

OUT AT THE UN

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1. THE BEST OF TIMES AND THE WORST OF TIMES

Sixty years ago national, regional and international human rights agendas were just starting to take shape. In the West lesbian and gay people were cautiously forming their first modern activist groups. It was hard to predict the future of the new human rights discourse. It was equally hard to understand whether it could or would give legitimacy to sexual and gender diversity. Gays and lesbians were not alone at this puzzling juncture. Other groups, as well, were hoping to find a better place in the new post-war world. 1945 was an odd time to be hopeful, with most colonial empires still in place, the beginnings of the cold war rivalry between the Eastern Bloc and the West, the threat of nuclear annihilation, and little recognition of human rights in any domestic legal system.

Today, in the first decades of the 21st Century, LGBTI people – lesbians, gay men, bisexuals, transgendered individuals and intersexuals – have secured important gains and, in some countries, broad legal recognition. Old laws criminalizing sex between males are gone in Europe, North America, Australasia and most of Latin America. In the countries of the UN's 'Western' group, anti-discrimination laws covering 'sexual orientation' are now the norm. Substantial legal recognition of same-sex relationships is now common. Initially a registration model was followed, avoiding any symbolically important references to 'marriage.' But by the beginning of 2011, 'marriage' had been extended to same-sex couples in Argentina, Belgium, Canada,

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Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, a handful of states in the United States, and in Mexico City. Progress on lesbian and gay issues opened the way for some recognition of transsexuals and transgendered individuals. New norms recognize the post-operative sex of transsexuals and allow marriage in that sex. Non-discrimination laws based on gender identity and gender expression are now more common. New medical protocols for the treatment of intersexuals have been developed, requiring informed consent for most surgery on the part of the individuals affected.

At the United Nations, statements supporting lesbian and gay equality rights were endorsed by 31 states in 2005, by 54 states in 2006 and 66 states in 2008. In a vote condemning the extrajudicial killings of gays and lesbians in 2010, 93 states gave support. The first substantive resolution was passed in the Human Rights Council in June, 2011, after years of opposition by states in the Organization of the Islamic Conference and sub-Saharan Africa. Slowly an alliance between the Western bloc and Latin American states made change possible. LGBTI NGOs are now active at the UN, and have important allies in the major international human rights NGOs. All of these changes are new.

But LGBTI visibility and legal gains provoked a serious backlash. ‘Gay bashing’ became more common in the West as gays, themselves, became more visible. Homophobic tirades were repeated in the 1990s and 2000s, by a string of leaders, notably Mahathir Mohammed in Malaysia and Robert Mugabe in Zimbabwe. A mayor of Moscow called gays and lesbians “satanic” and prohibited any public demonstrations. Gay ‘pride’ parades are regularly blocked or attacked in parts of Eastern Europe. Accounts emerged of the private vigilante torture and killing of alleged homosexuals in Iraq.² Lesbians have been gang raped in parts of Africa to ‘cure’ them. Honor killings have occurred of gay or lesbian sons or daughters. Draconian new legislation was proposed in Uganda to make it an offence not to turn in a person who you know is homosexual and applying the death penalty for HIV positive homosexuals who have sexual relations. Expensive referenda campaigns have been mounted in US states to bar same-sex marriage or to repeal new marriage laws.³ Virtually all have succeeded. Same-sex marriage was repealed by popular vote in California and Maine. Evangelical Christians have blocked reforms in parts of the US, Africa and Asia. Friendly states made “statements” at the UN, because resolutions would be blocked or defeated. The 2008 statement by 66 states in the General Assembly was followed by a counter statement, endorsed by 57 countries. 69 countries abstained. The 2010 vote in the General Assembly had 93 states supporting, but this was to condemn extrajudicial killings of gays and lesbians (among other named vulnerable groups), something that should have been non-controversial. 57 states opposed that motion.⁴

² See Human Rights Watch report, “They Want Us Exterminated”; Murder, Torture, Sexual Orientation and Gender in Iraq, August, 2009.

³ The mid-term elections in November, 2010, were the first set of elections in over a decade “where some homophobic ballot measure wasn’t either considered or passed.” Kerry Eleveld, View from Washington, Advocate (magazine), November 5, 2010.

⁴ The arguments of opponents were that “sexual orientation” was undefined, and had not been recognized as a prohibited ground of discrimination in UN instruments. They pointed out that no UN

Everywhere, LGBTI people remain largely invisible. When we say we now have ‘out’ people as mayors of major cities, members of legislatures, cabinet ministers and even, in 2009, the first head of government (in tiny Iceland), we are reminded that we do not call Angela Merkel an ‘out’ woman or Barack Obama an ‘out’ African American. Invisibility remains the norm for homosexuals, imposed by society, not freely chosen. Hiding ‘in the closet’ has been called “the defining structure for gay oppression” in the 20th Century.⁵ Being ‘out’ remains remarkable and rare, not just for public figures but for most people in everyday life. Most lesbian and gay people are not ‘out’ to their parents or on the job. The new public controversies over sexual and gender diversity actually bring new pressure on individuals who, in the past, were able to ‘live under the radar.’ Homophobia is now more open in many societies, sometimes said to be the last acceptable prejudice. It can be politically useful. It stifles debate, rallies support and gains votes. Racism, sexism, xenophobia and anti-communism have each played this role in the past. Homophobia is available for this purpose because of the new visibility of homosexuality as a public issue.

It is the best of times for many and the worst of times for many others.⁶

2. *THE LONG ROAD TO THE PRESENT*

Evolutionary psychologists would probably explain an anti-homosexual prejudice as the result of a strong bias towards procreation. In hunter-gatherer, herding, agricultural and cottage industry economies, children are part of the family economic unit. They contribute labor from their early years. They gradually take over the family’s economic activity, and support parents in old age. In much of the world today, adult children are still under a strong obligation to support their parents and siblings. They send remittances home from Hong Kong, Singapore, Japan, the Middle East or the West. Their home areas typically have a strong intolerance of homosexuality.

HOMOEROTIC TRADITIONS

Yet we have various historical accounts of the celebration of same-sex love in differing traditions.

Most famous in the west is the celebration of homoeroticism in Greek and Roman literature and in explicit depictions on some of the beautiful Greek ceramic vases.⁷

human rights treaties expressly prohibited sexual orientation discrimination. These arguments ignored decisions of the European Court of Human Rights and the UN Human Rights Committee.

⁵ Eve Kosofsky Sedgwick, from her book *Epistemology of the Closet*, as quoted in Mimi Swartz, *Living the Good Lie*, *New York Times*, June 16, 2011.

⁶ From the famous opening sentence of Charles Dickens 1859 novel, *A Tale of Two Cities*.

⁷ Craig Williams, *Roman Homosexuality*, Oxford, 1999; Kenneth Dover, *Greek Homosexuality*, Duckworth, 1978; Linda Dowling, *Hellenism and Homosexuality in Victorian Oxford*, Cornell, 1994; Catherine Johns, *Sex or Symbol: Erotic images of Greece and Rome*, British Museum, 1982.

Socrates, that wonderful maverick, was accused of ‘corrupting youth,’ giving us the homoerotic expression ‘Socratic love’. The poetess Sappho gave us the word lesbian, from her home on the Greek island of Lesbos.

Outside the west, we know most about the homoerotic traditions in China and Japan. Those countries have long literate traditions, and earlier views and practices were recorded. In many other societies we have homoerotic or transgender historical fragments, suggestive of some visibility and acceptance, but we lack enough information to make much sense of them. In other societies historians have not found equivalent historical material, or conflicting indicators.

These various homoerotic traditions are a counterpoint to the economically rational historical pattern of a norm of reproductive heterosexual family life. In general, the homoerotic traditions we know of were elite, age-stratified, gendered and non-exclusive.⁸ To elaborate:

- (1) We know of such homoerotic practices among elites. Of course, most of the historical record is about elites. We have accounts of homosexuality in court life, by entertainers, by elite soldiers.
- (2) The historical accounts are mainly about male homoerotic love, but not exclusively.
- (3) Most accounts are age-stratified. The object of love is described as a younger male.
- (4) Most accounts are of gendered relationships, in which one male is seen as feminine or passive, or one female is masculine and assertive.
- (5) The erotic relationships are not the exclusive sexual relationships of the partners. The king or the nobleman typically continues a heterosexual relationship with a wife or wives. The younger partner may go on to heterosexual marriage.
- (6) Our information tells us that the toleration or celebration of these practices has occurred in particular periods. Those periods come to an end. Such a period ended in Korea with the rise of Neo-Confucianism in the 14th century. New Western influences in the late 19th century ended such periods in China and Japan. Of course, homosexual activity did not end, for it occurs in all societies. But the public awareness, acceptance or celebration of it ended.

MODERN PATTERNS

The current focus on the issue of same-sex marriage by gay and lesbian activists in the West clearly indicates a much different modern paradigm. The modern image is of a relatively egalitarian couple, similar in age, not necessarily gendered in self-presentation, probably in an exclusive relationship, and often open to raising children in a nuclear family setting. History provides us with no similar general model in any cultural tradition. The modern nuclear heterosexual family is also historically new.

⁸ See Tamara Loos, Transnational Histories of Sexualities in Asia, *American Historical Review*, December, 2009, 1309, at 1320-1324.

Social and economic changes have made it easier for individuals to live openly homosexual lives. In modern economies individuals are economically independent of parents, kin and village. Well educated workers are highly mobile. They don't stay close to home. Parents are no longer dependent upon children for support in old age. Children are no longer an economic asset to the family. They are optional and expensive. In these new situations, homosexual individuals and couples become increasingly self-confident and seek recognition and acceptance by friends, employers, organized religion and society as a whole. These individuals may practice what is often called "identity politics", that is, they identify as members of a minority and seek recognition and rights as a distinct grouping within the larger society. Others frame their goals differently, seeking bodily autonomy, reproductive rights, and free individual erotic agency. These are seen as human rights goals for everyone, no matter how individuals might personally identify (a universalizing rights analysis).

CRIMINAL LAWS

Anti-homosexual criminal laws, in this overview, are clearly a remnant of the past. But such laws have been far from uniform even in Western history. They are religious in origin, tracing back to Jewish texts that were adopted by Christianity and Islam.⁹ No clear explicit parallel traditions developed in Hinduism, Buddhism or Confucianism. In the 16th century in Europe, as a result of the Protestant Reformation, the prohibitions moved from ecclesiastical law and church courts into regular state-run criminal law systems. Beginning early in the 19th century, half of Christian Europe ended any prohibition by adopting the Napoleonic penal code. Britain, however, held onto its "buggery" law. Starting in the late 19th century, Britain gave its colonies newly drafted criminal codes that prohibited "carnal intercourse against the order of nature". Because of the extent of British influence and British Imperial control, by the early 20th century half the world had a prohibition. And, of course, half did not. Britain, yes. France, no. India, yes. China, no. The new modern scientific criminal law for revolutionary Russia in 1922 dropped any prohibition. Stalin reimposed one in 1933.

MEDICALIZATION

As religious devotion waned in the West in Victorian times, the religious basis for anti-homosexual attitudes and laws declined. Medicine had been gaining a new scientific status. Germ theory, for example, developed in the 1860s and 1870s. Indeed the 19th century saw "spectacular triumphs of physics, chemistry, astronomy – and medicine."¹⁰ A new body of scientific work emerged on sexual variation, based on case studies (that is, following the new, empirical, scientific method). It drew on no earlier theories of sexual and gender variation. Most writing for the next sixty years was empirical, that is based on generalizations from individual subjects. But those subjects were patients who sought treatment because of emotional problems. Empiricism doomed homosexuals to medicalization, for the empirically visible homosexuals were those who were troubled.

⁹ See Sanders, 2009.

¹⁰ Peter Gay, *Freud; A life for our time*, Norton, 1988, 34.

Nevertheless, the initial writers had diverse approaches. Havelock Ellis supported sexual variation as normal. Magnus Hirschfeld launched a gay rights movement. Freud considered homosexuality an unremarkable “variation of the sexual function...”¹¹ But the single most important text was *Psychopathia Sexualis*, written by Richard von Krafft-Ebing, first published in German in 1886. An English translation appeared in 1892. It became the “standard reference tool” for psychiatrists in Europe and the United States.¹² It supported a pathological understanding of sexual variation.¹³ The pathological analysis travelled everywhere. The US, Japan, China and Brazil are examples.¹⁴

Though the new medical science was not unified, homophobia assumed a particular normalcy in Western thinking, supported by popular medical beliefs. These views were initiated in a period of immense intellectual and social change. It was the era of Darwin, Marx and Freud.¹⁵ It was a period of economic globalization comparable to the present day, with dramatic new levels in the movement of people, commodities and capital. The period saw the last great surge of formal colonial expansion. The West took control of major parts of Africa, Asia and Oceania. Russia took control in the Caucasus, Central Asia and Siberia. The independent states of Japan and Siam westernized their legal systems and built European-style palaces to assert their modernity and justify continuing autonomy. The Eiffel Tower and colonial railways displayed new Western

¹¹ Gay, 1998, 610. He described homosexuality as “produced by a certain arrest of sexual development” but not an illness. Pfaff takes Freud as saying that a homosexual orientation arises because of social or environmental factors, not hormonal or physiological causes. Given the state of medical knowledge in Freud’s time, it would not have been possible for him to say anything relevant on hormonal or physiological causes. Pfaff notes that modern studies of identical twins have led “some biologists” to conclude that causation in at least fifty percent of cases “is due to heredity.” But he takes fraternal birth order studies, which indicate a higher incidence of homosexuality in younger sons, as indicating a social or environmental cause, though others have seen them as supporting physiological causation. See Donald Pfaff, *Man and Woman: An Inside Story*, Oxford, 2011, 200-201. On homosexuality, Freud is cited by different authors in support of differing viewpoints.

¹² See Jay Hatheway, *The Gilded Age Construction of Modern American Homophobia*, Palgrave Macmillan, 2003, 102-4; David Halperin, *One Hundred Years of Homosexuality*, Routledge, 1990; John D’Emilio, *Making Trouble*, Routledge, 1992; Jonathan Ned Katz, *The Invention of Heterosexuality*, Plume-Penguin, 1996; Jonathan Ned Katz, *Love Stories: Sex Between Men Before Homosexuality*, Chicago, 2002.

