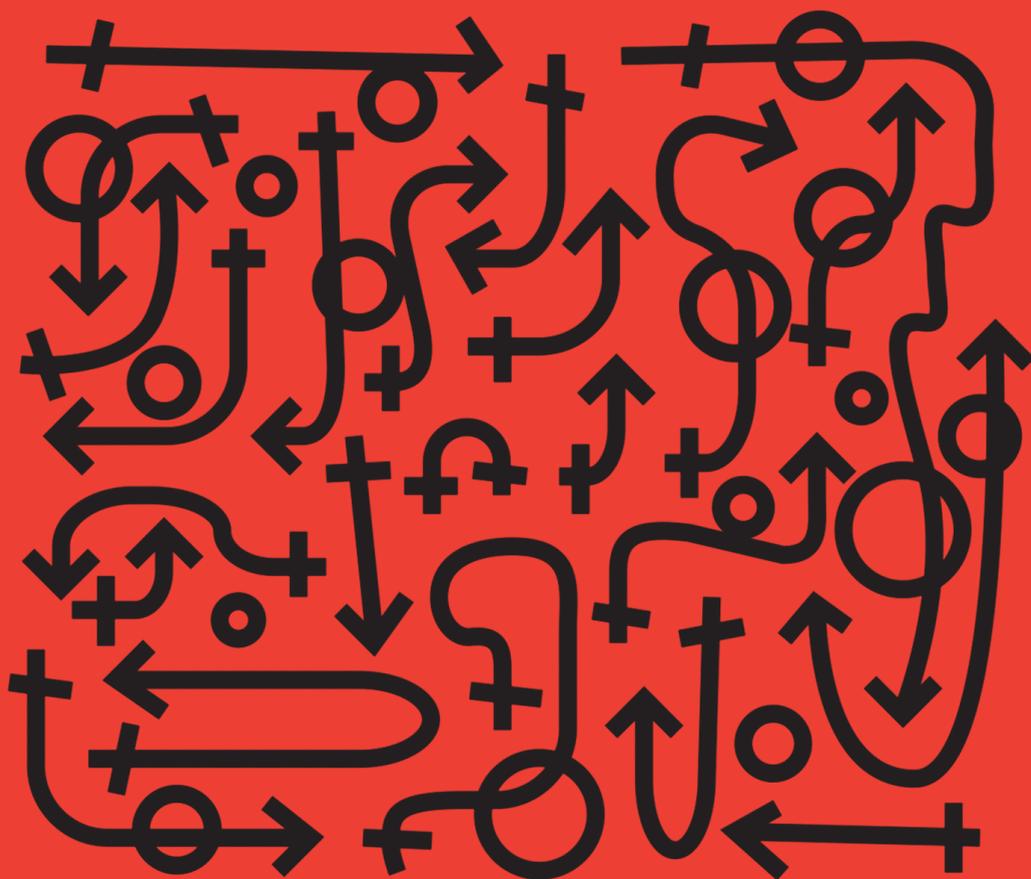


GLOBAL INFORMATION SOCIETY WATCH 2015

Sexual rights and the internet



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (Hivos)

Global Information Society Watch 2015

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INDIA

RECRIMINALISING HOMOSEXUALITY IN INDIA: ITS EFFECT ON ALTERNATE SEXUAL EXPRESSION ON THE INTERNET



SPACE

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Internet in the world's largest democracy

The theme of sexuality and the internet is particularly relevant to India. Being an emerging democracy with a population of approximately 1.27 billion people,¹ the advancement of both human rights and internet rights such as access to information and freedom of expression is important. This report discusses the impact on the online behaviour of sexual minorities following the Section 377 verdict by the Supreme Court of India in late 2013 that recriminalised homosexuality.

The new Indian government that came to power with an overwhelming majority in 2014 is openly majoritarian in approach, and is comprised of right-wing Hindu nationalist forces. Their recent decision to ban a BBC documentary titled *India's Daughter*,² on the widely reported gruesome gang rape in New Delhi in December 2012,³ revealed the patriarchal mindset of Indian males. At the same time, a rise in the number of verbal and physical attacks against religious minorities⁴ is indicative of a dangerous trend of stifling minority voices. In such a situation, the internet has become the last bastion for the free expression of alternative voices.

