criminal codes remain largely intact in many former colonies. Some of these colonial criminal laws are notoriously used by modern postcolonial governments to infringe human rights and restrict constitutional freedoms. While these laws have sometimes been challenged in court, they are often upheld despite their troublesome impact.

These laws are colonial holdovers, persisting in modern, postcolonial societies despite their anachronistic and foreign origins. As formerly colonized states continue the process of decolonization, their courts should assess a law's colonial origin when considering its validity under the native constitution. This Note contends that courts across the former British Empire can operationalize consideration of a law's colonial origin as an element of formal judicial review through a means-end proportionality test. Through a discussion of two types of proportionality—sequential and nonsequential—and their application to sodomy and sedition laws in three former British colonies—Malaysia, Kenya, and briefly, India—this Note demonstrates how

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proportionality can equip constitutional courts to further the national process of decolonization and the pursuit of self-determination.

INTRODUCTION

"They were wrong then, and they are wrong now."[1] At the 2018 convening of the Commonwealth[2] heads of government, Prime Minister Theresa May apologized to more than fifty leaders from across the former British Empire for her country's colonial imposition of antigay sodomy laws.[3] May elaborated, saying she "deeply regret[ted] both the fact that such laws were introduced and the legacy of discrimination, violence and death that persists today."[4] May's statements reflect a growing awareness of the enduring mark British colonialism has left on the world. That mark is particularly distinct in Asian, African, and American nations, the majority of which were colonized by European powers well into the twentieth century.[5] Relics of colonialism remain in many facets of postcolonial society. Codified in penal codes around the world, holdovers like sodomy laws are among the most obvious.[6] Indeed, Prime Minister May's remarks demonstrate how these laws often restrict constitutional freedoms and international human rights,[7] but they nevertheless persist in many

1. Pippa Crerar, *Theresa May Says She Deeply Regrets Britain's Legacy of Anti-Gay Laws*, GUARDIAN (Apr. 17, 2018, 8:22 AM), https://www.theguardian.com/world/2018/apr/17/theresa-may-deeply-regrets-britain-legacy-anti-gay-laws-commonwealth-nations-urged-overhaul-legislation [https://perma.cc/J7RS-P2PY].

2. The Commonwealth of Nations is the voluntary association of fifty-four states, almost all of which are former colonies and territories of the British Empire. *About Us*, COMMONWEALTH, https://thecommonwealth.org/about-us [https://perma.cc/XT7D-UJHH].

3. Crerar, *supra* note 1.

4. Lizzy Buchan, *Theresa May Urges Commonwealth Countries To Reform 'Outdated' Homosexuality Laws*, INDEP. (Apr. 17, 2018, 10:57 AM), https://www.independent.co.uk/news/uk/politics/theresa-may-commonwealth-homosexuality-laws-lgbt-rights-africa-caribbean-a8308256.html [https://perma.cc/XBV5-5D7R].

5. *See* Max Fisher, *Map: European Colonialism Conquered Every Country in the World but These Five*, VOX (Feb. 24, 2015, 10:24 AM), https://www.vox.com/2014/6/24/5835320/map-in-the-whole-world-only-these-five-countries-escaped-european [https://perma.cc/X8P5-WSNB] (illustrating the extent of European colonization from the 1500s to the 1960s).

6. *See, e.g.*, HUM. RTS. WATCH, THIS ALIEN LEGACY: THE ORIGINS OF "SODOMY" LAWS IN BRITISH COLONIALISM 4–5 (2008) [hereinafter HUM. RTS. WATCH, THIS ALIEN LEGACY], https://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf [https://perma.cc/8CWX-9V7X] ("[Half of the] 80 countries [that] still criminalize consensual homosexual conduct between adult men, and often between adult women . . . have these laws because they once were British colonies.").

7. *Cf.* DAVID M. ANDERSON & DAVID KILLINGRAY, POLICING THE EMPIRE: GOVERNMENT, AUTHORITY AND CONTROL, 1830-1940, at 1 (1991) (studying colonial policing to

Commonwealth nations[8] and are often upheld by courts when challenged.[9]

Although judges rarely scrutinize a law's colonial legacy, some examples exist. In a landmark decision, the Caribbean Court of Justice ("CCJ") overturned the mandatory death penalty in Barbados, a former British colony, in part based on the law's colonial origins and its fundamental inconsistency with international human rights.[10] In that case, the government argued the Barbadian Constitution's "savings clause"[11] protected colonial holdovers, like the mandatory death penalty, from judicial review. The Court dismissed this argument outright, refusing to "frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent."[12] Instead, the Court resolved to "ensur[e] that the laws conform to the supreme law of the Constitution and are not calcified to reflect the colonial times."[13]

Most scholarship in this area falls into one of two groups. One group focuses on these laws' problematic human rights implications—mainly using colonial legacy to emphasize the laws' alien and anachronistic nature—without explicitly focusing on constitutional doctrine or judicial review.[14] The second group focuses on

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demonstrate "the establishment and maintenance of authority [that] lie at the very heart of the historiography of empire").

8. *See* ENZE HAN & JOSEPH O'MAHONEY, BRITISH COLONIALISM AND THE CRIMINALIZATION OF HOMOSEXUALITY 2 (2018) (noting that, in 2018, thirty-eight of the seventy-two countries criminalizing sodomy were once under British rule).

9. *See, e.g.*, EG v. Att'y Gen. (2019) K.L.R. 1, 33–56 (H.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/173946 [https://perma.cc/6VRQ-DGAL] (upholding Kenya's sodomy law).

10. *See* Nervais v. The Queen, [2018] CCJ 19 (AJ) at 3–32, 47–48 (Barb.), https://ccj.org/wp-content/uploads/2018/06/2018-CCJ-19-AJ-1.pdf [https://perma.cc/K7BK-HEA7] (holding Barbados's mandatory death penalty law unconstitutional).

11. Savings clauses, a feature of some Commonwealth Caribbean constitutions, "grandfather in" pre-existing colonial laws into post-independence constitutional documents. *See generally* Margaret A. Burnham, *Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean*, 36 U. MIAMI INTER-AM. L. REV. 249 (2005) (describing the historical development of savings clauses in former British colonies in the Caribbean).

12. *Nervais*, [2018] CCJ 19 (AJ) at 25.

13. *Id.* at 28.

14. *See, e.g.*, Michael Kirby, *The Sodomy Offence: England's Least Lovely Criminal Law Export?*, *in* HUMAN RIGHTS, SEXUAL ORIENTATION, AND GENDER IDENTITY IN THE COMMONWEALTH: STRUGGLES FOR DECRIMINALISATION AND CHANGE 61, 65–66 (Corrine Lennox & Matthew Waites eds., 2013) (ebook) (detailing the historic implementation of sodomy laws and other penal laws in former British colonies); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1533–39 (2019) [hereinafter Achiume, *Migration as Decolonization*] (arguing that damaging colonial and neocolonial influences have perpetuated the

constitutional courts and doctrinal reform in Commonwealth nations but only mentions colonialism in passing or merely notes its general influence on the postcolonial legal system.[15] This Note unites these two areas of literature and seeks to spark new inquiries into constitutional doctrinal reform. It argues that critiques of colonial influence should be an operationalized element of postcolonial constitutional review. As part of a means-end proportionality test, constitutional courts in formerly colonized states should consider a law's colonial origins as a factor weighing in favor of its invalidation. To make the argument, this Note focuses on colonial holdovers in the penal codes of Commonwealth of Nations member states.[16] Because these codes are among the most tangible and persistent institutions of British colonial control, they are an appropriate illustration of how colonial influence should factor into constitutional review.[17]

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historic subordination of peoples from the "Third World" in international migration law); Varsha Chitnis & Danaya Wright, *Legacy of Colonialism: Law and Women's Rights in India*, 64 WASH. & LEE L. REV. 1315, 1348 (2007) (reasoning that the women's rights movement in India is hindered by the "inherent patriarchal and colonial underpinnings of many of [India's] gender-based laws"); Simon Coldham, *Criminal Justice Policies in Commonwealth Africa: Trends and Prospects*, 44 J. AFR. L. 218, 220 (2000) (describing reliance by African courts on "unAfrican forms of punishment" imposed during the British colonial era).

15. *See generally, e.g.*, Laurence Juma & Chuks Okpaluba, *Judicial Intervention in Kenya's Constitutional Review Process*, 11 WASH. U. GLOB. STUD. L. REV. 287 (2012) (arguing that judicial organs should do a better job of "nurtur[ing]" constitutional documents in order to promote stability and greater constitutionalism); H. Kwasi Prempeh, Marbury *in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239 (2006) (analyzing constitutionalism and judicial review in modern Africa, Professor Prempeh discusses the influence of colonialism generally but does not focus on colonial remnants in legal codes); Li-ann Thio, *Beyond the "Four Walls" in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428 (2006) (studying judicial review in Malaysian and Singaporean courts without mentioning the colonial influence on the modern legal systems in either—both nations are former British colonies).

16. This Note focuses on the former colonies of Great Britain because of its status as a particularly prolific colonial power. At the British Empire's height in the nineteenth century, more than 412 million people were under British control all over Asia, Africa, and the Americas. *See* AGNUS MADDISON, OECD, THE WORLD ECONOMY: A MILLENNIAL PERSPECTIVE 97 (2001) (describing the British Empire at its zenith, when it contained ten times as many people as Great Britain itself).

17. While some forms of British colonial control featured semi-autonomy, as in the case of "white settler colonies" like Australia and Canada, *see* HAN & O'MAHONEY, *supra* note 8, at 10–11 (noting the existence of British protectorates and self-governing colonies where attributing the criminalization of homosexual conduct to the British is less plausible), this Note focuses on case studies "in which British colonial administrators had formal legal authority" through the imposition of complete criminal codes, *see id.* at 10.

This Note is divided into four parts. Part I first reviews legal critiques of colonialism, drawing mainly from the area of human rights law, and describes the growing judicial consciousness of these critiques. Then, it analyzes Great Britain's influence on the penal codes of many Commonwealth nations, paying particular attention to sodomy laws and sedition laws.

Parts II and III argue for a doctrinal modification to Commonwealth judicial review that recalibrates existing proportionality tests to factor in the origins and original purposes of colonial criminal laws. Each Part considers one of two related, but operationally distinct, proportionality tests.[18] Part II explains the sequential proportionality test and explores its use in Malaysia, where courts have recently experimented with it. Then, Part III explores an alternative, nonsequential proportionality test. After describing the test's contours, this Part applies it first to Kenya—retheorizing the Kenyan High Court's recent decision to uphold the country's sodomy law to comport with the nonsequential test—and second, briefly, to India, recognizing its transnational prominence in the Commonwealth.

Finally, Part IV discusses potential obstacles to this Note's proposals for doctrinal reform. First, it examines how politics can affect the nature of judicial review by making courts overly deferential to the political branches of government, as happened following a constitutional crisis in Malaysia. Second, it explores how courts should react when colonial-era laws appear to be in line with contemporary majoritarian traditions and values. Ultimately, this Part shows that neither obstacle provides a valid reason to avoid the doctrinal modifications proposed in this Note.

I. OSSIFIED REMNANTS OF EMPIRE: COLONIAL LAWS, CONTINUING CONTROL

Great Britain's colonial influence is obvious in Commonwealth penal codes—many still contain colonial-era laws identical or nearly

18. Whereas some Commonwealth nations, like Canada, use a *sequential test*, first determining whether the government has identified a "sufficiently important" interest (an "end") before using a three-prong second step to determine whether the law is a means proportionate to that end, *see infra* Part II.A, other Commonwealth nations, like South Africa, favor a *nonsequential* balancing test, where courts considering limitations on constitutional freedoms tailor the test and the factors considered to the nature of the right and the particular facts of the case, *see infra* Part III.A.

identical to the British laws on which they were based.[19] As a result, institutionalized repression, drawn directly from laws created during the colonial era, is a feature of many postcolonial legal systems.[20] Accordingly, the purpose of this Part is twofold. First, it describes how colonial control is systemically entrenched in international law. This history presents the origins of the colonial legacy this Note calls upon courts to consider. Then, this Part introduces the chief criticisms of particular laws that are the focus of this Note—sodomy and sedition laws. Though focusing primarily on human rights critiques, this Part also highlights that these laws have persisted or been explicitly upheld in several Commonwealth contexts.