¹³ Upchurch indicates that Krafft-Elbing’s writings were controversial, with some critics seeing the medicalization as excusing homoerotic desire, rather than attributing it to a lack of character or self-discipline. Homosexuality was no longer a personal failure. See Charles Upchurch, *Before Wilde: Sex between Men in Britain’s Age of Reform*, California, 2009, 195. There was also a French literature. French physician Benedict Morel, in *Treatise on Degerations*, in 1857 termed same-sex attraction a degenerative condition. A second text was published that year by Ambroise-Auguste Tardieu, *Medicolegal Study of Assaults on Decency*. See Vernon Rosario, *The Erotic Imagination: French Histories of Perversity*, Oxford, 1997, 72-75.

¹⁴ James Green, *Beyond Carnival*, Chicago, 1999, 44-47.

¹⁵ Charles Darwin lived from 1809 to 1882 and published *The Origin of Species* in 1859. Karl Marx lived from 1818 to 1893 and published volume one of *Capital* in 1867. Sigmund Freud lived from 1856 to 1939 and published *The Interpretation of Dreams* in 1900. From 1856 to 1882 all three were alive. Freud, in his *Introductory Lectures on Psychoanalysis*, suggested that there had been three major challenges to human megalomania: Copernicus (the earth is not the centre of the universe), Darwin (humans had evolved from other animals) and Freud (humans were often controlled by unconscious drives). See Peter Gay, *Freud: A life for our time*, Norton, 1988, 449.

engineering skills. Anthropology developed in the service of empire. New legal codes were part of this modernization.

The focus for anti-homosexual views was medical or psychological, no longer religious. Emerging in a period of Western imperial expansion, the new ideas spread beyond the West, though their impact abroad was not the same as at home.¹⁶ Homoerotic traditions in China and Japan retreated from public view.

3. *POST-WAR REFORMS*

In the scientific ethos of the years immediately after World War II, a basic rethinking of sexual variation began. There seem to be three rather distinct and separate strands, featuring biologists, lawyers and psychologists. It is important to note that none of the initiators or key figures were known to be homosexual themselves. All were Western, which, in a sense, was appropriate for they were challenging the Western psychological tradition linked to Krafft-Ebing and his followers, as well as the surviving half of the anti-homosexual Western Christian-based legal tradition. LGBT organizations played no apparent role. LGBT organizations barely existed in the period in which the key figures worked.

First, Dr. Alfred Kinsey, a biologist, did a value free survey of what people actually did. His survey on the sexual activity of males, published in 1948, was a sensation, seen popularly as shocking, scandalous, pornographic. 200,000 copies sold in the first two months.¹⁷ Kinsey had no interest in any individual's 'identity.' He counted orgasms and the kind of stimulus that produced each one. A seven-point scale charted the gradations from exclusively homosexual patterns of stimulus through to those that were exclusively heterosexual. This challenged the idea that any one point on the scale was 'normal.' Sexual variation was a fact of life. A simple binary separating the categories of homosexuals and heterosexuals was a fiction. Kinsey's conclusions have never been absorbed into popular thinking. Kinsey is often misquoted as saying that 10% of men are homosexual. This demonstrates ongoing attempts to assert a binary in the face of Kinsey's non-binary findings. Binarization is commonly attempted both by people who identify as heterosexual and those who identify as homosexual. Life is simpler if we can view people as falling into two distinct categories.

¹⁶ It was the new bourgeoisie that ran the British imperial project and they projected an ethos of middle class respectability, distinguishing themselves from the lower classes and what they saw as a decadent aristocracy: George Mosse, *Nationalism and Sexuality, Respectability and Abnormal Sexuality in Modern Europe*, Howard Fertig, New York, 1985, 9. This view of the aristocracy as profligate libertines perhaps led to the rejection of homosexuality, seen as an elite vice. In contrast, in Siam and Japan, it was the aristocracy that handled the projects of modernization and the defense of the state against colonialism. Their attitudes towards sexual issues would not have been the same as those of the new British middle-class.

¹⁷ Jeffrey Weeks, *Sexuality and its Discontents*, Routledge, 1985, 77. The waiting market for serious writings on sexuality was seen again when 300,000 copies of Masters and Johnson's study *Human Sexual Response* were sold within a few months of publication in 1966: See Thomas Maier, *Masters of Sex*, Basic Books, 2009, 174.

Kinsey's work was part of the general expansion of scientific studies in the period. A similar study was conducted in the UK but its conclusions were suppressed.¹⁸ Later studies by biologists have shown that homosexual activity is common in animal species, again supporting the basic Kinsey conclusion that homosexual activity is so common that it cannot be considered 'unnatural'.¹⁹

Second, legal reformers supported decriminalization of male homosexual activity using arguments of privacy and secularism. The state should not be regulating private behavior solely on moral grounds. Harm to society must be shown to justify regulation or prohibition. The key documents were the Model Penal Code drafted by the American Law Institute in 1955 and the report of the government appointed Wolfenden Committee in the U.K. in 1957. These were very influential elite documents, each contributing to decriminalization.

Third, the studies of Dr Evelyn Hooker showed that psychological tests were unable to determine differences in adjustment between homosexuals and heterosexuals.²⁰ Her sample of homosexual males was not drawn from clinical patients. The medical arguments were demolished. The long reign of Krafft-Ebing was over. Homosexuality was removed from the list of pathological conditions by medical associations in the United States and United Kingdom in 1973, by the World Health Organization (WHO) in 1983, by Brazil in 1985, and by medical associations in many countries, including China in 2001.²¹ Medical experts now generally assume that sexual orientation and gender identity are determined either genetically or physiologically. This suggests they are not 'chosen' and cannot be altered by treatment.²² The WHO declassification of homosexuality in 1983 is such an important indicator of changed views that the anniversary of the decision is now celebrated as the International Day against Homophobia (IDAHO).

¹⁸ The United Kingdom did a nationwide sex survey in 1949. Twenty percent of both men and women told investigators that they had had homosexual sex. This information was "so scandalous" that the results of the study were suppressed; only surfacing in 2005: Data surface from 1949 British sex survey, Wockner International News #598, October 10, 2005. The data was discovered by the British Broadcasting Corporation in a university archive.

¹⁹ See Bruce Bagemihl, *Biological Exuberance*, St. Martin's Press, 1999; Joan Roughgarden, *Evolution's Rainbow*, California, 2004.

²⁰ See the documentary film *Changing Our Minds: The Story of Dr. Evelyn Hooker*, Director Richard Schmiechen, 1991, Frameline, U.S.

²¹ Luiz Mott describes the lobbying in Brazil in *The Gay Movement and Human Rights in Brazil*, in Stephen O. Murray, *Latin American Male Homosexualities*, New Mexico, 1995, 223,

²² In the contemporary United States a number of political and religious figures assert that a homosexual orientation is a personal 'choice.' Ending homosexuality requires personal motivation and, it seems, some therapeutic intervention. A number of psychologists and their associations hold that such therapies are unscientific and unethical. The view that the sexual orientation of individuals is on a spectrum ranging from exclusive homosexuality to exclusive heterosexuality means that, for many people, there is a choice. The choice is not of sexual orientation, but of rejecting one possible pattern of behavior for another. The individual will remain 'bisexual' but will act only on heterosexual stimuli as a matter of some personal discipline. For a current statement of professional standards, see *Practice Guidelines for LGB Clients*, issued by the American Psychological Association in 2011 (go to www.apa.org).

These innovative developments in behavioral studies, law and medicine created an agenda for slowly emerging lesbian and gay NGOs. Cautiously, they sought decriminalization and some private space, testing whether society would accept public advocacy by individuals assumed to be homosexual.²³

Again, these changes are a counterpoint to other developments in the period. State repression of homosexuals increased in the immediate post war years throughout the West. Police in some places sent young officers in casual street clothes to gay cruising areas to entrap homosexuals. There were raids on gay bars and gay saunas.

...police harassment was a constant problem for Carioca [Rio de Janeiro] homosexuals in the 1950s and '60s, and their archenemy was Police Commissioner Raimundo Padilha, who waged a campaign to “clean up” the downtown, a campaign that included detaining homosexuals.²⁴

The Wolfenden committee was established by the government of the United Kingdom because of public controversies over aggressive police enforcement of anti-homosexual laws and the trials of a few high-profile individuals. Increased police enforcement campaigns had triggered a backlash, in which even religious groupings objected to their excesses. Blackmail was another problem, associated with the high social stigma, the legal prohibition and the anti-communism of the period. Homosexuals were identified as security risks, arguing they had weak personalities and were open to blackmail. We have essentially no data on violence against homosexuals in the period, for victims would not report incidents for fear of outing themselves. The closet door was more tightly shut than it had been in the more relaxed inter-war years.

One of the key societal strategies was to keep homosexuals invisible through the strict censorship of books and films. Laws in New York State censoring films and stage plays were a reaction to “the growing visibility of the gay world” in the years after World War I.²⁵ The 1930 revised United States Production Code barred any depiction of homosexuality in American films.²⁶ Until 1958 the United Kingdom banned any films or

²³ It is a reminder of the extent of discrimination that early leaders in the West, before 1969, did not speak as homosexuals. Frank Kameney in the United States was a rare example, but he had no choice but to be open for he was fighting his firing from a government job for being homosexual. A similar case of fighting a firing was an early public issue in Canada as well. These individuals had been outed and in fighting for reinstatement they became public advocates. It is rare in Asia today to have public advocacy by open homosexuals, though this is changing.

²⁴ James Green, *Beyond Carnival*, Chicago, 1999, 159.

²⁵ George Chauncey, *Gay New York*, 1994, 355.

²⁶ The Hays Code was established by the heads of major studios after the 1922 sex scandal involving Fatty Arbuckle. It barred open-mouth kissing, lustful embraces and any references to any form of “sex perversion.” It was replaced in the 1960s by a rating system set up by the Motion Picture Association of America, an industry organization. See Jack Valenti, *Movie-rating system gets good ratings*, Los Angeles Times, The Nation (Bangkok), November 2, 2005, 12A; Richard Barrios, *Screened Out: Playing Gay in Hollywood*, Routledge, 2003. Barrios comments that when change occurred in U.S. movies in the 1960s, homosexuals were depicted with rampant homophobia. The documentary “This Film is Not Yet Rated”,

plays with homosexual themes.²⁷ Until 1998 South Korea prohibited any depiction of homosexuality in film. Malaysia allowed the depiction of homosexuals in films for the first time in 2010, but homosexual characters had to repent or convert to heterosexuality.²⁸ In India “for hundreds of television channels across the country, homosexuality still doesn’t exist.”²⁹ Chinese gay movies are only shown outside the country, even if they are filmed at locations within the People’s Republic.

When Ann Landers began her personal advice column in 1955, newspaper editors told her not to talk about homosexuality. This censorship was very significant. Her musings became the West’s most widely syndicated column, appearing in more than 1,200 newspapers with 90 million daily readers.³⁰ Much later the column became an important source of ideas of gay legitimacy and gay rights. Christine Jorgensen had ongoing celebrity status in print media in the U.S. after her pioneering sex change operation in 1951, but said she was barred from television.³¹ Gays and lesbians did appear in scandalous stories in the tabloid press.³² Serious fiction was rare, but a few books, such as *The Well of Loneliness*, broke the taboo. It was prosecuted. The early novels usually had tragic endings.³³ In 1986 a new editor at the *New York Times* reversed policy. As a result, coverage of gay and AIDS stories became routine, and the word ‘gay’ could be used.³⁴ AIDS had made it necessary to talk about homosexuals in public media.

In general, a basic dilemma continued. Most homosexuals hid their sexual identity from family and peers, staying “in the closet.” This protected them from rejection and discrimination. Hiding was made easier, paradoxically, by the fact that public media made little mention of sexual variation. The enforced silence was part of the problem, part of the stigma. In a famous phrase, homosexuality was the “love that dare not speak its name.” Only if social attitudes changed would it be safe to come out of the closet. But social attitudes would only change if people became comfortable with other people around them that they knew were gay. Gays had to come out of the closet to change social attitudes. But those social attitudes kept them in the closet. The “closet”

deals with the anti-gay bias in the Motion Picture Association of America’s rating system (director Kirby Dick, premiere on IFC TV, January, 2007).

²⁷ BBC News, December 6, 2002, Timeline: Gay fights for equal rights, accessed on the BBC website on September 5, 2004.

²⁸ Malaysia: Okay to be gay in a movie but only if character ‘repents’, AFP, March 22, 2010, accessed at www.fridae.com, July 16, 2010.

²⁹ Balaji Ravichandran, India is still in denial over homosexuality, Guardian News Service, *The Nation* (Bangkok), August 3, 2010, 14A.

³⁰ Bennie Currie, Advice columnist Ann Landers dead at 83, AP, *Bangkok Post*, Monday, June 24, 2002, 8.

³¹ Joanne Meyerowitz, *How Sex Changed*, Harvard, 2002, 88.

³² Terry Sanderson, In Black and White, *Gay Times*, September, 2003, 41, reviewed press coverage in the United Kingdom since the 1980s, demonstrating extensive tabloid coverage.

³³ The “notorious and best selling” novel *Wings* by Mikhail Alekseevich Kuzmin, published in Russia in 1906 and republished repeatedly until 1923, “was the first modern coming-out story with a happy ending in any language.” Don Healey, *Homosexual Desire in Revolutionary Russia*, Chicago, 2001, 101.

³⁴ Larry Gross, Abe Rosenthal’s Reign of Homophobia at the *New York Times*, TruthDig.com, May 16, 2006. See www.truthdig.com.

was a trap, but for most gays, it was the only realistic choice. Prejudice reinforced prejudice. It was a vicious circle. How could things change?

4. *TWO OPENINGS*

There were two quite different openings in the post-war period that created political opportunities for LGBT activism. They involved second-wave feminism, and the HIV/AIDS pandemic.

FEMINISM

Lesbian women have an uneasy relationship with gay men. It is a paradox, of course, that women who are not sexually interested in men and men who are not sexually interested in women need to work as allies. It is a further paradox that transsexuals, who most often seek heterosexual relationships, are now included in the activist LGBT coalition. Intersexuals, truly a separate category, have also been drawn in. These disparate groupings share in common their need to deal with the hostility or unease of their societies to sex and gender diversity.³⁵

It was lesbian women who most strongly articulated the problems of this alliance. The few activist organizations were typically dominated by men. Almost everywhere, lesbians organized separately from gay men. Did the new lesbian organizations have allies? Second wave feminism challenged many prejudices and assumptions, but, initially, almost everywhere, women's organizations shunned lesbianism as an issue that could destroy their movement. Lesbians were a 'lavender menace' to feminist gains, as Betty Friedan, then head of the National Organization of Women in the US, famously remarked in 1969.

