



WFD

Sexual and gender equality: moving beyond myths and fears in policy discussions

A resource for informed
parliamentary debates

Briefing Note

Shaun Martinez

London, August 2020

Acknowledgements and disclaimer

This briefing note on 'Sexual and gender equality: moving beyond myths and fears in policy discussions' is the product of Westminster Foundation for Democracy (WFD). It was made possible through funding received from the Department for International Development UK.

This briefing note has been authored by Shaun Martinez and published in August 2020.

The author would like to thank all the LGBTIQ+ activists that responded in depth to the online survey about LGBTIQ+ inclusion in preparing this guidance note and like to particularly thank Andrés Ignacio Rivera Duarte, Jholerina Angel-Khoetage Timbo, Mehlab Jameel, Michelle Yesudas and Sally Goldner for sharing their expertise with the author enriching the content of the note.

The views expressed in the note, as well as errors and mistakes, are of the author alone.

All photographs used in this briefing note were reproduced with the consent of the person photographed.

Table of Contents

1. An Introduction	4
Global situation	6
Definitions	5
Cultural, vernacular, precolonial understandings of SOGIESC	7
Introduction to current global narratives	8
2. International human rights law	9
Introduction to international human rights law	9
The Yogyakarta Principles	9
UN Independent Expert on Sexual Orientation and Gender Identity	10
So-called 'conversion therapy'	11
National Human Rights Institutions	11
3. Rights to equality and non-discrimination	14
The rights to equality and non-discrimination	14
Decriminalisation	14
Self-determination	15
SOGIESC-based discrimination and economic social and cultural rights	15
The right to freedom of religion or belief	16
Multiple and intersecting forms of discrimination	16
Existing constitutional protections	16
4. Rights to privacy	19
Rights to self-determination, bodily autonomy, physical integrity under rights to privacy	20
Trans youth and children and the right to privacy	21
5. Rights to freedom of peaceful assembly and association	24
6. Engaging with LGBTIQ+ communities	28
Equal rights to participation	28
The principle of 'Nothing About Us Without Us'	28
Effective engagement	30
Champions, celebrity activists, representativity	30
Sustained engagement	30

1. An introduction

'Parliamentarians have a critical role to play in repealing discriminatory legislation, adopting protective laws, holding inquiries on human rights violations, consulting with LGBTIQ+ people, speaking out against violations and supporting effective and independent National Human Rights Institutions.'

'We need policy makers to open up, to be sensitised. People still think of gender in terms of black and white, in binary terms with nothing in-between. If we are to grow as a nation, we must think beyond what we know, because there are endless possibilities in the world for us to be human.'

Jholerina Angel-Khoetage Timbo, Transgender Activist, Namibia



Takeaways:

1. **Definitions of terms commonly employed by activists and others**
2. **Cultural and linguistical understanding of identities**
3. **Global human rights-based narratives**

Global situation

International human rights law protects Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ+) individuals from discrimination and violence, yet LGBTIQ+ people around the world suffer from systematic violation of their rights. In more than 68 countries, consensual same-sex sexual relationships are criminalised.² In six of these countries, the penalty is death. In over 77 countries unclear or prohibitive restrictions exist to changing names and gender markers in official documents and deny individuals rights to self-determination. In only nine countries do explicit legal protections exist for Intersex individuals.

Where protections exist LGBTIQ+ activists face severe restrictions on their rights to freedom of expression, peaceful assembly and association by laws intended to prevent advocacy for the protection of the human rights of LGBTIQ+ people. Criminal laws are not the only problem. Widespread ostracism and stigmatisation mean that LGBTIQ+ individuals are frequently denied access to basic services, including education, housing and health care. Crimes perpetrated against LGBTIQ+, including sexual assault and murder, go unprosecuted and unpunished. LGBTIQ+ individuals find it difficult to report cases to the police, for fear of re-victimisation.

1. Living Free and Equal UN 2016 <https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>

2. https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf

Definitions

Reaching a common understanding of how individuals define their deeply felt lived experiences and often the intersection of one or more signifiers is fraught with challenges.³ Couching discussions on the equal application of all human rights and the right not to be discriminated against on the basis of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) can avoid offence. Asking how an individual identifies and their preferred pronouns can benefit further engagement on the rights of LGBTIQ+ people. The definitions that follow have been taken from authoritative resources such as ILGA, Amnesty International, the UN and the Yogyakarta Principles.

Cultural and linguistic interpretations that often pre-date the more modern terminology currently understood as Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) exist in parallel and need to be recognised when engaging with LGBTIQ+ people. The addition of the '+' alludes to the complexity and diversity that exists in our humanness. Following are some of the widely accepted definitions understood for the purposes of international human rights law.

Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics - SOGIESC

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.⁴

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance

or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.⁵

Gender expression is understood to refer to each person's presentation of the person's gender through physical appearance - including dress, hairstyles, accessories, cosmetics - and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person's gender identity.⁶

Sex characteristics is understood to refer to each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.⁷

Lesbian, Gay, Bisexual, Transgender, Intersex, Queer - LGBTIQ+

'The "+" is important as many groups are not included and the "+" symbolises the fact that they are included when we talk about the subject...' **Dawn Butler (Labour MP, UK) 2018⁸**

Lesbian: a woman who is sexually and emotionally attracted to women.⁹

Gay: a man who feels sexual and/or emotional desire exclusively or predominantly for persons of his own sex. NB: The term 'gay' should not be used as shorthand for the full range of SOGIESC identities. If the intention is to cover all without intentionally excluding any sexual orientation or gender identity/expression and/or intersex persons, then it is recommendable not to use only the term gay, and instead use LGBTIQ+ (lesbian, gay, bisexual, trans, intersex and queer people).

3. http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (...)sexual orientation, gender identity, gender expression and sex characteristics are each distinct and intersectional grounds of discrimination, and that they may be, and commonly are, compounded by discrimination on other grounds including race, ethnicity, indigeneity, sex, gender, language, religion, belief, political or other opinion, nationality, national or social origin, economic and social situation, birth, age, disability, health (including HIV status), migration, marital or family status, being a human rights defender or other status.

4. <https://yogyakartaprinciples.org/introduction/>

5. Op. cit.

6. http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

7. Op. cit.

8. <https://hansard.parliament.uk/Commons/2018-07-03/debates/FA46FE2B-7360-4B42-93D9-D42997870F47/LGBTActionPlan?highlight=lgbt%20myths#contribution-89692149-F7C7-4432-A852-B47A27710CBA>

9. https://ilga-europe.org/sites/default/files/ilga-europe_glossary_final_170714_www.pdf

Bisexual: when a person is emotionally and/or sexually attracted to persons of more than one sex.

Transgender: refers to those trans people who live permanently in their preferred gender, without necessarily needing to undergo any medical intervention/s. Until recently, this term was also the primary umbrella term referring to all trans people, but this use is now losing favour to the term 'trans' which is perceived to be more inclusive of all trans communities.

Trans person/people/man/woman is an inclusive umbrella term referring to those people whose gender identity and/or a gender expression differs from the sex they were assigned at birth. It includes, but is not limited to: men and women with transsexual pasts, and people who identify as transsexual, transgender, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, gender variant or with any other gender identity and/or expression which is not standard male or female and express their gender through their choice of clothes, presentation or body modifications, including undergoing multiple surgical procedures.

Intersex people are born with physical or biological sex characteristics including sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns that are more diverse than stereotypical definitions of male or female. These characteristics may be apparent at birth or emerge later in life, often at puberty. Intersex persons may have any sexual orientation and/ or gender identity.

Queer is an umbrella term that includes lesbians, gay men, bisexuals, trans people, intersex people, and radical sex communities. This term is sometimes used instead of 'bisexual' as a way of acknowledging that there are more than two genders to be attracted to. For decades 'queer' was used solely as a slur for gays and lesbians but was reclaimed by activists as a term of self-identification. However, some still hold 'queer' to have a negative connotation, and its use by heterosexuals is often considered offensive.¹⁰

Queer is also a political identity that is couched in queer theory and aligns itself with progressive feminisms with the aim, as a starting point, to create universal access to basic rights, inter alia, housing, health care, food, migration, and individual autonomy and self-determination. A queer political identity could be characterised around its resistance to neoliberalism, militarism, hate crime and incarceration and any form of assimilation of the LGBTIQ+ agenda.¹¹

Asexual: an asexual person is someone who does not experience sexual attraction. Asexual people have the same emotional needs as everybody else and are just as capable of forming intimate relationships. Asexuality should not be misinterpreted as celibacy, which is a choice or a certain situation. Asexuality is a sexual orientation.

Cisgender: a term referring to those people whose gender identity and gender expression match the sex they were assigned at birth and the social expectations related to their gender.¹²

Genderqueer: a person whose gender identity is neither male nor female, is between or beyond genders, or is some combination of genders.

Non-binary is a spectrum of gender identities that are not exclusively masculine or feminine—identities that are outside the gender binary. Non-binary identities can fall under the transgender umbrella, since many non-binary people identify with a gender that is different from the sex assigned to them at birth.

Pansexual: a person who is sexually attracted to all or many gender expressions.

10. https://www.amnestyusa.org/pdfs/toolkit_LGBTglossary.pdf Accessed April 2020.

11. For further information please see <http://www.againstequality.org> Accessed June 2020.

12. https://ilga-europe.org/sites/default/files/ilga-europe_glossary_final_170714_www.pdf Accessed April 2020.

Cultural, vernacular, precolonial understandings of SOGIESC

Defining gender identity, gender expression and transgender people in national laws and policies:

Every person has the right to use whichever term best describes their gender identity or expression. Laws and policies that define 'transgender' or local identity terms, including those for third gender identities, have a significant impact on whether and to what extent all transgender people's human rights are universally recognised and protected under national laws. Similarly, definitions of terms such as 'sex', 'gender', 'gender identity' and 'gender expression' can either recognise or limit the universal and inclusive application of human rights to all transgender people. Additionally, colloquial understandings of SOGIESC play a significant role in firstly recognising an individual's right to self-determination and in the wider application of human rights.

In Asia, for example, there is a long history of culturally specific terms for diverse gender identities or expressions. These include kathoey (Thailand), mak nyah (Malaysia), waria (Indonesia), hijra (Bangladesh, India and Pakistan), khwaja sira (Pakistan), and meti (Nepal). Typically, these terms describe people who were assigned a male sex at birth but whose gender identity or expression does not match this assigned sex. Each of the terms listed above from South Asia specifically describes a third gender identity.¹³

Of growing concern is a tendency for laws and policies, where they exist, continuing to conflate terms describing transgender people and intersex variations in ways that obscure the specific experiences and distinct human rights issues affecting each group.

All definitions in laws and policies of terms such as 'gender', 'gender identity', 'gender expression', 'transgender', or specific transgender identities should be inclusive of diverse genders, gender identities and expressions, and are based on self-determination and avoid conflating transgender and intersex terms.