A. Subjugation and Control: The Underpinnings of the Colonial System and Legacy

Colonial powers transplanted their own laws into their colonial possessions[21] in an effort to control the native population and maximize the colonial power's ability to exploit and profit from native resources.[22] Colonial laws were designed to subordinate local practices "[t]o overcome resistance to colonial conquest."[23] That these laws remained in place after formerly colonized nations achieved

19. *See generally* Douglas E. Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 ASIAN J. COMPAR. L. 1 (2009) (detailing the origins and current ubiquity of Section 377, the British colonial antisodomy law, in the Commonwealth).

20. *See* Lea Ypi, *What's Wrong with Colonialism*, 41 PHIL. & PUB. AFFS. 158, 162 (2013) (describing colonialism as "a practice that involves both the subjugation of one people to another and the political and economic control of a dependent territory (or parts of it)"). *But see generally* Ronald J. Daniels, Michael J. Trebilcock & Lindsey D. Carson, *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMPAR. L. 111 (2011) (using case studies to argue that British colonial arrangements have been conducive to the development of the rule of law in former British colonies).

21. *See* John R. Schmidhauser, *Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Systems*, 13 INT'L POL. SCI. REV. 321, 322 (1992) (charting the colonial influence on colonized legal systems and organizing them into legal "families" based on the origins of the colonial power).

22. Colonialism is commonly defined as "the policy or practice of acquiring full or partial political control over another country, occupying it with settlers, and exploiting it economically." NEW OXFORD AM. DICTIONARY 338 (3d ed. 2010); *see also Colonialism*, STANFORD ENCYCLOPEDIA OF PHIL. (Aug. 29, 2017), https://plato.stanford.edu/entries/colonialism [https://perma.cc/3DB3-UGLH] (describing colonialism as "a practice of domination" and providing rich detail as to the relationship between colonialism and Western political theory).

23. *See* Dullah Omar, *Constitutional Development: The African Experience*, *in* DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 175–76 (Vicki C. Jackson & Mark Tushnet eds., 2002) (explaining that colonial powers overcame resistance by being "increasingly authoritarian and suppressive," especially after World War II).

independence reflects a form of historical inertia: "[T]he postcolonial state emerged largely constrained and . . . determined by the structural values of its predecessor."[24] Today, native governments routinely employ fundamentally foreign,[25] colonial-era laws to try to control citizens' behavior and stifle dissent. These laws infringe significantly on human rights,[26] which is precisely why such laws and structures should be scrutinized by the courts responsible for their interpretation.

Justifications for the colonial system of control are reflected in international law, which historically defended the colonial enterprise by conceiving of colonized peoples as lacking in sovereignty.[27] Professor Antony Anghie traces the development of international law from the Renaissance to the modern era, and he argues that early conceptions of international law created and reinforced this hierarchy between colonizing sovereigns and colonized peoples.[28] For example, the positivist[29] interpretation of international law, which began in the nineteenth century and continues to predominate today, espoused a hierarchical conception of colonial relationships, taking the view that non-European states are "lacking in sovereignty."[30] This notion rendered the colonizing state supreme: it was the sole "sovereign state" in the colonial relationship and "[could] do as it wishe[d] with regard to the non-sovereign entity," the colonized state, "which lack[ed] the legal personality to assert any legal opposition."[31] This conception of international law thus served colonizing powers well. Specifically, it allowed them to pursue their colonial endeavors by giving them wide

24. *Id.* at 177.

25. *See* HAN & O'MAHONEY, *supra* note 8, at 10 (noting that, while modern governments have played a role in the persistence of colonial laws criminalizing homosexuality, "the exact wording of the law, the type of offence, and the extent of the penalty, all plausibly might have been different had the British not enacted the law in the first place").

26. *See* Omar, *supra* note 23, at 177 (arguing that "the colonial state" was often "the antithesis of human rights and democracy").

27. *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2004) (examining interactions between Western and non-Western polities throughout history to demonstrate how international law embeds the subordination of colonized peoples).

28. *See generally id.* (beginning with Francisco de Vitoria and the inception of international law in the colonial era and tracing it through nineteenth-century positivism, the League of Nations, postcolonialism, globalization, and the War on Terror).

29. Positivism is a central theory of international law that views sovereign states as the chief legal actors on the international stage, bound only by compacts to which they have consented. *Id.* at 33.

30. *Id.* at 34.

31. *Id.*

latitude to impose their own laws on their colonial possessions without violating international law. Accordingly, at their height in the nineteenth century, European powers leveraged international law to "secur[e] the *colonial advantage*: the economic and political dominance of colonial powers at the expense of colonies during that period."[32]

Twentieth-century developments in international law further protected the interests of colonizing powers, creating a system of control that withstood the process of formal decolonization. The devastation of World War II spurred the development of the international human rights legal regime[33] and also sparked the wave of formal decolonization, the process by which formerly colonial states declared and secured independence from the European powers that had colonized them.[34] Although many colonizing powers voiced support for colonized states exercising the right of "self-determination,"[35] achieving formal independence did not end the persistence of colonial control.[36] In fact, some scholars argue that formal decolonization merely replaced the colonial system with a *neocolonial* alternative.[37] As evidence, these scholars point to

32. E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AM. J. INT'L L. UNBOUND 142, 144 (2017); *see also The New Imperialism (c. 1875-1914)*, ENCYCLOPEDIA BRITANNICA (Nov. 5, 2018), https://www.britannica.com/topic/Western-colonialism/The-new-imperialism-c-1875-1914 [https://perma.cc/43PJ-HFCX] (describing the "notable speedup in colonial acquisitions" and "increase in the number of colonial powers" that took place in the latter half of the nineteenth and early part of the twentieth centuries).

33. *See* Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357, 357 (1993) (explaining that the Universal Declaration of Human Rights came out of the experience of World War II).

34. *See generally* Michael Collins, *Decolonization*, *in* ENCYCLOPEDIA OF EMPIRE (John M. MacKenzie ed., 2016) (describing formal decolonization as "flag independence" but noting that the decolonization process did not end there due to neocolonialism, postcolonialism, and the intersection of decolonization and globalization).

35. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/4684, at 67 (1960) ("All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

36. *See* Achiume, *Migration as Decolonization*, *supra* note 14, at 1518 ("Although international law facilitated formal independence for many political communities, for former colonies nation-statehood hardly did enough to disrupt relations of colonial exploitation.").

37. *See generally, e.g.*, SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH, AND THE POLITICS OF UNIVERSALITY (2011) (analyzing contemporary institutions of international law through the examples of decolonization, sovereignty over natural resources, and the end of the Cold War to argue that international law has continued to subordinate Third World, postcolonial states even in the modern era); Achiume, *Migration as Decolonization*, *supra* note 14, at 1539–41 (surveying interdisciplinary literature

multilateral institutions and bilateral relationships that favor the political and economic interests of formerly colonizing states while simultaneously rendering formerly colonized states politically and economically inferior.[38] For instance, some scholars criticize the international human rights system for centering on Western conceptions of rights, creating a "false universalism" of human rights that does not account for global South cultures.[39] This undermines the political and economic power of formerly colonized states because global North countries use the system "to intervene in the affairs of other less powerful and wealthy countries that do not meet their civilizational standards."[40]

Beyond this systemic critique of how the international legal system perpetuates colonial control, other scholars criticize the colonial entrenchment in postcolonial legal documents, like constitutions and codes.[41] Ultimately, colonial powers imposed on colonized states the criminal laws at issue in this Note, and the systemic persistence of

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showing "that the present era is defined by *neo*colonial imperialism, even if formal colonial imperialism has been outlawed").

38. *See* Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 748–49 (2006) (following formal decolonization, "colonialism was replaced by neo-colonialism; Third world states continued to play a subordinate role in the international system because they were economically dependent on the West, and the rules of international economic law continued to ensure that this would be the case"). Achiume provides a framework for this critique:

> First, within and through international institutions and bilateral arrangements, Third World nation-states are *politically* subordinate. The decisionmaking power they have—via the rules governing these international and bilateral fora—is unquestionably less than that of First World nation-states, which maintain superordinate positions. Second, Third World nation-states are *economically* subordinate, which not only is a harm in and of itself, but also further reinforces their *political* subordination.

Achiume, *Migration as Decolonization*, *supra* note 14, at 1544–45 (footnote omitted).

39. César Rodríguez-Garavito & Sean Luna McAdams, A Human Rights Crisis? Unpacking the Debate on the Future of the Human Rights Field 8 (Mar. 17, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2919703 [https://perma.cc/STR8-8J5X]. According to Professor César Rodríguez-Garavito and political scientist Sean Luna McAdams, many scholars claim that "the human rights project is another form of imperialism or civilizing mission pursued by Western states trying to veil their power schemes in the global South." *Id.* While this Note urges courts to consider the validity of laws from the colonial era using an international human rights lens, it is also important to highlight critiques of how the international human rights system's own development has been influenced by Western colonial powers.

40. *Id.*

41. *See, e.g.*, Sandipto Dasgupta, *"A Language Which is Foreign to Us": Continuities and Anxieties in the Making of the Indian Constitution*, 34 COMPAR. STUD. S. ASIA, AFR. & MIDDLE E. 228, 228 (2014) (arguing that "[t]he explicit persistence of the colonial constitutional structure . . . is a central current in the life of postcolonial constitutionalism").

neocolonial influences can help explain the continuity of these laws into the modern era.[42]

B. Colonial Criminal Laws: Pervasive, Antiquated, and Problematic

Sodomy laws and sedition laws, where they remain in force, are vestiges of British colonialism in Commonwealth nations.[43] Sodomy laws "criminalize consensual homosexual conduct between adult men," and sometimes between women as well.[44] Sedition laws are crimes against the state that generally prohibit written or spoken opposition to the regime in power.[45] These laws, taken together, implicate and may infringe long-recognized international human rights, such as the freedoms of association and of expression,[46] as well as the rights to privacy and equal treatment.[47] Moreover, these laws in form and in substance are remarkably similar throughout the Commonwealth.[48] The Indian Penal Code in particular, drafted by a

42. For instance, Britain lost much of its formal power during the midcentury wave of decolonization. In this new and uncertain world, it sought to maintain its influence indirectly, maintaining close economic and strategic ties with elites in former colonies like Kenya, which is one of this Note's focus countries. POPPY CULLEN, KENYA AND BRITAIN AFTER INDEPENDENCE: BEYOND NEO-COLONIALISM 145–80 (2017).

43. *See, e.g.*, Rhoda E. Howard, *Legitimacy and Class Rule in Commonwealth Africa: Constitutionalism and the Rule of Law*, 7 THIRD WORLD Q. 323, 325 (1985) ("Sedition laws were routinely used in order to control political protest, especially in the press, and were much more restrictive in Africa than in Britain itself."). *See generally* Sanders, *supra* note 19 (discussing the undeniable colonial origin of Section 377, the sodomy law that exists throughout the Commonwealth).

44. *See* HUM. RTS. WATCH, THIS ALIEN LEGACY, *supra* note 6, at 4 (explaining that more than eighty countries currently have such laws).

45. *Sedition*, ENCYCLOPEDIA BRITANNICA (2018), https://www.britannica.com/topic/sedition [https://perma.cc/8SAS-8MTS].

46. *See generally Chapter Four: Freedom of Assembly, Association and Expression*, *in* INT'L COMM. OF JURISTS, SOGI CASEBOOK (Sept. 6, 2011), https://www.icj.org/sogi-casebook-introduction/chapter-four-freedom-of-assembly-association-and-expression [https://perma.cc/7T3T-4BUP] (noting that laws prohibiting the LGBTQ community from organizing and speaking out about sexuality "must not violate the guarantees of equality and non-discrimination found in both international and domestic constitutional law"—that is, "public morality" cannot be used to "mask prejudice").

