REPRODUCTIVE HEALTH matters

FEATURE

Sexual rights as human rights: a guide to authoritative sources and principles for applying human rights to sexuality and sexual health

Alice M. Miller,[a] Eszter Kismödi,[b] Jane Cottingham,[c] Sofia Gruskin[d]

a Co-Director, Global Health Justice Partnership of the Yale Law School and the School of Public Health, Yale Law School, New Haven, CT, USA. *Correspondence*: alice.miller@yale.edu

b International Human Rights Lawyer on Sexuality, Gender, Sexual and Reproductive Health and Human Rights, Geneva, Switzerland

c Independent Consultant, Geneva, Switzerland

d Professor of Preventive Medicine, Keck School of Medicine; Professor of Law and Preventive Medicine, Gould School of Law; Director, Program on Global Health and Human Rights, Institute for Global Health, University of Southern California (USC), Los Angeles, CA, USA

Abstract: *This Guide seeks to provide insight and resources to actors interested in the development of rights claims around sexuality and sexual health. After engaging with the vexed question of the scope of sexual rights, it explores the rules and principles governing the way in which human rights claims are developed and applied to sexuality and sexual health, and how that development is linked to law and made a matter of state obligation. This understanding is critical to policy and programming in sexual health and rights, as it supports calling on the relevant range of human rights, such as privacy, non-discrimination, health or other universally accepted human rights, as well as demanding the action of states under their international and national law obligations to support sexual health.*

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Introduction

Political consensus on the term "sexual rights", although fiercely debated over the past decades, has never been reached.[1] Resistance stems from countries' claims to radically different understandings (and fears) of what "sexual rights" includes and therefore might bind them to. This Guide has been developed to help untangle confusions, to make clear how and why sexual rights ***are*** human rights, to support political advances in the recognition of sexual rights, and especially to clarify their legal foundations.

The parameters of sexual rights are defined as the full range of existing human rights that have been applied to public and private aspects of sexuality and sexual health. The Guide emphasizes that the scope of "sexual rights" is linked to, though distinct from, reproductive rights, that sexuality and its diverse forms and meanings, including its link to reproduction, require specific attention, and it shows how human rights law can be and has been used to underpin good practice for the promotion of sexual health. Most critically, the Guide focuses on and explains how these developments are supported by well-accepted rules of application and interpretation in rights law. The Guide is intended for those engaging with states and politics to change practices, end exclusions and improve sexual health and rights by helping to ground their efforts in international law. It is divided into three main parts; Section I: The scope of human rights as it relates to sexuality and sexual health, highlighting the role that all human rights have to play in sexual health; Section II: The sources of human rights in law, describing the authority for rights as legally binding claims at international and national levels; and Section III: Nine rules and principles guiding the development, interpretation and application of human rights in law and policy in support of sexuality and sexual health.

The scope of human rights relevant to sexuality and sexual health

The past two decades or more have seen important developments in the field of sexual rights, and this Guide builds on some critically important documents that are widely used in the world of

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policy and programme design and reform. These include: i) the International Commission of Jurists' (ICJ) compilation of cases and laws on sexual orientation and gender identity, which pulls together case law on a sub-set of sexual rights from around the world and at the international level;[2] ii) the 2014 World Association for Sexual Health (WAS) Declaration on Sexual Rights, which aims to explain sexual rights norms and link sexuality and sexual health with human rights principles and standards;[3] iii) the Yogyakarta Principles of 2007, which have been elaborated by NGOs and human rights experts as a normative statement of how existing human rights principles and obligations have been and can be progressively applied to specific human rights claims around sexual orientation and gender identity;[4] iv) the International Planned Parenthood Federation (IPPF)'s Sexual Rights: A Declaration, which is a compilation dedicated to elaborating how existing rights principles can best be understood to apply to sexuality as an attribute of all persons, young and old, regardless of gender/gender identity and sexual orientation;[5] v) and the 'WHO Sexual health, human rights and the law' report, included in this issue,[85] which links human rights standards to public health data and legal cases to demonstrate how states in different parts of the world can and do support sexual health through legal and other mechanisms that are consistent with international and regional human rights standards, and their own human rights obligations.[6]

In addition to these compilations about sexuality and rights, in this Guide we call attention to the WHO working definition of sexual rights, since this definition has been extensively cited as a reference point for sexual rights in various publications. According to this definition:

"Sexual rights embrace certain human rights that are already recognized in international and regional human rights treaties, supported in consensus documents and found in national laws. Rights critical to the realization of sexual health include:

The rights to life, liberty, autonomy and security of the person
The rights to equality and non-discrimination
The right to be free from torture or to cruel, inhuman or degrading treatment or punishment
The right to privacy
The rights to the highest attainable standard of health (including sexual health) and social security
The right to marry and to found a family and enter into marriage with the free and full consent of the intending spouses, and to equality in and at the dissolution of marriage
The right to decide the number and spacing of one's children
The rights to information and education
The rights to freedom of opinion and expression
The right to an effective remedy for violations of their fundamental rights

The application of existing human rights to sexuality and sexual health constitutes sexual rights. Sexual rights protect all people's rights to fulfil and express their sexuality and enjoy sexual health, with due regard to the rights of others, within a framework of protection against discrimination."[7]

As noted earlier, insofar as different aspects of reproduction and sexuality are linked, this is reflected both in the naming of some reproductive rights as also sexual rights and in the common application of certain human rights principles to those issues.

