International human rights law and the lesbian and gay rights movement have grown up together in the post-war period.¹ Both are still developing. Both are evolving from their western origins to a world-wide presence.²


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¹ None of the lesbian and gay human rights organizations now in existence pre-date World War II. The same is true of the Non Governmental Organizations, like Amnesty International and Human Rights Watch, which have taken up lesbian and gay issues in the last fifteen years. The regional and international human rights treaties and intergovernmental bodies concerned with human rights arise in the same period (with the exception of the International Labour Organization).

and the *International Covenant on Economic, Social and Cultural Rights*. The six "core" United Nations human rights treaties include, as well, the conventions on racial discrimination, women, torture and children. Does this international system recognize the rights of lesbians, gay men, bisexuals and transgendered people? None of the international human rights instruments make any reference to "sexual orientation" or "gender identity." There is a general equality provision in the *International Covenant on Civil and Political Rights*, but a broad focus on "equality" has not been characteristic of international law. Rather there are treaties and programs against discrimination on the basis of race and sex, and concerns with specific groups such as refugees, indigenous peoples and migrant workers. By the end of the 20th century, concern with discrimination on the basis of sexual orientation had gained sufficient recognition in national legal systems, under the *European Convention on Human Rights*, in a decision of the United Nations Human Rights Committee, and in the work of important Non-Governmental Organizations, that it was realistic to say that the issue had come onto an international human rights agenda.

The European Convention on Human Rights

The breakthrough came in the 1981 decision of the European Court of Human Rights in *Dudgeon v United Kingdom*. The United Kingdom had decriminalised gay male sexual activity in England and Wales in 1967. Criminal prohibitions were still in place in Northern Ireland. Jeffrey Dudgeon, an activist with the Northern Ireland Gay Rights Association, challenged the law. The European Convention does not have a general equality provision, so it was necessary to find a specific right in the convention that had been denied. The Court ruled that the law violated Dudgeon’s right to respect for his private life.

*Dudgeon* was a very good test case. The United Kingdom could not claim that the law was necessary for the "protection of health or morals," justifications allowed in the *Convention*. It had repealed the same law in England and Wales. The law was not being enforced, something that is true in almost every country that continues to have a criminal prohibition. The law was out of step with the laws in other European states, a fact that strongly influenced the Court. Public opinion in Northern Ireland was evenly divided. The United Kingdom wanted to end the criminal law prohibitions. Reform was stalled by the strong opposition of conservative Protestants. The Court decision made the reform of the law politically possible. The United Kingdom was happy to loose.

After *Dudgeon* the Court invalidated similar laws in *Norris v Ireland* in 1988 and in *Modinos v Cyprus* in 1993. In *Sutherland v United Kingdom* in 1997 the European Commission of Human Rights applied the same reasoning to strike down an unequal age

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of consent for homosexual and heterosexual acts, reversing earlier decisions. The Commission noted changed medical views on homosexuality, and observed that the law "might inhibit efforts to improve the sexual health of young homosexual and bisexual men." Criminal laws against sadomasochistic acts have been upheld. Criminal laws against group sex have been struck down. A ban on lesbian and gay organizations that have members who are under 19 was upheld in a ruling of inadmissibility.

The United Kingdom’s ban on homosexuals in the military was successfully challenged in the 1999 decisions in Smith and Lustig-Preen. The government had conceded that the ban interfered with the individuals right to respect for their private lives, but claimed justification. The Court held that the hallmarks of a democratic society included "pluralism, tolerance and broadmindedness…" The military concerns with "operational effectiveness" were based "solely upon the negative attitudes of heterosexual personnel…"

…these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above, any more than similar negative attitudes towards those of a different race, origin or colour.

5 Commission Report, July 1, 1997. The United Kingdom did not appeal the decision. S. L. v Austria raises the same issue. Under Austrian law 14 is the age of consent for heterosexuals, while 18 is the age of consent for homosexuals. On 30 January 2001 the Third Section of the European Court on Human Rights communicated the application of S. L. (Appl. 45330/99) to the Austrian government, asking for their response, along with two other similar applications by Austrians, G. L. and A. V..

6 Paragraph 59. Health agencies concerned with HIV/AIDS have quite consistently condemned sodomy laws as creating problems for education and prevention programs.

7 In Laskey, Jaggard and Brown v United Kingdom, (1997) 24 E.H.R.R. 39-61, the Court upheld the application of criminal assault laws to consensual sadomasochistic activity. The Court said the law did interfere with the privacy of the individuals, but the interference was justified on the grounds of protecting health and morals.


11 Lustig-Preen, Paragraph 80.

12 Paragraph 89.

13 Paragraph 90.
The contrast of the policy in relation to homosexuals to that in relation to women and racial minorities was a key part of the complainants case.

As in Dudgeon, the Court looked to changed practices in other countries:

[The Court] notes the evidence before the domestic courts to the effect that the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue…\(^\text{14}\)

The Court concluded that the discrimination was not "necessary in a democratic society", a requirement for any justification under Article 8. As a result, the right to respect for personal privacy had become the basis for a prohibition against discrimination in employment.\(^\text{15}\)

For many years the Commission gave no recognition to lesbian and gay families.\(^\text{16}\) In December, 1999, the Court found a breach of Article 8 in a case where a man lost custody of his child on the basis of his homosexuality, and was granted access only on condition that he hide his orientation.\(^\text{17}\) While the case did not focus on his same-sex relationship, the decision is the first family rights case to be won.

On transsexual rights, the European Court has ruled that governments have to make some accommodation to change of name and change of sexual information on

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\(^{14}\) Paragraph 97.

\(^{15}\) In paragraph 84, the Court mentions that the complainants had kept their homosexuality private. It would be an unreasonable reading of the decision to hold that their silence was necessary for their case to succeed.