Defining sexual orientation in public discourse:

Whilst prohibiting discrimination on grounds of sexual orientation in laws and policies is often comprehensive enough, public discourse needs to take into account vernacular terms for lesbians, gay men, bisexuals, pansexuals, asexuals, the list goes on. Again, in Asia there is a long history of terms some that predate the colonial powers. References to sexual and gender diversity from the 16th and 17th centuries, predating Spanish colonialism, exist in the Philippines. The Babaylan largely disappeared under colonialism and it wasn't until the 1960s that any resurgence of gender and sexual diversity was registered. The current LGBTIQ+ community in the Philippines is highly stratified along the lines of identity, geography and social economic status. The term 'Bakla'- generally an effeminate man- can be both a derogatory word and a unifying identity depending on the identity and social status of the person employing the term.¹⁴

In a 2018 article iGay, iLesbian, iBisexual - Xhosalisation of English author Lwando Scott explores the use of the vernacular making two important points. Existing words can often be found derogatory and therefore should be avoided when referring to LGBTIQ+ people and that the non-existence of terms does not lend weight to the argument LGBTIQ+ identities are western imports. He concludes that languages evolve over time and through practice. Engaging and listening to local activists can only help develop the SOGIESC lexicon, avoid alienation and promote inclusive policies.¹⁵

Debunking Myths: 'Homosexuality is a Western phenomenon'

Claims that same-sex attraction is a Western practice are false. LGBTIQ+ people exist everywhere, in all countries, among all ethnic groups, at all socioeconomic levels and in all communities and have for a very long time.

What is true is that many of the criminal laws that continue to be used today to punish LGBTIQ+ people in many countries are Western in origin and are a legacy of 19th Century colonial powers. This remains the case even though most former colonial powers no longer have these same discriminatory laws in place. Many have replaced them with legislation that promotes equality.

13. https://www.weareaptn.org/wp-content/uploads/2019/05/UPDATED-ACKNOWLEDGMENTS-2019_rbp-hhd-2017-legal-gender-recognition-1.pdf Accessed April 2020.

14. For more information see: https://pdf.usaid.gov/pdf_docs/PBAAA888.pdf

15. <http://holafrica.org/igay-ilesbian-ibisexual-xhosalisation-of-english/> and <https://www.theguardian.com/world/2015/jan/27/-sp-south-africa-gay-lesbian-bisexual-lgbti-language-isixhosa>

Introduction to current global narratives

It is valuable to highlight current narratives as a way of establishing entry points for continued engagement with LGBTIQ+ movements around the world.

The diversity of genders, of gender expressions and sexual orientations can only really be captured by law and policy through self-determination. The right to self-determination falls under the right to recognition before the law.¹⁶ Gender Recognition Laws should recognise this right and not include restrictions that violate rights to privacy and the rights to bodily autonomy and/or physical integrity that fall under it. Laws developed to protect people's rights to recognition before the law should also reflect rights of children. Articles 8 and 12 of the Convention on the Rights of the Child, signed by 140 states around the globe are very clear that legal processes such as those developed to support transgender adolescents should recognise the child's right to legal personality and self-determination. Where laws and policies fail to recognise rights to self-determination and leave prohibitive restrictions to changing names and/or gender markers, access to and enjoyment of civil, political, economic, social and cultural rights enjoyed by LGBTIQ+ adults and children are severely curtailed.

Laws that continue to criminalise consensual same-sex sexual conduct, predominantly colonial legacies with some recent national exceptions, violate rights to equality, non-discrimination and privacy. In addition, colonial legacy laws aimed over 100 years ago at protecting public morality and preventing vagrancy amongst others, discriminatory in design, continue to be applied in a discriminatory fashion to LGBTIQ+ people around the globe. Everyone is entitled to equality before the law and the equal protection of the law without discrimination. Principles of equality and non-discrimination on the basis of sexual orientation, gender identity, gender expression and sex characteristics need to be embodied in national constitutions or other appropriate legislation. Criminal and other legal provisions that disproportionately impact LGBTIQ+ people should be repealed.

In only nine jurisdictions do protections exist that specifically protect intersex people's rights to recognition before the law, privacy, bodily autonomy and physical integrity. The Parliamentary Assembly of the Council of Europe (PACE) made history in 2013 by passing a resolution on the bodily integrity of intersex children.¹⁷

PACE Resolution 1952 (2013) is the first resolution of its kind by any European institution. The resolution urges national authorities to 'ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and provide families with intersex children with adequate counselling and support'.

The 2017 Darlington Statement calls on states to ensure the rights of intersex people through, inter alia, enacting legislative protections prohibiting unnecessary medical interventions and establishing informed consent as a prerequisite to any medical treatment. The statement also calls on states to enact legislation that protects intersex people from discrimination on the grounds of sex characteristics, expanding the prohibitions of discrimination on the grounds of sex that exist already in most constitutions.¹⁸ The Yogyakarta Principles got further recognising the rights of intersex people to truth and reparations for the violations that have been perpetrated against them.¹⁹

Summary:

The global situation for LGBTIQ+ people, though improving, still has a considerable way to go before full equality is reached. Momentum over the last ten years to recognise and protect the human rights of everyone has grown. Parliaments alongside courts have played a substantial role in turning the tide on discrimination and violence. There is still much to do. The LGBTIQ+ community is as diverse as any other. Defining another's identity is a polemic and complex issue. The continued lack of legal recognition, criminalisation and a lack of protections remain as poignant reminders that society in general and policy makers in specific need to move past the complexities and see the human in human rights. Engaging with LGBTIQ+ communities is paramount if long-lasting positive change is to happen.

16. <https://yogyakartaprinciples.org/principle-3/>

17. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20174>

18. <https://ihra.org.au/wp-content/uploads/key/Darlington-Statement.pdf>

19. For more information see: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

2. International human rights law

Debunking Myths: 'There is nothing in international human rights instruments about LGBTIQ+ people, so they do not apply.'

Quite the contrary: international human rights law applies equally to everyone. International human rights law establishes legal obligations on states to make sure that everyone, without distinction, can enjoy their human rights. An individual's sexual orientation, gender identity, gender expression or sex characteristics is a status, like race, sex, colour and religion. Many human rights treaty bodies, human rights mechanisms, special procedures, recommendations of the United Nations Human Rights Council, United Nations resolutions and reports have repeatedly confirmed that LGBTIQ+ people are entitled to all the same human rights as other people and that discrimination on the basis of sexual orientation and gender identity violate human rights law.

Takeaways:

1. **Understanding of the applicability of international human rights law to SOCIESC issues**
2. **The Yogyakarta Principles**
3. **The role of National Human Rights Institutions and parliaments in promoting and protecting human rights**

Introduction to international human rights law

The application of international human rights law is guided by the fundamental principles of universality, equality, and non-discrimination.²⁰ Under international human rights law, all human beings, irrespective of their sexual orientation, gender identity, gender expression or sex characteristics (SOGIESC), are entitled to enjoy and exercise their human rights, such as the right to life; to liberty and security of person, including to freedom from arbitrary arrest and detention; to private and family life; to freedom from torture and other ill-treatment; to freedom of expression, association and peaceful assembly; to freedom from discrimination; to equality before the law and equal protection of the law without discrimination; and the right to access to justice and effective remedies in respect of violations of those and of other civil, political, economic, social and cultural rights.²¹

States, therefore, have well-established obligations to respect, protect and fulfil the human rights of all people, including lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) people.

These obligations range from refraining from interference in the enjoyment of rights, to preventing abuses by third parties and proactively tackling barriers to the enjoyment of human rights, including discriminatory attitudes and practices.²²

The Yogyakarta Principles

In November 2006 a group of 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. The Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity. The Principles affirm the primary obligation of states to implement human rights. Each Principle is accompanied by detailed recommendations to states. The experts also emphasise, though, that all actors have responsibilities to promote and protect human rights. The Yogyakarta Principles affirm binding international legal standards with which all states must comply. They promise a different future where all people are born free and equal in dignity.²³

20. Articles 1 and 2 of the Universal Declaration of Human Rights December 1948: https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf Accessed April 2020.

21. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Report of the United Nations High Commissioner for Human Rights, November 2011 https://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf Accessed April 2020.

22. Ibid.

23. <https://yogyakartaprinciples.org> Accessed 2020.

In November 2017, many of the same experts came together again in recognition of the significant developments both in the field of international human rights law and in the understanding of violations affecting persons of 'diverse sexual orientations and gender identities', as well as a recognition of the often distinct violations affecting persons on grounds of 'gender expression' and 'sex characteristics'.²⁴

The [Yogyakarta Principles plus 10 \(YP+10\)](#) aims to document and elaborate these developments through a set of Additional Principles and State Obligations. YP+10 should be read alongside the original 29 Yogyakarta Principles. Together, these documents provide an authoritative, expert exposition of international human rights law as it currently applies to the grounds of sexual orientation, gender identity, gender expression and sex characteristics.

In a 2016 debate in the UK Parliament on transgender equality several members of parliament referenced the Yogyakarta Principles as corner stone of their analysis and subsequent law reform in the UK.²⁵ Maria Miller, Conservative, Basingstoke in responding to the existing problems with the UK's 2004 Gender Recognition Act stated that: 'The current wording is outdated and confusing, and we believe that our proposed change would be in line with the Yogyakarta principles and with resolution 2048 of the Parliamentary Assembly of the Council of Europe.'²⁶

UN Independent Expert on Sexual Orientation and Gender Identity

In 2016 through Human Rights Council resolution 32/2 the UN appointed the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. This underlined that whilst the resolution should be implemented ensuring respect for the sovereign right of each country, its implementation should be in full conformity with universally recognised international human rights.²⁷

The Independent Expert has been mandated to:

- assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps; to raise awareness of violence and discrimination against persons on the basis of their sexual orientation or gender identity, and to identify and address the root causes of violence and discrimination;
- engage in dialogue and to consult with states and other relevant stakeholders, including United Nations agencies, programmes and funds, regional human rights mechanisms, national human rights institutions, civil society organisations and academic institutions;
- work in cooperation with states in order to foster the implementation of measures that contribute to the protection of all persons against violence and discrimination based on sexual orientation and gender identity;
- address the multiple, intersecting and aggravated forms of violence and discrimination faced by persons on the basis of their sexual orientation and gender identity;
- conduct, facilitate and support the provision of advisory services, technical assistance, capacity-building and international cooperation in support of national efforts to combat violence and discrimination against persons on the basis of their sexual orientation or gender identity.

An individual complaints procedure has been set up under the mandate which allows the Independent Expert to intervene directly with governments on allegations of violations of human rights that come within their mandates by means of letters which include urgent appeals and other communications. The intervention can relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the state concerned identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action.

24. Ibid.

25. <https://hansard.parliament.uk/Commons/2016-12-01/debates/D4F283FB-2C02-4C8C-8C7E-BEAB889D1425/TransgenderEquality?highlight=yogyakarta%20principles#contribution-64F38E82-1E6A-4F63-A3F2-B9E238D74376> Accessed April 2020.