For example, the decision to carry or terminate a pregnancy can be seen as an aspect of a woman's capacity to decide to link or delink sexual activity from the decision to become a parent, and engages the rights to health, privacy and non-discrimination amongst other rights. Thus, we include the means by which access to abortion is developing as a human right (consistent with the WHO working definition) here in our guidance on how rights principles related to sexuality are used.

Another intersection arises between sexual rights and gender-related rights. While gender identity and expression are not in themselves determinative of sexuality or sexual conduct, how one expresses gender can form the basis upon which state law regulates whom one can legitimately have sexual relations with. Thus, gender expression and identity norms matter for sexual rights, and can be included within the ambit of sexual rights.

All of the basic rights flagged in the WHO working definition have been codified – or made into law – in international and regional treaties, and many are also incorporated in national constitutions and law.

Sources of human rights law

Human rights claims contained ('sourced') in international treaties or national law can compel states to act. This section provides an overview of the 'sources' of basic human rights law underlying sexual rights.

International and regional treaties, and national constitutions and laws

The most easily recognized sources of binding international human rights law are treaties, also known as covenants, conventions, charters and protocols.* There are many such international treaties, such as the Convention of the Rights of the Child or the Convention on the Elimination of All Forms of Discrimination against Women.† International law is elaborated by nation states, all of whom have the equal right to participate in the process, and bind themselves to the resulting international legal obligations through the ratification of treaties. All states have ratified one or several of the international treaties. The widespread ratification of any treaty indicates that states' practices are likely, to some degree, to be consonant with the treaty. Widespread ratification can also influence the practices of states that have not ratified a treaty. Widespread commitment to the substantive rules of law contained in any particular treaty can become evidence of custom, or something that is generally accepted as what the law should be for all nations.†

Regional treaties, such as The European Convention of Human Rights or the African Charter of Human and Peoples' Rights, although only peripherally discussed in this Guide, function in much the same way, and are the product of the group of states making up a particular United Nations-designated geo-political region.

National constitutions and laws nearly always contain elements of human rights, such as non-discrimination, or the right to vote. National legal systems reveal the extent to which each state has the authority, the framework and the processes to promote and protect human rights. In some countries, national constitutions and laws are consistent with, or in some cases stronger than, international human rights law in their rights protections. For example, the Maltese Legal Gender Recognition Law, adopted in 2015 by the Maltese parliament, contains more progressive legal standards and procedural regulations than any international law with regard to gender identity and gender expression.[8] In other situations, which we discuss more fully below, national laws can be contradictory to more rights-enhancing international human rights standards as, for example, when a national law requires a husband's authorization for women seeking contraceptive services.[6]

At the international and regional level, the application of all these treaties and laws by national actors is overseen by a specific set of authoritative bodies, set up through the treaties. Thus, the Human Rights Committee, discussed below, for example, monitors the implementation of the International Covenant of Civil and Political Rights (ICCPR). Other sources of human rights include: the case law of international courts; decisions issued by the UN human rights treaty monitoring bodies.

The case law section below offers examples of where international, regional and national authoritative bodies have interpreted and applied already-existing, treaty-based or national constitutional rights standards so that they become a source of protection for rights relating to sexuality and sexual health. It is important to bear in mind that international law, which is shaped by agreements among states, is never perfect, and may not always reflect best current practice. International law was set up as an always-evolving set of practices and standards and human rights law partakes of this contestation. Two examples where human rights law is not settled or established in international or regional systems, but where there are innovative applications of non-discrimination, privacy and health standards, are found in laws on sex work and those on same-sex marriage.

Political Declarations

Political declarations of the United Nations system, while not legally binding, can be considered as contributing to an emerging global standard, in particular if the same statement is uttered repeatedly, and especially when accompanied by conforming conduct in legal changes, policy and practice. With respect to sexual rights, arguably no language has been as important as the articulation in the Beijing Platform for Action in 1994. Paragraph 96 stated: "The human rights of women include their right to decide freely and responsibly on all matters related to their sexuality, free of coercion, discrimination and violence." While

*Customary international law (CIL) is also a source of binding law for states: it is one of the oldest forms of international law and is based on deducing rules based on what governments actually do, coupled with their publicly stated reasons for their practice. We do not explore CIL in this Guide, although there are promising developments, particularly in one specific branch of international law, international humanitarian law [the law of armed conflict, loosely], which has been cited as the basis of an obligation to prevent rape in conflict. See: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule93.