Homosexuality: A criminal offence in India

In India, homosexuality was never considered a criminal offence until the advent of British rule. Lord Macaulay introduced the Indian Penal Code, which was based on Judaic-Christian principles, in 1860. Section 377 of the Indian Penal Code criminalises “carnal intercourse against the order of nature”, with imprisonment for up to 10 years, or for life, and also makes the offender liable to pay a fine.⁵

Section 377 remained in force for close to 150 years, until 2009, when the Delhi High Court in *Naz Foundation vs Government of NCT of Delhi & Others*⁶ struck down the provision for violating various constitutionally guarded fundamental rights. It was held to be discriminatory and arbitrary (violating the right to equality under Article 14 of the Constitution of India),⁷ an unreasonable restriction on citizens' fundamental right to privacy (under Article 21), and a curtailment of the right to free self-expression (Article 19), of which free sexual expression is an essential part.

The high court decision was, however, overruled by the Supreme Court of India,⁸ which questioned the “so-called rights” of the lesbian, gay, bisexual and transgender (LGBT) community in India, and said that a “mere possibility” of abuse of a statutory provision is not adequate grounds to question the legality of Section 377. The Supreme Court left the onus on the legislators to take a final call on whether to limit the provision by excluding sexual relations between two consenting adults from its ambit.

Conflicting judicial decisions and their impact on sexual expression

On 2 July 2009, the Delhi High Court bench of Justices AP Shah and Muralidhar, in a watershed judgement, decriminalised consensual homosexual relations between adults by limiting the scope

1 PTI. (2015, 11 July). India's population at 5pm today – 127,42,39,769. *Times of India*. www.timesofindia.indiatimes.com/india/Indias-population-at-5pm-today-1274239769/articleshow/48033866.cms

2 Plunkett, J. (2015, 5 March). India's Daughter: nearly 300,000 watch BBC's Delhi rape documentary in UK. *The Guardian*. www.theguardian.com/media/2015/mar/05/indias-daughter-bbc-delhi-documentary-complaints

3 Mandhana, M., & Trivedi, A. (2013, 18 December). Indians Outraged Over Rape on Moving Bus in New Delhi. *India Ink*. www.india.blogs.nytimes.com/2012/12/18/outrage-in-delhi-after-latest-gang-rape-case

4 Akkara, A. (2014, 1 October). India Under Modi Sees Increase in Attacks on Christians, Critics Charge. *Aleteia*. www.aleteia.org/en/world/article/india-under-modi-sees-increase-in-attacks-on-christians-critics-charge-5784411530330112

5 Section 377 in The Indian Penal Code can be accessed here: www.indiankanoon.org/doc/1836974

6 www.indiankanoon.org/doc/100472805

7 The Constitution of India can be accessed here: www.lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm

8 *Suresh Kumar Koushal & Anr vs Naz Foundation & Ors*. www.indiankanoon.org/doc/58730926

of Section 377 of the Indian Penal Code.⁹ In the immediate aftermath of this decision, the internet exploded with newly launched gay pride magazines, prominent among them being *Pink Pages* and *Gaylaxy*.¹⁰ Apart from these, mobile apps like PlanetRomeo, Grindr and Badoo skyrocketed in popularity amongst the LGBT community.¹¹ Newly created WhatsApp and Facebook groups enabled more personalised interaction in LGBT communities in cities like Ludhiana,¹² Mumbai,¹³ Delhi¹⁴ or Chennai.¹⁵

It seemed that sexual minorities in India had finally found their freedom and voice.

But just as a new India was settling into an era of liberal sexual tolerance, in December 2013, the Indian Supreme Court took a step backwards by reversing the Delhi High Court judgement on appeal.¹⁶ As a result of this reversal, the LGBT community in India – thousands of whom had come out into the open – were immediately put in a state of risk as they could now be re-branded “criminals” and arrested by the police.¹⁷

Offline haunts

Offline spaces or “haunts” fall into three categories: proudly gay spaces (gay venues such as restaurants or bars, which are non-existent in India), gay-friendly spaces (quite a few exist), or public spaces that are frequented by the gay community. Apart from these, there are also “cruising” sites that are used for the specific purpose of finding sexual partners. It is with these cruising sites that problems emerge.

