

Comment on the Freedom to Engage in Sexual Activity
Submitted to
The Drafting Committee, Yogyakarta Principles on the Application of International Human
Rights Law to Sexual Orientation and Gender Identity

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I am pleased to submit to you this comment in response to the January 5, 2017 call for comments regarding a review of the Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity (the Principles). The Yogyakarta Principles set out how international human rights standards apply to the situations and experiences of LGBT people. Sexual activity is a core concern for LGBT people, and a central target for governments seeking to violate human rights. The Principles should recognize the freedom of individuals to engage in private, adult, consensual sexual activity.

A. Recognition of Sexuality in the Current Principles.

None of the twenty-nine principles is devoted specifically to sexual acts. However, sexuality and sexual activity are reference in four ways. First, the Principles recognize sexual rights in the preamble: “[T]he international community has recognised (sic) the right of persons to decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free from coercion, discrimination, and violence.” Sexual rights are tied to the concept of equality, which pervades all principles: “respect for sexual rights, sexual orientation and gender identity is integral to the realization (sic) of equality between men and women.”

Second, sexual activity is identified as a component of assessing an individual’s sexual orientation. The principles define sexual orientation as “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.” (emphasis added). Conceivably, the inclusion of sexual relations as a characteristic of sexual orientation could be interpreted to mean that sexual relations would fall within the scope of personal characteristics that should be treated non-discriminatorily, and that governments may not violate an individual’s human rights based on that individual’s sexual relations.

Third, a broad right to privacy is presented in Principle 6, which states that “[t]he right to privacy ordinarily includes ...decisions and choices regarding both one’s own body and consensual sexual and other relations with others.”

Fourth, the principles refer to sexual activity in the context of recommendations to repeal laws which criminalize sexual activity. Principle 4, The Right To Life, states that the “death penalty shall not be imposed on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.” The

recommendations accompanying several principles (Principle 2, The Rights To Equality And Non-Discrimination, Principle 4, The Right To Life, and Principle 6, The Right To Privacy) call for the repeal of legal provisions that prohibit consensual sexual activity among people of the same sex who are over the age of consent.

B. Need for Revision.

1. Sexual Activity is a Central Human Experience for Sexual Minorities

Sexual activity, desire, and choices surrounding sexual acts constitute a fundamental human experience. For sexual minorities, the task of understanding one's own sexuality through sexual experience is part of healthy development of personality and identity.¹ Around the world, courts and legislatures have recognized the sacred centrality of this intimate sphere of human activity. The Indian High Court and the US Supreme Court both quoted the same language to make this point in cases reviewing laws criminalizing same-sex sexual activity:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by [due process protections]. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.

Lawrence v. Texas, 539 US 558, 573 (2003) quoting Planned Parenthood of Southeastern PA. v. Casey, 505 US 833, 851 (1992); Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277, p. 31 (Delhi High Court 2009).

Almost inevitably, disputes about the human rights of LGBT people, at some point, turn to arguments about sexual activity. Signatory Robert Wintemute has identified "sex rights" as one of the three types of rights which commonly drive LGBT movements, the other two being basic rights and love rights.² Signatory Sonia Correa concluded that "[i]n short, sexuality has taken shape on a global level, particularly during the closing decades of the twentieth century, as a key contested domain or field of struggle."³ Legal Scholar Kees Waaldijk proposes that all legal issues concerning sexual orientation can be viewed through the ability of same-sex people to relate to each sexually and in other ways. According to this analysis, government policies can be evaluated on whether they are supportive or in opposition to the right to relate.⁴ The common theme in these commentaries is that sex is always part of human rights claims for LGBT people.

¹ Cass, Vivienne. (1984). "Homosexual Identity Formation: Testing a Theoretical Model." *Journal of Sex Research* 20(2): 143-167.

² Wintemute, Robert (2005). From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights. In Nicholas Bamforth (ed.), *Sex Rights: The Oxford Amnesty Lectures* 2002. Oxford University Press.

³ Corrêa, S. & Parker, R. *Sex Res Soc Policy* (2004) 1: 15. doi:10.1525/srsp.2004.1.1.15

⁴ Waaldijk, Kees. "The Right to Relate: A Lecture on the Importance of Orientation in Comparative Sexual Orientation Law." *Duke J. Comp. & Int'l L.*24 (2013): 161.

2. Sexual Activity is a Central Target of State Action.

Sexuality continues to be the basis for oppression faced by LGBTI people in all parts of the world. Seventy-three states criminalize same-sex sexual activity. In 45 states, the law applies to both men and women. The death penalty can be imposed in 13 countries.⁵ There are several variations of these laws. Some laws prohibit same-sex behavior, including speech and social interaction. Some laws purport to criminalize homosexuality as a status. The prohibition on same-sex activity is an invariable component of all these laws.