\(^{17}\) \textit{Salgueiro Da Silva Mouta v Portugal}, Case number 33290/96, decided December 21, 1999 (judgment in French only).
official documentation.18 But the most recent decision upheld the United Kingdom’s refusal to change birth certificates.19

Because of the limited recognition of lesbian and gay equality rights under the European Convention on Human Rights, the International Lesbian and Gay Association decided in 1990 to press for an additional protocol to the Convention which would expressly prohibit discrimination on the basis of sexual orientation. The Committee of Ministers of the Council of Europe approved the text of a Twelfth Protocol to the Convention in July, 1999 which would add a general ban on discrimination, comparable to that in the International Covenant on Civil and Political Rights. The Protocol was opened for signature on November 4, 2000. While "sexual orientation" is not mentioned in the text, it is referred to in the explanatory report.20

The Council of Europe

The Council of Europe is a broad political organisation, separate from the European Union, responsible for the European Convention on Human Rights. States in central and eastern Europe have seen membership in the Council as important

...to gain ‘respectability’ within Europe and, perhaps most importantly, to qualify for certain membership ‘benefits’ as well as for possible admission to the European Union. Although the process of becoming a party to the Convention [on Human Rights] is not required to be completed prior to obtaining membership in the Council, it is generally assumed that the domestic legislative and other measures required to enable the state to ratify or accede will be completed within a period of two years.21

States seeking membership in the Council of Europe must agree to ratify the European Convention on Human Rights.22 The Council will consider whether the domestic laws of applicant states are in compliance with the Convention. Since the Dudgeon case, criminal prohibitions of homosexual activity are clearly in conflict with the Convention and applicant States are expected to repeal such laws. During the 1990s the Council of Europe’s requirements were responsible for the almost total repeal of offending criminal laws in eastern Europe. There were long disputes, resolutions and visitations aimed at Romania, which had not repealed its laws before admission was granted. Albania and Moldova repealed their total bans on homosexual acts in 1995 before being admitted. On


its accession to membership in November 1995 Macedonia promised to introduce a complete new penal code within one year and repeal the ban on homosexual acts between consenting adults. Current practice is shown by decisions in 2000 to make the membership of Armenia and Azerbaijan conditional on the repeal of criminal laws against same-sex relations.23

In 1981, the same year as the Dudgeon decision, Mr. Joop Voogd, Chair of the Committee on Social and Health Questions, submitted a report to the Parliamentary Assembly of the Council of Europe entitled "Discrimination Against Homosexuals".24 The report led to a set of resolutions (a) calling on the World Health Organisation to remove homosexuality from its list of diseases (which has occurred), (b) urging member states to decriminalise homosexual acts and apply equal ages of consent for homosexual and heterosexual acts, and (c) seeking equal treatment for lesbians and gay men in employment.25 In a 1983 resolution on issues of HIV/AIDS the Parliamentary Assembly voted to

...reaffirm its unshakeable attachment to the principle that each individual is entitled to have his privacy respected and to self-determination in sexual matters.26

An important report, Situation of lesbians and gays in Council of Europe member states, was prepared by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, and lay behind resolutions of the Parliamentary Assembly in June and September, 2000.27 Resolutions in June supported refugee status for persons facing persecution on the basis of sexual orientation and immigration rights for same-sex partners of nationals.28 On 26 September, 2000, the Parliamentary Assembly approved a sweeping series of recommendations in favour of lesbian and gay rights, going much further than its 1981 resolution. It called on the governments of Europe (a) to prohibit discrimination on the basis of sexual orientation, (b) to end any remaining criminal prohibitions of consenting adult homosexual acts, (c) to release anyone held under laws prohibiting consenting adult acts, (d) to apply equal ages of consent to homosexual and heterosexual acts, (e) to institute educational programs to combat homophobic attitudes, particularly in schools, the medical profession, the armed forces and the police, (f) to co-ordinate efforts to have a simultaneous public information campaign in as many member states as possible, (f) to ensure equal treatment for

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24 Parliamentary Assembly of the Council of Europe, Document No. 4755, October 1, 1981.


26 Thirty-Fifth Session, Resolution 812.


homosexuals in employment, and (g) to adopt legislation which provides for registered partnerships.29

The International Lesbian and Gay Association (ILGA) has gained "consultative status" with the Council of Europe.

The European Union

The most significant event in the work of the European Parliament is the 1993 Roth report. The Committee on Civil Liberties and Internal Affairs of the European Parliament, chaired by Claudia Roth, a member of the Parliament, reported on equality issues for lesbians and gay men.30 In response to the report, the European Parliament, passed a resolution in February, 1994,31 which

5. Calls on the Member States to abolish all legal provisions which criminalize and discriminate against sexual activities between persons of the same sex;

6. Calls for the same age of consent to apply to homosexual and heterosexual activities alike.

7. Calls for an end to the unequal treatment of persons with a homosexual orientation under the legal and administrative provisions of the social security system and where social benefits, adoption law, laws on inheritance and housing and criminal law and all related legal provisions are concerned;

8. Calls on the United Kingdom to abolish its discriminatory provisions to stem the supposed propagation of homosexuality and thus to restore freedom of opinion, the press, information, science and art for homosexual citizens and in relation to the subject of homosexuality and calls upon all Member States to respect such rights to freedom of opinion in the future;

9. Calls on the Member States, together with the national lesbian and homosexual organisations, to take measures and initiate campaigns against the increasing acts of violence perpetrated against homosexuals and to ensure prosecution of the perpetrators of these acts of violence;

29 Text available at http://stars.coe.int/asp/DocByDate.asp

30 Rapporteur: Mrs. Claudia Roth, Report of the Committee on Civil Liberties and Internal Affairs on Equal Rights for Homosexuals and Lesbians in the European Community, 26 January 1994 (Doc_EN\RR\244\244267).

10. Calls upon the Member States, together with the national lesbian and homosexual organisations, to take measures and initiate campaigns to combat all forms of social discrimination against homosexuals;

11. Recommends that Member States take steps to ensure that homosexual women’s and men’s social and cultural organisations have access to national funds on the same basis as other social and cultural organisations, that applications are judged according to the same criteria as applications from other organisations and that they are not disadvantaged by the fact that they are organisations for homosexual women or men;

The resolution seeks a Recommendation from the Commission of the European Community on equal rights for lesbians and gay men. The resolution says that the Recommendation should seek to end

- the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage, allowing the registration of partnerships,

- any restriction on the right of lesbians and homosexuals to be parents or to adopt or foster children.

The resolution is remarkable in supporting marriage or registered partnerships (thereby endorsing laws in place at the time in only two European states) and in calling for equal access to adoption rights. It is also striking in its call for state recognition and cooperation with lesbian and gay organisations, a common pattern in northern Europe, but new or unheard of in many parts of the world.

The Resolution of February 1994 was reconfirmed by the European Parliament on 17 September 1996, in the debate on the annual report on human rights in the European Union. The Parliament again resolved that all discrimination against homosexuals be abolished. In March, 2000, the Parliament again called for the granting of rights to non-married couples, including those of the same-sex, equal to those granted to married couples. At the same time it condemned unequal age of consent laws in Austria.

