

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

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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.* © 2015 Reproductive Health Matters. Published by Elsevier BV. All rights reserved.

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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

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.

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