2.1.5 Sexuality and the Law

Laws relating to sexuality are used to protect individuals by, for example, making sexual abuse, incest and other sexual behaviours illegal and by protecting and privileging certain relationships. They are also used to define what activity is socially acceptable within a given society and, therefore, which forms of sexual activity in which places and under what circumstances are punishable. Such law varies from country to country and it continues to be contested, repealed and re-enacted across the globe.

Laws on Sexuality

A range of laws are used to stop certain sexual behaviours including homosexuality, polyamory and sex work. They can also punish people associated with transgressive behaviours, opinions and identities by directly criminalising them or entrenching discrimination that deprives them of social and economic rights and access to justice. This can affect young people, transgendered people, unmarried women and people living with HIV as well as gay men and lesbians.

Pornography/Obscenity

The legal definitions and status of pornography and obscenity varies widely from country to country. Most countries allow at least some form of pornography or erotic material although some completely ban it. In some countries, moderate pornography can be sold in general stores or shown on TV while more explicit pornography is usually regulated. The production and sale, and to a slightly lesser degree, the possession, of child pornography is illegal in almost all countries and some countries have restrictions on pornography depicting violence. Pornography laws have been used to criminalise same sex relations and sex work and to prevent publication of information about sexuality and sexual health and to persecute, in particular, gay men.

Click here to read about the case of the “Lucknow four” and the misuse of pornography law

In July 2001, police in Lucknow, India raided the offices of the Naz Foundation, a non-governmental organisation (NGO) providing HIV/AIDS prevention and care to men who have sex with men. They seized material, including educational brochures, videos, and condoms and accused staff of spreading gay culture throughout Lucknow.

Four staff were charged with multiple offences including

* conspiring to commit sodomy under Section 377 of the Indian Penal Code;
• Section 292 (sale of obscene books),
• Sections 3 and 4 of the Indecent Representation of Women (Prohibition) Act (prohibition of advertisements or publication containing indecent representation of women); and
• Section 60 of the Copyright Act, 1957.

Charges were eventually dropped but not before the four men suffered detention with beatings and abuse.

Read more information about this case [1]

Age of Consent

The age of consent is a term which rarely actually appears in legal statutes but is used to describe the minimum age of a person with whom another person is permitted to engage in certain sexual activities. It is sometimes defined as the age at which a person is considered to be legally competent to consent to sexual acts. It should not be confused with the age of majority, age of criminal responsibility, the marriageable age, the voting age, the drinking age, driving age, or other purposes. The distinguishing aspect of the age of consent laws is that the person below the minimum age is regarded as the victim and their sex partner as the offender. Age of consent laws vary widely and while most jurisdictions set the age of consent in the range 14 to 18, ages of consent as low as 12 and as high as 21 exist. The laws may also vary by the type of sexual act, the gender of the actors, or other restrictions such as abuse of a position of trust.

Research in Europe and the US (for example see this report [2] on suicide risk and prevention for LGBT youth) indicates that gay, lesbian and transgender adolescents have higher rates of depression and anxiety than their non-LGBT peers and are more likely than non-LGBT teenagers to engage in self-harm, have suicidal thoughts, and attempt suicide. Equally, young gay men have been shown to be at increased risk of HIV in many settings. Despite such clear needs for health services the age of consent laws are powerful barriers to access. In wealthy countries minors must obtain consent from a parent or guardian before receiving treatment and in middle and low income settings they may fail to qualify for subsidised services. Additionally, if a person under the age of consent has a sexual partner over the age of consent seeking services may place the older partner at risk of a criminal charge.


Same-sex Conduct

Some sexuality law criminalises specific sexual acts, such as anal and oral sex, regardless of the sex of the partners. Some criminalise any kind of sexual contact between partners of the same sex. Sodomy was first made a crime in England in 1533 by Henry VIII. The law did not come to attention again until 1957 with the publication of the Wolfenden Report that concluded homosexuality was not a disease and should not be illegal. Prosecutions continued until the law was removed 10 years later. Ironically, anti-homosexuality laws survive in many former British colonies including India, Uganda, Ghana, Nigeria, Malaysia and Jamaica. In the United States anti-sodomy laws remain in place in 13 states despite a 2003 US Supreme Court ruling them unconstitutional. As well as the 76 countries that explicitly criminalise sodomy or same-sex conduct, others, such as Russia, criminalise LGBTI people with laws against ‘gay propaganda’ or promoting homosexuality. The focus has usually been on sex between men, although recently Botswana and Malawi have passed laws criminalising lesbian sex. Occasionally laws about same sex conduct have been drafted with great precision, but more commonly they use language such as ‘carnal knowledge against the order of nature’ or ‘gross indecency’.