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32. European patterns on adoption laws restrict adoption to married couples. The registered partnership laws in Denmark, Norway, Sweden and Iceland leave that restriction in place, specifying that a registered partnership is not to be considered marriage for purposes of adoption laws. The registered partnership law in Iceland allows for co-custody by a couple when the child is the natural child of one partner, not adoption as such.

33. This kind of recognition has spread rapidly as government health departments recognize that they cannot mount effective anti HIV/AIDS programs unless they have knowledge of and support from gay men. This seeking out of assistance from gay men has occurred even in China, which in the past denied that there were homosexuals in the country.


In June, 1997, in the European Union’s Treaty of Amsterdam, the European Council was empowered to act against discrimination on the basis of sexual orientation. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This led to a directive prohibiting sexual orientation discrimination in employment, published in the Official Journal on 2 December, 2000. Member states will have until 2 December, 2003, to implement the directive in national laws.

A couple of decisions of the European Court of Justice, the court responsible for European Union issues, moved toward the recognition of unmarried partners and transsexuals. But in the case of *Grant v South-West Trains* in February, 1998, the Court refused to find that discrimination on the basis of sexual orientation came within the prohibition on discrimination on the basis of sex. In another case the European Union Court of First Instance in January, 1999, refused to include a same-sex partner within the category of “spouse” for employment benefits, though the two men had gone through a registered partnership under Swedish law. The decisions have been appealed.

On September 7th, 1998, the European Parliament passed a resolution criticizing Austria, Bulgaria, Cyprus, Estonia, Hungary, Lithuania and Romania for unfair treatment of lesbians and gay men. The resolution was prompted by frustration over the refusal of Austria, Cyprus and Romania to reform their laws. The resolution also stated that the Parliament would refuse to consent to any country joining the European Union that violated the human rights of lesbians or gay men through laws or policies.

A Charter of Fundamental Rights was proclaimed by the Parliament, Council and Commission of the European Union on 7 December, 2000, in Nice, France. Article 21

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36 The court held that an unmarried heterosexual partner of a citizen of the United Kingdom, living and working in the Netherlands, had to be treated as a spouse for purposes of residency rights. To deny such rights would mean discrimination in the law of the Netherlands between nationals of the Netherlands and nationals of another European Union State: Netherlands v Reed, [1986] E.C.R. 1283 (17 April, 1986). This reasoning would apply to same-sex partners in certain member States. In 1996 the Court ruled that the prohibition on discrimination on the basis of sex barred discrimination against a transexual: P v S [1996] E.C.R. I-2143. This reasoning could be extended to cover discrimination on the basis of sexual orientation. But we now can expect some Council directive that will clearly deal with sexual orientation discrimination.


prohibits discrimination on a number of grounds, including sexual orientation. The Charter will apply to European Union institutions and to member states when acting within the scope of European Union law.

On 23 January, 2001, a resolution of the European Parliament outlined priorities for member States in the annual session of the United Nations Commission on Human Rights. Among other things, the parliament called for states to support measures to protect homosexuals against the degrading and inhumane treatment to which they still fall victim in some parts of the world.

A commentator recently summed up the actions of the European institutions:

At the beginning of the Cold War, all countries in the Eastern block except Poland had sodomy laws... Positive change first came in 1961, when both Hungary and Czechoslovakia repealed their sodomy laws... The Council of Europe set a standard of treatment of homosexuals in 1981 by passing Recommendation 924... In 1994 the European Parliament passed a resolution calling for the end of discrimination based on sexual orientation in numerous spheres including employment and family rights, and for measures to combat hate crimes. These actions by the Council of Europe and the EU, in conjunction with national laws in member states that reflect the spirit and often the letter of these statements, have in effect established a European treatment norm of gay and lesbian citizens.

Potential membership in the [European] institutions has served to induce post-Communist governments to implement legal reform. Withholding membership and sending special rapporteurs have so far been the primary ways in which European institutions have pressed Central and Eastern European countries to reform not only their statutes related to homosexuality but also statutes on a range of human rights and civil society issues.\(^{40}\)

### Organisation for Security and Co-operation in Europe

One of the least understood inter-governmental organisations active on human rights issues, is the Organisation for Security and Cooperation in Europe. It arose out of the “Helsinki” Accord of 1975, in which representatives of the two cold-war military alliances, the Warsaw Pact and the North Atlantic Treaty Organization, agreed to a set of security and human rights provisions. In recent years the OSCE has created a number of specialized institutions as well as holding fora on various issues. Representatives of the International Lesbian and Gay Association, which is strongest in Europe, have been active at meetings of the OSCE, beginning in 1980 when the OSCE was still a “Conference” not an “Organisation”.\(^{41}\) Lesbian and gay NGO participation, or

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\(^{40}\) Michael Jose Torra, Gay Rights After the Iron Curtain, The Fletcher Forum of World Affairs, Fletcher School of Law and Diplomacy, Summer, 1998.

\(^{41}\) The information in this section on the meetings of CSCE/OSCE, unless otherwise referenced, is from the files of Mr. Kurt Krickler, of the organisation HOSI Wien, Vienna, Austria, who regularly attended the CSCE/OSCE meetings on behalf of ILGA. On the opening day of the Madird Follow-Up Meeting in 1980, Spanish and French lesbian and gay groups held a press conference and a demonstration.

ILGA has been participating as an NGO in the Human Dimension of the OSCE since the Moscow meeting in 1991. Since 1993, we have been presenting oral statements to the Human Dimension, reporting positive developments in participating States with regards to the respect of the human rights of lesbians and gay men but also reminding non-complying States to honour their commitments entered not only under the OSCE process but also under the International Covenant on Civil and Political Rights and the European Human Rights Convention.

The Final Report of the 1993 CSCE Implementation Meeting on Human Dimension Issues held in Warsaw included the following sentences:

Participants point out to groups which were not "national minorities" but which none the less suffered discrimination, including women, homosexuals, migrant workers, and conscientious objectors...

It was pointed out that CSCE commitments in the area of non-discrimination cover homosexuals as well. Suggestions were made that discriminatory State policies against homosexuals, and criminalizing legislation, should be eliminated.

