



Legal Frameworks and Human Rights in Relation to Sexual Diversity *Implications for Research*

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Outline

- ▶ Background
 - Analysis of Legal Frameworks and Human Rights in relation to Sexual Diversity – UNAIDS
 - Not specialized report – but transdisciplinary
- ▶ Context
- ▶ Legal Frameworks
- ▶ Human Rights
- ▶ Stigma and Discrimination
- ▶ Potential Interventions
- ▶ Potential Research

Challenges to Equal Rights and Equal Access to Health Care

- ▶ Increasing focus on the continued HIV vulnerability of MSM as a result of social exclusion
- ▶ Social exclusion: Disenfranchisement that certain individuals or groups experience within society, based on one or more conditions (Honneth, 2007)
- ▶ Sexual diversity, sexual rights and human rights
- ▶ Fundamental human rights and freedoms include but are not limited to respect and dignity, non-discrimination, equality, participation, life, identify, self determination, access to health.
- ▶ Early 1990s: J. Mann – epidemic strongly structured in impact and effects

HIV Vulnerability

- ▶ HIV vulnerability depends on 3 groups of related influences (Aggleton, 2004):
 - Membership in groups or subcultures with higher HIV prevalence
 - Lower quality and coverage (in total numbers and in terms of population groups covered) of services and programs
 - Higher-level social/environmental influences (e.g. laws, policies, norms, culture) which configure a hostile environment

Challenges to the Realization of Health

- ▶ Continued existence of unjust and irrational laws (legal and normative frameworks)
- ▶ State and private violence resulting in abuses of human rights
- ▶ Presence of cultural barriers to law enforcement, resulting in discrimination
- ▶ Deficient health systems planning: low solving capacity, unfriendliness (i.e. implies lack of perception of the other's rights)

Review of Legal Frameworks, Human Rights and Stigma and Discrimination in LMIC

Study commissioned by UNAIDS

Objective of UNAIDS Study

- ▶ To review published and unpublished data and information of:
 - National legal frameworks
 - The situation of fundamental human rights
 - Stigma and discrimination

In relation to sexual diversity and HIV/AIDS in lower and middle income countries

Methodology and Analysis

- ▶ Data base of key variables for 7 regions (middle and low income countries according to the World Bank)
 - HR organizations reports, United Nations system, Global Fund, ILGA - Websites
 - Key Informants
 - Scientific Publications and conference abstracts
 - Current events
- ▶ Axes
 - Legal status of homosexuality/discrimination
 - Situation of HR and homophobic violence, violence towards the transgendered
 - Stigma and discrimination

I. Legal Systems : Repressive, Neutral and Protective

- ▶ **Repressive** – laws prohibit sexual intercourse between people of the same sex;
 - Highly repressive – sodomy a crime with severe penalties such as death, heavy labor, imprisonment (5 yrs or more);
 - Moderately Repressive – sodomy a crime subject to penalties of less than five years or fines;
- ▶ **Neutral** – countries which do not have any legal prohibition of same-sex behavior nor address sexual diversity
- ▶ **Protective** – laws prohibit discrimination against sexual diversity, with or without positive measures of recognition.
 - **Protective** – laws prohibit discrimination against sexual diversity, with or without positive measures of recognition;
 - Protective with recognition measures – laws include an explicit prohibition of discrimination against sexual diversity, with positive measures such as marriage, civil union, recognition of rights

Legal Systems: Repressive, Neutral and Protective

Legal Systems		Region						
		Sub-Saharan Africa	Latin America	Caribbean (16)	Middle East & North Africa (15)	South Asia (08)	East Asia & Pacific (24)	Europe & Central Asia (27)
		(48)	(17)					
1. Repressive	1.1 Highly Repressive	18		11	6	6	8	0
	1.2 Moderately Repressive	12	3	0	7	2	5	2
2. Neutral	2. Neutral	15	5	5	1	0	9	11
3. Protective	3.1 Protective Measures	1	3	0	0	0	2	6
	3.2 Recognition Measures	1	6	0	0	0	0	8
TOTAL	153 (consolidated)	47	17	16	14	8	24	27
	155 (general)							

The Role of Legal Traditions

- ▶ Civilist (Napoleonic Code)
- ▶ Common Law (British ex-colonies)
- ▶ Customary Law
- ▶ Muslim Laws
- ▶ Mixed systems (vast majority in Africa, MENA region, Asia and Caribbean)

Legal Tradition in Relation to Systems in Africa

- ▶ Africa (45 countries)
 - Highly repressive: 18
 - ▶ 17 mixed (customary in 13, c.law in 11, civilist in 9)
 - Repressive: 11
 - ▶ 10 mixed (civilist in 9, customary in 8, c.law in 6)
 - Neutral: 15
 - ▶ 13 mixed (civilist in all, customary in 12, muslim in 1)
 - Protective: 1 (civilist + common law)
 - Recognizing: 1 (civilist + common law)