Example: Nowhere to go and no protection for young gay men in Jamaica
Jamaican LGBT youth living in sewers. Source: Erasing 76 Crimes [5]

* Read the full article [5]

* Read an account [6] from Jamaican activist Yvonne McCalla-Sobers of local support for LGBT youth in Jamaica

Click here to read about the legal challenge to Section 377 in India

In India the Lawyers Collective and the Naz Foundation challenged Section 377 of the Indian Penal Code which criminalised homosexual conduct.

In July 2009, the Delhi High Court announced that Section 377 should be interpreted to exclude consensual sex between adults. The reasoning was that criminalisation of consensual sexual conduct violates Articles 21, 14 and 15 of the Indian Constitution.

However that judgement was overturned by the Supreme Court of India on 11 December 2013. The Court held that amending or repealing Section 377 should be a matter left to parliament, not the judiciary.

Click here to read Stonewall’s summary of homosexuality laws

* Homosexuality is illegal for men in 76 countries across the world and being a lesbian is illegal in 49.

* In five countries same-sex activity carries the death penalty. Even where it's legal to be gay other laws often stand in the way of equality.
In some cases gay pride marches are not allowed and neither is literature that 'promotes homosexuality' - which can include health information or literature that simply states the existence of homosexuality.

UK LGB&T rights organisation Stonewall works internationally to promote different voices from communities around the world to end this persecution. It lobbies the UK Government and European Union to do all they can through their diplomacy and international aid programmes to support gay equality globally and supports LGB&T activists who are fighting for their rights and risking their lives. Read more about Stonewall [7]

See a list of countries that criminalise same sex conduct [8]

Read more from the International Commission of Jurists SOGI Handbook [9]

Click here to read UN Secretary General Ban Ki-moon’s condemnation of anti-gay laws

‘Around the world, lesbian, gay, bisexual and transgender people are targeted, assaulted and sometimes killed. Children and teens are taunted by their peers, beaten and bullied, pushed out of school, disowned by their own families, forced into marriage (...) and, in the worst cases, driven to suicide.

‘LGB & T people suffer discrimination because of their sexual orientation and gender identity at work, at clinics and hospitals, and in schools – the very places that should protect them (...)’

‘Let me say this loud and clear: lesbian, gay, bisexual and transgender people are entitled to the same rights as everyone else. They, too, are born free and equal. I stand shoulder to shoulder with them in their struggle for human rights.’

Ban Ki-moon, United Nations Secretary General, 11 December 2012.

Sex Work

Prostitution is the legal term for sex work. It generally refers to the sale of sexual services but it is defined in law in many different ways. Some or all aspects of prostitution are illegal in most countries. In some it is only illegal for women to sell sex while in others the law applies to men and women. In a few countries it is also illegal to buy sexual services. The act of selling sex in any circumstances is illegal in Romania, the US (except Nevada), Yemen, China, Mongolia and a handful of other countries. In most countries only some activities related to prostitution are illegal. These usually include profiting from the prostitution of others, operating brothels, public soliciting, using premises or communicating for immoral purposes. This is the case throughout Western Europe, Canada, Brazil and most of Asia. In some countries laws against sex work are partially or wholly suspended so that prostitution can be regulated, usually to make way for health regulations or policies. This is the case in Ecuador, Senegal, Tunisia, Greece, Turkey, Hungary and Australia.
The legal definitions of prostitution vary widely. In some countries the law applies only to women while in others it is not gender specific. In most Arab states, for example, legal texts don’t define prostitution in plain language, leaving definitions to be determined by courts. In Japan, vaginal but not oral sex is considered to be prostitution. When sex is exchanged for goods and services rather than for money (sometimes called ‘transactional sex’ or ‘indirect sex work’), this is usually illegal only under religious law.

There are many documented instances of police extortion of and violence against sex workers. Many sex workers argue that such acts are underpinned by the laws against sex work and the threat of arrest or public exposure that police can hold over sex workers.

Example Article 298 of the Qatari law states that whoever takes prostitution or homosexuality as a profession or a means of livelihood shall be punished by a maximum of ten years in prison.

Example: Police Extort Macedonian Sex Workers

A sex worker in Macedonia said of a police officer, ‘He tells me if I don’t give him money every day, he will arrest me for prostitution.’ Source: Sex Worker Rights Advocacy Network (2009)


Adultery

Adultery is sexual intercourse between a married person and someone other than his or her lawful spouse. It usually applies only to intercourse and only with consent although there are some exceptions that mean that women who are raped can be punished for committing adultery.