The Parliamentary Assembly of the OSCE met in Ottawa, Canada, in July, 1995. The Assembly passed a declaration which called on member States

...to ensure that all persons belonging to different segments of their population be accorded equal respect and consideration in their constitutions, legislation and administration and that there be no subordination, explicit or implied, on the basis of ethnicity, race, colour, language, religion, sex, sexual orientation, national or social origin or belonging to a minority...

The reference to sexual orientation was included at the initiative of Danish parliamentarians. It passed by a large majority, over protests from Bulgarian members.


42 ILGA Euroletter 74, October, 1999.


Funding decisions by European institutions.

The European Commission funded summer courses in lesbian and gay studies in Utrecht in 1989, in Essex in 1991, and again in Utrecht in 1995. The courses were organised by a number of European universities, including the Department of Gay and Lesbian Studies at the University of Utrecht in the Netherlands. European Union funding resulted in the production and publication in 1993 of two significant studies, "Lesbian Visibility" and "Homosexuality: A European Community Issue". The Democracy Programme of the European Union is designed to support economic and political reform in former eastern-bloc States. In 1994 the Programme funded an anti-discrimination project of ILGA involving work with seven lesbian and gay organisations in Estonia, Latvia, Lithuania and the Russian Federation. A number of the annual conferences of the International Lesbian and Gay Youth Organisation have received funding from the European Youth Foundation (Council of Europe) and the Commission of the European Union.

The Netherlands has included financial support for lesbian and gay organisations in its foreign policy. It has provided funding to lesbian and gay groups in Costa Rica, El Salvador, Malaysia, Nicaragua and Zimbabwe, and funding for a regional conference in the Caribbean. Other states have made grants supporting lesbian and gay equality in developing states as part of their international promotion of human rights, including Australia, Canada, Denmark and Norway.

The United Nations


A 1983 study on prostitution, seen as a slavery-like practice, done for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, recommended an additional study on male prostitution. The recommendation made confused references to transvestism, transsexuality and pedophilia.

45 See LBL, ILGA, Nissen and Paulsen, Lesbian Visibility; With Special Reference to Lesbians in the Labour Market, November, 1993, 114 pp., and Waaldijk, Clapham, editors, Homosexuality: A European Community Issue, Nijhoff, 1993, 426 pp. Funding for the Lesbian Visibility study came from the Commission of the European Communities' Equal Opportunities Unit and from LBL, the Danish National Association for Gays and Lesbians. The work was done by individuals connected with LBL, which served at the time as the Women's Secretariat for the International Lesbian and Gay Association. The second study was commissioned and paid for by the Commission of the European Communities, the funding channelled through the European Human Rights Foundation. Again there were personal connections to the International Lesbian and Gay Association. Slightly earlier funding from the European Human Rights Foundation and from several political groups in the European Parliament allowed the research and publication of the "Iceberg Project", which assessed laws in Europe.

The resulting study, on the legal and social problems of sexual minorities including male prostitution, was completed in 1987. ILGA forwarded information to Mr. Fernand-Laurent, the special rapporteur, through Minority Rights Group, an accredited non-governmental organisation. The report contained an odd mix of stereotypes and misinformation. The report attracted almost no attention. Mr. Rhenan-Segura, a member of the Sub-Commission, called the study superficial and the conclusions dubious. He found the study to be of poor quality and said it had been received under an inappropriate agenda item, the consideration of the report of the Working Group on Slavery and Slavery-Like Practices. Such criticisms of reports are extremely rare in the diplomatic milieu of the United Nations. There were no follow up resolutions.47

On 13 August 1993 Mr. Louis Joinet, the French member of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, proposed that the mandate of a study on new forms of racism and xenophobia be expanded to include consideration of discrimination on the basis of sexual orientation. The proposal was not accepted. On August 24, 1995, he proposed an amendment to a resolution condemning discrimination on the basis of HIV/AIDS. The resolution mentioned nine examples of groups “suffering from disadvantaged economic, social or legal status” who were, as a result of that marginalization, more vulnerable to the risk of HIV infection. The list did not include male homosexuals, an obvious category in the west for any such list. Mr. Joinet moved the addition of that category. The amendment was strongly opposed by two members, Ms. Warzazi and Ms. Gwanmesia. After a somewhat heated exchange and an accusation of homophobia, the amendment was passed with ten affirmative votes, five negative votes and six abstentions. This appears to be the first resolution of the Commission or Sub-Commission to refer expressly to homosexuals.48

In August, 1996, representatives of Australia discussed the idea of a study on sexual orientation discrimination with several members of the Sub-Commission. There was some support, and an understanding that there would also be opposition. The matter was not raised in public sessions of the Sub-Commission.49

(b) Criteria for assessing human rights performance.

The 1991 Human Development Report, issued by the United Nations Development Programme, rated countries according to a "Human Freedom Index", reflecting the idea that "freedom" strengthens economic growth. The group of 77 objected to the inclusion of the freedom for homosexual activity as one of the forty criteria used in constructing the index. Because of the controversy, the UNDP developed

47 The report was received by the Sub-Commission as E/CN.4/Sub.2/1988/31 and discussed on 30 August 1988. In 1993 the author made inquiries in Geneva about the report. Almost no one remembered it. No one could identify the background or qualifications of Mr. Fernand-Laurent.

48 Information from Mr. Yves de Matteis, Dialogai, Geneva.

a new "Political Freedom Index" to replace the broader "Human Freedom Index" and stopped publishing the ratings of individual States.\textsuperscript{50}

A major study on economic, social and cultural rights by Special Rapporteur Danilo Turk, received by the Sub-Commission in 1992, addressed the issue of indicators to be used in assessing State compliance. One approach, the study said, was to begin with assessing patterns of discrimination. It went on:

To apply discrimination-oriented criteria, however, it will be necessary to devote increased attention to areas of discriminatory behaviour generally ignored at the international level, in particular the grounds of social status, income level, medical status, age, property and sexual orientation.\textsuperscript{51}

(c) Anti-discrimination concerns at the world conferences on human rights (Vienna), women (Beijing) and racism (Durban).