In South Korea the first public LG rights organization was started in 1993, but only lasted a month. The few women involved found the gay men too patriarchal to work with. Gay men immediately created their own separate organization. Ten months later a

³⁵ The dominant pattern of LGBT NGOs over time in all parts of the world is to have separate organizations for gay men, lesbian women and male-to-female transsexuals. In contrast, the loose International Lesbian and Gay Association (ILGA), an alliance of organizations, after beginning in 1978 as the International Gay Association, requires all major positions to be held by both a man and a woman. The late formal inclusion of transgender in the organization posed an issue for this structure, and positions are now to be held by a woman, and a person who does not identify as a woman. Trans spokespersons criticized the ILGA leadership in December, 2010, for issuing a press release praising the vote in the General Assembly on the restoration of the words "sexual orientation" in the mandate of the Special Rapporteur on Extrajudicial Executions as an "LGBT" victory, noting that the restored wording only referred to 'sexual orientation.' Activists had, in fact, pressed for an expansion of wording to include 'gender identity', but that had little chance of success in the politics of the moment, and failed. The criticism suggested a blindness to trans issues, in spite of the clear inclusion of trans issues in ILGA's work and structure. A subsequent article, *Transgender Rights Not Simply Gay Rights*, by Audrey Mbugua, a member of a transgender organization in Kenya, strongly argued that there was oppression of trans by the gay and lesbian movement. The article was published on the website of ILGA, February 10, 2011. See <http://ilga.org/ilga/en/article/mQAaM3L1NJ>, accessed February 12, 2011.

lesbian group was established. When it later attempted to join the mainstream national coalition of progressive women's organization, the application was rejected.³⁶

The isolation of lesbians from modern feminist movements has been largely overcome. Some lesbian leaders saw their place much more in the women's movement than in the homosexual rights movement, and persisted in seeking an alliance.

Claims for sexual rights were launched by lesbians in the context of the four international women's conferences from 1975 to 1995. The UN forums created an international women's movement. For lesbians who were active at local and national levels, this was an opening for them as well.

In the [First] World Conference on Women held in Mexico in 1975, perhaps the presence and participation of lesbians was unnoticed. However, according to the testimony of Nancy Cardenas, a few of them from different countries, worried about the situation of their rights, held a meeting behind closed doors, which marked the beginning of their participation in this kind of conference.³⁷

Joke Swiebel has written that the first known statement at the UN urging recognition of homosexual rights was made by a woman, a junior minister in the Dutch government, at the Third World Conference on Women, in Nairobi, in 1985.³⁸ Other sources note the first UN statement by an "out" activist, made by the present author, a male, in 1992 in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The first major debate on homosexual rights in a UN forum was at the Fourth World Conference on Women, in Beijing, in 1995. The first gay or lesbian organizations to gain NGO 'consultative status' at the UN were lesbian groups, the first in 1994 and the second in 1998 (working in the context of women's conferences and the women's convention), but those organizations did not sustain a presence at the UN.³⁹ The Beijing women's conference is remembered (by some) as the real launch of these issues at the UN. Many would see the 'Brazilian resolution' events of 2003-2005 as the starting point. Others might see the December, 2010, resolution restoring "sexual orientation" to the mandate of the Special Rapporteur on extrajudicial killings as the launch. But each of those events is now eclipsed by the passage of the South African resolution in the UN Human Rights Council on June 17, 2011. That resolution was a political breakthrough and it established an ongoing or process for considering the issues.

The Declaration of Montreal, the product of the large LGBTI rights conference held in 2006, calls for activists to

³⁶ See Douglas Sanders, *Mujigae Korea*, to be published.

³⁷ Patricia Jimenez, Gloria Careaga, *Lesbians in Beijing*, in Gloria Careaga-Perez, *Sexual Orientation in Women's Struggle*, *El Closet de Sor Juana WS*, International Lesbian and Gay Association, 2001, 12.

³⁸ Swiebel, 25.

³⁹ They were the Coalition of Activist Lesbians and International Wages due Lesbians. See Patricia Curzi, *Lesbian Movements: Ruptures and Alliances*, ILGA, 2009, 65-67. Because the lesbian organizations worked in women's forums, they were invisible to gay men, who assumed that ILGA's attempt to gain NGO accreditation in the early 1990s was unprecedented.

...seek more co-operation with the women’s movement, and stress our common ground. The commonality is our right to control our own bodies and to choose how to live our own lives. Our joint goal is to challenge the rigidity of the fixed roles allocated to women and men and the dominance of heterosexual male norms and interests. This joint goal is not something marginal, but is part of the core business of the LGBT human rights movement.⁴⁰

This ‘universalizing’ feminist approach continues, in parallel to other writings that focus on LGBT ‘identities.’ The high points in international recognition of ideas of sexual autonomy or control over one’s body are found in the debates and the outcome documents of the Cairo World Conference on Population and Development and the Fourth World Conference on Women in Beijing. The stories about Cairo and Beijing are told and retold in feminist inspired accounts (just as the stories of Wolfenden, *Dudgeon* and *Toonen* are told and retold in other writings).⁴¹ The South African resolution in the UN Human Rights Council in June, 2011, does not use ‘universalizing’ language, reflecting the rhetorical dominance of using identity categories. It refers to “sexual orientation and gender identity” as markers.⁴²

AIDS

The second opening in the period came with the spread of HIV/AIDS, beginning in the early 1980s. In contrast to the feminist opening, this focused on gay men. In the West, it was the greatest ‘outing’ in history.⁴³ Initially AIDS was described in Western media primarily as a “gay” disease. Media reported on cases of the new “gay cancer.”

It is hard now to remember that the early organizations usually did not have ‘out’ leaders. Even the pioneering Mattachine Society in San Francisco in the 1950s and 1960s had leaders who did not speak as homosexuals. The decriminalization work in the 1950s and 1960s was led by ‘experts’, not ‘activists’. If there were homosexuals among the experts, that was kept secret. When ‘Gay liberation’ emerged in the West after 1969, there were out gay leaders, but not very many. All that changed with AIDS. No one now

⁴⁰ See www.declarationofmontreal.org, accessed January, 2010.

⁴¹ See, for example, Rosalind Petchesky, *Sexual Rights: Inventing a Concept, Mapping an International Practice*, in Mark Blasius, *Sexual Identities, Queer Politics*, Princeton, 2001, at 118; Sonia, Correa, Rosalind Petchesky, Richard Parker, *Sexuality, Health and Human Rights*, Routledge, 2008. The lawyers and the politicians want to speak in terms of categories, with the result that we get anti-discrimination laws with a list of examples of prohibited discrimination, which may now include sexual orientation and gender identity. General concepts of sexual rights or sexual autonomy have not (yet) been included in national laws or international instruments.

⁴² The 2011 resolution is significant in including “gender identity” as well as “sexual orientation.” The December, 2010, vote in the General Assembly on the mandate of the Special Rapporteur on extrajudicial executions referred only to “sexual orientation” though there was lobbying to broaden the language.

⁴³ In North America gay men were immediately identified as carriers of the virus. In Africa transmission was overwhelmingly through heterosexual relations. The spread in Asia was also not strongly linked to homosexuals.

could be blind to the fact that there were gay men all around. New, visible ‘out’ gay leaders emerged.

Initially activists feared that their limited progress in gaining respectability would be swept away as gay men were re-stigmatized, now as carriers of a fatal disease. Surprisingly, that did not really happen. This suggests that some significant shifts in public and elite opinion on issues of sexual diversity had already occurred in the West, without much public acknowledgement. Of course there were some tirades that AIDS was a divine punishment for sin. But, from the very early days, it was clear that the infection was not limited to gay men. Additionally, out gay men in the West organized as care-givers and treatment activists, refusing to be seen as guilty and passive victims.

Governments mounted special health programs, but had no way to deliver prevention and treatment services to gay men, who were essentially an unorganized segment of the population. Governments and society had long worked to keep gay men disorganized and out of sight, but now they needed their help. Everywhere governments and other donors began funding autonomous gay-run HIV/AIDS organizations. This was the first significant infusion of money into any kind of LGBT organization, and it happened all around the world.⁴⁴

In the West small gay organizations already existed, but it was new organizations that were created for the AIDS work. In other parts of the world gay-run AIDS organizations were the first public gay organizations to be created, legitimated by the health concern and by their working relationships with government health ministries. In Asia today, with rare exceptions, only the gay-run AIDS organizations have offices and paid staff. These organizations often play the role of LGBTI advocacy groups. It was the AIDS Law project of the Lawyers Collective in New Delhi, funded from abroad, that mounted the successful legal challenge to the 1860 unnatural intercourse law, a major activist victory in 2009. That year also saw an Asian regional male sexual health organization, with funding from UNAIDS, sponsor the formation of the first Asia Pacific Transgender Network.⁴⁵

5. *HUMAN RIGHTS*

The overarching framework for LGBTI activism has become ‘human rights’. Human rights, as we now understand them, are a product of the post-war years.

⁴⁴ An interesting exception in the early years of the twenty first century was Myanmar/Burma, where NGOs were not able to function. As a result foreign funders set up service centers in their own names, notably Population Services International (U.S. money) and the Burnett Institute (from Australia). I do not mean to overlook the funding from the Netherlands through the HIVOS Humanist Foundation that went to various LGBT organizations outside the context of AIDS.

⁴⁵ APCOM, the Asia Pacific Coalition on Male Sexual Health, had defined its constituency as MSM, men who have sex with men, and TG, transgender. TG were included largely because of the involvement of male-to-female transgenders in sex work in the region. In December 2009 APCOM organized and held the small founding meeting of the Asia Pacific Transgender Network in Bangkok, Thailand. Ongoing funding had not been secured for the network as of writing.

The UN human rights instruments say little about sex. The *Universal Declaration* and the *International Covenant on Civil and Political Rights* both recognize the right of “men and women” to marry and found a family. ‘Marriage’ is privileged, described as “the natural and fundamental group unit of society” and entitled to “protection by society and the State.”⁴⁶ No other provisions in the major UN human rights instruments are gendered in a similar way.⁴⁷

The *Universal Declaration* and the two 1966 general human rights treaties sketched out a broad picture. Each document needed further elaboration, as subsequent treaties and instruments make clear. A series of cases tested the universality of the new human rights instruments. The task of fleshing out national, regional, and international human rights systems remains incomplete. We will group developments into (1) judicial and quasi-judicial decisions, (2) fights in political bodies (the EU, the world conferences and the UN political bodies), and (3) expert commentary.

One can note the absence, in this short list, of a category for treaties or other human rights instruments. To date, no international or regional human rights treaty expressly prohibits discrimination on the basis of ‘sexual orientation’ or ‘gender identity’, though two EU structural treaties refer to ‘sexual orientation.’⁴⁸ In general, it remains up to judges, experts and politicians to fill in the blanks in human rights provisions.

Do we, LGBTI people, have a space within “privacy” rights? Do we fit within ‘other status’ or ‘other grounds’ in equality provisions? Are sexual orientation discrimination or gender identity discrimination forms of sex discrimination, bringing us within virtually all non-discrimination laws? Do we have a right to marry a same-sex partner or marry in our chosen sex? Do we have a right to found a family, which requires rights to adoption, surrogacy or assisted insemination? Are we ‘social groups’ within refugee law? Does the ‘right to health’ speak to our particular needs and conditions? Do ‘mobility’ rights within the EU and immigration laws in general give rights to same-sex partners?⁴⁹ Do we have a right to happiness and personal fulfillment?

⁴⁶ Article 23, Universal Declaration of Human Rights.

⁴⁷ As described later, the UN Human Rights Committee, interpreting the wording of the *Covenant on Civil and Political Rights*, has said that homosexuals are entitled to the rights and obligations of marriage, but not the title.

⁴⁸ The Treaty of Amsterdam, amending the basic EU structure, enabled the Commission to act on sexual orientation discrimination, along with other new grounds, the most politically important of which was race. It did not itself prohibit such discrimination, leaving it to community law to resolve. It did lead to an equality directive requiring non-discrimination on grounds of sexual orientation in employment, a significant victory. This is part of community law, therefore part of the elements that make the EU like a state, rather than like an inter-governmental organization. The Lisbon Treaty applies the Charter of Fundamental Rights to EU governments when they are enforcing community law. The Charter prohibits discrimination on the basis of sexual orientation. One should also note the June, 2008, resolution “Human Rights, Sexual Orientation, and Gender Identity” of the General Assembly of the Organization of American States (AG/RES. 2435 (XXXVIII-0/08)), the first OAS resolution on LGBT rights.

⁴⁹ The 1993 book edited by Clapham and Waaldijk, *Homosexuality: A European Community Issue*, Nijhoff, made the argument on mobility rights to try to gain rights within existing EU community law. The book was funded by the European Commission.

What arguments will get us in the door and on the agenda, when we were not sent an invitation to the party? All the arguments listed above have been tried, and some have succeeded.

6. JUDICIAL AND QUASI-JUDICIAL DECISIONS

The importance of judicial and quasi-judicial decisions on issues of sexual and gender diversity is striking. Politicians and legislators are usually very slow to act, fearing questions about their own sexuality and expecting a backlash from religious leaders and conservative voters.

We have seen this political inertia most clearly in the survival of anti-homosexual criminal laws. They continued to be ‘on the books’ in many countries even after authorities stopped enforcing them in any systematic way, through a kind of *de facto* repeal. George W. Bush, when Governor of Texas, defended the Texas sodomy law as a “symbolic gesture of traditional values.”⁵⁰ The laws survived because politicians did not want to take risks. Homosexuals were not seen as a significant voting bloc, or a group that had civil society support. Decriminalization could occur when it was buried in a wholesale rewriting of criminal law (as in the adoption of the Napoleonic Code or the US Model Penal Code). In the US it was Bill Clinton, clearly the ‘underdog’ in the presidential campaign in 1992, who first took the political risk of openly courting the ‘gay vote’ in his country.⁵¹ Barack Obama continued this Clinton-initiated Democratic Party policy of including LGBTI issues in its domestic and international policies.