Adultery is condemned by most cultures and religions and although it has been historically regarded as a legal wrong, it is not considered a crime in most modern legal systems. Its main role in law in most countries is to allow a blameless party to obtain a divorce against an adulterous spouse or other family and civil proceedings. Occasionally adultery on the part of the victim has been a successful defence to murder.

In Islamic law adultery, extra-marital or premarital sex are called Zina and they are unlawful in both civil and criminal
matters. In countries where adultery is illegal, the punishments range from fines to the death penalty. In the 21st century, criminal laws against adultery have become very controversial, with international organisations calling for their abolition because they are enforced selectively, mostly against women, which leads to discrimination and gender-based violence; prevents women from reporting rape and sexual violence; and maintains social norms that justify violent crimes committed against women.

Example: A Saudi teenage girl in the company of a man (not one of her relatives) was gang raped by seven young men. The rapists also kidnapped the man who was with her, assaulted and battered him. The woman and her companion were sentenced to 90 lashes each for the offence of 'being alone with a man who is not a relative in a private place'. Four of the rapists were sentenced to 80 to 1000 lashes and one to four years in jail.

Read the Global Sex Survey [12] which found that, worldwide, 22% of people surveyed have had extramarital sex

**Sex Trafficking and Sexual Exploitation**

Human trafficking is defined in international law as involving force, power, deceit, except where the recruitment leads to 'sexual exploitation', in which case the consent of the trafficked person is not relevant. Sexual exploitation is not defined in law but it is mentioned in the Convention to End Discrimination Against Women (Article 6) and is understood to mean any situation where a third party facilitates or profits from commercial sex. Thus, anti-trafficking law can lead to raids on migrant sex workers and to their associates being classified as traffickers.

This obscuring of the distinction between migrant sex work and trafficking has resulted in criminalisation of sex workers and prevents institutionalisation of rights-based approaches to sex work. Such policy and legislation is being challenged by activists and key institutions such as the World Health Organisation and the Global Commission on HIV and the Law that reject it as being based on ideology that no woman freely chooses sex work rather than on a reasonable definition of force or on evidence of actual coercion.

Click here for a discussion of why we should distinguish sex trafficking from Sex Work.

It is critical to distinguish sex work from sexual trafficking – which is a gross human rights violation involving coercion, violence or threat.

Merging the two terms not only denies sex workers their right to self-determination and agency, ignores their realities, and endangers those engaged in it, but also risks making types of trafficking (other than sexual) invisible and thus leaves victims of non-sexual trafficking without proper protection.

Such confusion also produces ineffective legal and health interventions such as 'raid and rescue' of un-trafficked sex workers, whose livelihoods, associations, and safety nets are torn apart by the raids.

**Source:**
The International Council on Human Rights Policy

**Cross-Dressing**

Cross-dressing is wearing clothes of the opposite gender. Cross-dressing can be linked to sexuality but may not be. One way in which law has played a role in enforcing gender norms is by prohibiting cross-dressing. Colonial systems exported dress regulations to many countries around the world which are known as 'sumptuary laws.' Contemporary cross-dressing
laws have been used to target individuals who transgress gender roles, whether they are gay, lesbian, transgender or straight.

Heterosexual cross-dressing UK artist Grayson Perry accepts a CBE award at Buckingham Palace with his wife and daughter. Image courtesy of Alan Davidson.

Click here to read how Sudan, Nigeria and Guyana criminalise cross-dressing

In Sudan, laws prohibiting indecent or immoral dress have been used to punish men who wear women’s clothes as well as women who wear trousers and male models who wear make-up.

In Nigeria, laws on indecent dress have been used to fine and imprison cross-dressing men.

In Guyana, it is a crime if ‘a man, in any public way or public place, for any improper purpose, appears in female attire, or being a woman, in any public way or public place, for any improper purpose, appears in male attire’. (After a series of arrests transgender activists are challenging the constitutional validity of this law)

Is there a right to choose how to dress? Click here to find out
Cross-dressing laws may violate human rights in several ways. One's choice of attire may be described as an expression of individual liberty and autonomy, or an expressive statement protected under the right to freedom of expression. Cross-dressing may also be considered an element of trans identity protected under non-discrimination and equality guarantees.

Early cases, however, dealt with the textual vagueness of laws that criminalised dressing in clothing of the opposite sex.