Three lesbian and gay organisations were accredited to the United Nations World Conference on Human Rights, held in Vienna in 1993. This was the first time any UN event had knowingly accredited lesbians and gay men. ILGA and member organisations participated in certain of the regional conferences, leading up to Vienna. Six statements were made on lesbian and gay issues in Vienna, in the plenary or in the main committee. Five governments made positive references to lesbian and gay issues at the Conference: Australia, Austria, Canada, Germany and the Netherlands. Singapore made a statement at the conference, pointedly called "The Real World of Human Rights", which described most human rights as "still essentially contested concepts." The statement went on:

Singaporeans, and people in many other parts of the world do not agree, for instance, that pornography is an acceptable manifestation of free expression or that homosexual relationships is just a matter of lifestyle choice. Most of us will also maintain that the right to marry is confined to those of the opposite sex.\textsuperscript{52}

The draft final statement for the Vienna conference on human rights had an equality paragraph condemning discrimination on listed grounds. In the drafting committee Canada proposed adding "sexual orientation" to the list. In response the paragraph was altered to a general, open-ended prohibition of discrimination, without a list.\textsuperscript{53}

Again there were proposals that “sexual orientation” should be referred to in the final statement of the Fourth World Conference on Women, held in Beijing in September, 1995. In a preparatory conference in Vienna in October, 1994, Canada proposed a paragraph addressing discrimination against women on multiple grounds, such as sex and


\textsuperscript{51} E/CN.4/Sub.2/1992/16, paragraph 185.

\textsuperscript{52} Copy in possession of author.

\textsuperscript{53} Information from members of the Canadian delegation.
race, sex and disability, sex and sexual orientation. This “diversity paragraph”, as it came to be known, was included in the draft text without opposition or discussion. At the New York preparatory meeting in March-April, 1995, Canada again proposed the paragraph. The idea of such a paragraph was debated, but not the reference to “sexual orientation”. The paragraph along with much of the draft was “bracketed”, indicating that there was no consensus on the wording. At the New York meeting several delegations, including South Africa, Canada, Israel and the European Union proposed wording that referred to “sexual orientation”.54

Lesbians were highly visible at the Conference in Beijing and at the NGO Forum in Huairou. There was a lesbian venue at the Forum, the “lesbian tent”, and a large lesbian march on September 5th. Eleven explicitly lesbian or lesbian and gay organisations were accredited to the conferences.55

At the beginning of the Beijing Conference there were four references to “sexual orientation” in the draft “Platform of Action”. Two references were in descriptive “diversity” paragraphs. The third reference called on governments to take action to eliminate discrimination in employment based on sexual orientation. The fourth called on States to provide legal safeguards to prevent persecution on the basis of sexual orientation. The four references were considered together in a drafting committee meeting that stretched into the early morning of Friday, September 15th, ending after 4 a.m. After an hour of debate on sexual orientation, the chair, Ms. Patricia Licuanan, commented that this had been the first substantive discussion of the subject in any United Nations forum. She said it required much more discussion, but given the division, the references would be omitted.56 Thirty-three States indicated their support for the references.57 Twenty States indicated opposition.58


55 Information from Ms. Shelagh Day, NGO representative for EGALE (Equality for Gays and Lesbians Everywhere, Ottawa) and the National Association of Women and the Law (of Canada). See also Rod Mickleburgh, Lesbians and Fish Stories Conference Highlights, Globe and Mail, September 15, 1995, 9; Jonathan Manthorpe, Lesbianism as “right” an Elusive Goal, Vancouver Sun, September 14, 1995, 11; Canadian Press, UN Officers Detain 2 Canadians, Vancouver Sun, September 9, 1995, 1; Jocelyne Dubois, Lesbians Ready for Beijing, Xtra Newspaper, August 18, 1995, 18.


57 Australia, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Cook Islands, Cuba, European Union (15 States), Israel, Jamaica, Latvia, New Zealand, Norway, Slovenia, South Africa, Switzerland and the United States. Ms. Rachel Rosenbloom of the International Gay and Lesbian Human Rights Commission noted that at the previous world conference on women, ten years earlier, only the Netherlands had spoken in support of the rights of lesbians; Lesbians Hail Beijing ‘Victory’, Xtra Newspaper, September 29, 1995, 21.
Five years after Beijing, a special UN General Assembly session in June, 2000, revisited women’s equality issues. Again the debate was intense, and again there was no consensus on adding "sexual orientation" even in a sentence that was drafted as a factual comment:

The turning point came in the wee hours of Thursday morning, the first of two all-night negotiating sessions, when Western nations continued insisting that expanded homosexual rights be listed among the document's accomplishment. The section noted measures taken "by a growing number of countries…to prohibit discrimination on the basis of sexual orientation."

"We cannot accept that language," said a delegate from Senegal. A Syrian delegate agreed: "There's no way we can accept a document tonight with the phrase 'sexual orientation.'" Delegates from Nicaragua and Kuwait said they could not accept "sexual orientation," an undefined term, as a human right. 

Then the blowup came. Western delegations are "holding the women of the world hostage to one term, 'sexual orientation,'" when their real needs are clean water and help in overcoming illiteracy, said the Pakistan delegate.59

The World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, will be held in Durban, South Africa, 31 August to 6 September, 2001. Preparatory meetings have developed a Draft Declaration and Programme of Action which includes one reference to "sexual orientation."

We recognize that certain persons and groups may experience other forms of discrimination on the basis of their gender, age, disability, genetic condition, language, religion, sexual orientation, economic status or social origin, and that in addition they may experience acts of racism, racial discrimination, xenophobia and related intolerance. We note that this situation can result in such persons being victims of multiple forms of discrimination, and stress that special attention should be given to the elaboration of strategies, policies and programmes, which may include affirmative action, for such persons.

Perhaps there will be another eleventh hour fight over whether to retain this language.

(d) The Human Rights Committee

The Human Rights Committee is established under the provisions of the International Covenant on Civil and Political Rights. States which have signed the Covenant are required to make periodic reports to the Committee on their compliance with the provisions of the Covenant. If the state has signed the Optional Protocol individuals can send a “communication” directly to the Committee, alleging that the state

58 Algeria, Bangladesh, Belize, Benin, Cote d'Ivoire, Egypt, Ghana, Guatemala, Iran, Jordan, Kuwait, Libya, Nigeria, Senegal, Sudan, Syria, Uganda, United Arab Emirates, Venezuela and Yemen.

is in violation of the *Covenant*. The Committee will consider the case and give its "views" on whether a breach has occurred.