With politicians generally avoiding any initiatives, reform questions regularly fell to courts and judges. The pioneering decisions are those under the *European Convention on Human Rights*, a treaty sponsored by the Council of Europe. Terry Davis, the Secretary General of the Council of Europe, issued a statement on May 17, 2009, on the occasion of the International Day against Homophobia:

“It is unacceptable that some people in positions of official or moral authority in Europe still behave as if the European Convention on Human Rights does not apply to homosexuals,” Davis said. “People who discriminate often invoke morality to justify their attitude. They are making a relevant point, but they are getting it wrong. It is not the homosexuals who are immoral. It is the homophobes.”⁵²

⁵⁰ William Eskridge, *Dishonorable Passions*, Viking, 2008, 315.

⁵¹ Votes in presidential elections in the US are usually very close. Clinton gambled that trying to gain the ‘gay vote’ might make a difference.

⁵² Council of Europe supports IDAHO [International Day Against Homophobia], Rex Wockner, *International News*, # 787, May 25, 2009.

The lead decisions of the European Court of Human Rights have now been supported by certain decisions of the UN Human Rights Committee.

Here are the major decisions:

DECRIMINALIZATION

Any rationale for criminal prohibitions was fading away in the post WW II period. The point of such laws had largely become an attempt to keep gay people in the closet, safely out of sight. The famous case of *Dudgeon v UK*, decided by the European Court of Human Rights in 1981, was the first decision, beyond the national level, to extend human rights to homosexuals.⁵³ It ruled against the anti-homosexual criminal law that continued in force in Northern Ireland, part of the United Kingdom. The decision quoted from the Wolfenden report. It was not radical, for the UK had decriminalized in England, Wales and Scotland, leaving Northern Ireland as the sole troublesome holdout. As well, few criminal prohibitions remained in other parts of Europe. Dudgeon was pushing on an open door. In retrospect, it is almost a joke that Dudgeon, an out gay rights activist, won his case on the basis of ‘privacy’ rights. That was the ground available in the European convention, which, at the time, did not have a general non-discrimination clause. The decision was repeated and expanded in later cases in the European system.⁵⁴

A parallel decision by the UN Human Rights Committee occurred in 1994 in *Toonen v Australia*, under the provisions of the *ICCPR*.⁵⁵ The UN Committee would have looked very weak if it had not followed the well-established European lead. Toonen was also pushing on an open door, for all the Australian states except Tasmania had decriminalized. The national government in Australia wanted to lose the case in order to bring pressure for reform on the one wayward state.

Criminalization is now regularly said to be a breach of established international human rights standards. In 2010 this analysis was adopted by the UN Secretary-General and the UN High Commissioner for Human Rights. Nevertheless, as of 2011, colonial-era criminal laws remain in place in most of the former British colonies in Africa, Asia, the Caribbean and the Pacific Islands.⁵⁶ Prohibitions also exist in Central Asia and parts of the Middle East. Seven countries retain the death penalty as a possible punishment for homosexual acts.

⁵³ (1981) 4 E.H.R.R. 149.

⁵⁴ After *Dudgeon* the European Court of Human Rights ruled against similar laws in *Norris v Ireland* and *Modinos v Cyprus*, see (1991) 13 E.H.R.R. 186 and (1993) 16 E.H.R.R. 485. Certain judicial decisions have adopted the medical view that sexual orientation is determined for most individuals by the age of puberty. On that basis they have rejected arguments that a higher age of consent for homosexual acts is justified to “protect” young people from being drawn into homosexual patterns. The leading decision was that of the European Commission on Human Rights in *Sutherland v. United Kingdom* in 1997, later repeated by the Court in *L v. Austria* in 2003.

⁵⁵ CCPR/C/50/D/488/1992.

⁵⁶ Belize and Guyana, respectively on the coasts of Central America and South America, and both former British colonies, also retain criminal prohibitions.

PROTECTION FROM VIOLENCE

International refugee law protects individuals who have a well-founded fear of persecution on the basis of membership in a ‘social group.’ In 2008 the UN High Commission for Refugees issued a Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity, confirming that homosexuals and transgendered individuals are members of ‘social groups’ and therefore within the scope of refugee law. Numerous decisions of national courts had already upheld this interpretation of international refugee norms.

EQUALITY/NON-DISCRIMINATION

‘Privacy rights’ under the European Convention were extended to bar state employment discrimination in the 1999 decisions in *Smith* and *Lustig-Prean*, on military service in the UK.⁵⁷ These ‘privacy’ rulings, paradoxically, allowed homosexuals to be open about their sexual orientation without a fear of losing their jobs. Arguably all forms of state discrimination on the basis of sexual orientation, and more recently gender identity as well, are covered by this expansive interpretation of privacy rights.

RECOGNITION OF RELATIONSHIPS

The modern recognition of same-sex relationships began in the Netherlands in 1979 with legislation recognizing successor tenancy rights. The major breakthrough was the Danish *Registered Partnership Act* of 1989, extending most of the rights and obligations of marriage to same-sex couples who chose to register. Aging gay rights activists all remember the pictures that went around the world of the first couple leaving their ceremony in Copenhagen’s City Hall in an open Landau carriage, joining others for a champagne reception. The Danish legislation has been copied widely in Europe and North America. The year 1989 also saw the decision of the New York Court of Appeals in *Braschi v. Stahl*, upholding same-sex spousal survivor rights to a rent-controlled apartment.⁵⁸ These developments at national levels made international rulings possible.

In 2002, in *Joslin v. New Zealand*, the UN Human Rights Committee rejected a claim to equal access to marriage, on the basis of the reference to “men and women” in Article 23(2) of the *ICCPR*.⁵⁹ At the time only the Netherlands had opened marriage to same-sex couples (so the case was ahead of its time). In the 2003 decision in *Karner v. Austria*, the European Court of Human Rights recognized a same sex relationship for the purposes of successor tenancy rights (repeated in 2010 in *Kozak v Poland*). In 2003 the Human Rights Committee in *Young v Australia*, found that the denial of a spousal pension to a surviving same-sex partner violated equality rights.⁶⁰ That ruling was

⁵⁷ (2000) 29 EHRR, 493; (2000) 29 EHRR 548.

⁵⁸ 543 N.E. 2nd 49.

⁵⁹ CCPR/C/75/D/902/1999.

⁶⁰ CCPR/C/78/D/941/2000.

confirmed in 2007 in *X v. Colombia*.⁶¹ In 2010, in *Schalk v Austria*, the European Court of Human Rights rejected access to marriage, but recognized same-sex couples as coming within the “family” provisions of the convention and gave significance to the registered partnership law in Austria. The Court noted that a growing number of jurisdictions in Europe had extended marriage, but held that not enough states had yet done so to establish a European norm. The absence of some system for the legal recognition of same-sex relationships (as in registered partnership laws), the court suggested, could violate the *European Convention*.⁶² The European Court of Justice (EU) ruled in 2011 in *Romer v City of Hamburg* that when a registered partnership law was in place, there should be equal employment pension rights for married spouses and registered partners.⁶³ A new case from the UK tries to push the issue a bit further, arguing that because the UK has extended equal rights to heterosexual and homosexual couples it cannot justify calling one system “marriage” and the other system “civil unions.” Different titles suggest, the plaintiffs say, a privileging of one over the other.

CHILDREN

In 1999 the European Court of Human Rights in *Mouta v. Portugal* found a breach of the European Convention on Human Rights (ECHR) when a court denied custody of a child to the father on the basis of his homosexuality. In 2008 the court in *E.B. v. France* ruled that France could not discriminate on the basis of sexual orientation in decisions on the adoption of children. The question of whether adoption could be restricted to married couples was not directly addressed, although the court noted that ten European states already allowed homosexual couples to adopt children as couples.

EXPRESSION AND ASSOCIATION

In 2006 the court ruled in *Kobenter v Austria* that very strongly worded criticism of homophobic passages in a judicial decision was protected as freedom of speech. This overruled a conviction of their author in Austrian courts for defamation, an action brought by the judge who had written the judgment.

The banning of public parades or demonstrations by gay and lesbian activists was held to breach the European Convention in the *Baczkowski* and *Alekseyev* cases from Poland and Russia, respectively decided in 2007 and 2010.

TRANSSEXUAL RIGHTS

In 1996 in *P v. S and Cornwall County Council*, the European Court of Justice held that discrimination on the basis of sex reassignment was discrimination on the basis of sex and, for that reason, contrary to EU law.⁶⁴

⁶¹ CCPR/C/89/D/1361/2005.

⁶² 24 June, 2010.

⁶³ This followed or extended the earlier ECJ ruling in *Maruko v VdB*.

⁶⁴ Case C-13/94.

In July 2002, in the *Goodwin* case, the European Court of Human Rights rejected some of its earlier decisions and ordered the United Kingdom to change the information on Christine Goodwin's birth certificate from male to female. The breach was not simply of the right of privacy, but also of the right to marry. The Court ruled that Christine Goodwin, a post-operative male to female transsexual, had the right to marry a man.⁶⁵

The 2003 ECHR decision in the *van Kuck* case held that German courts had violated privacy rights by interpreting a health insurance contract between a transsexual woman and a private insurance company as not covering the costs of gender reassignment. In 2004, in *K.B. v National Health Service*, the European Court of Justice supported equality for transsexuals as spouses in a pension case. In 2007, in *L v Lithuania*, the Court held that the government health system had an obligation to provide sex reassignment surgery, seeing it as a legitimate medical procedure in proper cases.

The European Court of Human Rights summarized the state of a 'European consensus' on gay and lesbian rights in their *Alekseyev* decision in 2010: (1) no criminal prohibition for homosexual relations between adults, (2) entitlement to serve in the armed services, (3) parental rights, (4) successor tenancy rights and (5) equal age of consent for sexual activity. But not yet a consensus on (1) a right to adopt, or (2) the right to marry, areas where a 'margin of appreciation' was still given to decisions of the individual states.⁶⁶

7. POLITICAL BODIES - THE EUROPEAN UNION

Joke Swiebel describes a political opening for LG rights in the 1990s that came about as a result of an institutional reaction to outbreaks of racism in Europe. The concern was brought to a head by the electoral success of the right-wing anti-immigrant Freedom Party in Austria, which was an acute political embarrassment to European leaders.

In response to these developments, European political leaders decided to bring 'human rights' within EU law. Human rights were not part of the EU system. The EU was established as a trading bloc. It had evolved into a special kind of federal state. EU law only prohibited discrimination on the basis of sex (essentially for labor market reasons). The decision to bring human rights into EU law came long after the 1949 *European Convention on Human Rights*. That treaty belonged to the Council of Europe, a separate institution from the EU.

⁶⁵ The *Gender Recognition Act* in the UK, implementing the *Goodwin* decision, does not require genital surgery if the individual has been diagnosed as a transsexual and is living permanently in the chosen sex.

⁶⁶ *Alekseyev v Russia*, judgment, October 21, 2010, para 83. This involves a conservative reading of their decision in *E.B. v France* on adoption.

This opening of the EU system to ‘human rights’ occurred in a period of significant institutional growth for the EU. As well, the influential 1994 Roth Report in the European Parliament called for reforms on sexual orientation issues, even raising the issues of marriage and adoption. An agenda was in the air that could include ‘sexual orientation’ among other grounds of discrimination.⁶⁷ It did not include ‘gender identity,’ for the breakthroughs in the *P v S* and *Goodwin* decisions were still in the future.⁶⁸

While the driving issue for bringing human rights within the EU system was racism, it was to be one of five grounds on which discrimination would be prohibited – sex (already in the EU treaty), race, sexual orientation, age, religion and handicap. The most controversial of these was sexual orientation. There were lobbyists in place (notably the new ILGA-Europe NGO, funded by the EU) and internal reformers (who themselves were organized, officially, from 1998, in the parliamentary Intergroup on Gay and Lesbian Rights, of which Joe Swiebel was a member). Together they succeeded in having ‘sexual orientation’ included in the new EU treaty, along with the other ‘new’ grounds. They succeeded, again, in having the new treaty provision implemented quickly by a directive that required all member states to prohibit discrimination in employment on the basis of sexual orientation.⁶⁹ The directive, enacted in October, 2000, was

...the jewel in the crown of the LGBT movement’s work at EU level. It is the only piece of international legislation now in force in the world that prohibits sexual orientation discrimination.⁷⁰

It has had a ripple effect on subsequent EU issues such as mobility,⁷¹ the admission of new members⁷² and on the 2000 EU *Charter of Fundamental Rights*, which is made

⁶⁷ Nico Beger posits certain differences between Europe and the US which helped make these European achievements possible, including (a) the stronger representation of the left in representative democracy in Europe (because of the proportional representation systems) and the association of the left with progressive views on sexuality issues, (b) the relative absence of a Christian right (though there were major Catholic campaigns against the recognition of relationships) and (c) more supportive government responses to the AIDS pandemic in Europe. See Beger, 2004, 47-49.

⁶⁸ “ILGA-Europe did not lobby the intergovernmental conference leading to the Amsterdam Treaty extensively for the inclusion of gender identity. It did so, however, in the process of lobbying the anti-discrimination article for the Charter of Fundamental Rights.” Beger, 2004, 25.

⁶⁹ The new treaty provision allowed the prohibition of discrimination in general, not limited to employment, that is, not limited to the economic market rationale for the original prohibition of discrimination on the basis of sex. The directives implementing the mandate are restricted to discrimination in employment, with the exception of the directives on race and sex, which are broader. There has been work to produce a single directive, which would expand the anti-discrimination provisions on sexual orientation and other grounds to include publicly available services.

⁷⁰ Swiebel, 23. Since the EU treaties have been constructing a special kind of federal state, some argue that this is not fully an international provision, but equivalent to national prohibitions of sexual orientation discrimination in countries such as South Africa (explicit in the constitution) and Canada (interpreted as a constitutional requirement). The directive on sexual orientation was limited to discrimination in employment, while the directive on race covered employment and publicly available services. In 2008 a draft single directive was completed, designed to end this inequality (or this hierarchy of rights, as it has often been put). As of mid-2011, the 27 equality ministers in the Council of the European Union had not approved this reform.