47. *See, e.g.*, Toonen v. Australia, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), http://hrlibrary.umn.edu/undocs/html/vws488.htm [https://perma.cc/K2LT-88CU] (holding that Tasmania's law criminalizing sodomy was a violation of complainant's human rights under Article 17 of the International Covenant on Civil and Political Rights, which recognizes a right to privacy).

48. *See, e.g.*, Sanders, *supra* note 19, at 8 (describing the global spread of Section 377, the British colonial sodomy law). Sanders describes Section 377 as one part of "a comprehensive code designed to state in an orderly and rational way the complete body of British criminal law." *Id.*

British parliamentary commission,[49] was widely adopted elsewhere in Asia and in Africa as a "a one-size-fits-all model code."[50]

While this Note focuses particularly on sodomy and sedition laws in the Commonwealth, these are not the only human-rights-implicating laws implemented during the colonial era.[51] Despite the problematic nature of these archaic laws, they persist in many Commonwealth nations, where some courts routinely uphold them when explicitly challenged.[52] While national legislatures can repeal them, these laws often target groups without adequate representation in the political

49. *Id.* at 10–11. According to Sanders, the Indian Penal Code "was not a document that reflected existing Indian laws or customs. It was largely a rewrite of the British Royal Commission's 1843 draft [Indian Penal Code]." *Id.* at 11.

50. *Id.* at 12–14. *But see* ANDERSON & KILLINGRAY, *supra* note 7, at 5 ("English law was transplanted in the colonies, but that transplantation bred several mutant strains."). This Note does not imply that the colonial experience was identical across the British Empire, but rather it focuses on cases where the British influence was particularly pervasive.

51. *See, e.g.*, HAKEEM O. YUSUF, COLONIAL AND POST-COLONIAL CONSTITUTIONALISM IN THE COMMONWEALTH 6 (2014) (identifying "peace, order, and good government" clauses in Commonwealth constitutions as "a creation of British imperialism to facilitate direct or indirect control and governance of its overseas possessions"); Chitnis & Wright, *supra* note 14, at 1326–38 (highlighting the British colonial origins of Indian inheritance laws, consent laws, and abortion laws); George Baylon Radics, *Singapore: A 'Fine' City: British Colonial Sentencing Policies and Its Lasting Effects on the Singaporean Corporal State*, 12 SANTA CLARA J. INT'L L. 57, 61 (2014) (examining Singapore's corporal punishment laws, which originated during the British colonial era, "to demonstrate that many of the laws that Singapore is criticized for today can be traced back to the laws handed down by its former colonial rulers"); Atlaf Khan, *Backed by Colonial-Era Laws, Pakistan Has Declared War on Free Speech*, QUARTZ INDIA (Apr. 17, 2017), https://qz.com/india/960754/backed-by-colonial-era-blasphemy-laws-pakistan-has-declared-war-on-free-speech [https://perma.cc/7WVS-BFPV] (emphasizing that Pakistan's blasphemy laws, transplanted during the British colonial era, penalize "'disrespectful' behaviour or words against religion" with death); Eli Meixler, *Hong Kong's Use of Emergency Powers Explained*, FIN. TIMES (Oct. 4, 2019), https://www.ft.com/content/16f704c6-e68c-11e9-b112-9624ec9edc59 [https://perma.cc/7Y2J-KFE5] (noting that emergency powers recently invoked by the Hong Kong government in response to widescale protests originated during the British colonial era).

52. *See, e.g.*, Ong v. Att'y Gen., [2020] SGHC 63, ¶ 315 (High Ct. 2020) (Sing.), https://www.humandignitytrust.org/wp-content/uploads/resources/OMJ-v-A-G-and-other-matters-2020-SGHC-63-Judgment.pdf [https://perma.cc/6DHW-AHG8] (upholding Section 377A of the criminal code, the sodomy law from the British colonial era); EG v. Att'y Gen. (2019) K.L.R. 1, 33–56 (H.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/173946 [https://perma.cc/6VRQ-DGAL] (upholding Kenya's sodomy law); *see also* Jacob Kushner, *The British Empire's Homophobia Lives on in Former Colonies*, ATLANTIC (May 24, 2019), theatlantic.com/international/archive/2019/05/kenya-supreme-court-lgbtq/590014 [https://perma.cc/576L-8NZQ] (highlighting the Kenya High Court's 2019 decision to uphold the sodomy law, despite the fact that the 2010 constitution "explicitly guarantees equal protection to all people, freedom of expression, and freedom from discrimination, as well as requires affirmative-action programs for minorities and marginalized groups").

process.[53] As a result, it may fall to courts to address these laws.[54] To best do that, this Note argues that courts must supplement their current legal analysis with an understanding of the colonial roots of sodomy and sedition laws when considering constitutional challenges to them.

1. *Sodomy Laws*. Sodomy laws were long ago outlawed in Britain, where the original sixteenth-century laws were repealed in the Sexual Offences Act of 1967.[55] While several Commonwealth nations, like India, have addressed their sodomy laws through legislative repeal or judicial action,[56] these laws remain in place in many other Commonwealth nations,[57] including Malaysia[58] and Kenya.[59] While those sodomy laws still in force criminalize specific conduct, they function to penalize gay individuals in particular, thus rendering these laws discriminatory.[60] In addition, these laws often carry excessive punishments, including imprisonment for periods of more than ten years.[61] Nations generally wield sodomy laws as "broad instruments of social control,"[62] and where they have been struck down or repealed,

53. *See, e.g.*, HUM. RTS. WATCH, STIFLING DISSENT: THE CRIMINALIZATION OF PEACEFUL EXPRESSION IN INDIA 2 (2016) [hereinafter HUM. RTS. WATCH, STIFLING DISSENT], https://www.hrw.org/sites/default/files/report_pdf/india0516.pdf [https://perma.cc/5H6G-3EHS] (describing the marginalized nature of groups targeted by sedition laws).

54. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (recognizing that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

55. Sexual Offences Act 1967, c. 60, §§ 1–11 (Eng.).

56. Navtej Singh Johar v. Union of India, (2018) 1 SCC 112 (India), https://indiankanoon.org/doc/119980704 [https://perma.cc/4U6W-V39P].

57. Nico Lang, *Theresa May Urges 37 Countries To Repeal Sodomy Laws Amid Pressure from LGBTQ Advocates*, INTO (Apr. 17, 2018), https://www.intomore.com/culture/theresa-may-urges-37-countries-to-repeal-sodomy-laws-amid-pressure-from-lgbtq-advocates [https://perma.cc/76T7-HC37]. Since May's comments, the High Court of Botswana, another former British colony, has overruled the nation's sodomy law. Arthur S. Leonard, *Botswana Sodomy Law Struck Down*, GAY CITY NEWS (June 15, 2019), https://www.gaycitynews.nyc/stories/2019/13/botswana-sodomy-ban-mokgweetsi-masisi-2019-06-15-gcn.html [https://perma.cc/EU5W-2QH2].

58. PENAL CODE, § 377A, Act No. 574 (Malay.).

59. PENAL CODE, ch. 63, § 162, as amended (Kenya).

60. *See, e.g.*, Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just. 1999 (1) SA 6 (CC) at 108 (S. Afr.), http://saflii.mobi/za/cases/ZACC/1998/15.html [https://perma.cc/7STA-53PP] ("Thus, it is not the act of sodomy that is denounced . . . but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony.").

61. *See, e.g.*, PENAL CODE, ch. 63, § 162, as amended (Kenya) (providing that conviction may result in a prison term of up to fourteen years).

62. HUM. RTS. WATCH, THIS ALIEN LEGACY, *supra* note 6, at 53.

many courts and legislators have recognized that these laws are "violative of the [constitutional] right to dignity and the right to privacy."[63] In addition, sodomy laws arguably conflict with the constitutional right to equal treatment.[64]

Calls for decriminalizing sodomy are often based on the right to privacy. Professor Douglas Sanders's influential paper on Section 377, the current or former criminal code section number for sodomy laws throughout the Commonwealth, describes several different bases for decriminalization grounded in international human rights law.[65] As related to privacy, Sanders describes how Jeremy Bentham, famous for his theory of utilitarianism, was one of the earliest advocates for the decriminalization of sodomy.[66] According to Bentham, only laws that caused harm to others should be criminalized; sodomy laws, which prohibited private and consensual acts, were thus inappropriate exercises of criminal law.[67] The American Law Institute adopted this conception of homosexual acts as within the realm of "private morality,"[68] and ultimately, the U.S. Supreme Court invalidated sodomy laws throughout the United States based on the right to privacy encapsulated in constitutional substantive due process rights.[69] Furthermore, in considering a sodomy law in the Australian state of Tasmania, the U.N. Human Rights Committee found a violation of the

63. *E.g.*, Navtej Singh Johar v. Union of India, (2018) 1 SCC 67 (India), https://indiankanoon.org/doc/119980704 [https://perma.cc/4U6W-V39P].

64. Sodomy laws arguably abridge equal protection principles generally present in Commonwealth constitutions. *See, e.g.*, CONSTITUTION, art. 27(1) (2010) (Kenya) ("Every person is equal before the law and has the right to equal protection and equal benefit of the law."); FEDERAL CONSTITUTION, art. 8(1) (2010) (Malay.) ("All persons are equal before the law and entitled to the equal protection of the law."). *But see* FEDERAL CONSTITUTION, art. 149(1)(f) (2007) (Malay.) (limiting protections for personal liberty and freedoms of speech and association, among others, if they are inconsistent with acts of Parliament taken to prevent threats to the "public order"). This Note later considers the impact of limitations clauses on fundamental rights. *See infra* Parts II & III.

65. *See* Sanders, *supra* note 19, at 22–38 (summarizing the history of, and justifications for, decriminalizing sodomy, including those based on the right to privacy and equality rights).

66. *Id.* at 24.

67. *Id.*; *see also* Faramerz Dabhiowala, *Of Sexual Irregularities by Jeremy Bentham – Review*, GUARDIAN (June 26, 2014, 9:35 AM), https://www.theguardian.com/books/2014/jun/26/sexual-irregularities-morality-jeremy-bentham-review [https://perma.cc/Q5TT-QNSE] ("The main impetus for Bentham's [defense of] sexual freedom was [British] society's harsh persecution of homosexual men.").

68. Sanders, *supra* note 19, at 24.

69. Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The petitioners are entitled to respect for their private lives.").

complainant's right to privacy per Article 17 of the International Covenant on Civil and Political Rights ("ICCPR").[70]

2. *Sedition Laws*. Like sodomy laws, sedition laws are noteworthy for their oppressive application. Whereas England abolished the common law offenses of sedition and seditious libel with the passage of the Coroners and Justice Act of 2009,[71] many colonial-era sedition laws based on the offenses remain in place.[72] Moreover, "it was in the colonies that [sedition laws] assumed their most draconian form, helping to sustain imperial power in the face of rising nationalism in the colonies."[73] These laws' oppressive nature has persisted in the postcolonial state. For example, in the last few years, the Malaysian government has forcefully wielded the country's colonial-era sedition law to suppress antigovernment voices.[74] Despite a 2013 campaign promise to repeal the Sedition Act, Malaysia's government invoked it in several recent high-profile prosecutions against human rights and anticorruption activists.[75] Moreover, sedition laws often carry serious penalties. In India, for example, a conviction under the country's

70. *See* Toonen v. Australia, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), http://hrlibrary.umn.edu/undocs/html/vws488.htm [https://perma.cc/K2LT-88CU] ("Inasmuch as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy,' and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws.").

71. Clare Feikert-Ahalt, *Sedition in England: The Abolition of a Law from a Bygone Era*, IN CUSTODIA LEGIS (Oct. 2, 2012), https://blogs.loc.gov/law/2012/10/sedition-in-england-the-abolition-of-a-law-from-a-bygone-era [https://perma.cc/F8XR-RNFU].