†See the website of the Office of the High Commissioner for Human Rights for a full listing. http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

limited at the time to women and focused on health in its application and scope, this statement represents the first inter-governmentally-agreed articulation of what have become known as sexual rights. More recently, the inter-governmental Latin American and Caribbean review of 20 years of ICPD implementation by the United Nations Economic Commission for Latin America and the Caribbean concluded that states must "promote policies that enable persons to exercise their sexual rights, which embrace the right to a safe and full sex life, as well as the right to take free, informed, voluntary and responsible decisions on their sexuality, sexual orientation and gender identity, without coercion, discrimination or violence, and that guarantee the right to information and the means necessary for their sexual health, and reproductive health."[9]

Case law of international and regional courts

Applications of international and regional human rights standards to sexual health can be found in the case law of many different international courts, created by treaties, which have the power to issue binding decisions on the disputing parties and contribute to international and regional standards. The International Criminal Court, created by the Rome Statute, has such powers, as do the *ad hoc* international tribunals on war crimes as well as the regional courts attached to the regional human rights treaty systems, for example, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and People's Rights. To date, there are no such courts in Asia and the Pacific.

Each of these courts has made constructive rulings on rights in key cases related to sexuality, and sexual health. These include decisions affirming rights related to contraception, abortion, sexuality education, and adolescents' access to sexual and reproductive health services; as well as promoting the right to be free from sexual violence. They have also addressed the protection of the association, privacy, and non-discrimination rights of transgender and lesbian or gay people as well as rights to privacy in relation to same-sex behaviour.[‡] The work of these courts, and the way they interpret and apply existing international and regional legal standards to new facts and new realities are part of the dynamism and ongoing interpretation of international human rights standards. A specific example is the legal understanding of sexual assault and rape. Historically, the general criminal, peacetime legal definition was narrow in scope, recognising rape only in case of sexual intercourse involving vaginal penetration by a penis, by a man with a woman who was not his wife, through force and against her will. As a result of the *ad hoc* tribunals in Rwanda and ex-Yugoslavia, in 2010 the International Criminal Court elaborated the elements of the crime of rape and provided a broader definition, the elements of which can apply in conflict or non-conflict situations. According to the Court, the crime of rape covers coercive invasion or conduct resulting in penetration, however slight, of any part of the body of the victim, with a sexual organ, or with any object or any other part of the body, and the definition broad enough to apply to any person of whatever sex or gender.[10] A current review of the decisions applying relevant standards of international and regional human rights courts make it clear that the treaty law they enforce recognizes that rape can occur within marriage and should be treated as a crime, as well as demonstrating the evolution of legal understanding of the role of force, lack of consent and state duties to take allegations of rape seriously in regard to services and prevention.[11,12] Such decisions have contributed to a radical evolution of the legal definition of rape, and these elements are increasingly being affirmed in national law, with resulting greater protection of all individuals from sexual violence.

International human rights treaty monitoring body standards

The United Nations human rights treaty monitoring bodies are expert bodies formed by the United Nations to monitor the implementation of the international human rights treaties. While all treaty monitoring bodies have addressed sexuality and sexual health, some, such as the Committee on Elimination of all forms of Discrimination against Women (CEDAW), the Committee on the Rights of the Child (CRC), and the Committee on Economic, Social and Cultural Rights (CESCR), more frequently deal with sexual rights and sexual health matters and claims.

In addition, individuals or groups of individuals can bring complaints to these treaty bodies under

[‡]While the authors support the call to attend to the rights of LGBTQI persons, we seek to specify accurately what each decision supports: if the case addressed same-sex sexual behaviour, for example, it is not listed as extending the application of the non-discrimination principle to 'trans' persons. This practice highlights the partial nature of the development of some sexual and gender-related rights, revealing that further work needs to be done.

the various optional protocols – which must be ratified separately by states – which are additional mechanisms attached to some treaties. Decisions made by the treaty monitoring bodies concerning such complaints are authoritative interpretations for the state concerned, but also offer guidance to other countries on the meaning of the obligations they have undertaken by ratifying a treaty.

One early illustration of great relevance to sexual rights is the 1994 decision on *Toonen vs. Australia* issued by the Human Rights Committee, the treaty monitoring body for the ICCPR. In this case, in which an Australian man challenged the power of the state of Tasmania to criminalize same-sex sexual conduct between men, the Committee concluded that the protections against discriminatory interference with privacy included prohibitions on criminalizing intimate sexual conduct as a form of sex discrimination.[13,14] Following the decision, the Australian Government enacted the Human Rights (Sexual Conduct) Act (1994), through which same-sex sexual conduct is no longer criminalized.[15] The ruling marked a major evolution of law related to same-sex sexual conduct, and by frequent implication, sexual orientation, and has been used as a basis for law reform on same-sex conduct in other states,[16] including Fiji[17] and South Africa.[18]

Other sexual health and rights related cases have arisen in relation to abortion and contraception. For example, CEDAW issued a landmark decision in 2011, L.C. v. Peru, concerning a 13-year-old rape victim who, realising she was pregnant, attempted suicide by jumping from a building, injuring her spine. She was denied a therapeutic abortion, and the operation on her spine was delayed because of her pregnancy, resulting in serious disability. In determining Peru had violated her rights, CEDAW highlighted in particular the rights to a remedy, and discrimination on the basis of age and sex (gender inequality) affecting the girl's access to health services.[19]

In addition to such case-based decisions, treaty bodies also issue general interpretive statements, known as General comments or Recommendations, which provide another means for states to gain greater understanding of the scope of their obligations under each treaty. General Comments and Recommendations that have great relevance to sexual health include CEDAW's General Recommendation 24 on women and health,[20] CESCR's General Comment 14 on the right to health,[21] and CRC's General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health.[22] CRC's General Comment 15, for example, clearly indicates that states should work to ensure that girls can make autonomous and informed decisions about their reproductive health, and that sexuality education must be ensured according to the evolving capacity of the child.[23] These general interpretations are recognized as a matter of international law to be a means by which treaties can evolve. While these comments are not law *per se*, as states parties act in compliance with these recommendations, the new interpretation gains traction as an authoritative statement of the treaty's meaning.[24] For example, following CEDAW's General Recommendation 19 on violence against women in 1992,[23] states began to report on ways in which they had amended their laws to protect women and girls against violence, including sexual violence, and how they had ensured that health services were able to deal with the consequences of such violence.