⁷¹ The mobility directive 2004/58/EC came into force in July 2005. It recognizes as a “family member” a same-sex partner of an EU citizen in situations where there has been a registered partnership

applicable to member states when applying community law by the *Lisbon Treaty* of 2009. The EU Fundamental Rights Agency has published three studies on homophobia and discrimination in Europe, two in 2008, an update in 2010, and a series of country specific reports.⁷³

Perhaps in response to this progress within the EU, the Council of Europe, responsible for the *European Convention on Human Rights*, began drafting a “Recommendation” for its 47 members on issues relating to sexual orientation and gender identity. 20 Council of Europe members, including Russia and Turkey, are outside the EU. A group of governmental experts from 13 states, under Swedish leadership, prepared a draft in 2009. Russia and the Holy See insisted on changes, limiting adoption, for example, to individuals, not same-sex couples. Still the basic framework of the Recommendation is very positive. As well, the Council of Europe will review state compliance at regular intervals, giving NGOs openings to raise issues.⁷⁴

8. *POLITICAL BODIES - THE UN WORLD CONFERENCES*

UN world conferences are political bodies, designed to focus on particular areas of concern and forge new understandings and policies. They are inherently reformist in character, though, of course, being inter-governmental, they include states unsympathetic to change. The 1990s, a reformist decade almost everywhere, saw an unprecedented series of world conferences – environment and development in Rio in 1992, human rights in Vienna in 1993, population and development in Cairo in 1994, the fourth world conference on women in Beijing in 1995, social development in Copenhagen in 1995, the UN General Assembly Special Session on HIV/AIDS in 2001, and racism in Durban in 2001.

This string of world conferences presented new opportunities for activists. As earlier noted, the first speaker to introduce LGBT issues in a UN forum was a Dutch junior minister in a speech to the third UN World Conference on Women in Nairobi in 1985, in a plea for lesbian rights.⁷⁵ The first time that LG NGOs were accredited for any UN forum was at the 1993 Vienna human rights conference, followed quickly by accreditation at the women’s conference in Beijing in 1995. The world conferences had

under the laws of a member state and where registered partnerships are recognized in the law of the host country. Both the home country of registration and the host country of residence must have such laws for the non-EU-citizen partner to gain rights of residence and employment. The new directive was the first time registered partnerships gained recognition in EU law.

⁷² Swiebel, 23-24.

⁷³ See http://fra.europa.eu/fraWebsite/lgbt-rights_en.htm.

⁷⁴ Nigel Warner, Ground-breaking tool to fight discrimination, *Destination Equality* (magazine of ILGA Europe), Winter 2010-11, 12. The Recommendation was adopted by the Committee of Ministers of the Council of Europe in March, 2010.

⁷⁵ Swiebel, 25.

looser accreditation systems for NGOs than the UN Charter bodies, to avoid excluding groups from developing countries where few NGOs had UN accreditation.

THE VIENNA WORLD CONFERENCE ON HUMAN RIGHTS

Three LGBT NGOs were accredited at the UN human rights conference in Vienna in 1993. None had existing ‘consultative’ status at the UN. Six statements were made by lesbian and gay activists either in the special NGO session of the plenary or in the main committee. In addition they participated in the meetings of the NGO parallel conference. Five governments made positive references to lesbian and gay issues in their speeches to the plenary sessions of the conference: Australia, Austria, Canada, Germany and the Netherlands. Singapore was the only state to make a negative comment. In a statement pointedly called "The Real World of Human Rights" Singapore 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.⁷⁶

The draft final conference statement 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 quickly rewritten as a general, open-ended prohibition of discrimination, without a list.⁷⁷ Sexual orientation was back ‘in the closet.’

The Vienna Declaration and Programme of Action states that ‘all human rights are universal, indivisible and interdependent and interrelated...’ All participant states agreed to this language. It is modified only by the statement that

The significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind...

THE BEIJING FOURTH WORLD CONFERENCE ON WOMEN

⁷⁶ Copy in possession of author. Some of this language was repeated by Singapore’s Deputy Prime Minister S. Jayakumar in September, 2005, at the UN Summit. He repeated that most human rights were still essentially contested concepts. “But the penchant of some states to present their views as universal norms inevitably provokes resistance, unnecessarily politicizes the process and is ultimately unhelpful to the cause of human rights. Unless this deeper issue is squarely addressed, any changes will only be superficial.” Quoted in UFP, U.N. assembly pressured over new human rights council, Japan Times, September 18, 2005, 5.

⁷⁷ Information from members of the Canadian delegation.

Eleven explicitly lesbian or lesbian and gay organizations were accredited to the conference in Beijing.⁷⁸ There was a ‘lesbian tent’ at the NGO forum and a lesbian march on September 5, 1995. Two Canadian women unfurled a banner “Lesbian Rights are Human Rights” from an observer’s balcony in the main conference hall. Security guards hastily intervened.

In preparatory meetings leading up to the Conference, several delegations, including South Africa, Canada, Israel and the EU proposed wording that referred to “sexual orientation.” One proposal addressed discrimination against women on multiple grounds, such as sex and race, sex and disability, sex and sexual orientation. The four references to “sexual orientation” in the draft Platform of Action were considered together in a drafting committee meeting that stretched into the early morning of the final day, Friday, September 15th, ending after 4 a.m. After an hour of debate on sexual orientation, the chair, Ms Patricia Licuanan of the Philippines, 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.⁷⁹ Thirty-three States indicated their support for the references.⁸⁰ Twenty States indicated opposition.⁸¹ The diplomatic preference for consensus decision making prevailed. A fight on the floor during the closing plenary had to be avoided.

The Beijing Declaration and Platform for Action affirms women’s

...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. (Paragraph 96).

Five years after the Beijing conference, 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:

⁷⁸ 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.

⁷⁹ Information from Ms. Shelagh Day, NGO representative, who attended the drafting committee meeting. See also Rod Mickleburgh, *Women’s Rights Spelled Out Clearly*, *Globe and Mail*, September 16, 1995, 1; Patrick Tyler, *Forum on Women Agrees on Goals*, *New York Times*, September 15, 1995, 1.

⁸⁰ 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.

⁸¹ 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.

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 accomplishments. 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.⁸²

The International Service for Human Rights recorded the outcome:

The two most contentious issues were abortion and sexual orientation. A significant source of opposition came from Catholic and Islamic countries, including the Holy See, Nicaragua, Pakistan, Libya, Sudan, Iraq and Iran. Delegates from these countries blocked the use of the term "sexual orientation" from the final draft document and prevented it from being used even in a passage highlighting non-discrimination laws in various countries. In their closing statements, representatives of Norway, New Zealand, Canada and the European Union, stated their disappointment in the lack of language against discrimination based on sexual orientation and reaffirmed their commitment to anti-discrimination laws.⁸³

THE UN GENERAL ASSEMBLY SPECIAL SESSION ON HIV/AIDS

Various UN agencies took up concerns with AIDS, including the World Health Organization, the UN Development Programme and the World Bank. UNAIDS was established as an inter-agency body. Later the Global Fund was launched, dealing with three diseases, malaria, tuberculosis and HIV/AIDS. These programs on AIDS inevitably drew LGBT/SOGI issues into UN activities.

In June 2001, the United Nations General Assembly held a Special Session on HIV/AIDS, oddly only called the UNGASS. Two questions arose. Would a speaker from the International Gay and Lesbian Human Rights Commission (IGLHRC), a US based NGO, be allowed to speak at a UN sponsored workshop preceding the Special Session? Secondly, would the final statement of the Special Session mention

⁸² George Archibald, Feminist proposals routed at U.N. conference, Washington Times, June 12, 2000.

⁸³ Special Session – Beijing + 5, Human Rights Monitor, International Service for Human Rights, Geneva, No. 52, 2000, 9 at 10-11.

homosexuals or sexual orientation? The Iranian Ambassador feared that the session would turn into

...an opportunity for certain forces in the Western world to push the envelope in areas where there is cultural sensitivity, ideological sensitivity, ethical sensitivity.⁸⁴

Karen Kaplan from IGLHRC was included in the workshop by the Assembly President, then banned at the request of Egypt, Iran, Libya, Malaysia, Morocco, Pakistan, Saudi Arabia, Sudan and Syria. A motion to reinstate her was made by Canada, backed by the EU, Australia, New Zealand, Argentina, Norway, Chile, Iceland, and others. The US did not co-sponsor the motion, but voted in favor.⁸⁵ On June 24, 2001, the issue of approving Kaplan was debated for over two hours, delaying the opening of the session.

Islamic states sought unsuccessfully on Monday to block a U.S.-based gay rights group from participating in a panel, delaying for hours a major U.N. General Assembly session on AIDS. The nations, from Malaysia to Syria, many represented by the Organization of Islamic Conference, tried to deny the assembly a quorum after it was clear they would lose a vote. But Assembly President Harri Holkeri of Finland refused to rule that a threatened walkout meant there was no quorum and said delegates could not speak in the assembly and then say they were not there. "We have had the presence of the majority of members here in the plenary," he said.... The Islamic nations were backed by Cuba, China, Russia and Belarus as well as Nigeria, Tanzania, Burkina Faso, Cameroon, Congo, Kenya, Mali, Senegal, Haiti and El Salvador.⁸⁶

In the end, Karen Kaplan spoke at the workshop.

A Catholic-Muslim-Evangelical alliance was starting to become important.

Lamani [a Moroccan diplomat representing the Organization of the Islamic Conference] said he was first approached by U.S. Christian non-governmental organizations, or NGOs, at the special session of the U.N. General Assembly on AIDS in New York in June 2001. Liberal Western activists and governments, he said, had offended the religious and cultural sensitivities of Islamic countries by proposing that a final conference declaration include explicit references to the need to protect prostitutes, intravenous drug users and "men who have sex with men" from contracting AIDS. "It was totally unacceptable for us," Lamani said. "The Vatican and so many NGOs came to us saying this is exactly the same position we are defending."⁸⁷

⁸⁴ 'Sensitive' issues cloud agenda for talks at UN, Reuters, The Nation [Bangkok], June 19, 2001, 11A.

⁸⁵ Islamic states seek to bar gays, Reuters, The Nation [Bangkok} June 24, 2001, 8A.

⁸⁶ Evelyn Leopold, Muslim states in uproar at gays in UN AIDS meeting, Reuters, June 25, 2001.

⁸⁷ Colum Lynch, Islamic Bloc, Christian Right Team up to Lobby U.N., Washington Post, June 17, 2002.

The final document approved by the Special Session made no mention of homosexuals, or the phrase “men who have sex with men,” a phrase commonly used in HIV/AIDS prevention work.

A last-minute compromise on the declaration came after Western nations reluctantly agreed to drop language specifically naming groups vulnerable to the disease – including homosexuals and prostitutes – because it was offensive to some Muslim nations. Instead of mentioning “men who have sex with men,” the new language refers to those who are at risk due to “sexual practice.” Prostitutes are referred to as those vulnerable to infection due to “livelihood,” and prisoners as those made vulnerable through “institutional location.”⁸⁸

One Western diplomat, however, said the compromise text represented a victory for the Western camp. “The language of the declaration is not perfect because it does not contain any reference to sexual orientation,” the diplomat stressed. “But the reference to homosexuals was a cut-off point for the Muslim group of countries.” Europe was left in isolation after coalitions of Latin American and African countries as well as the United States failed to back its position, the diplomat said. But the Western camp was successful in imposing a paragraph on “cultural obstacles” relating to education, prevention and treatment of AIDS, he said, noting that the Islamic group had been persuaded to go along with it. Moreover, the text recognizes “women’s rights over their sexuality.” “It’s a great victory for the European Union and a defeat for Egypt and Iran,” said the diplomat, noting that “on a scale of one to three, we notched up two and a half.”⁸⁹

9 *POLITICAL BODIES - THE UNITED NATIONS*

Sexual orientation issues were included in the *European Convention on Human Rights* as a result of judicial interpretation of the treaty that started in 1981. The treaty itself still has no express references to sexual orientation or gender identity. In contrast to the experience of the Council of Europe with the *European Convention on Human Rights*, the EU began without a mandate on human rights. We have seen the political context for the inclusion of ‘sexual orientation’ rights in the EU in the 1990s as part of a larger introduction of human rights into the EU system. .

In contrast to the EU, the UN had a human rights mandate from its creation in 1945. There was an early period of innovation on human rights with the *Charter* language in 1945 and the successful drafting of the *Universal Declaration of Human Rights* in 1948. That was far too early for any inclusion of sexual or gender diversity issues. There was a major expansion of substantive provisions and procedures in the

⁸⁸ Dafna Linzer, UN adopts AIDS battle blueprint, AP, June 28, 2001.

⁸⁹ UN meeting participants reach compromise on declaration on AIDS, AFP, June 27, 2001.

1960s, notably the race convention of 1965 and the two major human rights covenants of 1966. Again, this was too early.⁹⁰ The UN began an incremental process of drafting specific new human rights treaties – women (1979), torture (1984), children (1989), migrant workers (1990), disappearances (2006), and people with disabilities (2006). These innovations were all too specific to provide opportunities to piggyback LGBT issues.

The world conferences of the 1990s saw LG activists accredited to the events, starting in 1993, but this did not represent any kind of tentative endorsement of LGBTI issues at the UN. Only one of those conferences had a real debate on sexual orientation issues (and only in the closed drafting committee).

Some innovations occurred at the UN with the millennium development goals and the structural reforms that saw the replacement of the Commission on Human Rights with the Human Rights Council and a new ‘universal periodic review’ (UPR) process. The UPR has been open to some airing of what we now call SOGI issues (for sexual orientation and gender identity).

None of the changes outlined in the preceding paragraphs provided a political opening for SOGI issues that compared to the opening in the EU in the 1990s, when a completely new provision on equality/non-discrimination was being drafted and activists were in place inside and outside the EU structures. At the UN SOGI issues have always arisen in the context of adding them to existing instruments or existing mandates or in stand-alone resolutions. They have never had the comfort of being simply in addition to other new provisions or just one item in broader reforms. Having the cover of a broader reform has often been crucial. France could decriminalize two centuries ago with the big new Napoleonic Code and never explain why homosexual acts were dropped. Russian officials never explained at home why homosexual acts were made legal by their omission from the new 1922 code. The comprehensive Model Penal Code could decriminalize in Illinois in 1961, while avoiding a debate on the omission of a sodomy prohibition from the long document. Specific fights – such as decriminalization in the UK in 1967, and adding ‘sexual orientation’ to existing anti-discrimination laws in Canada in the 1990s – had no such cover. They were very difficult stand-alone LG fights. In the US there were a long series of hard fought campaigns around specific anti-discrimination laws and later around same sex marriage. In the same way we have had a series of specific fights at the UN in which SOGI issues have been the sole issue. There has been no larger context of less controversial or more compelling issues. And, as we have seen, sexual orientation issues could not be slipped into more general considerations of women’s issues or discrimination issues (themselves not new issues).

There have been major fights in the political bodies of the UN: (1) the granting of ‘consultative status’ to LGBT NGOs, (2) the mandate of independent experts, (3) the ‘Brazilian resolution’ on LGBT rights, 2003-2005, and the follow-up statements, and (4) the South African resolution of June, 2011.

