

GLOBAL INFORMATION SOCIETY WATCH 2015

Sexual rights and the internet



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Global Information Society Watch 2015

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A policy landscape of sexual orientation, gender identity and the internet

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Introduction

Two groundbreaking advances in international human rights have been made in the last half decade, with recognition by intergovernmental bodies that human rights law applies equally to all persons regardless of their sexual orientation or gender identity (SOGI), and that human rights law is equally applicable online as offline. However, these achievements have not been without significant advocacy efforts by civil society. While internet rights are being increasingly integrated and addressed across the international human rights system, developments on SOGI have been laboured, politicised and isolated, with no state consensus. This report considers the trends, shifts and convergences in international policy making, using a geopolitical analysis.

A brief history

Sexual orientation and gender identity

Activists have been advocating for international recognition of SOGI-related rights as far back as the Beijing World Conference on Women in 1995,¹ with concerted efforts to develop state awareness and recognition of the issues since a failed resolution on human rights and sexual orientation in 2003.² Brazil's introduction, and later withdrawal, of a draft text was a catalyst for a number of civil society groups and activists working on sexuality and gender issues to communicate and coordinate more consistently to develop strategies to engage the UN human rights

system on these issues.³ This collective organising led to states delivering a series of joint statements at the UN General Assembly and Human Rights Council (HRC) between 2005 and 2011;⁴ increasing support for SOGI rights from a handful of countries to nearly half of the UN member states; and finally the adoption by the HRC of the first ever UN resolution on "human rights, sexual orientation and gender identity" in June 2011,⁵ and the second in September 2014.⁶

Internet rights

Although civil society has been involved in internet policy and governance spaces since the internet was created, the internet has only recently featured in international human rights policy development arenas. The impact of the internet on human rights was first recognised at the international level by an HRC resolution on freedom of expression in 2009.⁷ Since then, the UN has adopted a number of resolutions developing international policy on this theme. In particular, the HRC adopted a resolution on "The promotion, protection and enjoyment of human rights on the Internet"⁸ in June 2012 with 85 state co-sponsors, which affirmed that the same human rights apply online as offline. The following year in November 2013, the General Assembly adopted a resolution on the right to privacy in the digital age,⁹ which was followed up by the HRC in March 2015 with a procedural resolution of the same title, creating a UN expert mechanism on the right to privacy.¹⁰

1 See, for example, Ditsie, P. B. (1995). Statement delivered by Palesa Beverley Ditsie of South Africa, International Gay and Lesbian Human Rights Commission, at the United Nations Fourth World Conference on Women, Beijing, China, 13 September. www.un.org/esa/gopher-data/conf/fwcw/conf/ngo/13123944.txt and Wilson, A. (1996). Lesbian Visibility and Sexual Rights at Beijing. *Signs*, 22(1). fds.duke.edu/db/attachment/409

2 In 2003 Brazil unexpectedly introduced a draft text on sexual orientation to the former UN Commission on Human Rights. The resolution faced strong opposition, which led to it being deferred for a year and later withdrawn from consideration.

3 ARC International. (2004). *International Dialogue on Gender, Sexuality & Human Rights: Final report*. Geneva: ARC International. arc-international.net/wp-content/uploads/2011/08/International-Dialogue-Report-Geneva-2004.doc

4 ARC International. (2011). *LGBT Rights at the UN: A brief overview*. Geneva: ARC International. arc-international.net/wp-content/uploads/2011/08/LGBT-Rights-at-the-UN.pdf

5 A/HRC/RES/17/19. (2011). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/19

6 A/HRC/RES/27/32. (2014). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/27/32

7 A/HRC/RES/12/16. (2009). ap.ohchr.org/documents/sdpage_e.aspx?b=10&se=100&t=11

8 A/HRC/RES/20/8. (2012). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/20/8

9 A/RES/68/167. (2013). www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/167

10 A/HRC/RES/28/16. (2015). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/28/16

Since the 2009 resolution on freedom of expression, a number of thematic UN resolutions have addressed internet rights.¹¹

Comparing intersectional recognition

While internet rights concerns have effectively been mainstreamed into initiatives dealing with other human rights issues, sexual orientation and gender identity remain isolated from relevant state-negotiated human rights documents.¹²

Internet rights have been recognised by consensus in a number of intergovernmental policy documents, such as resolutions on freedom of opinion and expression, freedom of association and assembly, and the safety of journalists.¹³ The use of the internet and other forms of technology in propagating harassment and violence against women has been acknowledged by the Commission on the Status of Women¹⁴ – the primary UN political body tasked with women’s rights issues – and by the General Assembly in a resolution on protecting women human rights defenders.¹⁵