One of the main problems with offline solicitation, given the criminalisation of homosexuality, is that there is lack of safety for LGBT persons. Since cruising sites are public spaces, there is constant

risk of police intervention. This in turn leads to harassment, illegal detention, forced sexual intercourse and blackmail, with threats being made to “expose” the sexual orientation of those victimised to family members or otherwise making their identities public. Another huge issue is that due to the fear of being caught, participants “rush” sex and in the process do not use condoms, leading to increased prevalence of sexually transmitted diseases (STDs), particularly AIDS. This health threat, in fact, was the basis of the 2009 Delhi High Court petition, that criminalising homosexuality through the existing penal provision of Section 377 infringes upon the right to health which is a fundamental right under the right to life and liberty.¹⁸ The high court noted that 8% of the men who have sex with men (MSM) population is infected by HIV compared to less than 1% of the general public.¹⁹

Moreover, the impact of the Supreme Court reversal of the high court judgement has resulted in many sexual health awareness drives by NGOs being adversely affected. As homosexuality is a criminal offence, health activists face restrictions in engaging in face-to-face interaction with homosexual AIDS patients who are afraid to reveal their identities and prefer only phone counselling.²⁰

Online spaces: Pros and cons

The online space is a hugely popular advocacy platform²¹ because it is usually the quickest and cheapest way to communicate with many people at once. The internet, accessed increasingly through smartphones, has a rapidly expanding user base in India.²² Today most news stories break online first, and only then move to traditional media platforms.²³ In the early days of the internet the LGBT community used mailing lists or email to connect. Now social media is the primary way to find new sexual partners. Facebook is the most popular, followed by WhatsApp and, lastly, Twitter, as ways to connect directly as a “community” are limited for

9 *Naz Foundation vs Government of NCT of Delhi & Ors.* www.indiankanoon.org/doc/100472805

10 Homegrown. (2014, 21 May). 6 Indian LGBT Magazines You Should Know. *Homegrown*. www.homegrown.co.in/5-indian-lgbt-magazines-you-should-know

11 Nerurkar, S. (2013, 15 September). Indians hit mobile apps to find love. *Times of India*. www.timesofindia.indiatimes.com/tech/apps/Indians-hit-mobile-apps-to-find-love/articleshow/22597148.cms

12 www.facebook.com/ludhianagaysonwhatsapp

13 www.facebook.com/pages/Mumbai-Gay-Boys/482523425180439

14 www.facebook.com/Gaywhatsappdelhi

15 www.facebook.com/pages/Whatsapp-chat-chennai-gays/772501609450924

16 *Suresh Kumar Koushal & Anr vs Naz Foundation & Ors.* www.indiankanoon.org/doc/58730926

17 Monalisa. (2013, 12 December). Supreme Court upholds Section 377 criminalizing homosexual sex. *Livemint*. www.livemint.com/Politics/FHDQyBzrJMSOINCQrkgL/Supreme-Court-to-rule-on-legality-of-gay-sex-today.html

18 *Naz Foundation vs Government of NCT of Delhi & Ors*, paragraph 60. www.indiankanoon.org/doc/100472805

19 *Ibid.*, paragraph 17.

20 *Ibid.*, paragraph 16.

21 Wikipedia, “Internet activism”. https://en.wikipedia.org/wiki/Internet_activism

22 Tech Desk. (2015, 21 July). IAMAI says India will have 500 Million Internet users by 2017. *Indian Express*. www.indianexpress.com/article/technology/tech-news-technology/iamai-says-india-to-have-236-million-mobile-internet-users-by-2017/#sthash.H7ZOTKEN.dpuf

23 “One can say the Internet and digital media are surely and steadily replacing television as the primary news sources.” Saha, D. (2015, 16 June). Digital Versus Television: The Battle Begins. *NewsLaundry*. www.newsLaundry.com/2015/06/16/digital-versus-television-the-battle-begins

the latter, according to activists.²⁴ Most of these online communities that focus on finding sexual partners are regionally based, while groups offering general support²⁵ to the LGBT community are national. Interestingly, some websites like Gaydar²⁶ started dying out once they started charging for their service, leading to a rise in popularity of younger rival Grindr, which operates through its mobile app.²⁷ Unpaid Gaydar members known as “Gaydar Guests” had limits imposed on the number of messages they were allowed to send, which is a hindrance in this age of unlimited browsing.²⁸

Despite the many obvious positives of the online space as listed above in terms of expansive and immediate access to information, as well as the ability to connect marginalised communities, the sector is not without drawbacks. Blackmail and harassment are equally present both online and offline. In fact, many of the harassment and blackmail charges are levelled against the police. For example, NGOs running government-approved HIV prevention projects for sexual minorities face arrests and threats from the police,²⁹ who brand them as “accomplices” to homosexual “criminals” engaging in unnatural sex. Some of these NGOs succumb to these threats and disclose personally identifiable information of members sexual minorities who are then arrested at odd hours and charged under various penal provisions.³⁰