Systems in LAC and E.Europe

- ▶ Latin America (17 countries, all civilist)
 - Neutral 8, Protective 3, Recognizing 6
- ▶ Caribbean (16 countries)
 - Highly repressive: 11 (10 c.law; 1 c.law-civilist)
 - Neutral: 5 (all civilist)
- ▶ Eastern Europe (25 countries, all civilist):
 - Moderately repressive: 2
 - Neutral: 11
 - Protective 6
 - Recognizing 6

Systems in MENA and Asia

- ▶ MENA Region: 13 countries
 - Repressive 6 (all mixed: M+Ci or M+Ci+CL)
 - Mod Repr. 6 (all mixed: M+Ci/M+CL/M+Cu+Ci)
 - Neutral: 1 (M+CL+Cu)
- ▶ South Asia: 8 countries
 - Repressive 6 (M or M + CL/Cu or Ci+CL+Cu)
 - Moderately repressive: 1 (CL+Cu)
- ▶ East Asia: 22 countries
 - Repressive: 8 (3 CL; 3 CL+Cu; 1 CL+Cu+M; 1 M+Ci+Cu)
 - Moderately repr: 5 (2 CL; 2 CL+Cu; 1 CL+Ci)
 - Neutral: 8 (3 Ci; 4 Ci+another; 1 CL+Cu)
 - Protective: 1 (CL)

Legal Frameworks: Conclusion

- ▶ Classification of legal frameworks in 5 groups as related to sexual orientation and gender identity is useful
- ▶ Repressive legal systems constitute obstacles to the promotion of human rights and the realization of health among sexually diverse populations, including HIV prevention
 - In some regions (particularly the Caribbean and Sub-Saharan Africa), the legal traditions of Common Law and Customary Law are associated with repressive legal systems
- ▶ Cross-tabulation with country's legal traditions:
 - Useful for comparative law studies
 - Case studies of changes in legal framework
- ▶ Study potential intervention – initiatives to reach change

II. States' Practices Towards Human Rights of Sexually Diverse Populations

- ▶ States that are signatories of human rights instruments must 'respect, promote and fulfill the rights of all peoples'.
 - Respect: Refrain from violating
 - Promote: Intervene when violations by non-state actors occur
 - Fulfill: Act in anticipation of violations to reduce their likelihood
- ▶ Violate:
 - Most common violations are: the failure or indifference in protecting LGBT persons from violence and discrimination, complicity/ Abuse of authority / Accusations and blackmail. Violation of the right of assembly. Degrading treatment of arrested persons
- ▶ Occasionally respect:
 - E.g. Free rein for police repression and other rulings. Private tolerance and public condemnation
- ▶ Protect (Respect, Promote, Fulfill):
 - Antidiscrimination actions or positive discrimination. Freedom of thought, expression and association. Right to privacy

	States that violate rights	States that respect rights	States that fulfill rights
(A) Civil and political rights			
Life	Retains death penalty for sodomy; fails to pursue homophobic crimes or 'honor killings'	Eliminates criminal penalties for adult sexual behavior; investigates and prosecutes 'honor killings' and homophobic crimes	Pursues 'hate crimes' vigorously with or without formal statutes; takes action to reduce social stigma that engenders homophobic violence
Freedom from torture and cruel, inhuman, or degrading treatment or punishment/ Humane and dignified conditions of confinement for those deprived of liberty	Retains physical punishment for sodomy; subjects arrestees to humiliation or abuse by guards or other prisoners	Recognizes equal rights of detainees and prohibits abusive or humiliating treatment by guards and other personnel	Works to protect LGBT detainees from abuse while incarcerated
Liberty and security of person	Criminalizes consensual, private sexual activity between adults; criminalizes variant gender expression; permits or encourage police raids on LGBT venues; utilizes internet sites to entrap LGBT persons	Eliminates criminalizing statutes; recognizes or authorizes operation of LGBT venues; police do not target or seek to entrap LGBT persons	Campaigns to reduce stigma; prohibits discrimination based on sexual orientation and gender expression
Freedom from arbitrary or unlawful interference with privacy	Expresses official hostility toward LGBT individuals or groups; encourages public exposure and humiliation, including through police action	Refrains from stigmatizing language or policies by state agents; acts to defend the privacy of those arbitrarily targeted or abused	Prohibits discrimination in the workplace, housing, education or public facilities; discourages media sensationalism