Conversely, there is a huge struggle to include any language that might be associated with SOGI in any government-negotiated documents at the international level, with such language overwhelmingly negotiated out of draft texts or put to a vote. For example, even the word “gender” has become controversial because some governments insist that gender can only denote biological sex, refusing to accept the

concept of gender as a social construct or to recognise identities beyond the male-female binary.¹⁶

As a result, where SOGI language has been included in negotiated documents, it has been so virtually in isolation from intersecting fields, such as violence or discrimination against women or the protection of human rights defenders. The only UN human rights resolution to date referencing SOGI, apart from the HRC SOGI resolution itself, is the biennial General Assembly resolution on extrajudicial, summary or arbitrary executions. While the strong opposition to recognising SOGI-related rights means the discussion is reduced to violence and discrimination (the areas that have a possibility of gaining consensus), the reference in the “killings” resolution is nonetheless hotly contested each time, with attempts to vote the language out of the resolution during the final adoption process.¹⁷

Despite the fact that a broad number of thematic and country-specific UN human rights experts regularly report a vast array of infringements of the rights of LGBTI persons,¹⁸ in social and economic rights as well as civil and political rights, the political bodies have so far failed to take the intersectional approach that has been an attribute of developments on internet rights.

Politics of sexual orientation and gender identity rights

International intergovernmental debate on SOGI is a delicate matter, and unfortunately plays out in ways that are politically divisive and strategically counterproductive. Although there is a slow but steady increase in support for these issues from states from all regions, they are still perceived as primarily Western priorities despite the fact that the first UN SOGI resolution was tabled by South Africa and Brazil, and the second by Brazil, Chile, Colombia and Uruguay.

11 See, for example, A/HRC/RES/21/16, The rights to freedom of peaceful assembly and of association (2012). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/21/16; A/HRC/RES/23/2, The role of freedom of opinion and expression in women’s empowerment. (2013). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/23/2; A/HRC/RES/24/5, The rights to freedom of peaceful assembly and of association. (2013). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/24/5; A/RES/68/163, The safety of journalists and the issue of impunity. (2013). www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/163; A/RES/68/181, Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders. (2013). www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/181; and A/RES/69/166, The right to privacy in the digital age. (2014). www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/166

12 While this paper examines how these issues have progressed in intergovernmental spaces, it is important to note that infringements on the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons are consistently raised by UN human rights expert mechanisms, such as the Special Procedures, treaty monitoring bodies, and the Office of the High Commissioner for Human Rights, across a broad number of thematic and country specific reports. See for example: www.icj.org/sogi-un-database

13 See footnote 10.

14 CSW agreed conclusions on the elimination and prevention of all forms of violence against women and girls. (2013). Para. 34(wv). www.un.org/womenwatch/daw/csw/csw57/CSW57_Agreed_Conclusions_%28CSW_report_excerpt%29.pdf

15 A/RES/68/181. (2013). www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/181

16 See, for example, Adolphe, J. (2012). ‘Gender’ Wars at the United Nations. *Ave Maria Law Review*, 11(1). papers.ssrn.com/sol3/papers.cfm?abstract_id=2232495

17 ISHR et al. (2012, 22 November). Governments Condemn Extrajudicial Executions in Seminal UN Vote. *International Service for Human Rights*. www.ishr.ch/news/governments-condemn-extrajudicial-executions-seminal-un-vote; ISHR. (2012, 20 November). UN General Assembly: Rights groups welcome condemnation of killing of LGBT persons. *International Service for Human Rights*. www.ishr.ch/news/un-general-assembly-rights-groups-welcome-condemnation-killing-lgbt-persons

18 This report primarily uses the language of “sexual orientation” and “gender identity”, which have been acknowledged by the intergovernmental bodies, but also refers to lesbian, gay, bisexual, transgender, intersex and queer persons using the relevant acronyms LGBT, LGBTI or LGBTIQ, depending on the particular context. For example, while activists and human rights defenders might use the language of Queer rights, this term has not been taken up by the UN, but the UN does recognise and use L,G,B,T and I. Other language yet to be referenced in UN negotiated documents includes “gender expression” and “bodily integrity”.

This is partly because Western states have styled themselves as international leaders on SOGI, critiquing discriminatory laws and practices outside of their regional group, and is compounded by certain Western states using aid conditionality to apply pressure on ex-colonies to repeal colonial-era criminal provisions on same-sex relations.¹⁹

These practices have created a “West versus the rest” dynamic which contributes to the geopolitical polarisation on gender and sexuality-related rights that is reflected at the international level, and alienates potential support from those states that are open to discussing SOGI-related rights, but are opposed to Western hegemony on the international stage.