The first decision of the Human Rights Committee on lesbians and gay rights occurred in 1982 in *Hertzberg v. Finland*.\(^5^0\) Finnish penal law prohibited the public encouragement of "indecent behaviour" between persons of the same sex. This provision led to regulations and policies against radio and television programs dealing with homosexuality. The communication argued freedom of expression in the context of particular radio and television programs. Two had been censored and a third had been prosecuted, unsuccessfully, under Finnish penal law. Article 19 (3) of the *Covenant on Civil and Political Rights* provides that freedom of expression is

...subject to certain restrictions, but these shall only be such as are provided by law and are necessary:...(b) For the protection of...public health or morals.

Finland argued that the restrictions in Finnish law reflected prevailing moral conceptions. The Committee considered asking for the transcripts of the two censored programs, noting that only by such an examination could it determine whether the programs were mainly or exclusively made up of factual information on issues relating to homosexuality. Apparently willing to assume that the programs could have been wholly factual, the Committee ruled in favour of Finland.

It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.

The Committee finds that it cannot question the decisions of the responsible organs of the Finnish Broadcasting Company that radio and TV are not appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. According to article 19 (3), the exercise of the rights provided for in article 19 (2) carries with it special duties and responsibilities for those organs. As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded.\(^6^1\)

Distinguished Norwegian academic Torkel Opsahl was joined by two other members of the Committee, in dissenting from this reasoning:

Under Article 19(2) and subject to article 19(3), everyone must in principle have the right to impart information and ideas - positive or negative - about homosexuality and discuss any problem relating to it freely, through any media of his choice and on his own responsibility.

\(^{60}\) A/37/40, p. 161.

\(^{61}\) Paragraphs 10.3 and 10.4.
Moreover, in my view the conception and contents of the 'public morals' referred to in article 19(3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority. Therefore even if such laws as paragraph 9(2) of chapter 20 of the Finnish Penal Code may reflect prevailing moral conceptions, this is not in itself sufficient to justify it under article 19(3). It must also be shown that the application of the restriction is 'necessary'.

In 1994 the Human Rights Committee decided Toonen v Australia, a case with strong similarities to Dudgeon v. United Kingdom. Nicholas Toonen, like Jeffrey Dudgeon, was a gay rights activist. Tasmania, like Northern Ireland, retained old criminal prohibitions on homosexual activity. All other Australian jurisdictions had decriminalised. The government of Australia, like that of the United Kingdom, was critical of such criminal laws. As in Northern Ireland, the law in Tasmania was not enforced in practice. As in Northern Ireland opinion in Tasmania was divided on law reform. As in Northern Ireland, opposition was led by intemperate reactionaries. Elected representatives were quoted as saying that gay men were "no better than Saddam Hussein" and that people were "15 times more likely to be murdered by a homosexual than a heterosexual...". Toonen argued privacy rights and equality rights. Article 17 of the International Covenant on Civil and Political Rights bars "arbitrary or unlawful interference" with privacy. Article 26 prohibits discrimination

...on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

There were two equality arguments. The discrimination was on the basis of "sexual orientation" which, it was argued, would come within the phrase "other status". As well the law discriminated on the basis of "sex" by applying only to male homosexual activity. By ignoring lesbians, the law followed a criminal law tradition that denied women's sexuality.

Tasmania, which was allowed by Australia to make submissions to the Committee, argued that the law was partly motivated by a concern to check the spread of HIV/AIDS. But Australia, the World Health Organisation and work done for the United

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62 The views Opsahl, Lallah and Tarnopolsky are set out in an appendix. They agree with the majority in outcome, ruling that the standards in the Covenant did not apply to privately controlled media.


64 Paragraph 2.5.

65 Tasmania conceded that "sexual orientation" would be included in "other status", while the Australian government sought guidance from the Committee on this issue: paragraph 6.9.
Nations Commission on Human Rights all agreed that criminal prohibitions aimed at gay men made it more difficult to organise effective programs to prevent HIV infection.\textsuperscript{66} Tasmania also argued a moral basis for the prohibition. Australia conceded that "domestic social mores may be relevant to the reasonableness of an interference with privacy", while asserting a general Australian view that discrimination on the basis of sexual orientation was wrong.\textsuperscript{67}

The Committee followed the rulings in \textit{Dudgeon, Norris} and \textit{Modinos} in finding that the Tasmanian law violated Toonen's right to privacy. They easily rejected Tasmania's specious arguments on HIV/AIDS and turned to the issue of a moral justification for the law in a passage which clearly departs from the spirit of the majority ruling in \textit{Hertzberg}:

\begin{quote}
The Committee cannot accept that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether Sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.\textsuperscript{68}
\end{quote}

The Committee dealt briefly with the issue of equality rights:

\begin{quote}
The State party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.\textsuperscript{69}
\end{quote}

The Committee was not saying that the exclusive focus on male activity constituted discrimination on the basis of "sex". Nor did it place "sexual orientation" within the phrase "other status."\textsuperscript{70} The Committee held that "sex" included "sexual orientation".

\textsuperscript{66} Paragraph 8.5.

\textsuperscript{67} Paragraphs 6.6 and 6.7.

\textsuperscript{68} Paragraph 8.6.

\textsuperscript{69} Paragraph 8.7. In paragraph 11 the Committee stated that it was not ruling whether there had been a violation of article 26.

\textsuperscript{70} The concurring separate opinion of Mr. Bertil Wennergren states concurrence with the Committee's view that "sex" includes "sexual orientation", on the basis that the "common denominator" for the grounds race, colour and sex "are biological or genetic factors." This approach more logically leads to
orientation”. While discrimination against homosexuals operates with reference to the sex of individuals, the idea that discrimination on the basis of “sexual orientation” is discrimination on the basis of “sex” is a new and contested idea.\(^{71}\)

The Tasmanian government refused to comply with the Committee's decision. The Australian parliament invoked its "foreign affairs" power and enacted legislation establishing a right to sexual privacy, intending the legislation to override the offending provisions in Tasmanian law.\(^{72}\) Tasmania refused to accept that its anti-homosexual laws were "an arbitrary interference with the right to privacy" within the terms of the national legislation. The dispute went to the Australian High Court. But before a final decision at that level, the legislature in Tasmania repealed the criminal prohibitions.

Since the Toonen decision, the Human Rights Committee has included a concern with anti-homosexual criminal laws in its review of the reports of States parties on compliance with the Covenant. For example, in their 1995 comments on the report of the United States, the Committee expressed concern about the

...serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination.\(^{73}\)

Questions on privacy and non-discrimination are now a routine part of this monitoring process.\(^{74}\) A new communication has been submitted from Australia claiming equal spousal benefits, in the particular case a pension for the survivor or a war veteran.\(^{75}\)

\(^{71}\) Anna Funder, The Toonen Case, (1994) 5 Public Law Review, 156, is critical of the ruling that "sex" includes "sexual orientation", noting that an argument to this effect was never put to the Committee.