(B) Economic, social and cultural rights			
Work/Just and favorable working conditions	Permits or endorses discrimination against LGBT workers in public and private employment; deports foreign workers on the grounds of homosexuality; bans LGBT persons from serving in the armed forces	Prohibits discrimination in public and private employment, including the armed forces	Prohibits discrimination in public and private employment, including the armed forces; responds to discrimination complaints and educates employers to respect workers' rights
The highest attainable standard of physical and mental health	Ignores LGBT populations in HIV/AIDS programs and permits police harassment of HIV/AIDS programs; permits or ignores discrimination or abuse of LGBT persons or same-sex couples in clinical settings	Incorporates LGBT populations in HIV/AIDS programs; favors respectful treatment of LGBT persons and same-sex couples in clinical settings	Partners with LGBT organizations to promote health of these populations; includes human rights of LGBT persons in anti-stigma campaigns for persons living with HIV; promotes respectful treatment of same-sex couples in clinical settings
Education	Endorses or permits expulsion of LGBT persons from schools and universities; fails to protect LGBT persons from school-based persecution or harassment; prohibits LGBT organizations in school settings	Guarantees the right to education to all persons; responds to complaints of discrimination in education	Promotes LGBT rights to education; authorizes LGBT organizations in schools and universities
A share in cultural life and enjoyment of the benefits of scientific progress	Denounces LGBT persons and practices as incompatible with the country's cultural heritage	Embraces all members of society as full citizens	Promotes diversity and encourages scientific investigation of issues related to sexual orientation and gender variance

Situation of Human Rights

- ▶ Human rights of the whole population vs. specific rights of sexually diverse groups
- ▶ Table Appendix 3:
 - Western Europe +++++
 - North America +++/++++
 - Latin America and Eastern Europe: ++/++++
 - South, East and South East Asia: ++
 - Caribbean, MENA and SSA: +
- ▶ +Broad violations of HR; ++ Respect and violation
+++ Respect with problems; +++++ significant progress in fulfilling rights

Human Rights: Conclusion

- ▶ Useful to analyze the situation of specific human rights among sexually diverse populations
- ▶ Legal systems are key but culture (including institutional culture, local traditions and religion) is also key
- ▶ State (and social) practice may be more or less protecting of human rights than legal frameworks and does not necessarily reflect those frameworks
- ▶ Still significant changes must occur

III. Stigma and Discrimination

- ▶ Difficulties in methodology and access to data
- ▶ Synergy of sources of stigma and discrimination – Structural violence
- ▶ Direct and indirect discrimination
- ▶ Subjective: actual (enacted) and anticipated discrimination (self-segregation)
- ▶ Contexts of discrimination
 - Political, social, religious and legal
- ▶ Passing (closeted experiences). The case of transgenders.

Stigma and Discrimination: Conclusion

- ▶ In Latin America, Central and Eastern Europe, East Asia:
 - Despite lack of sodomy laws and even some protective measures, heteronormativity prevails, linked to fear of being outed and of homophobic practices, including violence and direct discrimination.
 - HIV epidemic played a role in recognition of rights.
- ▶ In Africa, Middle East and Southern Asia, and the English-speaking Caribbean:
 - Most countries still have sodomy laws
 - The little data available evidences strong discrimination against sexual diversity, leading to virtual invisibility of sexual minority status
 - However, increasingly rapid transformations as a result of global exchanges

Potential Interventions

- ▶ Actions to pursue legal and human rights transformations: **structural/ enabling** interventions
- ▶ To be considered in the context of combination prevention
- ▶ Judicial/constitutional actions often more promising than legislative actions
 - In repressive systems with religious or consuetudinary influences: increase visibility of other faiths or ideas
 - In neutral systems with a mixed tradition (with customary elements) emphasize the perspective of human and sexual rights (now present in civil and common law)
 - Use of regional or global courts for external pressure
- ▶ Action on institutional culture:
 - Promote exchanges and training of lawyers
 - Work with enforcement officials when laws exist
- ▶ Promote solidarity across other 'diversity' causes
- ▶ Public Health argument: Protecting human rights has a positive impact on HIV prevention and care

Potential Research

- ▶ Theoretical developments
 - Understand the operation of these structural/environmental factors:
New models
 - Understand the role of time and interaction with other factors in the occurrence of positive impacts
- ▶ Methodological development
 - How to assess impact? (for all structural interventions)
 - Can we look at impact in the same fashion as with 'proximal factor' interventions?
 - Avoid the positivistic trap (no 'proof of concept')
 - Studies that understand process of change, considering its characteristics as part of the process, rather than controlling for it
 - Dynamic contextual analysis and action
- ▶ Need of regional and local research
 - Participation of communities – partnership with communities
 - Pilot experiences of mainstreaming into multisectoral public policy

Potential Research (2)

- ▶ Studies on legal systems and human rights:
 - Comparative law studies on sexual diversity
 - Studies on the potential of change within systems linked to the same legal tradition
 - Relationship between legal frameworks & status of human rights
 - Promote pilot experiences of law/advocacy interventions in to identify strategies that are useful in each legal context
- ▶ Relationship between legal frameworks/HR and HIV
 - Analyze the dynamic correlation between diverse legal systems, the status of Human Rights, and HIV prevention and care
 - Assess the potential interaction between progress / control of HIV epidemic and protection / violations of the human rights of sexually diverse groups
- ▶ Stigma & discrimination studies with a structural focus
- ▶ Relationship between laws/human rights contexts and other structural factors affecting vulnerability
- ▶ Assess special issues related to transgender people