Similarly, finding sexual partners online also presents a health risk. Interestingly enough, in an email message to the author on 7 July 2015, Shruta Mengle Rawat, a human rights activist working with The Humsafar Trust³¹ in Mumbai revealed that “it’s actually an assumption that folks who

seek partners offline are at a higher risk.” A study was conducted by her organisation that directly investigated the adverse impact of the Supreme Court decision in 2014. It found that participants who met partners online were significantly more likely to report being asked for money after having sex (14.4% vs. 8.8%), theft (7.4% vs. 5.9%), or being forced to engage in unwanted sexual acts (14.7% vs. 10.3%) than those meeting sex partners offline. Reported rates of physical injury were 4.4% for both groups.³²

Challenging myths and perceptions

Advocacy is crucial in India because a legislative change is needed to amend or abrogate Section 377. This can only happen through consultation and the sensitisation of interest groups such as corporations, educational institutions, opinion leaders and political parties, along with the judiciary and police department. This is important in order to “dispel myths and misconceptions about gays, lesbians and transgender persons, and to create [an] enabling environment for sexual minorities.”³³ Some of the myths that are addressed through online interventions³⁴ include homosexuality as something “contagious” that can be “acquired” or “treated” as if it were a disease.³⁵ Another misconception is that homosexuality is the “cause” of AIDS – an archaic belief in line with AIDS being called a Gay-Related Immune Deficiency (GRID) when it first gained notoriety as a deadly disease in the 1980s. A large part of this misconception has been fuelled by naivety in the gay community itself. There is a perception that AIDS is caused through sex, and it is not “sex” if it is between two men. So some gay men do not use condoms, as condoms are supposed to be used only during “conventional sex”.³⁶

However, mainstream electronic and print media still steer clear of in-depth, open and regular discussions on these issues and instead only skim

24 “I would not look at Twitter as a platform as the ways to connect as a ‘community’ are limited.” Opinion expressed by Shruta Mengle Rawat, a human rights activist working with the Humsafar Trust in Mumbai, in an email message to the author on 7 July 2015.

25 Support could include helping LGBT youth come to terms with their identity, connecting them with others in the community, awareness raising on safe sex practices, assisting them on how to open up towards their friends and family who may have stigmas and prejudices towards the community as a whole, and letting go of resentment. See orinam.net/resources-for/lgbt/groups-and-lists

26 www.gaydar.net

27 Leach, A. (2010, 11 November). Gaydar Dating becomes an app, but will it unseat Grindr? *ShinyShiny*. www.shinyshiny.tv/2010/11/gaydar_dating_iphone_app.html

28 *Ibid.*

29 *Naz Foundation vs Government of NCT of Delhi & Ors*, paragraph 71. www.indiankanoon.org/doc/100472805

30 Alternative Law Forum. (2013, 3 November). 13 people arrested under Section 377 of the Indian Penal Code in November 2013. www.altlawforum.org/gender-and-sexuality/13-people-arrested-under-section-377-of-the-indian-penal-code-in-november-2013

31 www.humsafar.org

32 Mengle, S., Giani, S., Patankar, P., Soletti, A., Rosser, S. B. R., & Wilkerson, J. M. (2014). Harassment and violence after the reinstatement of India’s ‘sodomy law’. Paper presented at the International AIDS Conference 2014 in Melbourne, Australia, 20-25 July. www.pag.aids2014.org/flash.aspx?pid=4966

33 The Humsafar Trust. (2009, 31 Oct). Advocating legislative change: Taking the Delhi High Court decision forward. www.humsafar.org/ResDown/Advocating%20Legislative%20Change%20Taking%20Delhi%20High%20Court%20Judgement%20Forward_Write%20Up.pdf

34 For example, “India’s LGBT Answer Silly Questions About Being Gay”: www.youtube.com/watch?v=nX8V0fUrLTA

35 *Ibid.*

36 The Humsafar Trust. (n/d). *Safarnaama 1994-2004*. www.humsafar.org/ResDown/The%20Humsafar%20Trust%20Documentation%20Project%201994%20-%202004.pdf

the surface when there is a breaking story concerning LGBT people, to avoid ruffling feathers in our largely conservative society. So it is left to semi-formal online blogs and websites³⁷ to discuss these issues. YouTube has also been used successfully to raise debate. One YouTube sketch produced by a popular young Indian comedy troupe has a well-known Indian actor answering homophobic questions, and has received over one million hits.³⁸