Following the submission by a state of their report to the Committee, and what is called a "constructive dialogue" with the reporting state, and considerations in shadow reports provided by civil society actors, the treaty monitoring body issues "concluding observations" to the reporting state. This reporting process constitutes an important human rights accountability mechanism to monitor how states are implementing their obligations under a particular treaty.

National human rights standards

At the national level, constitutions, decisions of constitutional and other courts of high-level review and national legislation (here referred to as "national human rights standards") can be relevant to sexual rights and sexual health. The Portuguese Constitution, for example, specifically guarantees the right to family planning,[25] and the Law on Sexuality Education makes sexuality education compulsory in private and public primary, secondary and professional schools.[26] Another example is the recent Supreme Court of India decision, which breaks the binary gender norms of male and female in law and administrative practices in the country, and gives recognition of identity and equal rights to transgender persons.[27] While national court decisions and legislation are primarily binding on persons and entities living in or under the control of the state, they can provide important examples and persuasive reasoning and guidance to national courts and legislatures in other countries.

Some countries provide more than one system for assigning legal rights and responsibilities, such as having laws organized around specific religious doctrines and principles or custom and tradition, to which people, sometimes uniquely women, are either assigned (by reason of religion, for example) or by which one can elect to be guided. Marriage, inheritance and some crimes can be governed in some countries by diverse systems. However, one of the most fundamental and powerful principles of international law is that states must act at all levels to fulfil their international promises. This rule is summed up in the Latin phrase *pacta sunt servanda*, or agreements must be kept. Thus, a national government is obligated on the basis of the international human rights treaties it has ratified to assess its laws in light of its international commitments. States are given leeway as to how to address gaps or violations of their international obligations through their parallel legal systems, but they are not allowed to plead that their national law is not subject to international human rights legal review. It is important to note that in many (although not all) countries with plural legal regimes, their international human rights commitments and national constitution can provide a basis for assessing – usually under discrimination laws – which laws in existing systems fall foul of human rights guarantees.[6]

Human rights principles and their application in the development of new standards with regards to sexual rights, sexuality and sexual health

This section highlights nine key rules, which guide the development and application of human rights standards and law, which are of relevance to sexual rights claims.

Universality, inalienability and indivisibility of human rights

Human rights are universal and inalienable, indivisible, interdependent and interrelated. They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background. They are inalienable because people's rights can never be taken away. They are indivisible and interdependent because all rights – political, civil, social, cultural and economic – are equal in importance and none can be fully enjoyed without the others. They apply to all equally. Denial of one right invariably impedes enjoyment of other rights. For example, discrimination against people because they are living with HIV, or because of their same-sex sexual orientation, can affect their employment, housing, education and access to health services. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others. For instance, fulfilment of the right to health may depend on fulfilment of the right to education or to information.[28]

Non-discrimination and equality: a core principle of rights undergirding all other rights and a right in itself

Non-discrimination constitutes both an underlying principle guiding the application of all human rights, and a specific obligation on the state to act without adverse discrimination, and to affirmatively take certain steps in order to reach equality of all persons.[29,30]

Non-discrimination as a tool of equality and sexual health

The principle of non-discrimination has multiple associations with sexuality, sexual health and human rights. Inequality among and between persons and groups is a strong predictor of the burdens of ill health, including sexual ill-health. Inequalities are manifested through differential access to services and resources, in people's abilities to participate in the laws and policies that govern their lives, as well as to seek remedies for abuses committed against them.[31] Discrimination operates through processes of inequality that are rarely linked solely to one characteristic of a person, but are often fuelled by multiple factors. Indeed, in international human rights treaties, discrimination is understood to mean "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[32,33] This list, and the understanding of prohibited grounds, is taken to be non-exhaustive. Thus, "other status" has been interpreted to include age, sexual orientation, gender identity, disability, and HIV status, all of which can have effects on sexual health.[2,30,33–37]

Different forms of discrimination can interact, sometimes called "inter-sectional discrimination" or "multiple discrimination" such that analysis and remedies must pay attention not only to one axis of discrimination, such as discrimination on the ground of sex and gender, but also its connection to another status, such as race, age or national status, in order to capture the full dynamics of the barrier, and for remedies to work effectively towards meaningful equality.[29,30,36]