\(^{72}\) The decision of the Australian High Court in Tasmania v. Commonwealth, (1983) 158 Commonwealth Law Reports, 1, upholds a power of the national parliament to override matters of state law when implementing international law. This is the "foreign affairs" power which was invoked by the national government in enacting the Human Rights (Sexual Conduct) Act in 1994 which invalidates laws which constitute an "arbitrary interference" with privacy, tracking the words of the decision of the Human Rights Committee in the Toonen case. See Brian Opeskin, Donald Rothwell, The Impact of Treaties on Australian Federalism, (1995) 27 Case Western Reserve Journal of International Law, 1 at 49-54 which discusses the governments response to the Toonen decision.

\(^{73}\) CCPR/C/79/Add 50, 6 April 1995.

\(^{74}\) For example, in 1999, questions were asked of the United Kingdom (focusing on the unequal age of consent that was still in place), Guyana and Venezuela: CCPR/C/68/L/UKCD 3 December 1999, CCPR/C/68/L/GUY 3 December 1999, CCPR/C/68/L/VEN 3 December 1999.

\(^{75}\) Freya Rodger, The Unlikely Activist, Sydney Star Observer (newspaper), 4 May 2000.
The World Health Organisation

The World Health Organisation’s Global Programme on AIDS was established in 1987. While the WHO constantly restates the basic proposition that HIV/AIDS is not a gay disease, it has pointed out that discriminatory patterns towards gay men, women and racial minorities create serious problems for effective HIV prevention programs. ILGA and other lesbian and gay rights organisations have participated in the various HIV/AIDS conferences organised by the WHO. ILGA has co-operated with the Global Program on AIDS in many projects. WHO. has been represented in ILGA conferences since the 1989 meeting in Vienna, and has supported and co-sponsored the annual ILGA regional conferences for eastern and south-eastern Europe since the Prague conference in 1991. The World Health Organisation funded several research projects at the Department of Gay and Lesbian Studies at the University of Utrecht.

Regional treaty-based human rights bodies.

In 1992 the refusal of the Government of Argentina to grant legal status to the non-governmental organisation Comunidad Homosexual Argentina was taken to the Inter-American Commission of Human Rights. The refusal had been confirmed in a decision of the Supreme Court of Argentina. Later that year the government granted legal recognition to the organisation, an act which the Commission considered an "amicable settlement" of the matter. The same problem was repeated in 1995 with the refusal of government agencies to register the Costa Rican group Abraxas and the Association of Honduran Homosexuals Against AIDS. After protest, the Costa Rican organisation was registered. In 1998 a lesbian journalist in the United States was fired from her job for off the job political activity on behalf of lesbian and gay rights. She petitioned the Inter-American Commission over the failure of the United States Supreme Court to review a judicial decision upholding her firing. In 1999 a lesbian prisoner in Columbia petitioned the Inter-American Commission for equal access to conjugal visits.

76 See, for example, Statement of Dr. M. H. Merson, Executive Director, Global Programme on Aids, to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Agenda Item 4, August, 1994, copy in possession of author.


81 Sandra Nelson v United States. As of October, 1999, the petition was still being considered.

82 Marta Lucia Alvarez Giraldo v Colombia.
In 1999 the Commission ordered El Salvador to provide anti-retroviral medications to twenty-six Salvadorans whose lives were endangered by AIDS. The petition was handled by gay activist Richard Stern of Costa Rica.83

In 1995 a petition was submitted to the African Commission on Human Rights asking it to open an inquiry into Zimbabwe's laws and policies on homosexual conduct. The communication was withdrawn at the request of the country's largest lesbian and gay organisation out of concern for possible reprisals by the government.84 Later in 1995, a large book fair, annually held in Harare, banned a gay rights exhibit under pressure from the government. Four organisations boycotted the fair in protest. President Robert Mugabe in a speech opening the fair denounced homosexuals, saying "We do not believe they have any rights at all." Later he called for an international campaign "to oppose those who support homosexuality." He said that homosexuality was not part of African culture.85 Mugabe has continued to give speeches condemning homosexuals, saying they are no better than dogs or pigs.

The High Commissioner for Refugees

Refugees are defined as individuals who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.86 The United Nations High Commissioner for Refugees has interpreted the phrase "social group" to include lesbians and gay men. This interpretation has been accepted in decisions in many States. The first cases to gain widespread coverage in Australia, Canada and the United States involved individuals from Argentina, Brazil and China.87 The idea that lesbians or gay men can constitute a "social group" for refugee status no longer seems controversial and is expressly stated in the 1991 Austrian

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law on asylum. The issue in individual cases will be proving a well founded fear of persecution on the part of the individual making the application.  

The High Commissioner for Human Rights

The office of the High Commissioner for Human Rights was created as a result of recommendations from the Vienna World Conference on Human Rights. Former Irish President Mary Robinson became High Commissioner in 1997, and has had a much greater visibility than her predecessor. In October, 1998, she met with leaders of the International Lesbian and Gay Association and indicated a positive interest in receiving information on human rights violations against lesbians and gay men.

Support by states.

The following states have voted in favour of lesbian and gay rights. “A” means the state supported the accreditation of ILGA at the United Nations either in the NGO Committee of the Economic and Social Council or in the Council itself. “B” means that the state supported wording on lesbian rights at the Fourth World Conference on Women, held in Beijing in 1995. “C” indicates the state supported lesbian and gay rights in meetings of the Organisation for Security and Co-operation in Europe.

Argentina (A), Australia (A,B,C), Austria (A,B,C), Barbados (B), Belarus (A), Belgium (A,B), Bolivia (B), Brazil (A,B), Bulgaria (A), Canada (A,B,C), Chile (A,B), Colombia (B), Cook Islands (B), Costa Rica (A), Cuba (A,B), Denmark (A,B,C), Finland (B,C), France (A,B), Germany (A,B), Greece (A,B), Israel (B), Italy (A,B), Ireland (A,B), Jamaica (B), Japan (A), Latvia (B), Luxembourg (B), Mexico (A), Netherlands (B,C), New Zealand (B), Norway (A,B,C), Peru (A), Portugal (B), Russian Federation (A), Slovenia (B), South Africa (B), Spain (A,B), Sweden (A,B,C), Switzerland (B), Ukraine (A,B,C), United Kingdom (A,B), United States (A,B,C).