72. *See, e.g.*, Sedition Act 1948, § 4 (Malay.) (criminalizing "seditious tendenc[ies]" against the Ruler and Government). The Malaysian government has promised to repeal the Sedition Act but has yet to do so and is still charging individuals under the Act. *See Malaysia: End Use of Sedition Act*, HUM. RTS. WATCH (July 17, 2019, 8:55 PM), https://www.hrw.org/news/2019/07/17/malaysia-end-use-sedition-act [https://perma.cc/9CTM-GEZ8] (urging Malaysia to reinstate its moratorium on the Sedition Act).

73. CTR. FOR THE STUDY OF SOC. EXCLUSION & INCLUSIVE POL'Y, NAT'L L. SCH. OF INDIA UNIV. & ALT. L. F., SEDITION LAWS & THE DEATH OF FREE SPEECH IN INDIA 7 (2011), http://altlawforum.org/publications/sedition-laws-the-death-of-free-speech-in-india [https://perma.cc/685N-2DMY]; *see also* Press Release, Off. of the High Comm'r for Hum. Rts., U.N., Malaysia Sedition Act Threatens Freedom of Expression by Criminalising Dissent (Oct. 8, 2014), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15144& [https://perma.cc/2KDM-3Y8T] (calling on Malaysia to repeal the Sedition Act of 1948).

74. LINDA LAKHDHIR, HUM. RTS. WATCH, CREATING A CULTURE OF FEAR: THE CRIMINALIZATION OF PEACEFUL EXPRESSION IN MALAYSIA 24–27 (2015), https://www.hrw.org/report/2015/10/26/creating-culture-fear/criminalization-peaceful-expression-malaysia [https://perma.cc/9UTG-M5F9].

75. *Id.*

sedition law may result in life imprisonment.[76] Even where penalties are less severe, the scope of criminal acts under Commonwealth sedition laws can be very broad.[77] Finally, governments often weaponize sedition laws to target marginalized communities—political dissidents, ethnic or religious minorities, and other groups—highlighting their often discriminatory application.[78] Crystallizing these points, Mahatma Gandhi famously stated during his sedition trial, "Section 124A under which I am happily charged is perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen."[79]

Human rights critiques of sedition laws have generally focused on the laws' potential to violate freedoms of expression, assembly, and association.[80] Ahead of a recent meeting of the U.N. Human Rights Committee to review mandatory reports submitted by ICCPR member states,[81] the NGO Human Rights Watch[82] called on the Committee to consider India's Sedition Act in light of Articles 19, 21, and 22 of the Covenant, which protect the freedoms of expression, assembly, and association, respectively.[83] Commonwealth governments sometimes justify still-existing sedition laws as restrictions of free speech necessary

76. Sedition, PEN. CODE § 124A (1860) (India).

77. First-time offenders under the Malaysia's Sedition Act may be sentenced to a maximum prison sentence of three years and forced to pay a fine. Sedition Act 1948, § 4(1). Nevertheless, one may be sentenced for doing or attempting "any act" with a "seditious tendency"; "utter[ing] any seditious words"; or printing, publishing, or importing "seditious publication[s]." These provisions demonstrate the broad application of the sedition offense. *Id.* § 4(1)(a)–(d).

78. HUM. RTS. WATCH, STIFLING DISSENT, *supra* note 53, at 2 ("[Sedition] laws are used to stifle political dissent, harass journalists, restrict activities by nongovernmental organizations, arbitrarily block Internet sites or take down content, and target religious minorities and marginalized communities . . . .").

79. 2 SOURCES OF INDIAN TRADITIONS 357–59 (Rachel Fell McDermott, Leonard A. Gordon, Ainslie T. Embree, Frances W. Pritchett & Dennis Dalton eds., 3d ed. 2014) (describing Gandhi's 1922 trial for "attempting to excite disaffection towards His Majesty's Government").

80. *Submission to the UN Human Rights Committee Review of India*, HUM. RTS. WATCH (May 15, 2019, 9:35 AM) [hereinafter *Submission to UN Human Rights Committee*], hrw.org/news/2019/05/15/submission-un-human-rights-committee-review-india [https://perma.cc/38MW-ZKGF].

81. India ratified the ICCPR in 1979. *See Status of Ratifications – India*, OFF. HIGH COMM'R HUM. RTS. (2019), https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/INIndex.aspx [https://perma.cc/GY9A-6ZGJ] (providing an overview of India's human rights treaty ratifications).

82. *Submission to UN Human Rights Committee*, *supra* note 80.

83. International Covenant on Civil and Political Rights, arts. 19, 21, 22, Dec. 16, 1966, 999 U.N.T.S. 171.

to preserve public order and communitarian values.[84] Unlike sodomy laws, whose detractors can rely on privacy rights to challenge them, sedition laws cover behavior that by definition takes place in the public sphere. As a result, governments often counter human rights critiques with justifications based on unique cultural norms and the need to maintain public order and unity.[85] Nevertheless, these justifications are hypocritical:

> For people to enjoy . . . values as a community, they must be allowed to exercise their individual right to come together as a collective and determine their community rights and values. Fleeting governments are not the sole legitimators of rights, but rather it is the underlying collection of the people's legitimacy that determines rights.[86]

This right is furnished through the freedom of expression, which would be served by narrowing the scope of sedition laws.

Encouragingly, Commonwealth courts seem to be developing a consciousness of these laws' colonial legacies when considering challenges to their validity.[87] Nevertheless, these acknowledgements generally appear in dicta. This Note contends that such considerations should move from the background into the foreground of judicial review. The next two Parts delve deeper into how this doctrinal change should look.

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84. *See, e.g.*, Scott L. Goodroad, Comment, *The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, An Analysis of Singapore and Malaysia in the New Global Order*, 9 IND. INT'L & COMPAR. L. REV. 259, 261 (1998) (undergirding the continued use of sedition laws "are several unique Asian values which are purported to ensure the prosperity and vitality of Malaysia . . . and many other countries of East and South East Asia, which include[:] . . . strong familial connections, sacrificing individual rights for that of the community, and maintaining a well-ordered society").

85. *See id.* at 295 (arguing that, while "limitations on free speech seem self-serving for the leadership, ethnic conflicts and social disruptions cannot be denied").

86. *Id.* at 301–02.

87. *See, e.g.*, Nervais v. The Queen, [2018] CCJ 19 (AJ) at 29 (Barb.), https://ccj.org/wp-content/uploads/2018/06/2018-CCJ-19-AJ-1.pdf [https://perma.cc/K7BK-HEA7] ("[T]he laws conform to the supreme law of the Constitution and are not calcified to reflect the colonial times."); Navtej Singh Johar v. Union of India, (2018) 1 SCC 119 (India), https://indiankanoon.org/doc/119980704 [https://perma.cc/4U6W-V39P] ("[Section 377], understood as prohibiting non-peno vaginal intercourse, reflects the imposition of a particular set of morals by a colonial power at a particular point in history."); Motshidiemang v. Att'y Gen., [2019] MAHGB-000591-16 at 29 (Bots.), https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/01/legabibo.pdf [https://perma.cc/REF9-KADY] ("In the incorporation of the offence of sodomy in the colonies, such was not preceded by any consultation with the local populace.").

II. THE ROLE OF COURTS: JUDICIAL REVIEW AND SEQUENTIAL PROPORTIONALITY

Many Commonwealth courts considering constitutional challenges employ proportionality principles to decide laws' validity.[88] Proportionality review involves, in its most basic form, a means-end test. To justify the law, the government must specify its goal and prove the law is an appropriate means to achieve it.[89] Among Commonwealth nations, Canada has long used a *sequential* proportionality test to determine the validity of laws challenged under its Charter of Rights and Freedoms.[90] This Part uses Canada's test to illustrate the mechanics of sequential proportionality. Then, it illustrates the usefulness of modifying sequential proportionality to take account of a criminal law's colonial roots by considering an example from Malaysia. There, courts have been inspired to adopt a sequential proportionality test and should continue to develop it to account for postcolonial dynamics.

A. Sequential Proportionality: The Canadian Example

Canada is generally regarded as having popularized the notion of sequential proportionality analysis as a tool of judicial review in the Commonwealth,[91] particularly through the case *R v. Oakes*.[92] When considering the constitutionality of a rights-limiting law, the court first examines the threshold question of whether the government's limitation on a constitutional right serves a "sufficiently important"

88. *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 68, 74 (2008) [hereinafter Sweet & Mathews, *Proportionality Balancing*] (highlighting the spread of proportionality tests to Commonwealth jurisdictions like Canada, New Zealand, and South Africa). *But see, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 984 (1987) ("A common objection to balancing as a method of constitutional adjudication is that it appears to replicate the job that a democratic society demands of its legislature.").

89. Bernhard Schlink, *Proportionality (1)*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 719 (Michael Rosenfeld & András Sajó eds., 2012).

90. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 105–06 (Can.) (articulating Canada's three-part proportionality test for the first time). *See generally* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015) (referencing Canada repeatedly for its use of a sequenced proportionality test).

91. *See* Jackson, *supra* note 90, at 3096 n.2 ("The German Constitutional Court has been particularly influential, as has the Canadian Supreme Court, in developing 'proportionality review' in ways that influence other countries.").

92. R. v. Oakes, [1986] 1 S.C.R. 103 (Can.).

purpose, or *end*.[93] If the government fails to articulate a sufficiently important purpose, the inquiry ends but, importantly, "almost no Canadian law fails because of an insufficient purpose."[94] Once this purpose is determined, the court moves onto the second step of the inquiry, evaluating the *means* used to achieve it—that is, the law itself—via a three-part proportionality test that asks: (1) whether the law is "rationally connected" to the stated purpose; (2) whether the law "impair[s] the right in question as little as possible"; and (3) whether the limitations are proportional to the objective—"the more severe the deleterious effects of a measure, the more important the objective must be."[95] In effect, this test "prioritizes the right, putting the burden of justification on the government."[96]

The Canadian sequential proportionality test is relatively flexible. Once the court determines the government has articulated a sufficiently important purpose, the proportionality test's first step requires the government to show a "rational[] connect[ion]" between the law and the government's stated objective.[97] Professors Jud Mathews and Alec Stone Sweet note that "[t]his mode of scrutiny is broadly akin to what Americans call 'rational basis' review, although under [proportionality analysis], the appraisal of government motives and choice of means is more searching."[98] The second step of the proportionality test is similar to a "least-restrictive-means"[99] or "minimal impairment"[100] test. As Professor Vicki Jackson argues, however, "the minimal impairment test does *not* necessarily imply that if any less restrictive approach can be imagined, the law is invalid."[101] In the Canadian Supreme Court's terms, "[t]he government is not required to pursue the least drastic means of achieving its objective,

93. *Id.* at 105; *see also* Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (the rights limitation must be "prescribed by law"—that is, an obligation imposed by law).

94. Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 388 (2007).

95. *Oakes*, [1986] 1 S.C.R at 106.

96. Jackson, *supra* note 90, at 3100.

97. *Oakes*, [1986] 1 S.C.R. at 103.

98. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 802 (2011).

99. *See id*. at 803 (describing the second step as ensuring that the judge limits rights only to the extent necessary).

100. *See* Jackson, *supra* note 90, at 3114 (explaining the minimal impairment aspect of the second step and its requirements).

101. *Id.*

but it must adopt a measure that falls within a range of reasonable alternatives."[102] The third and final step embodies the principle of proportionality most closely, "call[ing] for an independent judicial evaluation of whether the reasons offered by the government, relative to the limitation on rights, are sufficient to justify the intrusion."[103] This step allows judges to fulfill their constitutionally required role of "assur[ing] appropriate attention to rights within a framework of constitutional justice."[104] Additionally, the court has discretion to adjust the level of rigor at each step, as demonstrated in the next Section's treatment of Malaysia's proportionality test.