Non-discrimination is one aspect of a state's obligation to act in ways that do not produce or perpetuate barriers to equality and the equal enjoyment of rights, including the highest attainable standard of health for all persons.[21,22,29,30] Measures for ensuring non-discrimination, including ensuring the equal protection of the law, may require broader policies and programmes, including policies addressing resource distribution and priorities across all sectors of society as well as within the health system. For example, elimination of coerced and forced sterilization of people living with disabilities, indigenous peoples, ethnic minorities, and transgender and intersex persons, requires action at the legal level but also in policies and practices, in education and health service delivery, to ensure that sterilization is only carried out with the full, free and informed decision-making of the person concerned.[32]

Laws as a source of discrimination

Laws, policies, programmes and practices, including in health care settings, can also be a source of discrimination and other human rights violations, with a significant impact on health. Beliefs about the appropriate gender roles for women and men, for example, which in turn dictate expected sexual conduct, often find their way into law and have a negative impact on the lives and health of women, and also of men. Many laws discriminate against people who transgress social rules about feminine or masculine social behaviour, and people whose sexual conduct is deemed unsuitable – including sex without reproduction and sex outside of marriage – or persons whose gendered role in sexual conduct does not conform to expected social behaviour.

Some of the most draconian manifestations of discriminatory beliefs and stereotypes are found in the substance and operation of the criminal law. For example, criminal law is applied in many countries to prohibit access to and provision of certain sexual and reproductive health information and services, to punish HIV transmission, and to punish a wide range of consensual sexual conduct occurring between competent persons. The criminalization of these behaviours and acts has many consequences for health, including sexual health. People whose sexual and reproductive decisions and whose consensual sexual behaviour are deemed a criminal offence may feel the need to hide their behaviour and actions from health workers, the police and others, for fear of being stigmatized, arrested and prosecuted. They are also often ill-treated by health care providers, reducing the likelihood that they will seek health services. Persons engaging in, or imagined to engage in, conduct which is against the law, are often targets for a range of abuses including violence (both sexual and non-sexual), extortion, harassment and other violations both by private individuals or groups but also by police, often with impunity. (6)

Use of criminal laws in relation to the access to and provision of essential sexual and reproductive health information and services and their application to consensual sexual conduct have been found by international and regional and national human rights bodies to be in contradiction with human rights and many states have changed their national laws accordingly.[6]

Many states have taken up a broad array of protections against discrimination, either by including relevant guarantees in their national Constitutions or by elaborating laws that offer explicit guarantees of non-discrimination on enumerated grounds such as sex, gender, sexual orientation or health status. Some states have defined specific grounds of protection relevant to sexual health through national case law. These laws and constitutional frameworks can in turn help shape the design and assessment of state and non-state health programmes.[6]

State action to end discrimination

State responsibility to combat discrimination extends beyond the content of national laws and includes an obligation to take meaningful action to end discrimination and establish the conditions for equality. This responsibility to act reaches into all spheres of life – public and private, economic, social, cultural, political and civil. The measures that are taken must be appropriate to the spheres. For example, states are allowed to differentially regulate public and private life, such as when the legislature establishes that public schools must provide comprehensive sexuality education whereas in the private sphere the legislature would not create legal mandates. However, the

state might still have an obligation to provide comprehensive public education through other more generally accessible means. The reach of this obligation on the state to end discrimination includes reviewing and revising laws and practices which are found to contain explicitly discriminatory components, such as regulations that provide women or girls access to information and services for contraception based on their marital status and/or husband's permission (direct discrimination), or laws which are neutral on their face but which produce discriminatory effects.[30,33] Indeed, some "gender neutral" laws may constitute discrimination against women of all kinds including transgender women, for example, when a state fails to provide services needed exclusively by women, not least in the provision of reproductive health services.[20,38]

The goal of non-discrimination is not merely a goal of formal equality, in which the state treats all persons alike and focuses on equality of standards, but *substantive equality*, which may require treating differently situated persons differently.[35] The test of substantive equality lies in its results: for example, whether differently-situated people (for example, transgender people, people living with disability) are able to access resources, participate and make decisions in public and private life equally and with equal capacity to influence results, and generally enjoy rights in practice. Any steps taken by the state for substantive equality are also subject to human rights review, to ensure that they are themselves not arbitrary or discriminatory and are in line with principles of autonomy, respect for diversity and freedom from gender or racial stereotypes. An example would be ascertaining how, and in what circumstances, pregnant women are treated differently from non-pregnant women and men.[29] Another example is the notion that failure to make reasonable accommodation to recognizable forms of difference such as disability may function itself as a form of discrimination.[39]

States' obligations include not only refraining from discriminatory actions, but also taking affirmative action to remove barriers and redress historical legacies of inequality. In such circumstances, such "positive discrimination" as a temporary special measure is not prohibited. Remedial legislative or administrative measures, called "temporary special measures", are allowed in many international human rights treaties and in many national laws; they are not only allowed as an aspect of equality but may be required to ensure the equal rights, including the sexual health rights, of a historically disfavoured group such as women of a certain ethnic group or refugee women. Laws providing for this kind of treatment are not considered discrimination, as long as they are reviewed for continuing relevance.[40]

Respect, protect, fulfil

Human rights standards make it clear that states have three forms of obligations: to *respect, protect and fulfil* rights.[20,21,41] An example of the obligation to *respect* rights in the context of sexual health would be the adoption of laws and other measures to ensure the police, as agents of the state, cannot harass or abuse individuals who dress or behave in a gender non-conforming manner. Another example would be a law that eliminates the requirement for married women to obtain the authorization of their husbands before receiving family planning services.