This list has some surprises. Cuba has frequently been criticised for its treatment of lesbians and gays. During the years involved Chile still had criminal laws against male homosexual acts. Austria, until recently, had a set of discriminatory laws against homosexuals. Yet these three states have been supportive at the U.N. Ireland and Russia were supportive at meetings which took place before their anti-homosexual criminal laws had been repealed. India abstained on the vote to accredit ILGA, though Indian criminal law prohibits male homosexual acts. Domestic laws or policies do not always dictate state policies in international fora.

While the Netherlands played an early role, Australia has been the most active state in recent years. Australia lobbied for more speaking time for lesbian and gay organisations at the Vienna World Conference on Human Rights in 1993, as well as urging movement on sexual orientation issues in their major statement at the conference.

Australia has raised lesbian and gay rights in the U.N. Commission on Human Rights. Australia has moved in domestic law to implement the Human Rights Committee decision in the Toonen case. And the change in government in Australia in 1996 has not altered the government’s position. Prime Minister Howard stated in February, 1996, that the two coalition parties “strongly oppose discrimination against individuals or groups on the grounds of race, gender, religion or sexuality.” His Foreign Minister, Alexander Downer stated:

I am strongly committed to individuals having the freedom to conduct their lives as they wish so long as that freedom does not impinge upon the freedom of others. I will carry out this commitment as Foreign Minister by ensuring that in its diplomatic representations abroad and in multilateral fora, Australia continues to oppose the persecution against individuals on the basis of religion, ethnic grouping or sexual preference.

Non-Governmental Organisations

The author made the first statement as a homosexual in a United Nations forum in 1992 in the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The statement was in the name of Human Rights Advocates, a San Francisco based NGO, and ILGA.\(^9^9\) In 1993 ILGA was the first lesbian and gay rights organisation to gain “consultative status” as a non-governmental organisation at the United Nations.\(^9^0\) Statements were made in the name of ILGA in the 1993 and 1994 sessions of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities and in the 1994 session of the United Nations Commission on Human Rights. ILGA’s NGO status was suspended in September, 1994.\(^9^1\) Of ILGAs 350 members, one was a highly controversial U.S. organization that supported "man-boy love". Senator Jesse Helms in the United States Senate used that affiliation to authorize the withholding of U.S. funding for certain international organizations if ILGA was not suspended. Three controversial member organizations were dropped from membership by ILGA in 1994, and a new ILGA constitution commits the organization to the support of international human rights standards, including the Convention on the Rights of the Child. But the NGO committee of the Economic and Social Council has been very uncooperative in moving to a reconsideration of the 1994 suspension. As of the end of 2000, the matter


\(^9^0\) Gaining consultative status was something of a fluke. The NGO Committee of ECOSOC broke from its tradition of consensus decision making in order to approve the application of Human Rights Watch, and this break from practice was extended, at the same session, to ILGA. In both the Committee and the ECOSOC a minority of members voted in favour of ILGA, because of absences and abstentions. In that way, ILGA was accredited largely by the votes of western states, including states in Eastern Europe and Latin America.

has not come back on the agenda of the Committee, in spite of frequent ILGA requests that its status be reassessed.

The International Gay and Lesbian Human Rights Commission, based in San Francisco, does work comparable to Amnesty International in publishing background materials, country studies and urgent action bulletins. It has been an invaluable source of information in refugee cases.

The number of non-governmental organizations that will deal with sexual orientation issues has slowly increased. The best known organizations active on these issues are Amnesty International and Human Rights Watch. In 1998 Human Rights Watch and the International Gay and Lesbian Human Rights Commission jointly published a report on sexual orientation and criminal law in Romania, probably the first such collaboration between a general human rights NGO and a lesbian/gay organization. In 1996 the Canadian Inter-Church Committee on Human Rights in Latin America published a report “Violence Unveiled: Repression against Lesbians and Gay Men in Latin America.” In 1997 War on Want, based in the United Kingdom, published a report “Pride World-Wide: Sexuality, Development and Human Rights.” It has begun a program of financial support for certain lesbian and gay organisations in third world countries. A grouping within the World Council of Churches has taken up ILGA’s call for the United Nations to commission a study on discrimination on the basis of sexual orientation.

CONCLUSIONS

There have been a number of adjudicative victories, Dudgeon, Norris, Modinos, Toonen, Lustig-Prean, Sutherland. Those victories are still on the narrow basis of “privacy” rights, but both in Europe and at the United Nations privacy rights have become a basis for barring discrimination, and have therefore taken on a much broader role. Lesbians and gay men have been able to get into important meetings like the Vienna World Conference on Human Rights and the Beijing Conference on Women, but their concerns have not yet appeared in final conference statements. There are a limited number of states and non-governmental organisations that speak out in favour of lesbian and gay equality rights in international fora. The International Lesbian and Gay Association is presently barred from routine United Nations human rights meetings and no other organization representing lesbians, gay men, bisexuals or transgendered people has "consultative status" at the United Nations. International law recognizes a well founded fear of persecution on the basis of sexual orientation as a basis for refugee status. Europe has moved to require non-discrimination rules in the laws of all members of the European Union.

International law can develop only when there have been reforms at the level of domestic legal systems. Reforms in western states have been accelerating. We have moved beyond a focus on decriminalization, and even beyond a focus on discrimination. Now the spread of laws recognizing same-sex relationships is the most striking development in the west. The 1996 post-apartheid constitution of South Africa was the first in the world to expressly prohibit discrimination on the basis of sexual orientation. Similar express wording was included in subsequent new constitutions in Fiji and Ecuador. An amendment to the constitution of Switzerland bans discrimination on the
basis of "form of life," a phrase intended to include sexual life. In a number of other states non-express constitutional language has been held to prohibit discrimination on the basis of sexual orientation. In domestic legal systems, we now have major rulings that constitutionally expressed equality rights require decriminalisation, individual equality, equal spousal benefits and partner immigration rights. Anti-discrimination laws that refer to sexual orientation are now common in the west, and exist in certain non-western states. It is the spread of these reforms that will permit sexual orientation issues to be openly addressed at the United Nations and in regional intergovernmental organizations.

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