Even in legal environments where LGBT people have achieved normative equality, public policy continues to single out same-sex activity. Examples of these policies include the following:

- Men are prohibited from donating blood if they have had recent same-sex sexuality activity but not if they have had recent opposite-sex sexual activity.
- In 16 countries, the age of consent laws are unequal, so that same-sex activity may be considered rape even though, for those same individuals, different-sex sexual activity would not.⁶
- In youth settings such as schools, physical affection between two youth of the same sex is sometimes treated more harshly than physical affection between youth of different sex.⁷
- Gay men are advised to be on PreP regardless of their history of condom use, straight people are advised to be on PreP only if history of condom use is low.
- Proprietors of hotels and beds and breakfast will rent to single gay people but not gay couple's because they do not want to be complicit in the commission of a same-sex sexual act.
- In some countries, LGB people in public, teachers, and military officers may be told that public displays of affection run afoul of moral turpitude rules similar display between different-sex couples do not.

B. Sex and sexuality are protected by human rights.

No international human rights body has enunciated a specific right to sex. However, human rights evolve, either by the recognition of new right or by the application of settled rights to new facts. For example, in the six decades since the signing of the Universal Declaration, we have seen the development of near instantaneous internet communications present new issues of surveillance and privacy, new methods of biotechnology and genetic engineering present new questions of property and personhood, and accelerated break-up and redrawing of national borders requiring new regimes of citizenship. For sexual orientation and gender identity, human rights have evolved to the point where, today, international human rights bodies have recognized that adult, consensual, private sexual activity is protected by human rights.

⁵ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., State Sponsored Homophobia 2016: A world survey of sexual orientation laws: criminalisation, protection and recognition (Geneva; ILGA, May 2016).

⁶ Id.

⁷ Snapp, Shannon D., and Stephen T. Russell. "Discipline disparities for LGBTQ youth: Challenges that perpetuate disparities and strategies to overcome them." *Inequality in School Discipline*. Palgrave Macmillan US, 2016. 207-223.

At the time of the signing of the Universal Declaration of Human Rights (an indeed for thousands of year before that) same-sex sexual activity occurred in all populations. However, in the mid-1900s, homosexuality and gender variations were seen primarily as diseases to be cured. In the years following, many governments began rethinking the legal acceptability of same-sex sexual acts and prominent national and global health organizations began removing homosexuality and gender variation from lists of disorders.

In 1994, the United Nations Human Rights Committee held that a provision of a Tasmanian law criminalizing consensual sex between adult males “enabled the police to enter the household” where “two consenting adult homosexual men may be committing an offence.” Based on a concern for the privacy of the sexual act itself, as well associated status, the Committee held that the law violated Article 17 of the International Covenant of Civil and Political Rights.⁸ Toonen has been uniformly followed by UN human rights bodies ever since then. Following Toonen, national Courts have struck down laws criminalizing same sex activity on a number of bases including privacy (“private life (which includes sexual life))”,⁹ dignity¹⁰, and discrimination.¹¹

At roughly the same time of the Toonen decision, international bodies began looking at a broader array sexual rights through a lens of sexual health. The recognition of these rights shows the evolution of sexual rights beyond the narrow right to private, adult, consensual, sexual activity. The 1994 the Basis for Action issued by the International Conference on Population and Development recognized the importance of the freedom to make decisions about reproduction. The right to an autonomous sexual life was affirmed at the Beijing World Conference on Women. “The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”¹² A few year later, the Committee on the Elimination of Discrimination Against Women called for decriminalization of sex between women as one of several recommendations to ease exclusion and oppression of women.¹³

Still later, staff of the World Health Organization created a working definition of “sexual rights” as a composite of several settled rights. The fact that several different rights have been invoked in relation to this issues demonstrates the centrality of sexuality to the human experience and recognized the multiple human rights concerns associated with sexuality.

“Sexual rights embrace certain human rights that are already recognized in international and regional human rights treaties, supported in consensus documents and found in national laws. Rights critical to the realization of sexual health include:

⁸ Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁹ Dudgeon v. the United Kingdom, 4EHRR 149 (1981) para. 41.

¹⁰ National Coalition for Gay and Lesbian Equality and Anor v. Minister of Justice, 6 BHRC 127 (CCT 11/98), [1998], ZACC 15, 1998 (12) BCLR 1517 (CC), 9 October 1998 (“National Coalition”), para. 28.; UK Privy Council case from Gibraltar in Rodriguez v. Minister of Housing of the Government, [2009] UKPC 52, para. 19.

¹¹ Concluding observations of the Human Rights Committee on Cameroon (CCPR/C/CMR/CO/4), at para 12.