Under the obligation to *protect*, states must elaborate laws and policies that fully protect against acts or practices that make some persons less equal than others. This includes, for example, revising laws which fail to protect all persons equally from sexual assault – as, for example, when a law does not include women within marriage or men as potential victims of sexual assault – or ensuring that laws do not treat female sex workers as less worthy of protection from rape than other women. It also includes the enactment of laws that eliminate barriers to people accessing accurate and diverse sexuality information in the media, or the enactment of laws that not only make the rape of men prosecutable as a substantial criminal offence, but also ensure adequate services. In these contexts, criminal law is a part, but alone not a sufficient component, of an adequate rights-promoting response.

Examples of *fulfilling* rights in regard to sexuality and health include the allocation of significant resources to the improvement of sexual health by, for example, funding public education campaigns on respecting people of diverse sexual orientations and gender identities and expressions, or creating legal frameworks that allow civil society to organize, educate and protect individuals from sexual abuse in the family.

Due diligence

The concept of due diligence, by which the state is responsible for respecting, protecting and fulfilling rights, functions as a standard of review for states

and their duty to ensure rights generally. Because states have a concrete responsibility to protect, they are accountable if they fail to prevent violations by non-state actors under specific conditions. In the context of sexual health this can be of vital importance – where, for example, discrimination or violence render some individuals unable to assert their rights on an equal basis with others. According to the principle of due diligence, states must prevent, investigate and punish acts which impair any of the rights recognized under international human rights law. States are obliged to establish national mechanisms for the practical application and oversight of these laws, as well as to ensure the existence of comprehensive remedies addressing violations of these standards.

The standard of due diligence has been explicitly incorporated into United Nations standards such as the Declaration on the Elimination of Violence against Women, which says that states should "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons."[24,44]

Increasingly, human rights bodies are using the concept of due diligence as their measure of review for state inaction in the face of private actor discrimination, exclusion and violence. They are gradually applying the due diligence standard more broadly to sexual and gender violence, domestic violence and rape in the community,[43–47] including not only criminal law but also affirmative preventive action, such as ending gender stereotypes as well as in the context of provision of health care for marginalized populations.[19]

Progressive realization of rights

The principle of progressive realization recognizes that no state will be in a position to immediately and completely fulfil all rights. For example, the financial, technical, logistical and other concerns that must be addressed to have a fully functioning health system, and therefore fulfil the right to health, are constantly evolving and can always be improved. This rule states that steps towards the full realization of those rights, including rights related to sexuality and sexual health, must be deliberate, concrete and targeted as clearly as possible towards meeting a state's human rights obligations, "to the maximum of its available resources."[21,48] It thus requires all countries to show concrete effort in moving towards full realization of rights within their means and without deliberate backsliding. Complementing the principle of progressive realization is the principle of "non-retrogression". Retrogression, which is reversing agreed-upon decisions and commitments, is not permissible under any circumstances, whether intentional or non-intentional. The principle of progressive realization includes the adoption of legislative measures and the provision of judicial remedies as well as administrative, financial, educational and social measures.[21,43]

In this context, the international community distinguishes between the inability and the unwillingness of a state to comply with its obligations. Even when there is material or structural inability, states must move steadily towards agreed-upon benchmarks and targets. A limited number of rights, however, are of immediate effect, such as the right to ensure adequate non-discrimination in law. Legal protection from violence or sexuality-based discrimination, for example, cannot be denied to anyone regardless of citizenship status, implying that asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the state, must be protected. On the other hand, the obligations to provide housing or health services are subject to progressive realization – as long as the state is making concrete and non-discriminatory steps toward reaching everyone within their borders.[21,30]

The "available resources" standard used when evaluating whether a state has met its duty of progressive realization also includes what is received through international assistance and cooperation. Thus, a state's duty to fulfil rights under the standard of progressive realization is assessed in light of all funding available, whether received from multilateral and bilateral assistance or private funders, and applies also to wealthier countries in relation to the assistance they are offering beyond their own borders.[21,49]

Participation

Under international human rights law and in accordance with consensus agreements, states have an obligation to ensure active, informed participation of individuals in decision-making that affects them, including on matters related to their health.[21,50–52] Participation of affected populations in all stages of decision-making and implementation of policies and programmes has been recognized as a precondition of sustainable

development,[53–55] and there is strong evidence demonstrating an association between the participation of affected populations and positive health outcomes.[56,57] When affected populations take part in programme and policy development, their health needs and human rights are better addressed.[58]

Participation can range from communities coming together to plan strategies to address local priorities, to the delivery of community-based responses for sexual and reproductive health, or social movements advocating for national policy change. Participation also includes the active involvement of individuals, communities or community-based organizations in the design, implementation, management or evaluation of their community health services or systems, including in relation to sexual and reproductive health.[59] Power differentials based on literacy, language, social status or other factors, which may exclude those who are most affected by the decisions taken, such as women and girls, have often been redressed through promotion of their meaningful participation.