⁹⁰ There were no NGOs lobbying for the inclusion of LGBT issues in the period. There had been no agenda setting report similar to the EU’s Roth report.

THE GRANTING OF ‘CONSULTATIVE STATUS’

The present pattern of international human rights non-governmental organizations is relatively new. Amnesty International was founded in 1961. Human Rights Watch originated in 1978 as Helsinki Watch. In 1991 Amnesty International included individuals imprisoned on the basis of their sexual orientation in their category of ‘prisoners of conscience.’ Human Rights Watch also began including LG issues in its work. Amnesty International altered its mandate in August 2001, to deal with all human rights and all forms of discrimination. Today a number of key international human rights NGOs are active on SOGI issues, often with a dedicated staff person or persons. Leading support groups are Amnesty International, Human Rights Watch, Global Rights, International Service for Human Rights and in the International Commission of Jurists.

Many branches of Amnesty International have LGBTI groups. AI members march in pride parades, call for anti-discrimination laws and support the recognition of same-sex relationships. Amnesty organized an international human rights conference in conjunction with the Gay Games in Amsterdam and again at the Gay Games in Sydney, Australia, in 2002. The set of Oxford Amnesty Lectures in 2002 was published under the title *Sex Rights*. AI has published at least four booklets on SOGI issues, including *Sex, Love and Homophobia* in 2004 with a foreword by Archbishop Desmond Tutu of South Africa.⁹¹

LGBTI or SOGI groups were largely barred from regular ‘consultative status’ at the UN until 2006. In that year, ILGA-Europe and two other organizations gained official access. This was only the second time a ‘political’ body within the UN structure made a decision we can identify as clearly supportive of LGBT rights (the first being the decision on the mandate of the special rapporteur on extrajudicial executions, noted below). The first LGBTI group from the ‘global south’ to get accreditation was the national federation from Brazil, ABGLT, in July 2009, with aggressive backing from its home government.

At the beginning of 2011 there were two individuals working full-time in Geneva on SOGI issues, John Fisher of the LGBTI NGO ARC International, marking six years residency in Geneva, and Allison Jernow at the International Commission of Jurists, a general human rights NGO, following an earlier dedicated staff person. What a small number! What a basic change!

THE MANDATE OF INDEPENDENT EXPERTS

In the 1960s the UN began what are referred to as the ‘special procedures’ a set of mechanisms that are not based on wording in the UN *Charter* or in specific treaties. They include working groups on specific topics (such as arbitrary detention), and ‘special

⁹¹ AI USA published *Breaking the Silence: Human Rights violations based on sexual orientation* in 1994. The international office published *The Louder We Will Sing* in 1999, *Crimes of Hate, Conspiracy of Silence* in 2001 and *Love, Hate and the Law* in 2008.

rapporteurs’, ‘special representatives’ and ‘independent experts’ appointed to report on individual countries or specific issues (such as human rights in North Korea or violence against women).

In the annual meeting of the Commission on Human Rights in 2001 certain delegates objected to the inclusion of cases of extrajudicial executions of sexual minorities in the report of Asma Jahangir, the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions. Delegates argued that she had overstepped her mandate by addressing these crimes. The resolution renewing her mandate was stripped of language explicitly recognizing that sexual minorities, among other groups, were vulnerable to extrajudicial executions.⁹²

This incident came a couple of months before a letter was circulated by the Office of the High Commissioner for Human Rights indicating that six thematic special rapporteurs “were interested in receiving information on sexual minority issues falling within their respective mandates...”⁹³ The annual reports of these independent experts now contain information on sexual orientation issues if relevant information has come to the rapporteur’s attention. Individuals and NGOs can forward information directly to the special rapporteur.

Asma Jahangir, the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, continued to investigate cases involving sexual orientation and gender identity and send urgent appeals to particular governments about incidents. Again her work was challenged. In 2002, in the Commission on Human Rights, Pakistan, on behalf of the Organization of the Islamic Conference (OIC), moved to delete two references to sexual orientation in the resolution extending her mandate. The motion was defeated, 28 to 15, with 9 abstentions.⁹⁴ This reversed the hostile decision taken by the Commission in 2001. The resolution on extrajudicial, summary and arbitrary executions, renewed periodically, was the only resolution ever adopted by the Commission on Human Rights to include an express reference to “sexual orientation.” When special procedures mandate holders include material on sexuality or sex/gender groupings, they routinely get some criticism. This occurred, for example, in 2009 for both the Special Rapporteur on Violence against Women and the Special Rapporteur on Torture.⁹⁵

⁹² See Human Rights Watch World Report 2002, page 602.

⁹³ Letter from Mr. Isaac Bitter to the International Gay and Lesbian Human Rights Commission. See Historic Progress: UN Officials Move to Address Human Rights Violations Based on Sexual Orientation, Gender Identity, Action Alert, IGLHRC, June 5, 2001. The six were the Special Rapporteur on extrajudicial executions, the Special Rapporteur on violence against women, the Special Rapporteur on torture, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on freedom of expression, and the Special Representative of the Secretary-General on human rights defenders. The Commissioner had approached the thematic rapporteurs and not the country specific rapporteurs.

⁹⁴ Voting in favor of deletion were Algeria, Bahrain, China, Democratic Republic of the Congo, Indonesia, Kenya, Libya, Malaysia, Pakistan, Saudi Arabia, Sudan, Syria, Togo, Vietnam and Zambia. The countries abstaining were Argentina, India, Nigeria, Russia, Senegal, Sierra Leone, South Africa, Swaziland and Uganda.

⁹⁵ International Service for Human Rights, Human Rights Monitor 09, #67, 2009, 19.

Opponents targeted the resolution on Extrajudicial Executions again in 2010. On November 17th, Benin, in the 3rd Committee of the General Assembly, acting on behalf of the African group, moved to delete the words “sexual orientation”. The motion passed by 79 votes in favor, 70 in opposition (with 17 abstentions). China and Indonesia voted to delete. India and the US voted to retain. None of the ten members of the Association of Southeast Asia Nations supported retention.

This loss was a bitter blow for the LGBT NGOs active at the UN, and a slap in the face to the High Commissioner for Human Rights and the Secretary General, both of whom had condemned criminalization and violence aimed at sexual minorities. The US announced on December 10th that it would move to restore the words when the resolution came before the plenary session of the General Assembly. In this tight eleven day ‘window of opportunity’ local LGBT groups were urged by Geneva based activists to lobby their home governments to support the restoration. On December 21st the words were restored by a vote of 93 in favor, 55 opposed, 27 abstentions and 17 member states absent. Supporting states had gone from 31 in 2005, to 54 in 2006, to 66 in 2008, and now to 93. This was still not a majority of UN member states, but enough to pass the motion, given abstentions and absentees. In Asia supporters were India, Israel, Japan, Nepal, South Korea, and Timor-Leste.⁹⁶ Opponents included member or the Organization of the Islamic Conference and states in Sub-Saharan Africa. China and North Korea opposed. The Philippines, Thailand and Vietnam abstained. South Africa supported deletion in November (in solidarity with the African group), but backed the US sponsored resolution in December.

The independent experts often used their expertise to delve into sexual orientation and gender identity issues. The report of the Special Rapporteur on health, Paul Hunt, in 2004 dealt with sexual and reproductive health issues. He said these rights were central to efforts to achieve gender equality, poverty reduction, to combat HIV/AIDS and to achieve the Millennium Development Goals of the UN.

...discrimination on the grounds of sexual orientation is impermissible under international human rights law. The legal prohibition of same-sex relations in many countries, in conjunction with a widespread lack of support or protection for sexual minorities against violence and discrimination, impedes the enjoyment of sexual and reproductive health by many people with lesbian, gay, bisexual and transgender identities or conduct [referencing reports of special rapporteurs on torture and on extrajudicial executions]. Additionally, the Special Rapporteur recalls that the Human rights Committee, in *Toonen v. Australia*, observed: “Criminalization of homosexual activity ... would appear to run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention.” ...

⁹⁶ Not included are votes of Australia, New Zealand or Pacific island countries.

Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.⁹⁷

The United States under the Bush administration criticized the report for what it saw as a permissive stance on abortion and for suggesting that sexual orientation was within an international human rights framework. Pakistan

...rejected the Special Rapporteur's conclusion that discrimination on the grounds of sexual orientation was impermissible under international human rights law and challenged the Special Rapporteur to quote exactly which article of any international human rights law convention prohibited such discrimination, According to Pakistan, the "easy" way for homosexuals, lesbians and transgender persons to avoid discrimination on the basis of sexual orientation was to "stop" engaging in non-heterosexual activity. In the words of the delegate, those of different sexual orientation should suppress their urges or "consult a medical doctor" and "get some medication."⁹⁸

Egypt and Saudi Arabia agreed. Canada and Switzerland disagreed.

The mandate of the Special Rapporteur on Health was renewed by the Human Rights Council in December, 2007, but only after some questioning of Paul Hunt by Egypt on both abortion and sexual orientation issues. Hunt said that

...“taking a dispassionate view of evolving human rights jurisprudence” it was his considered assessment that sexual orientation constitutes a prohibited ground of discrimination in international law. He added that ten years ago, female genital mutilation would have been considered a matter of “cultural sensitivity”, but is now widely regarded as incompatible with the right to health, and that maybe in future there will be similar changes with regard to perceptions of homosexuality.⁹⁹

The various special rapporteurs meet once a year, along with independent experts and the chairpersons of working groups. The report of their meeting in June 2005, included the following paragraph:

43. The discussion then turned to the emerging cross-cutting themes, particularly human rights violations on the grounds of sexual orientation and gender identity. NGO representatives presented a publication containing excerpts of the authoritative findings, jurisprudence and commentary of treaty bodies, special procedures, the Sub-Commission on the Promotion and Protection of Human

⁹⁷ Report of Paul Hunt, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, February 16, 2004, E/CN.4/2004/49, paragraphs 38 and 54.

⁹⁸ International Service for Human Rights, Human Rights Monitor, No. 62, 2004, 98.

⁹⁹ John Fisher, Arc-International, HRC 6 report, December 18, 2007, copy in possession of the author.

Rights and the Office of the High Commissioner for Refugees (UNCHR) with explicit reference to sexual orientation. They drew attention to the fact that discrimination on the ground of sexual orientation was widely practiced and that persons suffering such discrimination were more exposed to human rights violations and were less likely to claim their rights and obtain remedies. States should take measures to curb discriminatory laws and practices and take initiatives such as the enactment of non-discriminatory legislation, including the prohibition of discrimination on the ground of sexual orientation.¹⁰⁰

More recently, Special Rapporteur Martin Scheinin issued a report in August 2009, on Human Rights and Counter-Terrorism, addressing primarily the gendered impact of counter-terrorism measures. His discussion included attention to homosexuals and transgender people.

[20] Gender is not synonymous with women but rather encompasses the social constructions that underlie how women’s and men’s roles, functions, and responsibilities, including in relation to sexual orientation and gender identity, are defined and understood. ... [21] International human rights law ... requires States to ensure non-discrimination and equality (de jure and de facto) on the basis of gender, sex, sexual orientation and gender identity... [23] In Nepal, the counter-insurgency campaign that was defined with reference to terrorism was characterized by attacks on *meti* (effeminate males or transgender persons) by both sides, with reports that the Maoists were abducting *meti* and the police were taking advantage of the counter-terrorism environment to attack *meti* as part of a “cleansing” of Nepali society. ... [33] ...to stop dehumanizing victims of terrorism, Governments should remedy the gender inequality that makes women and lesbian, gay, bisexual, transgender and intersex individuals the targets of terrorism ... [36] ...in Egypt, Government targeting of lesbian, gay, bisexual, transgender and intersex individuals has been a way of shoring up religious legitimacy and signifying to opposition movements that the State is “the guardian of public virtue”.

There was opposition in the UN Human Rights Council when the report was received, mainly over his assertion that “gender” was socially constructed.

The 2010 report of Anand Grover as the new Special Rapporteur on the right to health criticized both the criminalization of homosexual acts and of prostitution. Grover, acting for a foreign funded AIDS law program in India, had successfully challenged the colonial era anti-homosexual criminal law before the Delhi High Court.

THE BRAZILIAN RESOLUTION

¹⁰⁰ Report of the twelfth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme, Geneva, 20-24, June, 2005, E/CN.4/2005/4.

In April 2003, with no advance warning, Brazil introduced a resolution, “Human Rights and Sexual Orientation”, in the Commission on Human Rights.¹⁰¹ In broad terms, it sought equal human rights for lesbians and gay men. The Brazilian representatives had not followed standard diplomatic practice in consulting with other government delegations in advance. Apparently they hoped that the resolution would slip through in the dying days of the Commission session. They wanted to act before the Cardoso administration came to an end in Brazil.

The resolution quickly gained 27 co-sponsors. Pakistan, on behalf of the Organization of the Islamic Conference, moved a “no action” motion. That procedural move was defeated, permitting consideration of the resolution itself.¹⁰² The United States delegation received instructions from Washington to abstain in any vote. Amnesty International issued a statement of support.

Amendments were proposed by Saudi Arabia, Pakistan, Egypt, Libya and Malaysia affecting all paragraphs of the draft resolution.¹⁰³ Pakistan threatened to move a hundred more amendments. The goal was to block any vote. Time was running out. The resolution and amendments were put over for consideration to the next session in 2004. Pakistan, as coordinator of human rights and humanitarian issues for the Organization of the Islamic Conference, circulated a letter to other OIC missions in Geneva. It listed a set of arguments against the Brazilian resolution.

The concept of “sexual orientation” has never been defined in the UN. It has hardly ever figured in a UN document. Efforts to do so have always created enormous controversy and discord. ... The list of sexual behaviour could always be expanded to include grossly errant behaviour like pedophilia. ... In our perspective sexual orientation is not a human rights issue. Instead it is related to social values and cultural norms. Individual countries need to deal with this issue within the parameters of their own social and legal systems. ... The concept of the traditional family constitutes the foundation of the human civilization.¹⁰⁴

The Holy See, which has observer status at the United Nations, also circulated its views on the Brazilian resolution.

This appears to be a preliminary step to claiming equal treatment regarding “marriage” for persons of the same sex, and regarding adoption for “unisexual households.” This attempt might be facilitated if a request were made to the Sub-

¹⁰¹ A detailed account of the events around the Brazilian resolution is found in Françoise Girard, *Negotiating Sexual Rights and Sexual Orientation at the UN*, in *Sex Politics*, Sexuality Policy Watch, 311.