26. <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnNveG1sL1hSZWYvWDJLURXLWV4dHluYXNwP2ZpbGVpZD0yMTczNiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNSdC9QZG9vWFJlZi1XRC1BVCIYTUwyUERG LnhzbA==&xsltparams=ZmlsZWlkPTIxNzM2> Accessed April 2020.

27. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/154/15/PDF/G1615415.pdf?OpenElement> Accessed April 2020.

Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards. In some cases, communications are also sent to inter-governmental organisations or non-state actors.²⁸

In November 2016, in the UK, in response to an urgent question from Sarah Champion MP (Labour, Rotherham) the then Minister for Europe and the Americas, Sir Allan Duncan in reference to the challenges posed to the mandate by some of the UN Member States, stated: 'The Government [of the UK], and all in the House, believe that the chance to live with dignity, free from violence or discrimination, should never be undermined by a person's sexual orientation or gender identity. All people are born with equal rights and should enjoy the protection of the United Nations. Acts of violence against LGBT people take place in all regions of the world, including our own. We condemn such violence and discrimination, and we strongly support the new independent expert in his work. We will resist any and all attempts to block his appointment and his mandate.'²⁹

Debunking Myths: 'We can change a person's sexual orientation and gender identity.'

The World Health Organization has made clear that sexual orientation cannot be changed. Attempts to forcibly change the sexual orientation of lesbian, gay and bisexual persons are ineffective, harmful and may amount to torture.

So-called 'conversion therapy'

So-called 'conversion therapy' is a practice that aims to change, 'cure' or 'repair' an individual's sexual orientation, gender identity and gender expression. LGBTIQ+ people are subjected to corrective violence and inappropriate medication (including anti-psychotics, anti-depressants, anti-anxiety and hormone injections). Electroconvulsive therapy, aversive treatments using electric shocks or vomit-inducing drugs, exorcism or ritual cleansing (often involving violence while reciting religious verse), force-feeding and food deprivation, forced nudity, and forced

isolation and confinement are some of the more extreme examples of 'conversion therapy'.³⁰ Many acts of so-called 'conversion therapy' bear strong similarities to internationally acknowledged acts of torture and other cruel, inhuman or degrading treatment and punishment. It is considered that these acts will subject the individuals, both adults and minors, to significant or severe mental and physical pain and suffering with long-term harmful effects - as the treatment is inherently humiliating, demeaning and discriminatory.³¹

In March 2020, the Inter-American Court of Human Rights (IACtHR) issued a landmark judgment in the case of *Azul Rojas Marín and Another v. Peru*, enhancing the rights of LGBTIQ+ people, and setting new standards with the potential to reduce the levels of violence suffered both within and beyond the Americas.³² Through this case the IACtHR has developed the concept of 'violence motivated by prejudice'; it concluded that discrimination based on sexual orientation can lead to arbitrary detentions of LGBTIQ people; it has developed its understanding of discriminatory torture; and it has set specific due diligence standards to ensure the effective investigation of these cases. The applicability of this precedent to the investigation and prosecution of so-called 'conversion therapy' cases has yet to be established.

'Conversion therapy' is practised in more than 69 countries across the globe and is imposed on both adults and minors because of their real or perceived sexual orientation and gender identity and is both provided under state control (hospitals, detention facilities, schools) and in private settings such as religious institutions, youth camps and retreats. The UN Independent Expert is to release a thematic report on 'conversion therapy' to the Human Rights Council in June 2020.

National Human Rights Institutions

National human rights institutions (NHRIs) are official, independent, legal institutions established by the state and exercising the powers of the state to promote and protect human rights. In every country where they are established, they should be the principal mechanism for human rights promotion and protection. They are concerned for the human rights of everyone within the jurisdiction of the state, but they should have a particular concern for those who experience human rights violations or are most at risk of human rights violations.³³

28. See for guidelines on submitting complaints to the procedure <https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx> Accessed April 2020.

29. <https://hansard.parliament.uk/commons/2016-11-08/debates/79524DE0-FE41-447D-A549-E2777BE24331/UNVoteOnTheIndependentExpertForTheLGBTCommunity> Accessed April 2020.

30. Accessed May 2020 <https://irct.org/media-and-resources/latest-news/article/1027>

31. Ibid.

32. http://www.corteidh.or.cr/docs/casos/articulos/seriec_402_esp.pdf Accessed May 2020.

33. Accessed April 2020.

NHRIs need to ensure that their work includes LGBTIQ+ people. Human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics occur in every country and people are at risk of violations because of their real or perceived LGBTIQ+ identities. NHRIs have a responsibility to respond with effective action to promote and protect the human rights of LGBTIQ+ people. Many NHRIs have already accepted this responsibility and have implemented significant activities and programmes.

The United Nations Paris Principles provide the international benchmarks against which national human rights institutions (NHRIs) can be accredited by the Global Alliance of National Human Rights Institutions (GANHRI).³⁴ Adopted in 1993 by the United Nations General Assembly, the Paris Principles require NHRIs to protect human rights, including by receiving, investigating and resolving complaints, mediating conflicts and monitoring activities and promote human rights, through education, outreach, the media, publications, training and capacity building, as well as advising and assisting the government. The Paris Principles set out six main criteria that NHRIs are required to meet a broad mandate, based on universal human rights norms and standards, autonomy from government, independence guaranteed by statute or constitution, pluralism, adequate resources, and adequate powers of investigation.

In accordance with the Abuja Guidelines³⁵ (2004) and the Belgrade Principles³⁶ (2012) NHRIs and national Parliaments have a joint responsibility in ensuring the promotion and protection of human rights. Parliamentarians should insist that the mandates of NHRIs, where they exist, uphold the Paris Principles and exist free from government intervention. NHRIs should include the rights of LGBTIQ+ people in their reports and briefings to the Parliament.

Case study: Pakistan- The Transgender Persons (Protection of Rights) Act 2018

The Transgender Persons (Protection of Rights) Act, 2018, is an affirmative federal law that allows for self-determination as the basis of legal gender recognition. In line with international standards, the law allows trans people to have their official documents changed and prohibits discrimination, affirming the rights of transgender individuals to education, health, inheritance, employment, vote, assembly, to access to public spaces and the right to hold public office, among other human rights. The Act is one of the most far reaching in the region and is a direct result of collaboration between the Parliament, NHRIs and civil society organisations.

A brief description of the process helps to demonstrate how the willingness to collaborate between the parliament and the NHRIs played a crucial role in seeing the law passed.

In response to a spate of killings of transgender women in Khyber Pakhtunkhwa in 2016, former law minister, Babar Awan of the Pakistan People's Party (PPP) filed a private members bill for the protection of rights of transgender people in the Senate. The Bill contained several flaws including the non-recognition of self-determination and established a requirement for medical tests. The Senate Functional Committee on Human Rights tasked the National Commission for Human Rights (NCHR) to redraft the bill. It was the NCHR that reached out to civil society organisations for support. In May 2017 under the auspices of fellow PPP Senator Farhat Ullah Babar the Transgender Task Force was established by the Federal Ombudsman's office. The multi-sectorial task force was chaired by Senator Rubina Khalid (PPP) and coordinated by Syeda Viqar un Nisa, the Commissioner for Children and Transgender from the Federal Ombudsman Office.

The task force was able to consult directly with government ministries and departments finally reaching out to the Council of Islamic Ideology (CII) in January 2018. Getting the buy-in from the CII was crucial to seeing the bill passed. By the end of January 2018, the CII had sent its opinion to the Senate Functional Committee. In February with the approval of the CII the bill passed to the Senate and was approved in March. Championed by MNA Naveed Qamar (PPP) the bill was passed by the National Assembly in May with a majority vote. The bill became law on May 23, 2018.

34. <https://www.un.org/ruleoflaw/files/PRINCI~5.PDF> Accessed April 2020.

35. https://agora-parl.org/sites/default/files/guidelines_abujaworkshop.pdf Accessed April 2020.

36. <https://www.forum-asia.org/uploads/wp/2017/01/Belgrade-Principles-Final.pdf> Accessed April 2020.



'The Transgender (Protection of Rights) Act 2018 was the culmination of considerable sacrifices, small victories and really big dreams. It has been a long road to dignity.'

'Most of all the lead up to the Act was a successful exercise in trust building. It built trust amongst activists, between activists and state rights institutions and state institutions, trans groups and the Parliament. It took years of work, planning and care to cultivate those relationships. This legislation stands today as a true testament to what can be achieved together if you commit to the work of building something of the value from the ground up.'

Mehlab Jameel
Activist and Social Researcher, Pakistan

Summary:

In recent years the protection of the human rights of LGBTIQ+ people has become even more explicit under international human rights law. Concerns and protections that existed under the Universal Declaration on Human Rights (1948) have been defined and expanded. A wealth of international jurisprudence now exists to prevent SOGIESC-based discrimination. The Yogyakarta Principles are a robust reminder to anyone working in the fields of human rights, SOGIESC and legal reform that international law is behind them. The creation of the Independent Expert on Sexual Orientation and Gender Identity in 2016 is a testament to national parliaments encouraging their governments for better international protections for LGBTIQ+ people. National Human Rights Institutions have been seen to take up the challenge of protecting these rights often in collaboration with national parliaments. Much still remains to be done to translate these advances in international law into national frameworks and practical protections. Parliamentarians will be key in that process.

3. Rights to equality and non-discrimination

Debunking Myths: 'When our national legislation does not conform with human rights norms and standards, there is not much we can do about it.'

Sometimes provisions of national laws and policies may conflict with fundamental rights enshrined in international law - whether it is in relation to the human rights of LGBTIQ+ people or in relation to other groups or specific human rights standards.

All states have a duty to review and reform national legislation and policies in line with international human rights standards, including in relation to human rights treaty obligations. Parliaments have the responsibility for law making and therefore must also ensure that national legislation conforms with international human rights obligations, rights and inclusion of all people, no matter how unpopular this viewpoint might be.

Takeaways:

1. **An understanding of how discrimination impacts on LGBTIQ+ people**
2. **Emphasis on decriminalisation of both identities and behaviours of LGBTIQ+ people**
3. **States are working towards providing redress for violations of the rights to equality and non-discrimination**

The rights to equality and non-discrimination

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC). Everyone is entitled to equality before the law and the equal protection of the law without discrimination. The law shall prohibit any such discrimination and guarantee to all equal and effective protection against discrimination.³⁷

SOGIESC-based discrimination exists in any distinction, exclusion, restriction or preference which has the purpose or effect of preventing LGBTIQ+ people from enjoying their rights to equality before the law and equal protection of the law, or any other human right and fundamental freedoms.³⁸ The impact of SOGIESC- based discrimination is often compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

Decriminalisation

Laws that criminalise consensual, same-sex sexual conduct violate an individual's right to be free from discrimination, rights to privacy and rights against arbitrary detention.³⁹ Laws that impose the death penalty for sexual conduct violate the right to life, as guaranteed by article 3 of the Universal Declaration and article 6 of the International Covenant on Civil and Political Rights. It is widely held that even if such laws are not enforced their existence breaches a state's obligations under international human rights law.