¹² Freport from the Fourth World Conference onf Women, Beijing, 4-15 September 1995, paragraph 96.

¹³ Report of the Committee on the Elimination of Discrimination against Women, UN-Doc-CEDAW/A/54/38 (1999).

- The rights to life, liberty, autonomy and security of the person
- The rights to equality and non-discrimination
- The right to be free from torture or to cruel, inhuman or degrading treatment or punishment
- The right to privacy The rights to the highest attainable standard of health (including sexual health) and social security
- The right to marry and to found a family and enter into marriage with the free and full consent of the intending spouses, and to equality in and at the dissolution of marriage
- The right to decide the number and spacing of one's children The rights to information and education The rights to freedom of opinion and expression The right to an effective remedy for violations of their fundamental rights
- The application of existing human rights to sexuality and sexual health constitutes sexual rights. Sexual rights protect all people's rights to fulfil and express their sexuality and enjoy sexual health, with due regard to the rights of others, within a framework of protection against discrimination."¹⁴

This evolution of rights regarding sexuality demonstrates not only that sexuality is a central aspect of the human experience, but that human rights apply in multiple ways to sexuality. Now, in 2017, we have arrived at the point where it is clear that consensual homosexual acts are protected by human rights. In its 2015 the Office of the UN High Commissioner report to the General Assembly state unequivocally:

“States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination. Arrests and the detention of individuals on charges relating to sexual orientation and gender identity ... are discriminatory and arbitrary. Since its landmark decision in *Toonen v. Australia* (communication No. 488/1992) in 1994, the Human Rights Committee and other mechanisms have repeatedly urged States to reform laws criminalizing consensual same-sex conduct, and welcomed their repeal.¹⁵

The High Commissioner's report formulates the right from the perspective of state action. The right is stated as a prohibition of action which violates it. The same right, stated from the perspective of the rights holder, is the freedom¹⁶ to engage in same-sex sexual activity.¹⁷ The

¹⁴ WHO. Defining sexual health: Report of a technical consultation on sexual health, Geneva: 2002, *updated* WHO. Developing Sexual Health Programmes: a framework for action. Geneva: WHO, 2010.

¹⁵ UNHCR, Distinction and violence against individuals based on their sexual orientation and gender identity, May 4, 2015, A/HRC/29/23, p12.

¹⁶ This is a freedom right as opposed to an entitlement right.

¹⁷ This frame of reference is consistent with the structural logic of human rights. Consider, for example, the issue of torture. Though the prohibition of torture is a restriction on the actions of the state (the state should not torture), the right is articulated from the perspective of the rights holder (the right to be free from torture). The same holds true where the right concerns an activity of the rights holder herself. Where the state may be prohibited from interference with a rights holder's activities (e.g. the state shall not interfere with expression or association), these rights are expressed from the perspective of the rights holder (e.g. everyone has the freedom of expression and association).

sphere of privacy, referenced both by the High Commissioner's report and the original Toonen case, surrounds, fundamentally, the sexual activity, as well as those engaging in it.

C. The Principles Should Recognize the Freedom to Engage in Private, Adult, Consensual Sexual Activity.

As stated in the Preamble, the Principles are an analysis of how "existing human rights entitlements... take account of the specific situations and experiences of people of diverse sexual orientations and gender identities." The principles are not merely a cut and paste of existing rights relevant to people of diverse sexual orientation and gender identity. They are an analysis and a re-articulation, through a series of principles, of how those rights apply to the unique circumstances and experiences of people of diverse sexual orientation and gender identity.

For example, In Principle 3, The Right to Recognition Before the Law, the authors borrow language from Article 6 of the Universal Declaration of Human Rights regarding recognition before the law. In addition, the authors extended the analysis to enumerate the right to a person's self-defined gender identity, free of impediments such as requirements for medical treatment, or restrictions based on marital and parenthood status. As such, the authors considered how human rights would apply to these situations and experiences of gender minorities and concluded with a statement of principles that addressed specific issues normally not addressed by general statements of rights.

Sexuality and sexual activity one of the many "situations and experiences of people of diverse sexual orientations and gender identity." In fact sexuality and sexual activity are themselves a basis for this diversity. Accordingly, it is appropriate for the authors to consider how human rights would apply to sexuality and sexual activity and craft a principle of human rights specific to that situation and experience.

International human rights law has recognized that private, adult, consensual sexual activity is deserving of human rights protection. It follows that the principles should articulate such a right. It is recommended that the authors adopt the following principle:

Everyone has the freedom to engage in adult, private, consensual sexual activity free from government intervention. Government prohibition of private, adult, consensual sexual activity are in violation of human rights standards. Additionally, governments may not discriminate against individuals on the basis of whether such activity is between people of the same or different sexes.