¹⁰² 24 member States voted for action, while 22 voted for no action. 53 States were members of the Commission.

¹⁰³ Andrew Osborn, *Muslim alliance derails UN’s gay rights resolution*, *The Guardian*, April 25, 2003.

¹⁰⁴ Letter of Shaukat Umer, Ambassador and Permanent Representative, Permanent Mission of Pakistan, Geneva, February 26, 2004, copy in possession of the author.

Commission on Human Rights to undertake a study on discrimination on any grounds, including “sexual orientation.”¹⁰⁵

This short document dealt with marriage and adoption three times, clearly a central concern. Like the Pakistan Ambassador’s letter, it argued that “sexual orientation” has not been recognized in international human rights law (ignoring the 1992 *Toonen* decision).

Around fifty lesbian and gay activists traveled to Geneva for the 2004 session of the Commission to support the Brazilian resolution. No comparable lobbying effort had ever been made in the past and a number spoke in Commission sessions. The lobbyists were active and visible. They organized panel discussions, parallel to the Commission sessions. Argentina, Brazil, Canada, Germany and Sweden used their speeches in the ‘high-level’ session to state their concern with discrimination on the basis of sexual orientation. Brazil announced the launch of its “Brazil without Homophobia” educational campaign, but did not mention the resolution.

In contrast, opposition was silent or indirect.

Rather ominously the Pakistani delegate concluded his statement on behalf of the OIC by stressing the need for co-operation and understanding, and warning against “efforts to create new rights not sanctioned by existing treaty law” arguing that they would be “high fractious, divisive and counterproductive.” In implicit reference to the postponed resolution of Brazil on sexual orientation, the delegate asserted “attempts to develop norms which directly contradict fundamental value systems need to be avoided (...) No Islamic society would be able to accept any obligation which directly contradicts the basic tenets of our religion”.¹⁰⁶

Brazil did not reintroduce the motion in 2004. It issued a statement that more time was necessary for consultations with other states in hopes of building a consensus.¹⁰⁷ The resolution was deferred to the next annual session.

In advance of the 2005 Commission session the International Commission of Jurists published a compilation of international human rights law references to sexual orientation and gender identity. It demonstrated, in over a hundred pages of detailed text, the extent to which sexual orientation issues had already been recognized in the special procedures, the treaty bodies and the refugee system. Around 60 gay and lesbian representatives traveled to Geneva, organizing parallel panel sessions and lobbying governments.

¹⁰⁵ Note on the Project of Resolution of the United Nations Commission on Human Rights concerning “Sexual orientation” and Discrimination, Permanent Mission of the Holy See to the United Nations Office in Geneva, March 1, 2004, copy in possession of the author.

¹⁰⁶ International Service for Human Rights, Human Rights Monitor, No. 62, 2004, 16.

¹⁰⁷ Press Release, Permanent Mission of Brazil to the United Nations, Geneva, March 29, 2004.

The resolution was not introduced again in 2005, ending the Brazilian initiative. The official reason given was a lack of support in the Commission. The resolution would not pass.¹⁰⁸ Both the German delegation and the NGO Human Rights Watch believed that there were probably enough votes to pass the resolution if the obstructive tactics of opposing states could be overcome.¹⁰⁹ One organizer analyzed the position of various countries, concluding that approval or rejection lay with 7 states whose vote he could not predict.¹¹⁰ In contrast, a prominent opponent estimated a vote at the 2005 session of the Commission of 23 against the resolution, defeating 20 or 21 supporters, with about 11 abstentions.¹¹¹ What created the possibility of majority support for the Brazilian resolution was a combination of votes from the West and from Latin America – plus the possibility of support from countries like South Africa, South Korea, Japan and the Philippines – and abstentions.

Given the difficulties of dealing with ‘sensitive’ issues within the Commission, why did Brazil make its move in 2003? And why did it back off in 2004 and 2005? It seems that the resolution had been largely the initiative of two individual Brazilian diplomats.¹¹² It was consistent with positions taken by Brazil during the presidency of Fernando Henrique Cardoso, both at home and at the UN World Conference on Racism in Durban in 2001. Brazil had been a lead state in Durban in trying to get a reference to sexual orientation into the final conference statement.

President Luis Inacio Lula da Silva took office in January 2003. His government was very active, internationally, but not always in ways conducive to the initiative on gay and lesbian rights. Brazil established itself as a leader of developing states at the UN and in the World Trade Organization. Brazil headed a grouping, dubbed at the time the ‘G-20’, which challenged the US and the EU on agricultural subsidies at the WTO ministerial meeting in Cancun, Mexico, changing the political dynamics within the trade organization. Lula actively sought investment from Arab states. He “made friends with

¹⁰⁸ A delegation representing the Metropolitan Community Church met with the Honorable Nilmario Miranda, Brazilian Minister for Human Rights in Brazilia, May 5, 2004. The Minister told the delegation that the resolution was withdrawn because sufficient votes did not exist for passage. See Press Release, Metropolitan Community Churches, May 7, 2004, copy in possession of the author.

¹⁰⁹ Scott Long of Human Rights Watch stated: “When we counted the votes, there was a strong possibility the resolution would pass.” Quoted in Brazil withdraws gay rights UN resolution, Friday on-line magazine, Friday.com, April 9, 2004.

¹¹⁰ John Fisher of ARC International concluded that there were 16 member states that would vote “yes”: Argentina, Australia, Austria, Brazil, Croatia, France, Germany, Hungary, Ireland, Italy, Mexico, Netherlands, Peru, Sweden and the United Kingdom. In addition 8 others were likely to vote yes: Armenia, Chile, Honduras, Paraguay, Russia, South Africa and Ukraine. The votes of the following member states could not be predicted: Costa Rica, Cuba, Dominican Republic, Guatemala, Japan, Republic of Korea and the United States. Probable “no” votes were predicted for Bahrain, Bhutan, Burkina Faso, China, Eritrea, Ethiopia, Gabon, India, Nepal, Sierra Leone, Sri Lanka, Swaziland and Togo. “No” votes would come from Congo, Egypt, Indonesia, Mauritania, Nigeria, Pakistan, Qatar, Saudi Arabia, Sudan, Uganda and Zimbabwe. Analysis of March 12, 2004, circulated on the list chr@list.arc-international.net.

¹¹¹ Family from Sanya to Geneva: An Interview with Dr. Farooq Hassan, Islamonline, accessed March 13, 2005.

¹¹² It was badly drafted and had to be immediately rewritten with the assistance of NGOs, suggesting it had not come out of any sustained discussion within the Brazilian mission or government.

oil-rich Arab countries.”¹¹³ In April 2005, he hosted an Arab-South America summit in Brazil, with representatives of thirty-four states.¹¹⁴ The story has circulated that Egypt directly asked Brazil to drop the resolution on sexual orientation as the price for their participation in the summit. For Brazil, economic and political considerations seemed in conflict with pursuing the equality initiative. Maybe the hoped for Arab investment did not materialize. Brazil proceeded with its “Brazil without Homophobia” domestic campaign. Particularly in his second term, Lula was a strong supporter of LGBT rights.¹¹⁵

Western states expressed a reluctance to take over sponsorship of the resolution from Brazil. The German delegation, probably the strongest supporter of the Brazilian resolution, said European sponsorship would be the “kiss of death.”¹¹⁶ It would polarize the issue between Western and non-Western countries, something that was already a reality within the UN. A member of the South African delegation said that the perception of developing states was that Brazil “was being used by the EU to push the resolution” because, it said, Brazil gave no reason for the initiative.¹¹⁷ South Africa had no interest in taking over the Brazilian initiative, saying it would only support resolutions that dealt with discrimination in general, or focused on development issues. South Africa wanted to retain a leadership role in the African group, and support for the Brazilian resolution conflicted with that goal. So different reasons led various states to do nothing.

The events connected with the Brazilian resolution stimulated increased attention to sexual orientation issues. There were references to sexual orientation rights in the opening ‘high level’ segment of the Commission session, in the debates around special procedures, and in an EU statement. New Zealand delivered a joint statement on behalf of 31 states (both current members and non-members of the Commission). The statement said, in part:

Sexual orientation is a fundamental aspect of every individual’s identity and an immutable part of self. It is contrary to human dignity to force an individual to change their sexual orientation, or to discriminate against them on this basis. And, it is repugnant for the State to tolerate violence committed against individuals because of their sexual orientation. ... we recognize that sexuality is a sensitive and complex issue. But we are not prepared to compromise on the principle that all people are equal in dignity, rights and freedoms. The

¹¹³ Richard Bourne, *Lula of Brazil*, California, 2008, 112.

¹¹⁴ Dina Ezzat, *Two to tango*, Al-Ahram Weekly Online, circulated by the Egyptian Initiative for Personal Rights, www. eipr.org, received September 10, 2004.

¹¹⁵ Evangelical Christians, a group with increasing influence in Brazil, demanded that candidates for the presidency in 2010 sign a pledge not to liberalize abortion and not to institute same-sex marriage (which had just been permitted in neighboring Argentina). Dilma Rousseff, Lula’s chosen successor as head of the Workers’ Party signed the pledge. It seems that with some uncertainty whether she would inherit Lula’s high popularity, she felt she could not take the risk of alienating this potential voting bloc.

¹¹⁶ Statement made at a meeting of the German delegation and LGBT activists in Geneva, Thursday, April 1, 2004, as recalled by Scott Long of Human Rights Watch: email, April 3, 2004, copy in possession of the author.

¹¹⁷ This was stated by a member of the South African delegation to LGBT activists in 2004: Minutes of the LGBT Working Group – April 15, 2004, copy in possession of the author.

Commission must uphold the principle of non-discrimination. We urge all States to recognize this common ground and to participate in debate. We hope this Commission will not be silent for too much longer.¹¹⁸

The 2005 New Zealand statement began a pattern. In 2006, 54 states signed on to a Norwegian statement that urged attention to the issues. The French-Dutch-Argentinean statement in the General Assembly in 2008 gained 66 supporters, then 67 when Barack Obama came to office in the US and retroactively added the US to the list. But it was 67 of 192.

LEADERSHIP FROM THE HIGH COMMISSIONER FOR HUMAN RIGHTS AND THE SECRETARY GENERAL

The office of the High Commissioner for Human Rights was created as a result of recommendations from the 1993 Vienna World Conference on Human Rights. The High Commissioner heads the section of the UN secretariat responsible for human rights, while having a much higher profile than simply the head of a UN department. The High Commissioner has become an independent and expert voice, often ahead of the views of many member states.

Former Irish President Mary Robinson was High Commissioner from 1997 to 2002, with 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. Earlier she had acted for Senator Norris in the challenge to Ireland's anti-homosexual criminal law before the European Court of Human Rights.¹¹⁹ She suggested the convening of an 'experts' meeting on SOGI issues, but indicated her office would play no role in organizing such an event. A following High Commissioner, Louise Arbour, had been supportive of lesbian and gay equality rights when she served as a judge of the Canadian Supreme Court. In 2005 the website of her office included a reference to "sexual orientation" in a section on "cross-cutting issues." In 2006, Arbour gave a speech at an international LGBTI human rights conference in Montreal. In 2008, Navi Pillay, the current UN High Commissioner for Human Rights, stated:

No human being should be denied their human rights, simply because of their perceived sexual orientation or gender identity. ... Those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such.

¹¹⁸ Statement of New Zealand Permanent Representative Ambassador Tim Caughley, Item 17, Commission on Human Rights, April 15, 2005. No African states supported the statement. From Asia only South Korea was listed as endorsing the statement. Six Latin American states were listed.

¹¹⁹ Mary Robinson, together with Amnesty International, Human Rights Watch and two other organizations, filed an amici curiae brief in the United States Supreme Court hearing of *Lawrence v Texas*, using international legal materials to argue against a Texas criminal law that penalized same sex acts. The case was decided in July, 2003.

The High Commissioner's Strategic Management Plan for 2010-2011 included combating discrimination on the basis of sexual orientation as one of six thematic priorities.

Ban Ki-moon was the first Secretary General to make a statement on SOGI issues. The statement was read at a 'high level' panel co-sponsored by 13 states and three NGOs, held in Geneva on September 17th, 2010. Also on the panel were High Commissioner Pillay, and civil society speakers from Guyana, India and Uganda. By video link, Archbishop Desmond Tutu spoke from South Africa. Also by video, transgender activist Sass Rogando Sasot spoke from the Philippines. Ban Ki-moon stated:

Laws criminalizing people on grounds of sexual orientation and gender identity violate the principle of non-discrimination. They also fuel violence, help to legitimize homophobia and contribute to a climate of hate. That is why, in May of this year, during a visit to Malawi, I called for such laws to be reformed worldwide. No doubt deeply-rooted cultural sensitivities can be aroused when we talk about sexual orientation. Social attitudes run deep and take time to change. But cultural considerations should not stand in the way of basic human rights.¹²⁰

In January, 2011, the website of the High Commissioner had a lead story about human rights defender Danilo da Silva Mussagy, who was described as someone who gives "a face to those in Mozambique discriminated against because of their sex or sexual orientation and advocates for those suffering from discrimination."¹²¹

In May, 2011, the High Commissioner's office issued a document "Tackling discrimination on grounds of sexual orientation and gender identity" quoting from twenty-one agencies and experts. Accompanying the statement was a video, in which the High Commissioner rejected the idea that sexual orientation and gender identity were "new concepts" (as regularly argued by opponents at the UN). She stated that discrimination on such grounds was "no different" than discrimination based on sexism, racism and xenophobia, which were "universally condemned." She proclaimed:

Equal rights for everyone, whoever they are, whoever they love. It is a great human rights cause, and one that I am proud to support.

THE SOUTH AFRICAN RESOLUTION, JUNE 17, 2011

The South African constitution was the first in the world to prohibit discrimination on the basis of sexual orientation. One of the heroes of the anti-apartheid struggle of the African National Congress, Simon Nkoli, had come out as gay years

¹²⁰ Accessed on the website [www. arc-international.net](http://www.arc-international.net), November 25, 2010. Ban Ki-moon made a similar statement in a special address to the Human Rights Council, 25 January, 2011, rejecting "persecution of people because of their sexual orientation or gender identity..." He said that "cultural practice cannot justify any violation of human rights."