123 UN Member States no longer criminalise consensual same-sex sexual conduct. A growing global trend has seen national parliaments take conscious action to remove discriminatory provisions in their penal codes. In 69 UN Member states, however, consensual same-sex sexual conduct remains a criminal act. In several cases, the law is very specific as to what conduct falls under the scope of the provisions. In others, vague terms such as 'acts against nature', 'indecency', 'immoral acts', leave the door open to arbitrary interpretation, which frequently leads to the discriminatory use of these laws to persecute LGBTIQ+ people.⁴⁰

37. <https://yogyakartaprinciples.org/principle-2/> and <http://yogyakartaprinciples.org/relating-to-the-rights-to-equality-and-non-discrimination-principle-2/> Accessed May 2020.

38. Ibid.

39. Articles 2, 12 and 9 of the Universal Declaration on Human Rights https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf and Articles 2, 17 and 9 of the International Covenant on Civil and Political Rights, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> Accessed May 2020.

40. https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf Accessed May 2020.

Public morality, nuisance, vagrancy and begging laws, in most cases remnants of the colonial era, continue to be applied in a discriminatory fashion towards LGBTIQ+ people. In targeting them a wide range of rights from freedom of movement and assembly to rights against torture, inhuman and degrading treatment are violated in the process.⁴¹

The Yogyakarta Principles call on states to 'ensure that legal provisions, including in customary, religious and indigenous laws, whether explicit provisions, or the application of general punitive provisions such as acts against nature, morality, public decency, vagrancy, sodomy and propaganda laws, do not criminalise sexual orientation, gender identity and expression, or establish any form of sanction relating to them' and in response to public morality laws 'repeal other forms of criminalisation and sanction impacting on rights and freedoms on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including the criminalisation of sex work, abortion, unintentional transmission of HIV, adultery, nuisance, loitering and begging'.⁴²

Self-determination

Everyone has the right to recognition everywhere as a person before the law without discrimination.⁴³ Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. Discrimination exists where someone is forced to undergo medical procedures, including gender assignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. Discrimination exists where status such as age, marriage or parenthood is invoked to prevent the legal recognition of a person's gender identity. Discrimination exists where pressure is exerted to conceal, suppress or deny their sexual orientation or gender identity.⁴⁴

SOGIESC-based discrimination and economic social and cultural rights

Societal prejudice towards LGBTIQ+ individuals is fuelled by continued criminalisation of identities and behaviours. LGBTIQ+ people face incredible discrimination in relation to the enjoyment of their economic, social and cultural rights. LGBTIQ+ children and teenagers' rights to education are denied through bullying and ill-equipped teachers. Gendered educational systems and institutions prevent the inclusion of transgender children and youths. Gender recognition laws that do not recognise transgender children's rights to socially transition aggravate this exclusion.

Positive social and cultural media representation of LGBTIQ+ people leads to feelings of isolation and are detrimental to the health of LGBTIQ+ children. Poor mental health contributes to high school dropout rates.⁴⁵ A lack of education contributes to the lack of employment opportunities for LGBTIQ+ people. Prejudice over real or perceived SOGIESC often prevents LGBTIQ+ people from moving beyond the recruitment stage and the very same prejudice impacts on their ability to engage with the informal sector. Prejudice impacts on access to health care for many LGBTIQ+ people; many have negative experiences of medical health care providers. Housing and access to public places again present possibilities for discrimination against LGBTIQ+ people.

41. The abuses perpetrated by police officers and others in Myanmar has been well documented by the ICJ. <https://www.icj.org/wp-content/uploads/2019/11/Myanmar-In-The-Shadows-Advocacy-Report-2019-ENG.pdf> Accessed May 2020.

42. <http://yogyakartaprinciples.org/principle-33-yp10/> Accessed May 2020.

43. Article 16 <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> Accessed May 2020.

44. Principle 3 <https://yogyakartaprinciples.org/principle-3/> Accessed May 2020.

45. https://www.unfe.org/wp-content/uploads/2017/04/Un-Factsheet_English.pdf Accessed June 2020 See also Netflix Documentary 'Disclosure' <https://www.youtube.com/watch?v=ysbX6JUlaEc> Accessed June 2020.

The right to freedom of religion or belief

Article 18 of the Universal Declaration of Human Rights outlines the right to freedom of religion or belief as 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'⁴⁶ Parliaments across the globe have discussed at length how organised religion can often impact negatively on the LGBTIQ+ people's enjoyment of their rights and lead to further SOGIESC-based discrimination.⁴⁷ Article 19 of the Universal Declaration, right to freedom of opinion and expression, entitles everyone to freedom of thought and opinion.⁴⁸ These rights do not exist in opposition to each other, but rather contribute to a non-discriminatory framework. Laws that seek to limit forms of expression merely because they are based on or affiliated with a certain religion or belief are in violation of free expression, and of freedom of religion or belief. Often, these laws are discriminatory by design or in their impact, targeting the expression of minorities or marginalised groups, in this case LGBTIQ+ people. Restrictions, couched in binary stereotypes, on gender expression for example violate both rights.

'Anti-Homosexual Propaganda' laws such as the UK's Section 28 of the Local Government Act 1988, a vaguely worded law which prohibited local authorities and schools from 'promoting' homosexuality and prevented councils from funding much-needed lesbian and gay initiatives at a time when gay people were struggling to cope with the AIDS epidemic, until it was finally repealed by the 2010 Equality Act, violated rights of freedom of expression. These same laws when citing the protection of religious beliefs in their rationale would again violate both rights to freedom of expression and freedom of religion or belief. While states are required to protect individuals from discrimination and incitement to violence based on their religion or belief, it does not give those same individuals a corresponding right, because of their religions or beliefs, to discriminate against others.

Multiple and intersecting forms of discrimination

LGBTIQ+ people face multiple and intersecting forms of discrimination particularly those from minority race or ethnic communities, faith communities, sex workers, drug users, people with disabilities, migrants, refugees, people living with HIV and AIDs, and people living in poverty.

Policies that assume that LGBTIQ+ people are a homogeneous community and policies relating to the rights of LGBTIQ+ people that are designed and operate in isolation from policies to combat other grounds of discrimination fail to address the many obstacles to the realisation of the human rights of the most excluded LGBTIQ+ people.

Policies should reflect and address the diversity and heterogeneity of the communities, particularly those most at risk of human rights violations, and be integrated and connected with other policies to combat discrimination and violence and protect human rights.

Existing constitutional protections

Explicit provisions against SOGIESC-based discrimination need to be included in constitutions. The Constitution of Fiji is the only one to include sexual orientation, gender identity and gender expression as protected grounds. Bolivia and Malta explicitly include both sexual orientation and gender identity as non-discrimination grounds, while Ecuador and South Africa explicitly include sexual orientation. At present, no constitution explicitly includes sex characteristics as a prohibited ground of discrimination.⁴⁹

In the absence of constitutional protections, comprehensive legislation that prohibits SOGIESC-based discrimination in all spheres of life can provide protection. Draft legislation would need to address discrimination as experienced by LGBTIQ+ people such as in education, health care, housing, civil administration, social services, employment, provision of goods and services, recognition of relationships and family law, immigration and inheritance. Ideally the legislation would be applicable in both public and private spheres. Effective measures to investigate alleged discriminatory actions, redress for victims and effective accountability measures for alleged perpetrators through criminal, civil and/or administrative sanctions should or rather must be included in any proposed legislation.

46. <https://www.un.org/en/universal-declaration-human-rights/> Accessed May 2020.

47. See Column 2034 <https://hansard.parliament.uk/Lords/2015-09-17/debates/15091736000777/LGBTICitizensWorldwide?highlight=economic%20cost%20lgbt%20exclusion#contribution-15091736000405> Accessed May 2020.

48. Op cit Article 19.

49. <https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>

49. <https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>

Case study: 2013 The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Australia)⁵⁰ - The SDA Amendment Act

In 2013 it became unlawful to discriminate on the grounds of sexual orientation, gender identity and intersex status throughout the commonwealth of Australia protecting in particular LGBTIQ+ people from continued discriminatory practices. The Act covered both private and public actors, inter alia, the Commonwealth Government, state governments and local governments, private companies, small businesses, incorporated and unincorporated bodies, educational authorities, partnerships, recruitment and employment agencies. The Act also strengthened the powers of the Australian Human Rights Commission to receive and investigate SOGIESC-based complaints increasing protections for LGBTIQ+ people.

The public inquiry on the proposed amendments received over 90 written submissions.⁵¹ The Inquiry report was published in June 2013. Both the public inquiry and the submission represent a welcomed coalition between Parliament and civil society. Activists claim that the public consultation served to unite the LGBTIQ+ movement in the commonwealth again underscoring the need for parliamentarians, NHRIs and civil society to act together to bring about progressive legislative reform.

The Act contains religious exemptions that were questioned both during the inquiry and during the second reading of the Bill. The Green Party of Australia recommended that the exemptions be removed, arguing: 'Freedom of religion is an important human right, but religious bodies should not have a blanket exemption from anti-discrimination law. The present sections 37 and 38 of the Sex Discrimination Act provide broad exemptions from anti-discrimination law for religious bodies, and educational institutions set up for religious purposes, respectively. These exemptions offend against the principle that people should be treated equally, with dignity and respect, so that they can access opportunities and services such as health, education and housing'. The party added that submissions to the inquiry 'raised issues about the practical impact of these exemptions. The Public Interest Law Clearing House's submission noted they mean a religious hospital can refuse to employ a gay doctor, a religious school can refuse to enrol a bisexual student or hire a lesbian administrator and a faith-based homelessness shelter can refuse to accept a transgender resident. The submission of Dr Tiffany Jones cited research showing there are students with protected attributes in every education system in Australia, including religious educational institutions, and that these students continue to experience homophobic abuse. Systemic discrimination makes it much harder for a tolerant, rights-oriented culture to flourish. The religious exemptions in the Sex Discrimination Act do not strike the right balance between freedom of religion and protection from arbitrary discrimination.'⁵²

Slight inroads were made by removing state funded care homes run by religious organisations from these exemptions in response to the need to protect both the rights to family (newly defined marital or relationship status) and the rights to health of the elderly.⁵³ Strong arguments against the proposed changes were made during the second reading although largely welcomed by activists.⁵⁴

50. https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5026_aspassed/toc_pdf/13090b01.pdf;fileType=application%2Fpdf Accessed May 2020.

51. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/sexdiscrimsexualorientation/submissions Accessed May 2020.

52. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/sexdiscrimsexualorientation/report/d02 accessed May 2020, and [https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r5026_amend_964f887c-4e0a-4b81-89fa-d968d797cbcl/upload_pdf/7392_Sex%20Discrimination%20Amdt%20\(Sexual%20Orientation,%20Gender%20Identity%20and%20Intersex%20Status\)%20Bill%202013.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r5026_amend_964f887c-4e0a-4b81-89fa-d968d797cbcl/upload_pdf/7392_Sex%20Discrimination%20Amdt%20(Sexual%20Orientation,%20Gender%20Identity%20and%20Intersex%20Status)%20Bill%202013.pdf;fileType=application%2Fpdf) Accessed May 2020.

53. https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5026_ems_3afab29a-1766-4409-baac-5c1217ee6adf/upload_pdf/382040sem.pdf;fileType=application%2Fpdf Accessed May 2020.

54. https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/70ac34e4-7be0-4e97-b879-74b4286624bd/0209/hansard_frag.pdf;fileType=application%2Fpdf Accessed May 2020.

'We found generally that a combination of fact and logic combined with human and social justice principles did guide us through the debate. At times, restraint can be required when dealing with what seem to us like very '101' or 'rude' questions. We accept that not everyone will respond the way we would like; however, as we ended up with 95% of Federal Parliament voting for the legislation, we were extremely happy.'

Sally Goldner AM

Media Representative, Transgender Victoria and Treasurer, Bisexual Alliance Victoria



Summary:

The rights to equality and non-discrimination, like all rights, are universal and protected by international human rights law. LGBTIQ+ people experience discrimination in all walks of daily life, both private and public and often experience multiple forms of discrimination given the complexities of their identities. Laws that criminalise aspects of those identities and behaviour choices are discriminatory in both essence and application. States are moving towards expanding protections for LGBTIQ+ people and establishing their rights to equality. Religious exemptions to laws that prohibit SOGIESC-based discrimination often run contrary to rights to freedom of expression.

4. Rights to privacy

Debunking Myths: 'LGBTIQ+ people are requesting "special rights."'

Not true. There are no special rights being claimed by or for LGBTIQ+ people. They are entitled to enjoy the same human rights and fundamental freedoms to which every human being is entitled. Regrettably, these rights and freedoms are denied to millions of people around the world just because of their sexual orientation, gender identity, gender expression and sex characteristics. This is why there is a need to focus on ending discrimination, in this case discrimination in the application of the rights to privacy, on the basis of sexual orientation, gender identity, gender expression and sex characteristics and ensure the inclusion of all LGBTIQ+ people.

Takeaways:

- 1. The state has both the obligation to establish the dignity of person and prevent arbitrary interference of that right**
- 2. Integral to rights to privacy are the principles and rights to self-determination, bodily autonomy and physical integrity**
- 3. A child's right to transition and to legal recognition is protected by international human rights law**

The right to privacy is deeply felt by all; Article 17 of the International Convention on Civil and Political Rights (ICCPR) defines the right to freedom from arbitrary or unlawful interference in an individual's privacy, family, home or correspondence, and from unlawful attacks on their honour and reputation.⁵⁵ It is then both a means to control the state and in parallel establishes a right of dignity. In August 2017 the Supreme Court of India in responding to Justice K.S. Puttaswamy (ret'd) and Others vs the Union of India (The Privacy Judgement) ruled that the right to privacy was indeed a fundamental right.⁵⁶ Further, the nine-judge bench held that:

'Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.'⁵⁷

The judgement continued: 'sexual orientation is an essential attribute of privacy, discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of fundamental rights...'⁵⁸ The ruling emphasises each individuals' deeply felt sense of privacy and private life and was a forerunner to the reading down of Section 377 of the Indian Penal Code by the Supreme Court in September 2018.⁵⁹

55. <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> Accessed May 2020.

56. https://www.scribd.com/document/357098939/SC-Right-to-Privacy-Judgment#from_embed Accessed May 2020

57. <https://thewire.in/law/supreme-court-aadhaar-right-to-privacy> Accessed May 2020.

58. Op cit pg. 124.

59. Every provision of a legislation is open to wide interpretations. What reading down basically does is that it reduces the scope of interpretations that can be given to a provision so that no case sustains on the basis of the interpretation that has been read down. It is done in a case where the provision sustains partially for other valid interpretations. In the case of Navtej Johar v. Uol i.e. the case

Principle 6 of the Yogyakarta Principles expands on the right to privacy in relation to LGBTIQ+ people, adding that: 'The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others'.⁶⁰ Laws that continue to criminalise consensual same-sex sexual conduct, that maintain prohibitive restrictions in changing names and gender markers on official documents or that maintain criminal sanctions against gender expression are in violation of the right to privacy.⁶¹

For intersex individuals, violations of the rights to privacy can commence literally from birth with intersex babies subjected to surgeries and hormone treatment. Medical interventions on intersex infants can impact a range of human rights, including the right to privacy as it extends to the rights to bodily autonomy, physical integrity and self-determination in relation to non-consensual medical treatment.⁶²

Rights to self-determination, bodily autonomy, physical integrity under rights to privacy

Working definitions of the concepts:

Legal gender recognition: a legal process that establishes an individual's right to equality before and protection of the law and acts as a gateway to the enjoyment of all other basic human rights and fundamental freedoms.

Self-determination is an important concept that refers to each person's ability to make choices and manage their own life. This ability plays an important role in psychological health and well-being. Self-determination allows LGBTIQ+ people to feel that they have control over their choices and lives.

Bodily autonomy: the right to self-governance over one's own body without external influence or coercion. It is generally considered to be a fundamental human right. Bodily autonomy relates to the principle of prior, free and informed consent.

Physical integrity: the right of each individual to live free from non-consensual physical and/or psychological interference with their own body and mind. Previously raised in connection with practices such as torture, inhumane treatment and forced disappearance, the principle of physical integrity has the potential to apply to wide range of SOGIESC-based human rights violations of adults and children.

Prohibitive restrictions: requirements to relinquish other rights, including the right to privacy (self-determination, bodily autonomy and/ or physical integrity). These restrictions include, inter alia, sterilisation, diagnosis of a mental disorder, medical treatment, invasive surgery, assessment of time lived in the 'new' gender identity and being single or divorced.

of Sec 377 IPC, the court read down the meaning of the word 'unnatural' as to not include consensual sexual relationship. Now for all purposes, the word unnatural can't be used to incriminate consensual same sex relationships. However, Sec 377 remains in the statute books for other offences.

60. <https://yogyakartaprinciples.org/principle-6/>

61. The inability to change identity documents can mean ordinary everyday activities such as travel, banking, medical appointments impose frequently deeply embarrassing and distressing privacy infringements that limit the enjoyment of life and constrain personal development in ways not experienced by individuals of binary genders. https://www.ohchr.org/Documents/Issues/Privacy/SR_Privacy/2019_HRC_Annex2_GenderReport.pdf Accessed May 2020.

62. Ibid

Gender Recognition Laws (LGR) that retain or create prohibitive restrictions to changing names and gender markers on official documents violate the dignity of an individual and by extension rights to privacy. The European Court of Human Rights (ECtHR) established in *A.P., Garçon and Nicot v. France* that the sterilisation requirement as part of LGR violates human rights.⁶³ The applicants complained that they needed to prove infertility and genital surgery as well as undergoing excessive and lengthy intrusive and discriminatory examinations in order to satisfy the condition. The ECtHR held that sterilisation against their will for the purpose of achieving LGR puts those individuals in a situation of an insoluble dilemma: that of choosing full exercise of the right to a private life (LGR) at the expense of their physical integrity also guaranteed by the same right.⁶⁴

Trans youth and children and the right to privacy

Article 16 of the Convention on the Rights of the Child (CRC), establishes a child's right to privacy: 'no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation'.⁶⁵ Read together with other articles of the CRC, the best interests of the child being of primary concern (Art. 3), non-discrimination (Art. 2), identity (Art. 8), the need to respect the growing capacity of a child to make decisions about their life (Article 5) and children's views are to be listened to and given due weight, in accordance with the age and maturity of the child (Article 12), a human rights framework for the LGR of trans youth and children already exists.

Each of these points is reiterated in the Yogyakarta Principles. LGR is set out in Yogyakarta Principle 3: the right to recognition before the law. It acknowledges that every person's self-defined gender identity is one of the most basic aspects of their self-determination, dignity, and freedom. Ireland's Ombudsman for Children argued that Article 8 of the CRC may be interpreted as including a child's right to their gender identity.⁶⁶ Article 8.2 of the CRC requires that whenever a child is illegally deprived of elements of their identity, a country must provide appropriate assistance and protection to speedily re-establish that child's identity.⁶⁷ As seen with adults the LGR of children and adolescents is crucial in protecting and fulfilling other rights including a child's right to development to education, to the highest attainable standard of health and in alarmingly increasing numbers, the right to life.⁶⁸

63. *A.P., Garçon and Nicot v France* (Appl nos. 79885/12, 52471/13 and 52596/13), ECtHR, 6 April 2017.

64. Op cit.

65. <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> Accessed May 2020.

66. Ombudsman for Children (October 2013), Advice of the Ombudsman for Children on the General Scheme of the Gender Recognition Bill 2013. Accessed May 2020: <https://www.oco.ie/app/uploads/2013/10/OCOAdviceonGenderRecognitionBill2013.pdf>

67. Op cit Article 8.2.

68. More than one in four (27 per cent) trans young people have attempted to commit suicide and nine in ten (89 per cent) have thought about it. https://www.stonewall.org.uk/sites/default/files/trans_stats.pdf Accessed May 2020.

Case study: Argentina and Chile - marked distinctions in gender identity laws

In 2012, **Argentina** adopted pioneering legislation, which established the right of all persons to recognition of their gender identity, personal development, and to be treated by others, in line with their gender identity.⁶⁹ It establishes a simple and free administrative process through the Civil Registry to correct gender markers, names and photos on identity documents and in public records when they are not aligned with a person's self-identified gender identity. The law specifically prohibits any requirements with regards to surgery, treatment or psychological or medical treatment to obtain such recognition. It also enshrines the right to be treated with dignity and stipulates that all public and private actors must respect a person's gender identity, including their self-identified name, regardless of whether this aligns with the information on their national identity document.

The law stipulates that no existing rights or obligations are to be affected by such changes, including those relating to family law, such as adoption, and also establishes measures to protect the privacy of the individuals concerned.

The law also establishes the right of all adults to access, should they wish to, partial or comprehensive hormonal treatment and surgery to adjust their bodies, in line with their gender identity, as part of their right to comprehensive health, and on the basis of their informed consent. No-one is required to undergo such procedures in order to obtain recognition of their gender identity. The law also explicitly rejects a link between surgery and hormonal treatment, so that individuals may access, should they wish to, hormonal treatment only. Such procedures are mandated to be included in the basic national public health insurance scheme.