The inability of affected populations – such as sex workers and victims of violence – to participate in drafting and assessing the laws that affect their sexual health, is both a cause and consequence of ongoing discrimination, and ongoing or increased exposure to violence and ill-health. For example, some countries legally restrict from registering as associations, groups identified as transgender, lesbian, gay or sex worker; others enact laws criminalizing their speech. All of these measures affect their ability to work against violence, or on HIV prevention and other issues of great importance to sexual health. At both the international and regional level, courts and human rights bodies have found these kinds of restrictive laws to be a violation of fundamental rights of speech, association and protection from non-discrimination; in these decisions the basic principle of ensuring rights to participation in society are affirmed.[60–63] For example, when the European Court of Human Rights noted that LGBT organizations must be allowed to march and demonstrate, they were upholding the underlying principles of civic participation for all persons through the European Convention's provisions on assembly and association, as well as non-discrimination.[64]

Permissible limits on rights

Since the adoption of the Universal Declaration of Human Rights in 1948, it has been understood that in exercising their rights and freedoms, "everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".[65] The critical question is always how to assess whether the state has achieved the correct balance of rights and interests when it enacts rules limiting some action, with the stated goal of protecting the rights of others.

There are some rights, such as the protection from torture, freedom from slavery and freedom from arbitrary deprivation of life, which can never be restricted by the state no matter what the justification.[66]

However, some human rights treaties have provisions that allow a very narrow list of rights to be temporarily suspended in cases of emergencies which threaten the life of the nation, but even the suspension ("derogation") of these rights cannot be done in a discriminatory way.[66] Moreover, there are some rights which contain general limiting clauses in the text of the treaties: for example, some rights to association may be suspended to protect the health of the general population, but evolving case law has made clear that this exception will be closely scrutinized, such that it is proved that the restriction is based on public health evidence and does not unnecessarily discriminate against certain population groups. An important case judged by the European Court of Human Rights, in which the right to freedom of movement of an HIV positive man had been restricted, held that the compulsory measures (forced isolation) were not justified by the state's concern about the man's future sexual practices.[67]

It is a general principle that most rights can be expressed up to the point where that expression impedes on someone else's enjoyment of a right.[68,69] For example, rights to sexual speech can be subject to appropriate time, place and manner restrictions.[70] Grounds of "health" and "morals" have been regularly invoked by states to justify the imposition of laws that limit individuals, with a serious impact on sexual health. Such laws include those that limit expression and association of certain population groups such as sex workers or transgender people, laws that criminalize same-sex or other consensual sexual behaviour, and laws that ban certain kinds of sexual and reproductive health information. However, there are key human standards that demonstrate that evoking "morality" or "health" in

order to limit the enjoyment of human rights must be strictly necessary and cannot be applied in an arbitrary or discriminatory manner. The *Toonen* decision from 1994 cited above was an early case that highlighted that neither a morality claim pressed by a state nor a "health" claim (for HIV prevention) were in and of themselves sufficient to shield state action from review for discrimination under the ICCPR. Both older and more recent cases have made it clear that disapproval of homosexuality or perceptions that information about sexual identity is "obscene" are not sufficient grounds for censorship or denial of rights of expression and association.[60,71,72]

The right to remedy and redress

Under international human rights law and many constitutional laws, a core obligation of states is to provide effective remedies for human rights abuses, regardless of whether the perpetrator is a state or non-state actor.[73,29] There is no one set way to determine what is an effective remedy, but it must include due process and proportionality, meaning that punishment and redress must match, and not exceed, the nature and severity of the injury. Moreover, in order to be meaningful, the state must show that it has taken steps to ensure that the same violation will not happen again. This action, called a "guarantee of non-repetition", is also a critical feature of forward-looking remedies.[65,66,74–80] Guarantees must be such that a real change can be seen in the practice of the state - one that effectively moves to prevent violations.

In the context of sexuality and sexual health, the right to an effective remedy includes a remedy that responds to the gendered and sexual aspects of the harm.[42] For example, an effective remedy if unmarried women are legally denied access to family planning should include changing the law to grant access to family planning information and services regardless of marital status.

Distinct legal rights for people less than 18 years old

According to international human rights law, people under the age of 18 are entitled to the full range of human rights, but the specific legal obligation of states towards young people changes when they turn 18. At 18 years of age, everyone can fully assert their rights under core human rights treaties and national constitutions and laws. It is important to note the differences between the legal regime governing the rights of those under 18 and the public health/programmatic category, which includes adolescents and young people between the ages of 15 and 24.