Canada's proportionality test is best understood in light of Section One of the Canadian Charter of Rights and Freedoms, which states that rights and freedoms protected by the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[105] Thus, the test is designed to determine whether limitations are "reasonable" and therefore constitutional.[106] The nexus between Canada's limitations clause and its proportionality test may be instructive for Commonwealth nations whose constitutions also contain similar provisions furnishing possible limitations or restrictions on rights and freedoms.[107]

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102. Mounted Police Ass'n Ont. v. Canada, [2015] 1 S.C.R. 3, 77 (Can.).

103. Jackson, *supra* note 90, at 3099.

104. *Id.* at 3101.

105. Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (UK).

106. *See* Jackson, *supra* note 90, at 3111 ("Canadian doctrine has developed a proportionality test to determine whether this standard [set forth in Section One] is met.").

107. *See, e.g.*, CONSTITUTION, art. 24 (2010) (Kenya) ("A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . . ."); FEDERAL CONSTITUTION, Nov. 1, 2010, art. 10, § 2, cl. a–c (Malay.) (allowing Parliament to impose "such restrictions as it deems necessary or expedient in the interest of the security of the Federation" on the freedoms of speech and expression; assembly; and association, respectively); S. AFR. CONST., 1996, § 36(1) ("The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . . .").

B. Sequential Proportionality and Sedition: A Case Study of Malaysia

Malaysian civil courts[108] have favorably referenced proportionality principles[109] when considering constitutional challenges to the validity of statutes. Two recent cases are of particular note for how a proportionality test could address the country's sedition law, which was enacted in 1948 by British administrators[110] and is paradigmatic of colonial holdovers wielded as instruments of social control. In *Public Prosecutor v. Azmi bin Sharom*,[111] decided in 2015, the Federal Court, Malaysia's highest court, purported to apply a proportionality test while considering the Sedition Act's constitutionality; in reality, the Federal Court upheld the law without fully applying the test.[112] Despite this, a more recent decision has positioned the Federal Court to apply proportionality more robustly. In *Alma Nudo Atenza v. Public Prosecutor*, [113] a 2019 challenge to a different act, the Federal Court

108. Malaysia's court system is bifurcated into civil courts and Islamic courts, the latter of which have jurisdiction over claims by Muslim citizens falling within certain areas of subject matter jurisdiction. *See generally* Farid S. Shuaib, *The Islamic Legal System in Malaysia*, 21 PAC. RIM L. & POL'Y J. 85 (2012) (describing Malaysia's separation of civil, secular courts from Islamic courts, which are given special jurisdiction over constitutionally enumerated areas). The arguments here are not directed toward such Islamic courts, which deal with jurisdictional questions based on religious doctrine beyond the scope of this Note.

109. *See, e.g.*, Sivarasa Rasiah v. Badan Peguam Malay., [2010] 2 MLJ 333, 339, 350 (Malay.), https://www.slideshare.net/surrenderyourthrone/sivarasa-v-badan-peguam-malaysia?from_action=save [https://perma.cc/D5DZ-A2BF] (applying proportionality principles to a challenge under Article 10 of the Constitution to the Legal Profession Act of 1976, where petitioner, an attorney disqualified for a position on the Malaysian Bar Council because of his status as a member of Parliament, argued that the Act violated his freedom of association).

110. *See* ANDREW HARDING, LAW, GOVERNMENT AND THE CONSTITUTION IN MALAYSIA 192 (1996) (pointing to English jurist Sir James Stephen as the originator of Malaysia's definition of sedition); Jennifer Pak, *What Is Malaysia's Sedition Law?*, BBC NEWS (Nov. 27, 2014), https://www.bbc.com/news/world-asia-29373164 [https://perma.cc/HD8E-WRH8] (reporting that the law was enacted "by the British colonial government in 1948 to use against local communist insurgents"); *see also Malaysia: End Use of Sedition Act*, *supra* note 72 (describing the former government's alleged promises to repeal the Act during the 2018 election campaign but pointing out its recent use of the law to target political dissenters). More recently, public pressure to repeal the law has continued, but the government has been equivocal about its intentions to do so. *See* Ida Nadirah Ibrahim, *Gov't Mulling New Law To Replace Sedition Act, Says PM*, MALAY MAIL (July 11, 2019, 1:31 PM), https://www.malaymail.com/news/malaysia/2019/07/11/govt-mulls-new-law-to-replace-sedition-act-pm-says/1770394 [https://perma.cc/6XJU-3FEG].

111. Pub. Prosecutor v. Azmi Sharom, [2015] 8 CLJ 921 (Malay.), https://www.malikimtiaz.com.my/doc/azmi-sharom.pdf [https://perma.cc/2HAL-VQMC].

112. *See id.* at 942–43 (referencing and providing the proportionality test articulated in *Sivarasa Rasiah*, [2010] 2 MLJ at 350, while only nominally and briefly applying it to the facts of the case).

113. Alma Nudo Atenza v. Pub. Prosecutor, [2019] 3 MLRA 1, 34–40 (Malay.), http://www.elaw.my/JE/01/JE1_2019.pdf [https://perma.cc/ZR2M-5YEC].

cited to Canada's test and fully applied a three-step sequential proportionality test, ultimately holding a rights restriction unconstitutional.[114] In a future challenge to the Sedition Act, the Federal Court should apply the *Alma Nudo* proportionality test, making sure to consider the law's colonial origins as reflective of its purposes. This Section gives a more detailed explanation of these two cases before illustrating how the *Alma Nudo* test would apply to Malaysia's sedition law.

In *Azmi bin Sharom*, the defendant was charged under §§ 4(1)(b) and (c) of the Sedition Act, which provide that "[a]ny person who . . . utters any seditious words"[115] or "prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication,"[116] respectively, "shall be guilty of an offence."[117] The defendant challenged the constitutionality of the act, arguing that it was inconsistent with Article 10 of the Malaysian Constitution, which enshrines the freedoms of speech, assembly, and association.[118] The court analyzed the merits of the defendant's claim set against Article 10's limitations clause, which specifies that the government may impose:

> such restrictions [on the freedoms of speech, assembly, and association] as it deems necessary or expedient in the interest of the security of the Federation or . . . designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.[119]

In analyzing whether the challenged sections of the act were consistent with Article 10's limitations clause, the Court ultimately purported to apply a proportionality test,[120] although its treatment of the law under this test was cursory. The Court listed the steps of its own proportionality test, established earlier in *Sivarasa Rasiah v. Badan*

114. *Id.* (holding that § 37A of the Dangerous Drugs Act violated Articles 5 and 8 of the Constitution, which protect rights to personal liberty and equal treatment, respectively).

115. Sedition Act 1948 (Act 15 of 1969), § 4(1)(b) (Malay.).

116. *Id.* § 4(1)(c).

117. *Id.* § 4(1).

118. FEDERAL CONSTITUTION, Nov. 1, 2010, art. 10 (Malay.).

119. *Id.* art. 10(2).

120. Pub. Prosecutor v. Azmi Sharom, [2015] 8 CLJ 921, 942–43 (Malay.), https://www.malikimtiaz.com.my/doc/azmi-sharom.pdf [https://perma.cc/2HAL-VQMC].

Peguam Malaysia,[121] which, similar to Canada's test, requires the government to demonstrate that:

> (a) [it has] an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.[122]

Despite expressly articulating the test and devoting an entire subsection to analyzing the law under it,[123] the Federal Court neglected to consider each step in turn. Instead, the Federal Court applied a "proximate connection" test borrowed from an earlier case.[124] There, the Court dealt with a challenge under Article 10 of the Constitution by dictating that the "connection contemplated" between the law and the limitation under Article 10(2) "must be real and proximate, not far-fetched or problematical."[125] Thus, although the *Azmi bin Sharom* Court claimed to apply a proportionality test, it actually analyzed whether the challenged provisions of the act were "too remote or not sufficiently connected"[126] with the limitations under Article 10(2) of the Constitution. This analysis resembled the first prong of Canada's sequential proportionality test,[127] but the Federal Court's curt proportionality analysis ended there. The Federal Court concluded that the connections between the general prohibitions against "seditious tendencies" under the act were not too remote, and thus were within the ambit of Article 10(2).[128]

Despite *Azmi bin Sharom*'s trivial application of proportionality to the defendant's challenge to the Sedition Act, Malaysian courts have

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121. Sivarasa Rasiah v. Badan Peguam Malay., [2010] 2 MLJ 333, 350 (Malay.), https://www.slideshare.net/surrenderyourthrone/sivarasa-v-badan-peguam-malaysia?from_action=save [https://perma.cc/D5DZ-A2BF].

122. *Id.*

123. *See Azmi Sharom*, [2015] 8 CLJ at 942–43 (subjecting the law to explicit treatment under a proportionality analysis).

124. *Id.* at 937–38, 942–43 (citing Pub. Prosecutor v. Pung Chen Choon, [1994] 1 MLJ 566 (Malay.), https://www.slideshare.net/surrenderyourthrone/pp-v-pung-chen-choon [https://perma.cc/W88X-Y2SC]).

125. *Id.* at 937.

126. *Id.* at 942.

127. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 106 (Can.) (articulating the first step of a three-step test asking whether the law is "rationally connected" to the stated purpose).

128. *Azmi Sharom*, [2015] 8 CLJ at 942.

recently demonstrated more robust approval of sequential proportionality.[129] In *Alma Nudo*, the Federal Court considered a challenge to the constitutionality of Malaysia's Dangerous Drugs Act.[130] In beginning its analysis, the Federal Court emphasized that all constitutional challenges should be interpreted in light of Article 8(1) of the Federal Constitution,[131] which provides that all persons are "entitled to the equal protection of the law."[132] Going further, the Federal Court asserted that Article 8(1) "imports the principle of substantive proportionality."[133] Then, the Federal Court provided that the same sequential proportionality test "lucidly articulated"[134] in *Sivarasa Rasiah*[135] (and quoted in *Azmi bin Sharom*) was the proper interpretation of proportionality under Article 8(1). The Federal Court then signaled its straightforward, firm adherence to sequential proportionality when considering constitutional challenges: "Accordingly, when any State action is challenged as violating a fundamental right, . . . art 8(1) will at once be engaged such that the action must meet the test of proportionality."[136] The Federal Court then paid homage to the use of proportionality in its sister Commonwealth jurisdictions,[137] indicating its support for transnational judicial dialogue. *Alma Nudo* referenced the proportionality tests used

129. *See, e.g.*, Alma Nudo Atenza v. Pub. Prosecutor, [2019] 3 MLRA 1, 32 (Malay.), http://www.elaw.my/JE/01/JE1_2019.pdf [https://perma.cc/ZR2M-5YEC] ("[W]hen any State action is challenged as violating a fundamental right, such as the right to life or personal liberty under art 5(1), art 8(1) will at once be engaged such that the action must meet the [three-step] test of proportionality."); Nik Nazmi bin Nik Ahmad v. Pub. Prosecutor, [2014] 4 MLJ 157, 172 (Malay.), http://www.janablegal.com/wp-content/uploads/2018/11/Nik-Nazmi-Nik-Ahmad-v-PP.pdf [https://perma.cc/HG6C-5KMS] (citing to Canada's sequential proportionality test with approval and applying a proportionality principle as part of a broader reasonableness test).

130. *Alma Nudo*, [2019] 3 MLRA at 6. More specifically, the defendants contested the statute's conflation of drug *trafficking* with drug *possession*. Section 37 of the statute allowed the government to charge individuals with trafficking merely by proving their custody and control over the particular controlled substance. *Id.* at 26. Among other constitutional violations, the defendants argued that this provision violated their right to a presumption of innocence under Article 5(1) of the Federal Constitution. *Id.*

131. *Id.* at 31.

132. FEDERAL CONSTITUTION, Nov. 1, 2010, art. 8(1) (Malay.).

133. *Alma Nudo*, [2019] 3 MLRA at 31.

134. *Id.* at 32.