¹²¹ See [www. ohchr.org / EN/Pages/WelcomePage.aspx](http://www.ohchr.org/EN/Pages/WelcomePage.aspx), accessed January 8, 2011. While this was unremarkable for organizations like Amnesty International or Human Rights Watch, it was the first time sexual orientation issues were given such visible inclusion on this website.

earlier. The 1955 “Freedom Charter” of the ANC condemned sexual orientation discrimination and leaders said that their experience made them committed to ending discrimination of all kinds. It was clear that this strong ANC commitment did not reflect majority views in South Africa, but the principle was entrenched in the new constitution of post-apartheid South Africa. It led to judicial decisions ending criminal prohibitions, recognizing spousal rights and opening marriage. As already noted, these developments conflicted with South Africa’s goal of being the leading international voice for Black Africa. South Africa could not be counted on to support initiatives on sexual orientation and gender identity at the UN.

In 2010 and 2011 the politics of these issues were changing at the UN. Both the Secretary General and the UN High Commissioner for Human Rights now publicly condemned criminal sanctions and violence against LGBT individuals. Latin America, as a bloc, now supported LGBT rights, with active leadership from Brazil and Argentina. The Organization of American States passed a resolution on sexual orientation and gender identity on June 7th by consensus. That month the UN Political Declaration on HIV and AIDS recognized the need to address the human rights of men who have sex with men. China, which saw itself as a leader and voice for developing states, was investing heavily in Africa and Latin America (whose positions on sexuality issues were in conflict). Strategically China was prepared to move from opposition to abstention. A court in India had struck down the 1860 criminal prohibition, used in the past by Indian diplomats to say that the best they could do would be to abstain on any vote. Russia and Eastern Europe had decriminalized in the 1990s. Russia was grumpy, with its domestic religious revival and active neo-Nazis, but there was support in some parts of Eastern Europe. Asia had some supporters, sometimes.

After the joint statement on SOGI issues in the Human Rights Council, delivered by Colombia in March, 2011, South Africa tabled a resolution to establish an open-ended intergovernmental working group to elaborate “new” concepts like sexual orientation and define their parameters. This would take place “prior to their integration into existing norms and standards of international human rights law.” LGBT activists were opposed, for they had long argued that sexual orientation issues were not “new.” South Africa was adopting the language of opponents, not supporters. South African diplomats were taking seriously the spurious arguments of various African and Muslim speakers. But South Africa was open to negotiations about the resolution, and in March any action was deferred. In the June session of the Council, LGBT NGOs gave a one page document to the South African delegation, specifying their problems with parts of the proposed resolution.¹²² South Africa presented a revised text on June 7th, and again LGBT NGOs promptly submitted critical comments in writing. To emphasize the importance of the issues, a second document was circulated, listing violations of rights, including murder, death threats, violence, imposition of the death penalty and arbitrary detention.

¹²² Specifically they criticized (1) categorizing sexual orientation as a “new” issue, (2) the idea that a “single modality” in the Council should undertake consideration of sexual orientation issues, and (3) the idea of an open ended intergovernmental working group which would address definitions and scope, not violations of rights.

On June 11th, Kimberley Vance of ARC International reported:

There is a truly historic process unfolding in Geneva right now. For the first time ever, states are engaged (along with civil society partners), in a process of open informal negotiations on a draft resolution (not a joint statement, A RESOLUTION!) on sexual orientation and gender identity. What is also historic is that this process is being led by South Africa, with a number of other states ready to co-sponsor early next week, if some agreement on “modality” can be reached. When this resolution was first tabled at the March session, it took many of us by surprise, and the wording in the resolution was extremely problematic. It contained language that could have actually set our cause back significantly, and any reference to gender identity was absent from the text.¹²³

All concerns raised by NGOs were accommodated in a new draft circulated by South Africa on June 14th. The final version, considered on June 17, 2011, read as follows (omitting the first three routine preambular paragraphs):

Expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity

- 1. *Requests the High Commissioner [of Human Rights] to commission a study to be finalized by December, 2011, to document discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity;***
- 2. *Decides to convene a panel discussion during the 19th session of the Human Rights Council [in 2012], informed by the facts contained in the study commissioned by the High Commissioner and to have constructive, informed and transparent dialogue on the issue of discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.***
- 3. *Decides also that the panel will also discuss the appropriate follow-up to the recommendations of the study commissioned by the High Commissioner;***
- 4. *Decides to remain seized of this priority issue.*¹²⁴**

The resolution passed with 23 votes in favor, 19 against and 3 abstentions¹²⁵. Opponents represented the Organization of the Islamic Conference and Black Africa.

¹²³ Kimberley Vance, Arc International, email to the SOGI list, June 11, 2011, Historic process unfolding in Geneva – we need your input.

¹²⁴ A/HRC/17/L.9/Rev.1.

Nigeria, purporting to speak for the African group, said South Africa had broken with the consensus tradition of the African group. He claimed that 90% of South Africans did not support the resolution. “It grieves my mind because South Africa is the giant pillar of Africa.”¹²⁶ Opponents cited the statement from the Vienna World Conference on Human Rights that religious and cultural differences should be “taken into account” and the rejection of “sexual orientation” language at the Durban world conference on racism, xenophobia and other forms of intolerance. Later in the day, the US ambassador to Geneva noted that “very recently, we didn’t expect that we would be able to see this kind of a result.” She noted the strong Latin American support and South Africa “taking a risk.”¹²⁷ Maybe everyone was surprised at the outcome, particularly after the hostility and procedural aggression shown during the earlier Brazilian resolution.

10. *EXPERT BODIES - THE UNITED NATIONS*

The UN has a set of ‘political’ bodies, but also a number of roles for ‘experts,’ who are to act independently, without regard to positions taken by their home governments. We have already seen decisions by the Human Rights Committee, an ‘expert’ committee established to monitor compliance with the *International Convention on Civil and Political Rights*. We have also looked at reports of the independent experts, and statements by the High Commissioner for Human Rights and the Secretary-General. We turn to work of the treaty bodies and the attempt by experts to codify this area in the Yogyakarta Principles.

The reality is that the views of the expert bodies are largely ignored by the political bodies of the United Nations. The expert bodies are, in a real sense, a separate international system, in parallel with the Human Rights Council and the General Assembly. Perhaps we can understand this in terms of ideas of the ‘separation of powers.’ The expert bodies are like the courts, in those countries where courts have independence and competence. But, unlike those courts, the expert bodies lack enforcement powers. They often, as well, lack ‘persuasive’ status, a designation of respect shown by judges to court decisions which they are not structurally bound to follow. We often see some frustration on the part of specific state representatives over the lack of ‘political’ control over the systems of ‘special procedures’ and ‘independent

¹²⁵ There were 31 co-sponsors, led by South Africa and Brazil (which included members and non-members of the Council). Council members voting in favor of the resolution were Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, UK, USA and Uruguay. Voting against were Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Moldova, Russian Federation, Saudi Arabia, Senegal, Uganda. Abstaining were Burkina Faso, China and Zambia. Kyrgyzstan was absent. Libya was suspended.

¹²⁶ AFP, UN declares equality for all sexualities, Bangkok Post, June 18, 2011, 5.

¹²⁷ U.S. Department of State, Briefing on Lesbian, Gay Bisexual and Transgender (LGBT) Resolution at UN Human Rights Council, June 17, 2011.

experts’, including the actions of the High Commissioner for Human Rights. There is an elite, independent, ‘expert’ system that is part of the UN, which continues to try to give leadership and direction, but is usually irrelevant in debates in the Human Rights Council.

TREATY BODIES

The *Universal Declaration of Human Rights* and other early UN instruments had no enforcement provisions. In early UN practice, offending countries could not even be named in bodies like the Commission on Human Rights. This changed with the race convention, approved by the General Assembly in 1965. That treaty established an ongoing committee of experts that (a) would receive periodic government reports on state compliance with the treaty; (b) question government officials on compliance and (c) if the country had signed onto an optional procedure, give an opinion on a specific complaint, after the complainant had exhausted domestic remedies. These powers were brand new. For the first time at the UN there was an actual investigatory and adjudicative system, albeit limited in character. This 1965 innovation has been copied in all subsequent UN human rights treaties. In a previous section we have seen some of the decisions of the Human Rights Committee, established under the 1966 *International Covenant on Civil and Political Rights – Toonen v Australia, Young v Australia, X v Colombia*. Since the *Toonen* decision in 1994, it has become routine for the Human Rights Committee, and other ‘treaty bodies’, to question governments about discrimination on the basis of sexual orientation.

In 2009, the committee established by the *International Covenant on Economic, Social and Cultural Rights* drafted a “general comment” on non-discrimination. The various treaty bodies have published such comments to indicate their interpretation of treaty provisions and to tell countries what to cover in their periodic reports. Other treaty body ‘comments’ have made reference to ‘sexual orientation’ as a prohibited ground of discrimination, but the 2009 comment under the *ICESCR* was more comprehensive than others. (1) It stated that “other status,” at the end of the list of examples of prohibited grounds of discrimination, included “sexual orientation.”¹²⁸ (2) It included “gender identity” as another prohibited ground of discrimination, bringing transgendered individuals under treaty protection. (3) It referred to the Yogyakarta Principles (see below) for the definitions of “sexual orientation” and “gender identity”, (thereby responding to those state representatives who argue that these phrases are undefined or lack any standard usage). (4) It affirmed the principles of multiple and systemic discrimination, recognizing that individuals identities and desires are complex and intersecting (thereby responding to critics of ‘identity politics’ who see the LGBTI language as restrictive).

There had been a joint submission to the treaty committee by four international LGBTI NGOs, the first time such an organized action had taken place in relation to a

¹²⁸ It does not suggest that discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex, as had been held in the *Toonen* decision of the Human Rights Committee.

treaty body on the drafting of a general comment.¹²⁹ This represented a maturing of LGBTI lobbying at the UN, led by John Fisher of ARC International. As well, there now could be support from important general human rights NGOs. And lobbyists now had the ‘Yogyakarta Principles’, a document written in the formal and complex language of UN resolutions and instruments. Lobbyists were engaged, and they spoke the language of the institutions they were lobbying.

THE YOGYAKARTA PRINCIPLES¹³⁰

By early in the twenty first century, as we have seen, there were significant parts of the UN system which recognized equality rights based on sexual orientation and gender identity. These changes were led by the ‘expert’ institutions – the treaty bodies, the independent experts, and the High Commissioner for Human Rights.

To consolidate and advance this new recognition, two leading UN NGOs, the International Service for Human Rights and the International Commission of Jurists, organized a meeting of academics, experts and activists at Gadjah Mada University in Yogyakarta, Indonesia, in November, 2006. The group included Mary Robinson, the former UN High Commissioner for Human Rights, eight UN special rapporteurs, twelve academics (many of whom were special rapporteurs), five individuals with experience on treaty bodies, two judges, and individuals connected with national human rights commissions. The sessions were co-chaired by Thai law professor Vitit Muntabhorn (who was the Special Rapporteur on Human Rights in North Korea) and Sonia Onufer Correa, who works with Brazilian NGOs and Sexuality Policy Watch.

The meeting produced the Yogyakarta Principles, which state twenty-nine principles that are well established in international human rights law. The principles, themselves, are non controversial. It then applies those principles to issues of sexual orientation, gender identity and intersexuality. One can logically object to the conclusions only if the now well established facts of sexual and gender diversity are dismissed on moral, religious or cultural grounds. International human rights law says that discrimination on the basis of sex and race cannot be justified on grounds of tradition, custom or religion. The same principle logically applies to sexual orientation and gender identity.

Because of the *Joslin* decision of the Human Rights Committee, holding that the right to marry, as formulated in the *Convention on Civil and Political Rights*, is limited to men and women, the Yogyakarta Principles do not call for equal marriage rights, only equal substantive rights for same-sex couples.

¹²⁹ The groups were ARC International, the International Lesbian and Gay Association, the International Gay and Lesbian Human Rights Commission, and the Center for Women’s Global Leadership.

¹³⁰ See www.yogyakartaprinciples.org.

11. *SLOW CHANGE*

Change has been slow. LGBTI people are seen as relatively small minorities, dispersed among larger populations. We have no natural institutions of our own that can support a leadership (such as schools or churches). We remain largely invisible. The ability to ‘pass’ gives individuals a way of dealing with stigma that runs counter to organizing for change. Many societies are happy to keep pretending that we do not exist, encouraging invisibility. And, it seems, discussion of sexual issues or sexual variation is difficult in almost all societies.

The evolutionary and economic reasons for views focused on procreation (and, for that reason, against sexual variation) have been fading away. That change, however, is not evenly experienced in different parts of the world. Children are an expense in Amsterdam and Sydney, but an economic asset in India and Uganda. The role of religion, often, is to carry forward earlier social views. Secular societies have moved much more easily to the recognition of sexual and gender diversity than societies that remain religious. In the biggest states – China, India, the US, Russia – change is difficult or contested. Western economic progress has supported individual subjectivity and personal freedom from parents, kin, and home community. Birth families and extended kinship ties, however, remain very strong in most developing countries.

Jeffrey Weeks celebrates “The World We Have Won” in his description of the basic social and legal changes in the UK.¹³¹ Change is underway outside the West as well. China Daily called 2009 the “Year of Gay China” noting twelve events over twelve months.¹³² Indians will remember 2009 as the year the Delhi High Court ruled against the colonial-era prohibition of consenting male homosexual acts. In 2011, LGBTI voices from all the UN regions are again at the UN, seeking recognition and redress, and celebrating the achievement of the South African resolution. More fights lie ahead, no doubt, but there can be no denying that major advances have occurred.

Atrocities are also occurring, increasingly, it seems, in particular parts of the world. They are more visible now, and international opinion is more open to condemning them. The murder of David Kato a gay activist in Uganda in early 2011 sparked condemnation from a host of countries and international organizations.¹³³ That followed an international reaction to the brutal gang rape and murder of lesbian activist FannyAnn Eddy in Sierra Leone in 2004. Individuals and organizations now investigate and publicize abuses. Media will cover the stories. That work must continue. It is a grim counterpoint to the progress in recognizing equal dignity for LGBTI people in other parts of the world.

¹³¹ Jeffrey Weeks, *The world We Have Won*, Routledge, 2007.

¹³² Christine Laskowski, *Year of Gay China*, China Daily, December 28, 2009. China Daily, an English language newspaper, is published by the government. It is aimed at expatriates and has often been more liberal than Chinese language publications.

¹³³ See David Kato, *Obituary*, *The Economist*, February 12, 2010, 92.

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