LGBT rights: The next frontier

Over the last year or so, after the Supreme Court judgement, instances of online blackmail are on the rise. “Straight” individuals posing as “homosexuals” are luring LGBT people into online or offline encounters in order to extort easy money from them by threatening to expose their identities to their family, friends, the police or even publicly. Today, many of the Facebook groups for sexual minority communities that were visible to the public have been forced to convert into “secret groups” in order to avoid messages from being displayed openly on individual members’ Facebook walls. But despite these limitations, the online space continues to be a vibrant platform for discussing LGBT rights.

Prior to the Delhi High Court judgement, the issue was rarely talked about or debated on public platforms. After the judgement was passed in 2009, there were a couple of ads by an accessories company³⁹ targeting the LGBT community, and another ad funded by a mainstream national newspaper.⁴⁰ These went largely unnoticed. After the Supreme Court judgement, in 2014, a celebrated Indian movie actor featured LGBT issues on his critically acclaimed talk show *Satyameva Jayate* (Sanskrit for “Truth Alone Triumphs”), which discusses social issues of national importance. It received close to 700,000 hits on YouTube and over 1,000 comments.⁴¹ Many other Indian celebrities came out in support,⁴² while others were

compelled during talk shows to make their stance known when they tried to be non-committal.⁴³

LGBT rights are the next challenge for human right activists in India. Currently, their rights are not assured due to the continued lack of awareness and an unwillingness to let go of populist decision making. That said, keeping in mind the progressive decision by the Indian Supreme Court last year recognising transgender people as a “third gender”,⁴⁴ the recent decision of the US Supreme Court legalising gay marriages,⁴⁵ and the passage of a transgender rights bill in the Upper House of the Indian Parliament this April,⁴⁶ there is legitimate hope that it is a question of when and not if all sexual minorities will be given full rights on par with their heterosexual counterparts.

Action steps

The following advocacy steps are suggested for civil society in India:

- *Push for change in legislation and policy:* Interest groups, including political parties, must push for the decriminalisation of homosexuality, and a narrower interpretation of Section 377, keeping in line with existing international policies and United Nations resolutions.
- *Leverage both offline and online media to raise awareness:* After the government made corporate social responsibility (CSR) mandatory in 2013, companies have been spending their CSR money on progressive ad campaigns on a variety of social causes, which include preventive healthcare and promotion of gender equality.⁴⁷ Subsequently, in order to increase

37 Sheikh, I. (2014, 1 December). Watch India's LGBT Community Answer All Your Silly Questions About Being Gay. *BuzzFeed*. www.buzzfeed.com/imaansheikh/have-a-gay-old-time#_hp3jAxZnw

38 AlB: Imran Khan Answers Questions About Being Gay & Sec 377. www.youtube.com/watch?v=cXqH7_dYM_k

39 Fastrack - The Closet. www.youtube.com/watch?v=fmk9D53G6F8

40 Videos Posted by Hindustan Times Gay Facebook. www.youtube.com/watch?v=7swyJ0_RCbE

41 Satyamev Jayate, Season 3, Episode 3: Accepting Alternative Sexualities. www.youtube.com/watch?v=mHr87BxZYcw

42 Rajput, R. (2013, 15 December). Bollywood actors, musicians lend support to LGBT community. *The Hindu*. www.thehindu.com/news/national/other-states/bollywood-actors-musicians-lend-support-to-lgbt-community/articles462940.ece

43 Koffee With Karan, Season 4 - Anil Kapoor & Sonam Kapoor. www.youtube.com/watch?v=bYj3NwimYk; see also Sherlock Homo. (2014, 3 April). Review : Koffee With Karan & Hurricane Sonam Kapoor. *Gaysi Family*. www.gaysifamily.com/2014/04/03/review-koffee-karan-hurricane-sonam-kapoor/

44 Anand, U. (2014, 16 April). Supreme Court recognises third gender, glimmer of hope for gays. *Indian Express*. www.indianexpress.com/article/india/india-others/sc-recognises-third-gender-glimmer-of-hope-for-gays/#sthash.ALAWHJfx.dpuf