135. Sivarasa Rasiah v. Badan Peguam Malay., [2010] 2 MLJ 333, 350 (Malay.), https://www.slideshare.net/surrenderyourthrone/sivarasa-v-badan-peguam-malaysia?from_action=save [https://perma.cc/D5DZ-A2BF].

136. *Alma Nudo*, [2019] 3 MLRA at 32.

137. *Id.*

in a few jurisdictions, including the "[u]seful guidance" of Canada's test in *Oakes* in particular.[138]

Then, the Federal Court applied each step of the test to § 37A of the Dangerous Drugs Act, the statutory provision challenged by the defendants.[139] First, the Federal Court considered the government's objectives for the law—targeting the country's drug-trafficking problem—and deemed it a "sufficiently important objective"[140] meriting application of the remainder of the proportionality test. Then, the Federal Court considered whether a "rational nexus" existed between the law and the objective, holding it was "at least arguable that the resulting ease of securing convictions [wa]s rationally connected to the aim of curbing the vice of drug trafficking."[141] Nevertheless, the Federal Court found that the law failed the third stage of the test, proportionality, underlining that "any restriction of fundamental rights does not only require a legitimate objective, but must be proportionate to the importance of the right at stake."[142]

Alma Nudo represents the Federal Court's affirmation of proportionality principles through its articulation and complete application of the sequential proportionality test.[143] A Malaysian court considering a renewed challenge under the Sedition Act could follow *Alma Nudo*'s reasoning as a template. Using *Alma Nudo*'s framework against the backdrop presumption of constitutionality,[144] the Federal Court could consider the colonial legacy of the law in all three prongs of the *Sivarasa* test.[145] First, the Federal Court could scrutinize the government's objectives under part (a) of the test or in its analysis of part (b), which asks whether the law has a "rational nexus"[146] to the

138. *Id.* at 34.

139. *Id.* at 38–39.

140. *Id.* at 38.

141. *Id.*

142. *Id.* at 39. Specifically, the Court found that the law's system of presumptions provided for trafficking convictions based on a presumption of possession, rather than proof of possession, amounting to a "harsh and oppressive" regime that imposed an "unacceptably severe incursion into the right of the accused under art 5(1) . . . disproportionate to the aim of curbing crime." *Id.* at 40.

143. *Id.* at 38–39.

144. Pub. Prosecutor v. Azmi Sharom, [2015] 8 CLJ 921, 937 (Malay.), https://www.malikimtiaz.com.my/doc/azmi-sharom.pdf [https://perma.cc/2HAL-VQMC].

145. Sivarasa Rasiah v. Badan Peguam Malay., [2010] 2 MLJ 333, 350 (Malay.), https://www.slideshare.net/surrenderyourthrone/sivarasa-v-badan-peguam-malaysia?from_action=save [https://perma.cc/D5DZ-A2BF].

146. *Id.*

objective. Finally, the Federal Court could of course include colonial legacy in its analysis of the law's ultimate proportionality, which constitutes part (c) of the test. Importantly, the Malaysian articulation of the test differs from the Canadian test in a key respect: the government must articulate a "rational nexus" between the law and its objective, rather than showing that it is the "least restrictive means."[147] Nevertheless, in *Alma Nudo*, the Court indicated that a consideration of whether the law is the least restrictive means could fit in the proportionality prong of the test, thus highlighting some flexibility in the test's application.[148]

Assessing a challenge to the Sedition Act, the Federal Court could first ask whether the government had a "sufficiently important"[149] objective to justify infringing the freedoms of speech, assembly, and association under Article 10 of the Constitution. The government could likely justify the Sedition Act as a permissible restriction "in the interest of the security of the Federation,"[150] or as necessary to the "public order or morality."[151] However, the Federal Court could inquire into the law's use as a tool of colonial control to take a deeper look at its underlying purposes: quashing political dissent as a means to shore up the government's power. Assessing the roots of the law would thus reveal an inconsistency in the allegedly benign objectives of protecting national security and the public order. By considering the law's colonial origins, the court could account for the historical underpinnings of the law, enacted during a period of foreign control when Great Britain stripped the local population of its ability to self-govern. Nevertheless, given that laws rarely fail to pass this threshold question in countries that regularly employ a proportionality test, the law's colonial legacy might be more potent at the second step of the proportionality inquiry.

147. *Compare Alma Nudo*, [2019] 3 MLR at 38 (asking merely whether a "rational nexus" exists between the rights restriction and the stated objective), *with* R. v. Oakes, [1986] 1 S.C.R. 103, 106 (Can.) (asking whether the law "impair[s] the right in question as little as possible").

148. *See Alma Nudo*, [2019] 3 MLR at 40 (finding the law was disproportionate in part because "[i]t is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under art 5").

149. *Sivarasa Rasiah*, [2010] 2 MLJ at 350.

150. FEDERAL CONSTITUTION, Nov. 1, 2010, art. 10(2)(a) (Malay.).

151. *Id.*; *see also* Goodroad, *supra* note 84, at 278 ("National security and public order are other methods that have repeatedly been used to limit free speech in . . . Malaysia.").

That second step considers whether the rights restriction has a "rational nexus"[152] with the government's stated objective. Here, the Federal Court could again assess the colonial legacy of the law as indicative of its irrationality. Again, the law's colonial justification as an instrument to control anticolonial dissenters would be instructive. In recent years, the now-former Prime Minister similarly used the sedition law to clamp down on political dissidence in response to his administration's declining popularity.[153] The Sedition Act's use to restrict political dissent erodes the "nexus" between the law and the government's stated objective. Political dissent is a natural feature of democratic systems like Malaysia, and the Constitution's protections of freedoms like that of free speech and expression underscore the nation's fundamental adherence to principles of pluralism, tolerance, and self-government. Using the colonial origins of a law as a cudgel to silence political activists highlights colonialism's longstanding status as a tool of social control. Even so, the second prong of the test articulated in *Sivarasa* and applied in *Alma Nudo* is not strictly a "least restrictive means" test like the second prong of Canada's proportionality test.[154] While this likely would make it more difficult to overcome the Federal Court's presumption of constitutionality, the Federal Court could consider whether the law poses the least restrictive impairment of the right in its discussion of proportionality, as in *Alma Nudo*.[155] Despite this difficulty, considering colonial legacy would still strengthen challenges to colonial laws like the Sedition Act. Moreover, the Federal Court can consider all these elements under the third prong of the test, which asks whether the rights restriction is proportionate. Because of the proportionality inquiry's flexibility and breadth, the Court may exercise its independent judgment of the case's merits.[156]

A difficulty with this approach is that under Article 10 of the Malaysian Constitution, the Court is not permitted to inquire as to the "reasonableness" of a law.[157] Indeed, Malaysian courts have noted that

152. *Alma Nudo*, [2019] 3 MLR at 38.

153. *See* LAKHDHIR, *supra* note 74, at 4 (describing increased crackdowns on free speech in light of rising public discontent toward the government in the late 2010s).

154. *See supra* note 147.

155. *See Alma Nudo*, [2019] 3 MLR at 40.

156. *See* Jackson, *supra* note 90, at 3099 (identifying the third "proportionality" prong of the sequential test as a place where courts exercise "independent judicial evaluation").

157. *See* Pub. Prosecutor v. Azmi Sharom, [2015] 8 CLJ 921, 940 (Malay.), https://www.malikimtiaz.com.my/doc/azmi-sharom.pdf [https://perma.cc/2HAL-VQMC] (declining to adopt the "reasonableness test" to consider the validity of challenges under Article 10).

Article 10(2), the limitations clause, does not contemplate "reasonable" restrictions on the freedoms of expression, assembly, and association.[158] However, this difficulty is not insurmountable. Although an assessment of a law's "reasonableness" is often a feature of proportionality tests,[159] it is far too literal to decline to apply proportionality principles simply because a limitations clause does not explicitly require *reasonable* limitations. In fact, despite its refusal to assess the "reasonableness" of the Sedition Act, the Court in *Azmi bin Sharom* confirmed that "[t]he restriction that may be imposed by the Legislature under art. 10(2) is not without limit."[160] And given the particularized facts of each case, the Federal Court's consideration of colonial legacy would, at the very least, cast doubt on the veracity of the government's objectives and aid the Court in its ability to correctly identify the extent of the law's restriction of Article 10 freedoms.[161]

III. THE ROLE OF COURTS: JUDICIAL REVIEW AND NONSEQUENTIAL PROPORTIONALITY

Sequential proportionality is not the only proportionality framework used in the Commonwealth. Courts in other Commonwealth countries, like South Africa, use a "global proportionality test"[162]—sometimes referred to as a *nonsequential* proportionality test—which lacks the structure and sequence of Canada's test. This Part first provides an analysis of nonsequential proportionality using South Africa's test as a model. Then, it analyzes the High Court of Kenya's decision upholding the country's colonial-

158. *Id.* (contrasting Article 10(2) with the analogous Article 19(2) of the Indian Constitution, which stipulates "reasonable restriction[s]," and noting that Article 10's legislative history suggests that the term "reasonable" was deliberately omitted).

159. *See generally* Sweet & Mathews, *Proportionality Balancing*, *supra* note 88 (describing proportionality tests as balancing tests where "reasonableness" is often synonymous with necessity or least-restrictive-means analyses).

160. *Azmi Sharom*, [2015] 8 CLJ at 923.

161. To caveat, this Note acknowledges the recent political unease in Malaysia. In 2018, the Pakatan Harapan, a center-left, reform-oriented coalition, ousted the long-ruling, rightwing Barisan Nasional party. Jonathan Head, *How Malaysia's Government Collapsed in Two Years*, BBC NEWS (Mar. 5, 2020), https://www.bbc.com/news/world-asia-51716474 [https://perma.cc/8U55-SDDB]. In March 2020, however, following a short period of turmoil, the Pakatan Harapan party was replaced in power after losing its majority in parliament. *Id.* The Barisan Nasional has regained its majority. *Id.* Given the nascence of the new ruling coalition, it is unclear whether or how this transition will affect the courts. *Id.*

162. Niels Petersen, *Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court*, 30 S. AFR. J. ON HUM. RTS. 405, 428 (2014).

era sodomy law[163] and argues that the case may have turned out differently if the High Court had employed a proportionality test that considered the colonial origins of the law. Finally, given the Supreme Court of India's recent invalidation of a sodomy law[164] and the increasing prominence of India's jurisprudence,[165] this Part briefly forecasts the use of nonsequential proportionality with respect to India's colonial-era sedition law, which remains a source of great controversy.[166]

A. Nonsequential Proportionality: South Africa's "Balancing Exercise"

Like Canada's, South Africa's Constitution also contains a limitations clause.[167] The South African Supreme Court has, however, eschewed the use of a sequential proportionality test, opting instead to use a multifactor balancing test to interpret some constitutional rights.[168] In *S v. Manamela*,[169] the South African Court described its proportionality standard as follows:

> It should be noted that the five factors expressly itemised in [the limitations clause] are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global

163. EG v. Att'y Gen. (2019) K.L.R. 1 (H.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/173946 [https://perma.cc/6G3U-SYWV].

164. Navtej Singh Johar v. Union of India, (2018) 1 SCC 112 (India), https://indiankanoon.org/doc/119980704 [https://perma.cc/4U6W-V39P].

165. Jeffrey Gettleman, Hari Kumar & Kai Schultz, *Hundreds of Cases a Day and a Flair for Drama: India's Crusading Supreme Court*, N.Y. TIMES (Sept. 27, 2018), https://nyti.ms/2NMxDqU [https://perma.cc/F7QW-RXHX].

166. *Use and Misuse of Sedition Law: Section 124A of IPC*, INDIA TODAY (Oct. 9, 2019), https://www.indiatoday.in/education-today/gk-current-affairs/story/use-and-misuse-of-sedition-law-section-124a-of-ipc-divd-1607533-2019-10-09 [https://perma.cc/JAM4-YYTJ].