The law establishes the right for minors to have their gender identity legally recognised through their legal representative, on the basis of the express consent of the minor, taking into account the evolving capacities and best interests of the child, in line with the provisions of the Convention on the Rights of the Child. Minors have the right to support from a specialised lawyer throughout this process. The law further establishes that minors may access, on the same basis, medical treatment, with courts tasked with reviewing requests for surgeries on minors, in line with national and international standards on the protection of the rights of the child.

In neighbouring **Chile**, however, the story is quite different.⁷⁰ A bill drafted by activists and presented to the Senate in 2013 took over four years to become law. The final draft of the Act contains some serious contradictions. The Act claims to recognise several key principles and rights, the non-pathologisation principle, the right not to be discriminated against, the rights to privacy, dignity, the interests of the child, rights of the child to self-determination in accordance with increasing levels of maturity.⁷¹ Despite the original concept drafted by activists and supported by the Senate, the law fails to recognise basic rights of children under 14 outlined in the CRC. Adolescents between the ages of 14 and 18 (the age of maturity in Chile) are required to undergo a lengthy court process in order to change names and sex on their official documents. Further it is the adolescent's parent or legal representative that petitions the court, a provision that largely obscures the daily lives of many trans adolescents in the country and the continued stigma associated with trans identities. Court rulings are subject to appeal. Any potential changes are left on hold until the final ruling from the Court of Appeals.

Again, contrary to the principles under the right to privacy, the law requires trans individuals wishing to access the provisions to be single. In the case of any requests from married individuals, whether or not they are of legal age, they are required to file for a divorce.⁷² The Senate argued this as no marriage equality act exists in Chile. On termination of the marriage the court will order the Civil Registry and Identification Service to rectify the birth and marriage certificate, officiating for such purposes to proceed with the change of sex and name, or only the sex, as appropriate.⁷³

69. http://www.jus.gob.ar/media/3108867/ley_26743_identidad_de_genero.pdf Accessed May 2020.

70. <http://bcn.cl/283xn>

and <https://www.camara.cl/verDoc.aspx?prmTIPO=DOCUMENTOCOMUNICACIONCUENTA&prmID=57528> Accessed May 2020.

71. <https://www.bcn.cl/leyfacil/recurso/ley-de-identidad-de-genero> Accessed May 2020.

72. In Chile people of 16- 18 years of age may marry, with parental consent.

73. <https://www.bcn.cl/leyfacil/recurso/ley-de-identidad-de-genero> Accessed May 2020.

'The recognition of gender identity in Chile was the product of sustained advocacy work carried out [by] us trans people... we had to expose our lives, experiences and discrimination to raise awareness and educate legislators who knew nothing about us, our lives or our rights. Ignorance about gender identity became a constant problem, continually confusing identity with sexual orientation.

'Advancing in dignity and rights is not an easy path when there is so much ignorance. It was the Parliamentarians who recognized they knew very little on the subject who finally approved the Law, which although it's true recognizes gender identity, does so from the age of 14, leaving trans children without rights.'

Andres Ignacio Rivera Duarte
Human Rights and Gender Identity Consultant,
Researcher and Teacher, Chile



Summary:

The rights to privacy are extremely personal, limit any possible interference by the state and establish the rights to life with dignity. Laws that criminalise consensual same-sex sexual conduct are found in violation of these rights. The right to privacy is respected and actively promoted in legislation that recognises self-determination, bodily autonomy and physical integrity and that protect LGBTIQ+ people from unnecessary interference. Children and young people have the same rights as adults and laws aimed at protecting trans and intersex children and youth should recognise the opinions of the child in accordance with the level of maturity. The applicability of the Convention of the Rights of the Child to legislative development is both obvious and paramount. Engaging with trans and intersex youth is perhaps the natural way forward to full enjoyment of rights.

5. Rights to freedom of peaceful assembly and association

Debunking Myths: 'Being around LGBTI people or having access to information on homosexuality encourages people to become gay.'

Learning about or spending time with people who are LGBTIQ+ does not influence the sexual orientation or gender identity of anyone including minors, nor does it harm their wellbeing.

Takeaways:

1. **Rights to freedom of expression, peaceful assembly and association**
2. **Access to information**
3. **The incongruence of populist, morality laws**

Everyone has the right to freedom of association and peaceful assembly, as guaranteed by article 20 of the Universal Declaration of Human Rights and articles 21 and 22 of the International Covenant on Civil and Political Rights.⁷⁴ Limitations on these rights must be compatible with international human rights law, including provisions on non-discrimination. SOGIESC-based restrictions on these rights violate international human rights obligations. States also have an obligation to proactively ensure the protection of these rights from interference by third parties, and to enable the conditions required for the effective realisation of these rights by all persons, including LGBTIQ+ people.

Principle 20 of the Yogyakarta Principles reiterates the universality of rights to freedom of peaceful assembly and association adding that LGBTIQ+ people may form and have recognised SOGIESC-based associations that distribute information to or about, facilitate communication among, or advocate for the rights of LGBTIQ+ people.⁷⁵ Principle 20 moves states to ensure legal protection for LGBTIQ+ organisations and their rights to peacefully organise or assemble and enable them to receive funding and other resources from third parties in carrying out their work defending human rights including the sharing of SOGIESC-themed information.⁷⁶

Whilst there has been progress in several countries on the effective realisation of the right to peaceful assembly by LGBTIQ+ people, in a number of countries pride marches, artistic and cultural events, workshops and other peaceful assemblies by LGBTIQ+ people and their organisations continue to be banned, facing discriminatory and arbitrary restrictions from authorities. Violent attacks and threats are common with authorities slow to respond and investigate.

Organisations working on the protection of the rights of LGBTIQ+ people are denied legal registration, members of such organisations face harassment and intimidation, the arrest of LGBTIQ+ human rights defenders being commonplace.⁷⁷ LGBTIQ+ organisations and human rights defenders are also adversely affected by a shrinking civil society space, that curtails the operations of LGBTIQ+ organisations working on human rights issues. In South Asia for example, laws and policies that restrict access to foreign funding and impose cumbersome and often intrusive registration policies have hindered the ability of LGBTIQ+ organisation to effectively carry out their work, particularly if their work engages with criminalised populations.⁷⁸

74. <https://www.un.org/en/universal-declaration-human-rights/> and <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> Accessed May 2020.

75. <https://yogyakartaprinciples.org/principle-20/> Accessed May 2020.

76. Ibid and <http://yogyakartaprinciples.org/relating-to-the-right-to-the-freedom-of-peaceful-assembly-and-association-principle-20/>

77. See Principle 27 of the Yogyakarta Principles on the right to defend human rights, <https://yogyakartaprinciples.org/principle-27/> Accessed May 2020.

78. India, <http://legislative.gov.in/sites/default/files/A2010-42.pdf> Bangladesh, <https://www.icj.org/wp-content/uploads/2015/10/Bangladesh-Foreign-Donations-News-Web-Story-2015-ENG.pdf> Pakistan, <http://mumtazstartups.org/docs/npos.pdf> Nepal, <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/NPL-1-2018.pdf>

Integrated into the full enjoyment of the rights to freedom of peaceful assembly and association is the right to freedom of expression. Freedom of expression refers to the right to communicate one's opinions and ideas. For LGBTIQ+ people, this goes from the ability to come out publicly and talk openly about SOGIESC related issues, to the ability to speak in public about these issues and promote their human rights.⁷⁹ Principle 19 of the Yogyakarta Principles defines the rights to freedom of opinion and expression as including: 'the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.'⁸⁰

In a 2015 report Article 19 identified issues common to the experiences of many LGBTIQ+ people, human rights defenders and their organisations worldwide.⁸¹ Anti 'gay' propaganda laws effectively censor the ability of organisations to defend the human rights of LGBTIQ+ people and often lead to adjustments to the lived context that include self-censorship.

During a debate in the UK Parliament on Relationships Education, Relationships and Sex Education and Health Education (England), Angela Rayner MP (Ashton-under-Lyne, Labour) highlighted how potentially life threatening a lack of access to information essential to the right to freedom of expression is.

She stated: 'LGBT issues are not something that can be detached from the society in which our young people are growing up and to which they are exposed. LGBT people will be their friends, their families, their teachers and of course some of the children being taught. They must know that, throughout their education, they will get the support that they need. Teaching LGBT awareness does not make someone any more or less LGBT, but it does teach people the facts and dispel the myths, to ensure that our young people feel loved and valued for who they are.'

'For all the positive social change that has been achieved, nearly half of all LGBT young people are bullied in school for their sexuality, and half of them do not tell anyone about it. More than three in five lesbian, gay and bisexual young people have self-harmed, and the figure rises to more than four in five among trans students. Perhaps most devastating of all is the fact that one in five lesbian, gay and bisexual students have tried to take their own lives, as have more than two in five trans people.'⁸²

Debunking Myths: 'Parliamentarians should follow public opinion when there is overwhelming public support for punitive laws against lesbian, gay, bisexual and transgender people.'

Parliamentarians have the responsibility to advance the human rights and inclusion of all people, no matter how unpopular this viewpoint might be. Negative public attitudes can never justify human rights violations, including punitive laws and police harassment and brutality against LGBTIQ+ people, any more than they can justify sexist, racist, xenophobic, sectarian and other discriminatory acts or policies. When there are discriminatory attitudes against certain groups, it is the responsibility of parliamentarians and others to work to overcome such discriminatory attitudes through public education, awareness raising and other measures.

79. <https://www.ilga-europe.org/what-we-do/our-advocacy-work/freedom-assembly-pride-events>

80. <https://yogyakartaprinciples.org/principle-19/> Accessed May 2020.

81. https://www.article19.org/data/files/KZ_LGBT.pdf Accessed May 2020.

82. Angela Rayner (Ashton-under-Lyne) (Lab) <https://hansard.parliament.uk/Commons/2019-03-20/debates/70E06C19-0480-4856-B4D7-61770D9BF610/Education?highlight=lgbt%20myths#contribution-513BAAE5-2DA2-43B8-A0F1-F6E031A49C00> Accessed May 2020.

Case study: Nigeria, Same-Sex Marriage (Prohibition) Act 2014⁸³

On January 7, 2014, Nigeria's former president, Goodluck Jonathan, signed the Same-Sex Marriage (Prohibition) Bill into law. The notional purpose of the law is to prohibit marriage between persons of the same sex. In reality, its scope is much wider. The law forbids any cohabitation between same-sex partners and bans any 'public show of same sex amorous relationship'. The law imposes a 10-year prison sentence on anyone who 'registers, operates or participates in gay clubs, societies and organisation' or 'supports' the activities of such organisations.