45 Agencies. (2015, 28 June). US legalises gay marriages: Indian LGBTs voice hope, apprehension. *Mid-day.com*. www.mid-day.com/articles/us-legalises-gay-marriages-indian-lgbts-voice-hope-apprehension/16326165#sthash.Ok7erNGw.dpuf

46 Express News Service. (2015, 25 April). Rajya Sabha passes historic private Bill to promote transgender rights. *Indian Express*. www.indianexpress.com/article/india/india-others/rajya-sabha-passes-private-bill-to-protect-the-rights-of-transgenders/#sthash.g6Hgl4Po.dpuf

47 Ministry of Corporate Affairs, Notification amending Schedule VII of the Companies Act, 2013, New Delhi, 27 February 2014. www.mca.gov.in/Ministry/pdf/CompaniesActNotification3_2014.pdf

brand goodwill, advertising campaigns are held that promote these CSR activities.⁴⁸ Major Indian brands were also appreciated for taking a strong stand against the Supreme Court verdict.⁴⁹ Recently, an ad by an e-commerce fashion company that used the idea of what it is like to be a lesbian in India in its campaign brought the public focus back onto LGBT issues.⁵⁰ This media attention needs to be sustained to ensure that awareness deepens and the clamour for equal rights reaches a critical mass.⁵¹ It is especially crucial to sensitise audiences using the internet, as mainstream television will take years to become as bold as other media platforms.

- *Judicial reading down*: Hearteningly, the Supreme Court judgement in some ways lacks force, as subsequent Supreme Court and high court decisions have limited its authority by reading down Section 377 and setting precedence.⁵² Such reading down should continue, and activists could consider creating awareness campaigns to further sensitise the judiciary.

48 Narain, R. (2015, 5 January). Dear Indian corporate: here is why you need to take social responsibility seriously. *Quartz India*. www.qz.com/321040/dear-indian-corporate-here-is-why-you-need-to-take-social-responsibility-seriously

49 Nashrulla, T. (2013, 13 December). 15 Heartening Ways Indian Brands And Bollywood Stars Are Fighting For LGBT Rights. *BuzzFeed*. www.buzzfeed.com/tasneemnashrulla/15-heartening-ways-indian-brands-and-bollywood-are-fighting#.mlwrQdVWVj

50 Das, D. (2015, 14 June). Video: Myntra's Anouk Lesbian ad is a good step but fails to look real. *Indian Express*. www.indianexpress.com/article/trending/video-myntras-anouk-ad-on-being-a-lesbian-in-india-is-a-good-step-but-fails-to-look-real

51 Ghobadi, S., & Clegg, S. (2015). "These days will never be forgotten...": A critical mass approach to online activism. *Information and Organization*, 25(1), 52-71. www.sciencedirect.com/science/article/pii/S1471772714000426

52 Chandrachud, C. (2014, 12 December). Limiting the impact of Section 377. *The Hindu*. www.thehindu.com/opinion/op-ed/limiting-the-impact-of-section-377/article6683396.ece

Sexual rights and the internet

The theme for this edition of Global Information Society Watch (GISWatch) is sexual rights and the online world. The eight thematic reports introduce the theme from different perspectives, including the global policy landscape for sexual rights and the internet, the privatisation of spaces for free expression and engagement, the need to create a feminist internet, how to think about children and their vulnerabilities online, and consent and pornography online.

These thematic reports frame the 57 country reports that follow. The topics of the country reports are diverse, ranging from the challenges and possibilities that the internet offers lesbian, gay, bisexual, transgender and queer (LGBTQ) communities, to the active role of religious, cultural and patriarchal establishments in suppressing sexual rights, such as same-sex marriage and the right to legal abortion, to the rights of sex workers, violence against women online, and sex education in schools. Each country report includes a list of action steps for future advocacy.

The timing of this publication is critical: many across the globe are denied their sexual rights, some facing direct persecution for their sexuality (in several countries, homosexuality is a crime). While these reports seem to indicate that the internet does help in the expression and defence of sexual rights, they also show that in some contexts this potential is under threat – whether through the active use of the internet by conservative and reactionary groups, or through threats of harassment and violence.

The reports suggest that a radical revisiting of policy, legislation and practice is needed in many contexts to protect and promote the possibilities of the internet for ensuring that sexual rights are realised all over the world.

GLOBAL INFORMATION SOCIETY WATCH

2015 Report

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