167. S. AFR. CONST., 1996, § 36(1) ("The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . . .").

168. Katherine G. Young, *Proportionality, Reasonableness, and Economic and Social Rights*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 248, 256–60 (Vicki C. Jackson & Mark Tushnet eds., 2017).

169. S v. Manamela 2000 (3) SA 1 (CC) at 29 para. 32 (S. Afr.), https://collections.concourt.org.za/bitstream/handle/20.500.12144/2070/Full%20judgment%20(538%20Kb)-1478.pdf?sequence=1&isAllowed=y [https://perma.cc/T6WN-RTAQ].

> judgment on proportionality and not adhere mechanically to a sequential check-list.[170]

The Court explicitly repudiated the Canadian-style sequential proportionality test, instead preferring a "global judgment" to a "sequential check-list."[171]

The South African test favors multifactor balancing based on the recognition that "[t]he fact that different rights have different implications for democracy . . . means that there is no absolute standard which can be laid down for determining reasonableness and necessity."[172] Given these differences, the Court considers the following factors as relevant to the balancing test:

> [T]he nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[173]

These factors overlap with the different steps of the sequential test. The Court first looks to the "purpose for which the right is limited," as the Canadian courts look for a "sufficiently important" purpose, then the Court looks at whether "means less damaging" could be pursued to achieve the purpose, as the Canadian courts look for "minimal impairment."[174] The difference, however, is that the South African Court does not consider these elements in a particular order, and no single factor is dispositive.[175] Nevertheless, the South African Court has extensively referenced Canada's proportionality jurisprudence,[176]

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170. *Id.* at 29 para. 32.

171. *Id.*

172. S v. Makwanyane 1995 (3) SA 391 (CC) at 436 para. 104 (S. Afr.), https://collections.concourt.org.za/bitstream/handle/20.500.12144/1981/Full%20judgment%20Official%20version%206%20June%201995.pdf?sequence=16&isAllowed=y [https://perma.cc/45KA-A4P5].

173. *Id.*

174. *Compare id.* at 436 para. 104, 438 para. 107 (setting out the factors of South Africa's global balancing test), *with* R. v. Oakes, [1986] S.C.R. 103, 105–06 (Can.) (articulating the paradigmatic three-step sequential proportionality test).

175. *See* Sweet & Mathews, *Proportionality Balancing*, *supra* note 88, at 129 (noting that the South African proportionality test is "not always conducted in a sequence of discrete steps").

176. Kevin Iles, *A Fresh Look at Limitations: Unpacking Section 36*, 23 S. AFR. J. HUM. RTS. 68, 69 (2007).

juxtaposing the noncategorical nature of the multifactor, nonsequential balancing test with the prevalence of transnational judicial dialogue in the Commonwealth.

A court using a nonsequential proportionality test like South Africa's while considering the validity of a colonial-era law could consider the law's colonial legacy as illuminative of its purpose. A court could also consider whether the colonial legacy of the challenged law was inherently antithetical to the nature of the constitutional right in question, such as the rights to freedom of expression and association or the rights to privacy and equal treatment under the law. Given the nonsequential test's non-exhaustive, flexible nature, a court employing it could theoretically decide to consider a law's colonial legacy as an independent factor and thus invalidate a law based on the implications of its colonial legacy alone. Because the nonsequential test is not exhaustive, it allows courts to cater their analysis to the particular facts of each case. Perhaps a court would decide the nature of the right implicated is so important that any limitation not formulated and implemented by an elected, independent, native government is invalid. Regardless of the factor used to consider colonial legacy, the element of control—the moral and physical control inherent in many colonial-era criminal laws—would be the relevant takeaway.

B. Kenya and the Potential for Proportionality: EG *Re-examined*

Kenya's Constitution contains a limitations clause[177] closely reminiscent of South Africa's, providing that "[a] right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society."[178] The Kenyan limitations clause also sets forth factors, similar to those in the South African global balancing test, to be considered in light of any limitation.[179] These strong similarities are not accidental. Kenya's constitutional drafting process was influenced by South Africa's post-apartheid experience,

177. CONSTITUTION, art. 24 (2010) (Kenya).

178. *Id.*

179. *Compare id.* (considering "the nature of the right or fundamental freedom; . . . the importance of the purpose of the limitation; . . . the nature and extent of the limitation; . . . the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose," among other factors), *with* S. AFR. CONST., 1996, § 36(1) (considering "all relevant factors," including "the nature of the right," "the importance of the purpose of the limitation," "the nature and extent of the limitation," "the relation between the limitation and its purpose," and "less restrictive means to achieve the purpose").

and provisions of Kenya's Bill of Rights, including its limitations clause, were significantly borrowed from South Africa's Constitution and jurisprudence.[180] Although the two provisions are not identical,[181] the striking similarities they share furnish the Kenyan courts with the opportunity to mirror the South African approach to judicial review of rights limitations. South Africa's global balancing test would be a particularly workable method of constitutional interpretation in the Kenyan context and had the High Court of Kenya applied this test in its recent decision upholding the country's sodomy law,[182] the High Court may have reached a different result.

In *EG v. Attorney General*,[183] decided in May 2019,[184] the High Court of Kenya ultimately upheld the sodomy law despite challenges based on the petitioners' constitutional rights to equality,[185] human dignity,[186] and privacy,[187] among others.[188] The High Court's decision hinged on its interpretation of Article 45(2) of the Constitution, which recognizes the "right to marry a person of the opposite sex, based on the free consent of the parties."[189] Focusing on the provision's protection of the right to marry someone of the "opposite sex," the High Court reasoned that the country's criminalization of homosexual conduct did not violate the petitioners rights to human dignity and privacy, and it expressly declined to address whether the limitation was

180. Jill Cottrell Ghai & Yash Ghai, *The Contribution of the South African Constitution to Kenya's Constitution*, *in* CONSTITUTIONAL TRIUMPHS, CONSTITUTIONAL DISAPPOINTMENTS: A CRITICAL ASSESSMENT OF THE 1996 SOUTH AFRICAN CONSTITUTION'S LOCAL AND INTERNATIONAL INFLUENCE 252, 255 (Rosalind Dixon & Theunis Roux eds., 2018).

181. *See id.* at 261 (pointing out that Kenya's limitations clause, in § 24(1)(d), considers "the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others," whereas South Africa's limitations clause does not).

182. EG v. Att'y Gen. (2019) K.L.R. 1, 56 (H.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/173946 [https://perma.cc/PV26-ZBW2].

183. EG v. Att'y Gen. (2019) K.L.R. 1, 56 (H.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/173946 [https://perma.cc/PV26-ZBW2].

184. *Id.* at 1.

185. CONSTITUTION, art. 27 (2010) (Kenya).

186. *Id.* art. 28.

187. *Id.* art. 31.

188. *See EG*, (2019) K.L.R. at 29 (listing other allegedly violated rights and freedoms, including the freedom of conscience, religion, belief, and opinion; the right to health; and the right to fair hearing).

189. CONSTITUTION, art. 45(2) (2010) (Kenya).

"reasonable and justifiable"[190] in light of Article 24.[191] The High Court rendered its judgment despite the petitioners' explicit indications that they did not seek to legalize same-sex marriage but merely sought to protect their right to conduct themselves in private as they saw fit.[192] In effect, the High Court found the petitioners' challenge *indirectly* incompatible with the Constitution—the challenge failed due to the Constitution's affirmative recognition of opposite-sex marriage, despite its lack of a provision explicitly prohibiting same-sex marriage. The High Court then went further, finding that "[same-sex] relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution."[193] This assertion is particularly extraordinary in light of the Kenyan Constitution's "transformative" approach to civil and political, as well as economic, social, and cultural, rights.[194] In *EG*, the High Court's reasoning allowed the constitutional recognition of opposite-sex marriage to trump the many other constitutional rights the petitioners asserted.

Although the Kenyan High Court referenced analogous case law in other Commonwealth countries,[195] the High Court failed to scrutinize the government's objectives for the sodomy law and to ask whether it was a valid limitation under Article 24. Had the High Court employed a global balancing test to do this, it may have reached the opposite result. Although the High Court referenced the colonial origin of the law,[196] it did not discuss it further. Nevertheless, the High Court opined that the Kenya Constitution is "a mirror reflecting the national soul, the identification of the ideals and aspirations of the nation."[197] As a result, the court continued, "[t]he spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion."[198] Under a proportionality test, the High Court could inquire into the government's purposes for limiting the petitioners' rights to privacy

190. *EG*, (2019) K.L.R. at 54.

191. *Id.* at 55.

192. *Id.* at 10.

193. *Id.* at 55.

194. *See* Ghai & Ghai, *supra* note 180, at 256 (noting that the Kenyan Constitution is "readily identifiable as [a] 'transformative constitution[]'").

195. *See EG*, (2019) K.L.R. at 49–52 (reviewing caselaw overturning sodomy laws in India, South Africa, Botswana, the United States, and elsewhere).

196. *Id.* at 30.

197. *Id.* at 53.

198. *Id.*

and human dignity, and in so doing, it would have to contend with the fundamental incompatibility of a *colonial* law with the values reflecting the "national soul."[199] Indeed, the soul of many postcolonial nations—including Kenya—is reflected in the pluralistic, democratic ideals enshrined in their constitutions, ideals inconsistent with the sodomy laws and other colonial-era criminal laws used to control and repress the colonized populace.

Going further, the High Court would consider the nature of the restricted rights and would likely recognize that the rights to human dignity and privacy are among the most fundamental protections under the Constitution. In its opinion, the High Court asserted that "[t]he Constitution gives prominence to national values and principles of governance which include *human dignity*, equity, social justice, *inclusiveness*, *equality*, [and] *human rights* . . . ."[200] Considering the law's colonial legacy would likely increase the High Court's level of scrutiny by focusing its attention on the law's original purpose and its highly discriminatory implementation. In the opinion, the High Court dismissed the petitioners' arguments under Article 27, which enshrines equal treatment under the law, because the latter did not provide an "iota of evidence . . . to establish any of the cited acts of discrimination."[201] If the High Court had considered the law's colonial legacy as reflective of its roots in social control and subjugation, it may have adopted a less rigid stance toward the petitioners' equal-treatment claims. While the High Court pronounced that "the Constitution must not be interpreted in a 'narrow, mechanistic, rigid and artificial'"[202] fashion, its decision to uphold the law by stressing the incompatibility of homosexual conduct with the provision recognizing opposite-sex marriage had precisely these failings. By using a proportionality test that considered the law's colonial legacy, the High Court would have better fulfilled its role as a "guardian of the constitution."[203]

Reflecting on the relics of colonialism still present in his country, the Kenyan writer Mukoma Wa Ngugi said, "The British empire in one sense ended, but its language is now the language of the world."[204]

199. *Id.*
200. *Id.* at 34 (emphasis added).
201. *Id.* at 42.
202. *Id.* at 53.
203. Juma & Okpaluba, *supra* note 15, at 288.
204. Kushner, *supra* note 52.

Colonial laws that remain in place are persistent reminders of the continuing repercussions of colonialism in postcolonial societies. In Kenya, and elsewhere in the Commonwealth, courts have the responsibility to assess the validity of these laws under the Constitution. A proportionality test that factors in colonial origins may help courts dismantle this enduring legacy of control and develop a rights jurisprudence that is more protective of the fundamental rights enshrined in postcolonial constitutions.