Nigeria had already criminalised same-sex sexual conduct. Sections 214 and 215 of the Nigerian Penal Code make 'carnal knowledge of any person against the order of nature' a felony punishable by fourteen years imprisonment.⁸⁴ Section 217 establishes a three-year penalty for 'gross indecency' or attempted 'gross indecency' between men.⁸⁵ In Northern Nigeria, where Shari'a law is implemented in 12 states, the punishment for same-sex sexual conduct ranges from 100 lashes to 100 lashes and up to a year in prison and possible stoning to death if one or both the men are married. For women the sentence is reduced to 50 lashes and six months in prison.⁸⁶

The Bill, based on a report by the Senate Judiciary, Human Rights and Legal Matters Committee was passed unanimously by the Senate in 2011 with the Senate increasing the penalties from 10 to 14 years for entering into a marriage or civil union and from five to 10 for participating in 'gay' life or creating an organisation.⁸⁷ The Report from the Senate Committee on the Judiciary, Human Rights and Legal Matters is sadly unavailable. Another significant amendment made by the Senate was to include after the word 'invalid' in Clause 1 the word 'illegal',⁸⁸ moving the act of entering into a same-sex union from an administrative issue in terms of spousal benefits into the realms of criminality. The Senate Bill was approved by the House of Representatives in 2013.⁸⁹ Interestingly both houses passed the Bill in and around the time of fiercely contested presidential and parliamentary elections.

In response to the Act, The African Commission's Special Rapporteur on Human Rights Defenders in Africa, Mrs. Reine Alapini- Gansou, issued a press release noting that she: 'is deeply concerned about the consequences this law may have on sexual minorities who are already vulnerable as a result of social prejudice',⁹⁰ going on to say:

*'The Special Rapporteur is concerned by some provisions of the Act, in particular, Sections 4(1) and 5(2) which prohibit and provide for penalties against defenders of the rights of lesbian, gay, bisexual and transgender (LGBT) people. These provisions undermine the work of human rights defenders and are against any public debate on this crucial issue'*⁹¹

On January 14, 2014, former United Nations High Commissioner for Human Rights, Navanethem Pillay, called the Act a 'draconian new law' that 'makes an already bad situation worse'.⁹²

*'Rarely have I seen a piece of legislation that in so few paragraphs directly violate so many basic, universal human rights ... rights to privacy and non-discrimination, rights to freedom of expression, association and assembly, rights to freedom from arbitrary arrest and detention: this law undermines all of them.'*⁹³

83. <https://www.refworld.org/pdfid/52f4d9cc4.pdf> Accessed May 2020.

84. <http://lawsofnigeria.placng.org/laws/C38.pdf> Accessed May 2020.

85. Ibid.

86. For example see the State of Zamfara Penal Code, Articles 130, 131, 134 and 135 <https://www.f-law.net/law/threads/37487-Shari-ah-Penal-Code-Law-Zamfara-State-Of-Nigeria-January-2000> Accessed May 2020.

87. <https://www.nassnig.org/documents/download/4490>

88. Ibid

89. <https://www.nassnig.org/documents/download/5625>

90. Special Rapporteur on Human Rights Defenders in Africa, Press Release on the Implication of the Same Sex Marriage [Prohibition] Act 2013 on Human Rights Defenders in Nigeria, 5 Feb. 2014, available at <http://www.achpr.org/press/2014/02/d190/>

91. Ibid.

92. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14169&LangID=E>

93. Ibid.

In September 2015 the contents of the law were raised in the UK House of Lords by Lord Smith of Finsbury (Non-Affiliated) who stated: 'In 2013, it [Nigeria] introduced the Same-Sex Marriage (Prohibition) Act. It actually goes much further than the title suggests. The Act not only prohibits marriage, it outlaws the registration of gay clubs, societies and organisations and their sustenance, processions and meetings. It outlaws the public showing of same-sex amorous relationships, directly or indirectly, and it prohibits same-sex couples from living together. (...) frightening pieces of legislation.'⁹⁴

Summary:

The rights to freedom of peaceful assembly, association and expression are key to advancing the human rights of LGBTIQ+ people and are recognised under international human rights law. LGBTIQ+ human rights defenders need to be able to exercise these rights in order to advocate for an end to SOIGESC-based discrimination. Contained within the rights to freedom of expression is the right to access information often curtailed by anti 'gay' propaganda laws and policies. A lack of positive and affirming information can threaten rights to life of young LGBTIQ+ people. Populist morality laws such as the Nigerian Same-Sex Marriage (Prohibition) Act not only silence the LGBTIQ+ community endangering access to information but really have no place in modern democratic societies.



Left: author Shaun Martinez with fellow LGBTIQ+ activists from South Asia, Nepal Pride 2019

94. <https://hansard.parliament.uk/Lords/2015-09-17/debates/15091736000777/LGBTICitizensWorldwide?highlight=same%20sex%20marriage%20prohibition%20act%20nigeria#contribution-15091736000346> Accessed May 2020.

6. Engaging with LGBTIQ+ communities

Debunking Myths: LGBTIQ+ people are 'not normal', they are a creation of the modern age; their identity is a 'trend'.

Lesbian, Gay, Bisexual, Transgender Intersex and Queer identities are not 'current trends'. Almost every country has a recorded history of people whose identities and behaviours bear close resemblance to what we call today LGBTIQ+ identities. Moreover, records demonstrate that specific roles in society were designated to these forerunners of LGBTIQ+ identities.

Takeaways:

1. **Equal rights to participation in public life and public affairs**
2. **The principle of 'Nothing About Us Without Us'**
3. **Effective and respectful engagement**

Equal rights to participation

Article 25 of the International Covenant on Civil and Political Rights defines the obligations of state parties in connection with the right to take part in the conduct of public affairs, vote and be elected at genuine periodic elections, and have equal access to public service positions.⁹⁵ General Comment 25 and jurisprudence adopted by the Human Rights Committee in 1996 expands the interpretation prohibiting any form of discrimination that prevents equal participation and relates equal participation to the rights of freedom of expression, peaceful assembly and association.⁹⁶

Principle 25 of the Yogyakarta Principles calls on states to take all appropriate measures to eliminate stereotypes and prejudices regarding sexual orientation and gender identity that prevent or restrict participation in public life and ensure the right of each person to participate in the formulation of policies affecting their welfare, without discrimination on the basis of, and with full respect for, their sexual orientation gender identity, gender expression or sex characteristics.⁹⁷

The Yogyakarta Principles +10 call on states to develop and implement affirmative action programmes to promote public and political participation for persons marginalised on the basis of sexual orientation, gender identity, gender expression or sex characteristics.⁹⁸

The principle of 'Nothing About Us Without Us'

Laws and policies too often treat LGBTIQ+ as a homogenous group and fail to address the situation of subpopulations facing specific challenges, including trans men, trans women, intersex people, bisexual people, non-binary people and lesbians. Policies that assume homogeneity and policies relating to the rights of LGBTIQ+ that are designed and operate in isolation from policies to combat other grounds of discrimination fail to address the many obstacles to the enjoyment of the human rights of the most marginalised LGBTIQ+ people. Policies should reflect and address the diversity and heterogeneity of LGBTIQ+ people, particularly those most at risk of human rights violations, and be integrated and connected with other policies to combat discrimination and violence.⁹⁹ A disconnect seems to exist between the documentation and data gathering done by LGBTIQ+ organisations and state policies.

95. <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> Accessed May 2020.

96. Paragraphs 6 and 8 <https://www.equalrightstrust.org/sites/www.equalrightstrust.org/files/ertdocs//general%20comment%2025.pdf> Accessed May 2020.

97. <https://yogyakartaprinciples.org/principle-25/> Accessed May 2020.

98. <http://yogyakartaprinciples.org/relating-to-the-right-to-participate-in-public-life-principle-25/> Accessed May 2020.

99. <https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf> Accessed May 2020.

In a debate in the UK Parliament in March 2020 on the health of LBT women, members of parliament recognised both the valuable contributions made by civil society and the diversity within the LGBTIQ+ community in the country.¹⁰⁰ Hannah Bardell MP (Livingston) (SNP) raised the issue of diversity within the community not only in terms of different orientations and identities but also on the intersections of different forms of discrimination.¹⁰¹ Both are key considerations when engaging with LGBTIQ+ communities.

Where parliamentary groups focusing on the human rights of LGBTIQ+ exist there is greater possibility of engaging with national and international civil society, LGBTIQ+ activists and their organisations. The All Party Parliamentary Group in the UK in its first report in 2016 laid out the foundations for a solid body of work engaging with LGBTIQ+ movements around the world particularly during visits to developing countries.¹⁰² That said whilst debates in the UK Parliament have included information from other countries, the sources cited by the speakers remain predominantly UK-based LGBTIQ+ organisations.¹⁰³ Under the principle of 'Nothing About Us Without Us' any debate on the situation of global LGBTIQ+ rights should be based on information gathered through engaging with LGBTIQ+ movements around the globe.

The Principle 'Nothing About Us Without Us' is important as not only does it recognise LGBTIQ+ people's rights to equal participation, it places an equal value on the lived experiences of those very same LGBTIQ+ people. The results from a quick survey developed to consult LGBTIQ+ activists from around the globe demonstrate a clear correlation between progressive anti-discrimination legislation and extensive engagement with LGBTIQ+ communities, organisations and activists. Without access to the Nigerian Senate Committee's report it is speculative to assume that in the drafting and passing of the Nigerian Same-Sex Marriage (Prohibition) Act 2014 few if any LGBTIQ+ activists were consulted.

Increasingly donors and funders are beginning to adopt this principle, with the knock-on effect that what scarce resources exist for LGBTIQ+ movements are now being

administered by LGBTIQ+ organisations themselves and not by organisations that claim to be working on LGBTIQ+ issues. It is also creating a drive to find ways of funding the most marginalised of LGBTIQ+ organisations.

In keeping with the human rights principle of participation, and the principle of 'Nothing About Us Without Us', it is critical that authorities consult and partner with LGBTIQ+ people and their organisations on all initiatives and policy making processes that affect the rights of LGBTIQ+ people. It is crucial that LGBTIQ+ people are also included in policy making processes that intend to address other forms of discrimination.

Cooperation between state entities and LGBTIQ+ organisations can take many forms, including the co-convening of awareness-raising events and advocacy campaigns, funding relevant projects and organisations, training public officials, establishing effective forums for consultation and ensuring that LGBTIQ+ people are included in decision-making bodies and in the design, development, implementation and monitoring of public policies. There is also a protection angle to engaging with LGBTIQ+ activists and their organisations, being named in parliamentary debates raises activists' profiles, reflecting their demands in policies and acknowledging the sources also begins to address continued social stigma. Visiting delegations of parliamentarians holding meetings with LGBTIQ+ organisations in their offices helps to raise the profile of the organisations and can quite literally prevent violent attacks.

The power to politically dissuade violent aggression against LGBTIQ+ people has been discussed at length in the UK Parliament.¹⁰⁴

In Honduras from 2008 until the beginning of 2018, at least 295 LGBTIQ+ people were killed; 11 of them were human rights defenders. In the first half of 2019 the number of killings of LGBTIQ+ was already around 21, 13 of them trans women. The exact numbers are difficult to determine as crimes often go unreported or reported as common crime rather than violent expressions of SOGIESC-based discrimination.