The politicisation of SOGI plays out in intergovernmental human rights policy development spaces such as the HRC in divisive and regressive ways. Firstly we have seen a division of state positions, generally along lines of regional and political blocs.²⁰ Traditionally this has been Western and most Latin American states supporting SOGI issues, opposed by Russia, the Vatican, most of the African Group and members of the Organisation of Islamic Cooperation (OIC). States within these groups that have dared to support SOGI issues have faced harsh censure from their peers.²¹

Secondly, concepts such as cultural relativity, traditional values and protection of the family have been introduced and manipulated in these spaces, primarily by the religious right wing – the OIC, the Vatican, Russia, and conservative groups such as the UN Family Rights Caucus.²² Since 2009 the HRC has adopted various documents undermining the universality of rights, including three resolutions on “traditional values” and two on “protection of the family”.²³ In general, the support and opposition for these initiatives has been in line with positions against and for SOGI-related language respectively.

The politicisation of sexuality rights in international forums means that foreign policy is often at odds with national-level standards and developments, particularly on rights relating to gender identity. For example, some Western states, such as Belgium, France, Norway and Switzerland, present themselves as champions of LGBT rights in international debates while requiring transgender people to undergo sterilisation in order to legally change their gender,²⁴ a policy that the European Court of Human Rights has ruled to be a violation of the rights to privacy and family life.²⁵ Conversely, some states that have culturally established and documented forms of gender diversity²⁶ – and in the case of Pakistan leading case law recognising the rights of *hijras*²⁷ – claim that such diversity is contrary to their cultural, moral or religious values when it comes to international debate.²⁸ This is a terrible contradiction of domestic reality and foreign policy.

State positions on SOGI in the international bodies have almost become a symbolic representation of one side versus another in the greater struggle for a new world order that replaces Western hegemony. Sadly, this positioning is to the detriment of human rights, including through the development of international legal norms and standards that exclude LGBTIQ persons.

19 Abolafia Anguita, L. (2012, 9 March). Aid conditionality and respect for LGBT people rights. *Sexuality Policy Watch*. sxpolicy.org/we-recommend-134/7369

20 UN member states are divided into five regional groups: the African Group, Asia-Pacific Group, Eastern European Group, Latin America and the Caribbean Group, and Western European and Others Group. There are also a number of additional political blocs and affiliations of states and sub-regional blocs that form collective positions on issues, such as the Arab Group, the Association of Southeast Asian Nations (ASEAN), the Organisation of Islamic Cooperation (OIC), Mercosur, the Non-Aligned Movement (NAM), the European Union (EU), etc.

21 For example, South Africa and Mauritius were publicly denigrated by Nigeria, the then coordinator of the African Group, for their leadership on and support for the first UN resolution on human rights, sexual orientation and gender identity in 2011.

22 www.unfamilyrightscaucus.org/un-initiatives/statements-activities

23 Resolutions on “traditional values”: A/HRC/RES/12/21 (2009); A/HRC/RES/16/3 (2011); A/HRC/RES/21/3 (2012); on “protection of the family”: A/HRC/RES/26/11 (2014); A/HRC/RES/29/22 (2015).

24 Transrespect versus Transphobia Worldwide (Tvt), Legal and Social Mapping: www.transrespect-transphobia.org/en_US/mapping.htm

25 European Court of Human Rights. (2015, 10 March). Refusal to authorise transsexual to have access to gender reassignment surgery breached right to respect for private life. (Press release.) hudoc.echr.coe.int/webservices/content/pdf/003-5032376-6183620

26 See, for example, Jain, D., & Rhoten, K. (2013, 28 December). A Comparison of the Legal Rights of Gender Non-Conforming Persons in South Asia. *Economic & Political Weekly*. www.academia.edu/11810587/A_Comparison_of_the_Legal_Rights_of_Gender_Non-Conforming_Persons_in_South_Asia

27 Khaki v. Rawalpindi, Supreme Court of Pakistan (12 December 2009).

28 See, for example: United Nations Office at Geneva (UNOG). (2011, 17 June). Council establishes mandate on Côte d'Ivoire, adopts protocol to child rights treaty, requests study on discrimination and sexual orientation. unog.ch/unog/website/news_media_archive.nsf/%28httpNewsByYear_en%29/C125763C00590FD6C12578B2004B0A50?OpenDocument; UNOG. (2012, 7 March). Human Rights Council holds panel discussion on discrimination and violence based on sexual orientation and gender identity. unog.ch/unog/website/news_media_archive.nsf/%28httpNewsByYear_en%29/C125763C00590FD6C12579BA004DFE81?OpenDocument; UNOG. (2014, 26 September). Human Rights Council adopts resolution on sexual orientation and gender identity and concludes twenty-seventh session. unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/24F74BA2FCAB79CDC1257D5F0063A227?OpenDocument; UNOG. (2015, 22 June). Human Rights Council holds general debate on the promotion and protection of all human rights. unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/C85AF94F13C23F94C1257E6C0059B456?OpenDocument

Politics of internet rights

In comparison to the tumultuous international debates on SOGI, internet rights policy has been developing relatively smoothly, with consensus resolutions and references in the UN General Assembly, the HRC and the Commission on the Status of Women. This is not to suggest that states unanimously respect or support internet-related rights, but that opposition is more nuanced and complex than the open hostility that some governments express on SOGI.