**Gender Identity**

Transgender law covers a wide range of issues that arise when an individual's internal experience of gender does not correspond with the sex assigned at birth. Legal recognition cases most commonly arise when individuals seek to change their sex on identity documents, such as birth certificates, passports, and national identity cards. They may concern other documents, such as diplomas, driver’s licence, national health insurance card, or other certification or documentation related to identity or qualifications. Legal recognition cases also occur when individuals change their name to reflect a preferred gender. Since identification is required for most activities in daily life (enrolling in school, finding a job, opening a bank account, renting an apartment, or travelling across a border), the issue is one that is significant to the individuals concerned. An individual’s right to change the sex on his or her identity documents protects privacy and prevents discrimination and stigma on the basis of gender identity or gender re-assignment.

For more on gender identity and the law see International Commission of Jurists SOGI Handbook [16]

[Click here to read an example of discrimination against transgender people in Health Services](#)

A transgender woman in South Africa described going to a clinic to get post-exposure prophylaxis after being raped by a client who discovered that she was transgender.

The clinic nurse told her to leave and come back when she was not wearing women’s clothing. The transgender woman was so traumatised that she never returned. She later tested HIV-positive.

**Source:**

Submission made by Transgender Sex Workers, Cape Town, for Gender DynamiX, South Africa, for the Africa Dialogue of the Global Commission on HIV and the Law.

[Click here to read about transgender rights in Nepal](#)

The rights of transgender people were recognised in a landmark Supreme Court case in Nepal in 2007. The evidence presented showed that transgendered people (called ‘meti’) were targeted by police and others for their non-conforming gender expression and identity. Because metis were routinely denied citizenship cards, they did not have access to a range of entitlements and benefits that such cards conferred.

The court ordered that metis be given identity documents that recognised their gender status as ‘third gender.’ It also ordered protections against discrimination on the basis of gender identity be enshrined in the new Constitution saying that it is the ‘responsibility of the State to create the appropriate environment and make legal provisions accordingly for the enjoyment of such rights’.
Read our Case study on transgender rights in Nepal.

Source:

Example: Argentina. A new law in Argentina defines gender identity as “the inner and individual gender experience as each person feels it, which can coincide or not with [sex] assigned at birth.” It enables people to plan changes to their names and sex on official documents without approval from a judge or doctor.

Example: Brazil. Under a policy developed by Brazil’s Federal Medicine Council, the Brazilian public health system provides free sex-change operations.

HIV Law

Laws about HIV have been introduced in various countries to try to limit HIV transmission by making it an offense for a person who knows they are living with HIV to: have sexual intercourse; have sexual intercourse without disclosing their HIV status to their partner; have sexual intercourse without a condom. Since 1987, countries around the world have applied existing criminal laws and/or created HIV-specific criminal statutes to prosecute people living with HIV who have, or are believed to have, put others at risk of acquiring HIV. Most criminal cases have been framed by prosecutors and media as being cases of ‘deliberate’ or ‘intentional’ HIV transmission when, in fact, the majority have involved neither intent nor transmission.

The use of the criminal law in this way is of concern in the following areas:

- Effectively treating sex between adults, in the absence of disclosure of known HIV-positive status, as a physical or sexual assault despite the absence of intent to harm;
- Prosecuting consensual sex even when there was prior disclosure of HIV-positivestatus, the alleged exposure posed a very low risk of HIV infection, and/or HIV transmission did not occur;
- Applying harsh prison sentences to alleged HIV ‘exposure’ during non-consensual acts that pose very little or no risk of HIV infection, e.g. biting, spitting or scratching;
- Applying increased prison sentences to people living with HIV who are convicted of sex work, even when there is no evidence that they have intentionally or actually put their clients at risk of HIV;
- Applying the criminal law to vertical transmission of HIV during pregnancy, delivery or via breastfeeding.

Additional concerns include:

- Enactment of overly-broad HIV-specific laws;
- Inappropriate application of general criminal law offences to HIV nondisclosure, exposure or transmission;
- Selective law enforcement that appears to mainly target members of vulnerable or marginalised populations;
- Potential miscarriages of justice in terms of proof and causality;
- Potential negative public health impacts of a criminal justice approach to HIV prevention.

Source: UNAIDS - Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape
Click here to read an example of a Namibian court ruling on right of women living with HIV

Three women living with HIV in Namibia were told they could have a caesarean section (reducing the chances of passing the HIV virus on to their children) only if they agreed to be sterilised at the same time.

The Namibian High Court granted a partial victory for these women by confirming that the human rights of these women were violated when they were coerced into being sterilised while they gave birth.

Source:
LM and Others v. Government of the Republic of Namibia, High Court of Namibia

Further reading:


Links