100. <https://hansard.parliament.uk/Commons/2020-03-10/debates/CD9E6213-BA77-469D-AABC-830871DFF6B/LesbianBisexualAndTransWomen'SHealthInequalities?highlight=engaging%20lgbt%20people#contribution-983BEB28-9CDC-4851-88A4-338E1ADB3386> Accessed May 2020.

101. Ibid.

102. https://docs.wixstatic.com/ugd/cf74d6_9aef960a172749b6ae9da560b09e8e61.pdf also <https://www.appglgbt.org> Accessed May 2020.

103. Global LGBT Rights House of Commons 2017 <https://hansard.parliament.uk/Commons/2017-10-26/debates/4429F08C-BCBC-4363-995A-55869AE27F50/GlobalLGBTRights> Accessed May 2020.

104. <https://hansard.parliament.uk/Lords/2015-09-17/debates/15091736000777/LGBTICitizensWorldwide?highlight=global%20lgbt%20rights#contribution-15091736000416> Accessed June 2020.

LGBTIQ+ organisations claim that most of the killings were perpetrated by state security forces. Impunity reaches around 95% for crimes perpetrated against Honduras' LGBTIQ+ population. The organisations haven't given up: they are working on an Equality Law that will not only benefit LGBTIQ+ but also other people in the country such as the elderly, people with disabilities, women, children, and indigenous people. In October 2019, the Ministry of Human Rights, the Ministry of Development and Social Inclusion, Somos CDC and the Asociación Arcoiris signed a cooperation agreement to continue moving forward in this direction.¹⁰⁵

Representatives from Honduran LGBTIQ+ organisations recognise the importance of support from the international community. 'Knowing that we have international support is a relief, because we know that we are not alone. We know that pressure from international organisations can have a huge impact. If we go alone to seek support, they ignore us. If we go with an international organisation, the doors open for us'.¹⁰⁶

Effective engagement

There are a number of practical steps individual policy makers or parliaments as a whole can take to effectively engage with their LGBT constituents. In countries with a low-level of protection from SOGIESC-based discrimination and with high levels of LGBTIQ+ exclusion LGBTIQ+ people will naturally have concerns around suddenly being consulted. Trust will need to be built and expectations will need to be managed. Expect criticism, particularly in the initial stages, and avoid consultation fatigue particularly if any changes to legislation are going to take some time. Public inquiries are useful tools to engage a wide audience, but responses are often limited to respondents of a certain socio-economic status. To address marginalisation and discrimination within LGBTIQ+ communities an appropriate methodology has to be developed. Most of all, although it's an obligation of the state to ensure the human rights of everyone, the LGBTIQ+ people consulted should never feel that it's an exercise in 'ticking boxes'.¹⁰⁷

Where they exist, enlisting the support of NHRIs can help break down any initial resistance from LGBTIQ+ organisations to enter into a dialogue with parliamentarians. This is particularly true where the NHRI already has a specific body of work in promoting and protecting the rights of LGBTIQ+ people.

Champions, celebrity activists, representativity

Engagement is key. Structured, genuine engagement should aim at building trust and that results in positive change in the lives of those consulted. A lack of familiarity with the subject matter or apprehension over being seen as too involved or aligned with LGBTIQ+ communities can force short cuts. LGBTIQ+ parliamentarians are often tasked with promoting debates in house on what are considered 'their' issues. Recalling that the promotion and protection of human rights is a responsibility of the parliament and an obligation of the state relying on champions is at best ill-advised. Champions often need the support of their straight, cisgender and endosex peers.

The same limitations that promote 'champions' also produce celebrity activists. A celebrity activist is often well-educated, speaks the same language as those relying on the short cuts and has the ability to travel with relative ease. Their socio-economic status facilitates the consultation process. If advisory boards exist these activists are usually the ones making up their numbers. The problem here is representativity. Relatively well socially positioned these celebrity activists have little in common with the more marginalised LGBTIQ+ people, those living in poverty, those whose way of earning a living is criminalised, those working in the informal sector, LGBTIQ+ people with disabilities... the list goes on. Celebrity activists' experiences of discrimination will differ from others and their strategies for improving the lives of the LGBTIQ+ people are often influenced by what they have to lose or conversely how relatively well protected from possible harm they are. Engagement and consultations should be as pluralistic and diverse as possible.

Sustained engagement

Engagement needs to be sustained. Legislative reform is often a lengthy process. Implementation, and monitoring of that implementation is ongoing. Often the decriminalisation of same-sex sexual conduct, the law that recognises self-identification or the act that prohibits discrimination on the grounds of sex characteristics are the very beginnings ensuring that the law is implemented and serves its purpose requires constant monitoring and data collection by LGBTIQ+ organisations and in some cases NHRIs. Sustained engagement with LGBTIQ+ organisations and NHRIs will enable policy makers to respond to changes in the lives of LGBTIQ+ people as they happen.

105. <https://pbi-honduras.org/news/2019-12/we-are-not-demanding-new-or-special-rights-we-just-want-our-human-rights-have-already> Accessed June 2020 also see <https://vimeo.com/388078753>

106. Ibid.

107. For more practical steps to engaging LGBTIQ+ people see <https://www.equality-network.org/wp-content/uploads/2013/02/Community-Connections-1-Engaging-LGBT-People.pdf> Accessed May 2020.

Case study: Nepal, 'sexual and gender minorities' in the constitution

In 2007 the Supreme Court of Nepal decriminalised same-sex sexual conduct and instructed the Government of Nepal to remove all discriminatory provisions in the country's legal framework.¹⁰⁸ The Supreme Court also instructed the Government to commission a study into the viability of marriage equality in Nepal. In 2014 UNDP and one of the leading LGBTIQ+ organisations in the country released a report that demonstrated SOGIESC-base discrimination in the country was still widespread. The evidence in this report was then used to engage with members of the Constituent Assembly, particularly those members of the Assembly involved in the constitutional drafting process. Sustained engagement over a period of a year contributed to some significant changes in the lives of LGBTIQ+ people in Nepal. Several workshops were held to which activists invited both government ministers and members of the Constituent Assembly. A policy document containing the recommendations from LGBTIQ+ people from all over the country was made available to over 100 members of the Assembly.

The new Constitution was formally endorsed by Nepal's Parliament on 16 September 2015. Article 18 of the Constitution, on the Right to Equality, specifically states that marginalised groups, which includes sexual and gender minorities, will not face discrimination by the state and judiciary.¹⁰⁹ Furthermore, the Constitution specifies that citizens of Nepal are permitted to decide what preferred gender identity appears on their citizenship document and that gender and sexual minority groups have the right to full participation in state mechanisms and public service 'on the basis of the principle of inclusion'.¹¹⁰

Once the Constitution was approved the momentum for change waned and the specific laws called for by the Constitution have not been tabled. It was only in 2017 that the Parliament approved the revised penal code that removed same-sex sexual conduct or 'crimes against the order of nature' from the country's statutes. The Constitution also provides no definition of what constitutes a sexual or gender minority. It does define 'minorities' as ethnic, religious or linguistic groups but makes no attempt to clarify its own terminology around sexuality or gender identity.¹¹¹ No legal definition of sexual and gender minority exists - rather it's a form of shorthand and in this case preferred as the terms lesbian, gay, bisexual and transgender were considered 'too western'. There is no specific gender recognition law in Nepal and prohibitive restrictions still apply if transgender people want to change their gender markers to male or female and not opt for the third or 'other' option. The inability to change gender markers leads to violations of a series of other rights. Discrimination still exists at the point of entry for LGBTIQ+ people to most services. The draft of the Child Protection Bill that prohibits unnecessary medical interventions on intersex children has yet to be tabled. Whilst LGBTIQ+ organisations continue to push for change the Parliament, it would seem, has lost its willingness to engage, forcing some LGBTQ+ people to return to the Supreme Court and have the judiciary clarify the constitution and establish their rights.

108. Sunil Babu Pant and Others vs The Government of Nepal Accessed May 2020 <https://www.icj.org/wp-content/uploads/2012/07/Sunil-Babu-Pant-and-Others-v.-Nepal-Government-and-Others-Supreme-Court-of-Nepal.pdf>

109. Article 18 Section 3: The State shall not discriminate citizens on grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds. Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, **gender and sexual minorities**, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya. <http://www.lawcommission.gov.np/en/archives/981> Accessed May 2020 Emphasis authors' own.

110. Ibid

111. Ibid

'International human rights law guarantees people the right to participate in political processes with inherent dignity. Over time, the protection of human rights has been gradually politicized even weaponized against LGBTIQ+ communities. Once these rights are politicized, the effect is the infantilizing [of] LGBTIQ+ people. Policy makers presume we don't know what we want or what our rights are. We are never consulted when laws are being drafted become really damaging when it comes to laws that impact on our bodies and lives.'

Michelle Yesudas, Lawyer and LGBT Activist, Malaysia



Summary:

International human rights law, provisions on privacy, dignity and non-discrimination amongst others in national constitutions provide a framework for engaging with LGBTIQ+ communities. Effective and genuine engagement needs to move beyond 'ticking boxes' and establish a platform for sustained and action orientated change. LGBTIQ+ communities initially and quite rightly may demonstrate a certain cynicism and lack of trust. Engaging NHRIs in the process can support a more open environment for any consultation. Over reliance on champions and internationally renowned LGBTIQ+ activists can often obscure the lived experiences of the more marginalised LGBTIQ+ people and measures need to be built into the consultation process to overcome this.

About the author

Shaun Martinez has spent the last 20 years working in human rights around the globe, an experience that has taught him that dreaming of a better world is necessary. Shaun has considerable experience in a wide range of human rights issues, current issues are racism and poverty in the UK and how both intersect with the LGBTIQ+ communities.

Shaun has intervened at UN and EU policy levels and developed considerable expertise in training and capacity development of human rights activists, NHRIs, government and community-based organisations. Over 12 years ago he researched and co-authored a manual for the protection of LGBTI human rights defenders and is disappointed that the manual is still needed. Shaun maintains strong links to both local and international queer movements and is a strong believer in the principle of nothing about us without us that centres LGBTIQ+ people as agents of their own changes.

About Westminster Foundation for Democracy

Westminster Foundation for Democracy (WFD) is the UK public body dedicated to supporting democracy around the world.

Operating directly in over 40 countries, WFD works with parliaments, political parties, and civil society groups as well as on elections to help make countries' political systems fairer, more inclusive and accountable.

WFD experts, both in-house and associates, develop tools, guides and comparative studies on democracy and governance issues.

Westminster Foundation for Democracy
Artillery House, 11-19 Artillery Row, London, SW1P 1RT
🐦 @WFD_Democracy | 📘 @WestminsterFoundation
www.wfd.org