C. Nonsequential Proportionality in India: A Further Avenue for Reform

India's Supreme Court is well known in the Commonwealth both for its activist approach to rights protection and for its analytically rich jurisprudence.[205] Indeed, in 2018, India's Supreme Court made history in *Navtej Singh Johar v. Union of India*[206] when it invalidated the country's sodomy law. This decision vindicated a decades' long fight for LGBTQ+ equality and recognized the privacy and equality rights of millions of Indian citizens.[207] At the same time, India was the centerpiece of the former British Empire, and it retains many colonial-era criminal laws that pose human rights challenges, including the country's notorious sedition law.[208]

India's jurisprudence may provide inspiration to courts considering how to grapple with a law's colonial legacy. In its decision overturning Section 377, India's sodomy law, the Indian Supreme Court referenced the law's colonial legacy extensively.[209] The Court pointedly referred to the law's foreignness: "A hundred and fifty eight years ago, a *colonial legislature* made it criminal, even for consenting

205. *See* Arun Thiruvengadam, *The Global Dialogue Among Courts: Social Rights Jurisprudence of the Supreme Court of India from a Comparative Perspective*, *in* HUMAN RIGHTS, JUSTICE AND CONSTITUTIONAL EMPOWERMENT 264–309 (C. Raj Kumar & K. Chockalingam eds., 2007) (describing India's extensive engagement in transjudicial dialogue in its rights jurisprudence).

206. Navtej Singh Johar v. Union of India, (2018) 1 SCC 1 (India), https://indiankanoon.org/doc/119980704 [https://perma.cc/4U6W-V39P].

207. *See id.* at 113 ("We further declare that Section 377 insofar as it criminalises homosexual sex and transgender sex between consenting adults is unconstitutional.").

208. Ayesha Pattnaik, *The Art of Dissolving Dissent: India's Sedition Law as an Instrument To Regulate Public Opinion*, S. ASIA @LSE BLOG (Oct. 4, 2019), https://blogs.lse.ac.uk/southasia/2019/10/04/long-read-the-art-of-dissolving-dissent-indias-sedition-law-as-an-instrument-to-regulate-public-opinion [https://perma.cc/6XZK-5RPJ].

209. *Johar*, (2018) 1 SCC at 116.

adults of the same gender, to find fulfillment in love."[210] Going further, the Court emphasized the conundrum many postcolonial societies face—as long as they retain colonial laws, they are tethered to the colonial legacy.[211] Indeed, the Court found Section 377's colonial history quite instructive to its validity:

> A supposedly alien law, Section 377 has managed to survive for over 158 years, impervious to both the anticolonial struggle as well as the formation of a democratic India, which guarantees fundamental rights to all its citizens. *An inquiry into the colonial origins of Section 377 and its postulations about sexuality is useful in assessing the relevance of the provision in contemporary times*.[212]

The Indian Supreme Court has experimented with proportionality tests but traditionally employs a reasonableness test akin to a nonsequential, global balancing test.[213] In its consideration of the sodomy law, the Court made numerous references to proportionality principles and tests used in other Commonwealth and international courts,[214] and it made analogies to their reasoning to invalidate Section 377.[215] However, the Court's reasoning in *Navtej Singh Johar* was not structured as a proportionality analysis. Rather, the Court borrowed theories and arguments from several different doctrines and paid significant attention to other countries' jurisprudence on sodomy laws.[216] Nevertheless, its references to proportionality and reasonableness make the Indian Supreme Court a natural candidate for operationalizing a more formalized nonsequential proportionality test.

Given the Indian Supreme Court's open acknowledgement of colonialism's problematic influence on postcolonial society, it would be

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210. *Id.* (emphasis added).

211. *Id.* at 116 ("Eighty seven years after the law was made, India gained her liberation from a colonial past. But Macaulays [sic] legacy - the offence under Section 377 of the Penal Code - has continued to exist for nearly sixty eight years after we gave ourselves a liberal Constitution.").

212. *Id.* at 13 (emphasis added).

213. *See generally* Abhinav Chandrachud, Wednesbury *Reformulated, Proportionality and the Supreme Court of India*, 13 OXFORD UNIV. COMMONWEALTH L.J. 191 (2013) (arguing that India's Supreme Court does not employ a sequential proportionality test but rather a reasonableness test).

214. *Johar*, (2018) 1 SCC at 127–29.

215. *Id.* at 63 ("In view of the test laid down in the aforesaid authorities, Section 377 IPC does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner.").

216. *Id.* at 118–45.

natural for the Court to consider colonialism as part of its balancing test for constitutional challenges to any colonial-era law. The country's sedition law has been the subject of recent criticism, but the government has insisted on maintaining its use.[217] As a result, the Indian court system may very well be activists' most realistic avenue to challenge the law. The courts could consider the country's sedition law in light of its original colonial purposes, as the Court did in *Navtej Singh Johar* for India's sodomy law.[218] Indeed, they could apply many of the same arguments this Note raised in connection with Malaysia's sedition law.[219] Given the Indian Supreme Court's influence in the broader Commonwealth,[220] India could spur a new conversation in transnational judicial dialogue by adopting a more explicit and consistent consideration of colonialism when considering colonial-era laws.

IV. COUNTERARGUMENTS: OBSTACLES TO DOCTRINAL REFORM

While academic critiques of colonialism are widespread, there may be more practical roadblocks to operationalizing these critiques in the context of judicial review. Many Commonwealth courts have a longstanding practice of legislative deference,[221] which may limit their willingness to do a more searching analysis of a law's purposes and origins. Moreover, courts in jurisdictions that have failed to legislatively repeal laws from the colonial era may need to contend with arguments that such laws are reflective of local cultural beliefs.[222] This Part considers each of these contentions and responds to them in turn.

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217. *Sedition Law To Stay, Gov't Says Need To Retain Provision To Fight Anti-National Elements*, INDIA TODAY (July 3, 2019, 1:20 PM), https://www.indiatoday.in/india/story/sedition-law-modi-govt-retain-provision-anti-national-elements-1560982-2019-07-03 [https://perma.cc/HJ3Q-GKUJ].

218. *Johar*, (2018) 1 SCC at 13.

219. *See infra* Part II.B.

220. *See* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 829 (2012) (identifying India as one of three constitutional systems whose courts are increasing in transnational influence as the United States' international constitutional influence declines).

221. *See, e.g.*, Prempeh, *supra* note 15, at 1256 (describing many postcolonial African courts' historic practice of "deference to the judgment of the dominant politicians of the day").

222. *See, e.g.*, HUM. RTS. WATCH, THIS ALIEN LEGACY, *supra* note 6, at 1 (describing the Indian Home Ministry's old defense of Section 377, India's now-invalid sodomy law, as reflective of Indian values and culture).

A. Contending with a Tradition of Legislative Deference: A Transnational Approach

Malaysia's courts provide a useful example of how politics can shape the judiciary and alter its approach to judicial review. In 1988, Malaysia experienced a constitutional crisis that dramatically reshaped Malaysia's Federal Court and produced enduring deference to the dominant political party.[223] In response to a string of judicial invalidations of legislative enactments, coupled with a series of scandals involving the judiciary,[224] the Malaysian government amended the Constitution to strip the courts' absolute power of judicial review and instead limited courts to only those "powers as may be conferred by or under federal law."[225] In light of this complex political situation, the Malaysian judiciary has been relatively deferential in the last few decades.[226] While the Malaysian courts have recently taken a more activist approach in their adoption of proportionality,[227] the Malaysian experience cautions that changes in the political landscape can have a chilling effect on rights-protective judicial review.

Although courts should respect the separation of powers and temper their interference with the province of the political branches, they should embrace their status as "guardian[s] of the constitution"[228] and take an active role in ensuring the protection of constitutional rights.[229] Commonwealth courts can ensure a more stable rights jurisprudence by maintaining a transjudicial dialogue with other Commonwealth jurisdictions.[230] For example, Professor Li-ann Thio claims that "resort to foreign jurisdictions and international law"[231]

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223. *See generally* A. J. Harding, *The 1988 Constitutional Crisis in Malaysia*, 39 INT'L & COMPAR. L.Q. 57 (1990) (providing a contemporary account of the crisis and describing its impact on the Malaysian judiciary).

224. *Id.*

225. FEDERAL CONSTITUTION, Nov. 1, 2010, art. 121(1) (Malay.).

226. Yvonne Tew, *Malaysia*, *in* THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN ASIA (David Law, Holning Lau & Alex Schwartz eds., Oxford Univ. Press forthcoming 2021).

227. *See supra* Part II.B.

228. Juma & Okpaluba, *supra* note 15, at 288.

229. *See* Jackson, *supra* note 90, at 3154 ("[W]hile legislatures and executives may have particular knowledge and competence about, for example, the scope of national security risks and the best means to minimize those risks, courts have more capacity fairly to decide questions of individual rights."); Sweet & Mathews, *Proportionality Balancing*, *supra* note 88, at 84 (describing arguments that the risks of judicial lawmaking are a "reasonable . . . price to pay for obtaining some greater social benefit," like "protecting rights").

230. *See* Thio, *supra* note 15, at 501.

231. *Id.*

among Malaysian and Singaporean courts has "aided in the progressive development of jurisprudence, particularly with respect to novel areas"[232] of law. The Commonwealth, with over fifty members,[233] simultaneously features a wide range of cultural, political, and economic experiences and has a mutual basis in the English common law. While this Note highlights some of the chief problems with the colonial experience, the Commonwealth's shared colonial history has its positives. As each member of the Commonwealth moves on its own trajectory toward realizing human rights, members can look to each other for inspiration and judicial expertise when deciding challenges to colonial-era, human-rights-infringing laws.

B. Balancing Adherence with Local Values and Custom

In its decision to uphold Kenya's sodomy law, the Kenyan High Court appeared to sympathize with respondents' and interested parties' appeals to religion, morality, and public opinion as justification for the law.[234] Indeed, supporters of such laws often appeal to tradition and conservative social values in arguing for the laws' continued force.[235] Where colonial-era laws target minority groups but nevertheless enjoy majoritarian support, courts should give even greater heed to arguments highlighting the *colonial* origins and *colonial* purposes of the law. Given the political-process failures involved with ensuring minority representation, courts are often the only place where such groups are able to make their voices heard. The doctrinal changes proposed by this Note speak to this problem directly. A careful and intentional analysis of a law's colonial origins that incorporates awareness of the continued process of decolonization will help guard against the deference to public opinion and majoritarianism that the Kenyan High Court unfortunately employed in its decision to uphold the sodomy law.[236] When a Commonwealth court considers the original purposes for such colonial criminal laws, it will need to confront the reality that such laws were designed by a foreign power to control the

232. *Id.*

233. *About Us*, *supra* note 2.

234. EG v. Att'y Gen. (2019) K.L.R. 1, 55 (H.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/173946 [https://perma.cc/7YPS-ZQQ3] ("In our humble view, the desire of Kenyans, whether majoritarian or otherwise are reflected in the Constitution.").

235. *See* HUM. RTS. WATCH, THIS ALIEN LEGACY, *supra* note 6, at 23 (arguing that "[d]espite the claims of modern political leaders that anti-sodomy laws represent the values of their independent nations," the laws further entrench colonial values).

236. *EG*, (2019) K.L.R. at 55.

citizenry the court is constitutionally mandated to protect. Such a doctrinal adjustment will help to temper the misguided notion that colonial-era criminal laws are somehow the product of local traditions and values.

CONCLUSION

Colonial-era criminal laws are a stark reminder of colonialism's continuing influence on the postcolonial world. Their persistence is even more striking given their impact on human rights. In the words of Professor Margaret Burnham, this impact "illustrates the absurd results that can occur when independent states are still tethered to colonial laws that have been discarded as unjust by the colonial power itself."[237] The doctrinal modifications proposed by this Note, if adopted, may not result in the wholesale invalidation of such laws. Indeed, consideration of colonial legacy is one of many different elements a court should entertain when evaluating a constitutional challenge to a sodomy, sedition, or other colonial criminal law. Nevertheless, greater judicial appreciation of postcolonial dynamics will only strengthen the rigor of constitutional jurisprudence in the Commonwealth and beyond. Further research opportunities abound, including an analysis of how proportionality principles vary across the Commonwealth, a deeper dive into how culture and politics shape and challenge the process of postcolonial judicial review, or how postcolonial civil law systems (such as former French colonies) could incorporate an analogous doctrinal test more suitable for civil law jurisdictions. The process of decolonization that began in the mid-twentieth century is ongoing and multifaceted, and the judiciary should not hesitate to advance it.

237. *See* Burnham, *supra* note 11, at 252.