Distinctions that are made on account of age but which are about supporting the rights of persons under 18 are not seen as discrimination. There are specific human rights standards that help guide how persons under 18 can meaningfully access and enjoy their rights, including general comments of the Committee on the Rights of the Child in relation to adolescents' health.[22,76,81,82] The application of human rights principles to childhood is based on the notion that the ability to think and to act for oneself is an evolving process: as children grow older, their power to exercise rights grows greater. The human rights system recognizes this by balancing the power of parents, guardians and the state over the rights of children, increasing the powers of the child as the child grows, and decreasing the power and responsibilities of the state and parents over time.[22,76,81,82]

The bright line of age 18 for adulthood does not mean that all persons under 18 are treated identically. Article 5 of the Convention on the Rights of the Child emphasizes that the evolving capacity of children should be the guiding principle for assisting children to exercise their rights. It means that older teens are understood to have greater autonomy than younger children. This concept balances the recognition of children as active agents in their own lives, and as rights-bearers with increasing autonomy, while also being entitled to protection in accordance with their vulnerability. In regard to sexual health, it is essential that children be protected from sexual exploitation and abuse, but under 18s also have specific rights to access information and services in relation to sexuality and sexual health without third party authorization, as well as rights to expression and action contributing to their development.[22]

The case law of the United Kingdom in this regard has gained regional and global attention and applicability. The UK House of Lords established that it is lawful for doctors to provide contraceptive advice and treatment to minors without parental consent, provided certain criteria are met.[83] The criteria specified by the judge – that have come to be known as the Fraser Guidelines – are being used as guiding standards for service provision for adolescents in the United Kingdom and in other national, regional and global fora. According to these guidelines, it is lawful to provide contraceptives and other treatment without parental consent if the health professional is satisfied that the young person will understand

the professional's advice, cannot be persuaded to inform his or her parents, and that it is in his or her best interest to be given contraceptive advice or treatment with or without parental consent.[84]

Human rights law also demands that the law not create distinctions based on gender stereotypes between girls and boys, or stereotypes that preclude diverse gender expression or sexual orientation decisions by young people. Gender stereotype should not be the basis of determining sexuality-related rights: the age of marriage, for example, should be equal (and 18); and while the age of sexual consent can be lower than the age of marriage, it must be equal for boys and girls, and for heterosexual and same-sex sexual relations. Non-discrimination regarding gender expression, sex, gender identity and sexual orientation are also applicable to evolving rights holders under 18 years of age.[22,30]

Conclusion

Human rights law is neither static nor a free-for-all: it evolves according to very specific rules which guide the development of all international law, not just human rights law. The nine rules of application and interpretation discussed above have played a key role in the development of the current body of international and national human rights-related law supportive of sexual rights and sexual health – far more so, it is safe to say, than any one of the drafters of the treaties in the 1960s, 1970s and 1980s could have imagined. That is as it should be: the imagination of drafters of treaties is not the final delimiter of the scope of law. Participation by new claimants, new ideas about people, the interaction of states in the global regimes of trade, conflict, health and development, create new contexts and allies in evolving understanding, whether it be of marriage or of the capacity of young people. This is where this Guide sets out some of the 'rules of the road', which can be used to encourage the continued evolution of the international human rights regime to support sexual health and sexual diversity.

The current regime is not perfect - it is precisely at the intersection of the possible and the ideal, with conflicting ideas of the ideal that human rights operates. Many states and other actors resist the application of these principles to the dynamism of rights, and claim that either human rights are a set catalogue of rights, or that this catalogue cannot be used to change their national practice because of long-standing custom, or because sexuality in particular is exempt from international review. As we note in our Commentary (23/46, pp. 7-15, this issue), sexual rights is not exempt from these contestations, nor is the process that develops rights free of prejudices, stereotypes and power games. Even if one accepts the most conservative arguments about how law develops, it is clear, however, that it *does* develop and the principles explored in this Guide have been part of this development. Sexual rights, as an evolving component of human rights, are a part of this global rights evolution: they are constrained but also free to move in measured ways to ensure all of our rights in freedom and dignity.

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Résumé

Ce Guide cherche à transmettre des connaissances et des ressources aux acteurs intéressés par le développement de revendications relatives aux droits autour de la sexualité et la santé sexuelle. Après avoir abordé la question controversée de la portée des droits sexuels, il explore les règles et les principes qui gouvernent la manière dont les revendications fondées sur les droits de l'homme sont développées et appliquées à la sexualité et la santé sexuelle, et comment ce développement est lié à la législation et devient une obligation étatique. Cette compréhension est essentielle pour définir les politiques et la programmation en matière de santé et droits sexuels, car elle soutient les actions exigeant de bénéficier de tout l'éventail des droits de l'homme, comme la protection de la vie privée, la non-discrimination, la santé ou d'autres droits fondamentaux acceptés universellement, tout en demandant aux États de prendre des mesures au titre de leurs obligations juridiques nationales et internationale de soutenir la santé sexuelle.

Resumen

Esta Guía tiene como objetivo brindar conocimientos y recursos a los actores interesados en la formulación de afirmaciones de derechos relacionados con la sexualidad y salud sexual. Después de abordar la controvertida cuestión del alcance de los derechos sexuales, explora las reglas y principios que rigen la manera en que las afirmaciones de derechos humanos son formuladas y aplicadas a la sexualidad y salud sexual, y cómo esa formulación está vinculada con la ley y pasa a ser cuestión de obligación del Estado. Este entendimiento es fundamental para las políticas y programación en salud y derechos sexuales, ya que apoya hacer un llamado a los diversos derechos humanos pertinentes, tales como privacidad, no discriminación, salud u otros derechos humanos aceptados universalmente, así como exigir que los Estados tomen medidas, de conformidad con sus obligaciones de derecho internacional y nacional, para apoyar la salud sexual.