While there does indeed appear to be international consensus on the issue of access to technology, a customary division of state positions on other issues such as freedom of expression remains unchanged in how states see their validity online or offline. During the HRC plenary panel on freedom of expression on the internet in 2012, China called on the international community to promote internet access in developing countries while also stating that freedom of expression could undermine social stability and national security.²⁹ Cuba has both expressed concern about issues of access to information and communications technology (ICT) and lamented the United States (US) monopoly of the internet.³⁰

Furthermore, the geopolitical divide over internet rights is not as clear-cut as it is on SOGI issues. When Edward Snowden leaked classified information from the US National Security Agency (NSA) in 2013, the US was in the unusual position of being criticised by many of its peers in the West.³¹

Indeed, states from all regions have relished the opportunity to criticise the US in the wake of the Snowden revelations. Although not explicitly critical of US policy, pre-existing anti-US sentiment meant that the resolutions on the right to privacy in the digital age quickly garnered support amongst states such as North Korea,³² Russia, Cuba and China.³³ Consequently, it could be argued that a

politicisation of internet rights issues has been to the benefit of consensus-building on international human rights policy development on these issues.

SOGI versus internet rights policy

As SOGI language is a notorious key to destroying consensus in government negotiations, states have used sexual orientation references as a bargaining chip to block or undermine developments that they oppose.

For example, sexual orientation language was used by Western states to bargain against references to the “defamation of religions” in international discussions on racism, racial discrimination, xenophobia and related intolerance, both during the Durban Review Conference in 2009 and in follow-up meetings and negotiations.³⁴

This highly questionable tactic arose in discussions on internet rights in negotiations on a resolution on the right to privacy in the digital age at the UN General Assembly in 2013, when a key ally of the US proposed including a reference to sexual orientation. Some of the Five Eyes³⁵ countries readily supported the proposed language, while other states that were supportive of the resolution theme objected, knowing they would not be able to join a consensus on a text that contained sexual orientation language. This was understood to be a strategy to break consensus on an issue that those states implicated in the revelations of deep breaches of privacy rights could not otherwise break without admitting that they did not support the key message of the resolution.

As the Five Eyes countries were openly attempting to water down the text of the privacy resolution,³⁶ it seemed likely that sexual orientation language was actually being introduced in order to polarise state positions on the text as a whole, and potentially lead to a vote. In effect, the US and its allies pitted sexual orientation against the right to privacy in a failed attempt to undermine international condemnation of and action on the infringement of rights that is mass surveillance.

29 UNOG. (2012, 29 February). Human Rights Council holds panel discussion on the promotion and protection of freedom of expression on the internet. unog.ch/unog/website/news_media_archive.nsf/%28httpNewsByYear_en%29/C125763C00590FD6C12579B300535CC6?OpenDocument

30 Ibid.

31 MacAskill, E., & Borger, J. (2013, 30 June). New NSA leaks show how US is bugging its European allies. *The Guardian*. www.theguardian.com/world/2013/jun/30/nsa-leaks-us-bugging-european-allies

32 United Nations. (2013, 26 November). Third Committee Approves Text Titled ‘Right to Privacy in the Digital Age’, as It Takes Action on 18 Draft Resolutions. www.un.org/press/en/2013/gashc4094.doc.htm

33 UNOG. (2015, 26 March). Human Rights Council creates mandate of Special Rapporteur on the Right to Privacy. unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/4CA5769DF702CoCC1257E14005F5F4B?OpenDocument

34 See, for example, ISHR. (2009, 4 November). Stalemate at the Ad Hoc Committee on complementary standards. *International Service for Human Rights*. www.ishr.ch/news/stalemate-ad-hoc-committee-complementary-standards

35 https://en.wikipedia.org/wiki/Five_Eyes

36 MacAskill, E., & Ball, J. (2013, 21 November). UN surveillance resolution goes ahead despite attempts to dilute language. *The Guardian*. www.theguardian.com/world/2013/nov/21/un-surveillance-resolution-us-uk-dilute-language

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.

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