

Unfolding from Nonexistence: the Dynamic but Contested Evolution of LGBT-human Rights

David Langlet*

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* Assistant Professor, Department of Law, School of Business, Economics and Law, University of Gothenburg. Thanks are due to Mika Nielsen and Lukas Romson for valuable advice and comments.

“We reaffirm the principle of non-discrimination, which requires that human rights be equally applied to all human beings regardless of their sexual orientation or gender identity.”¹

“We affirm that those two notions [sexual orientation and gender identity] are not and should not be linked to existing international human rights instruments.”²

1 Introduction and Terminology

The subject matter of the present contribution is the human rights of lesbian, gay, bisexual and transgendered (LGBT) people. Although not always treated as a significant issue in general human rights discourse and education, the legal situation of LGBT-individuals is high on the agenda of many political and judicial bodies.³ One need only mention the debates and legal battles fought in the US over civil unions and same-sex marriages and the legislative activity on such matters in many European countries over the last decade.⁴ The 2003 decision by the US Supreme Court to strike down state legislation criminalizing sexual conduct between consenting adults also brought the legal conditions of LGBT-individuals into the limelight.⁵ The present text is an attempt at presenting the evolution and present state of international LGBT-human rights law.

Before turning to the development of LGBT-rights as human rights, some points must be made about the terminology used. Here the acronym “LGBT”

1 Statement on “human rights, sexual orientation and gender identity” made before the UN General Assembly by the representative of Argentina in December 2008 in the name of 66 UN Member States (for a list of these States, *see* note 156 below). General Assembly, Sixty-third session, 70th plenary meeting, 18 December 2008, Official Records, U.N. Doc. A/63/PV.70, p. 30.

2 Statement made before the UN General Assembly by the representative of the Syrian Arab Republic in response to the above statement on behalf of 59 UN Member States (for a list of these States, *see* note 158 below). *Ibid.*, p. 31.

3 *See e.g.* Smith, R. K. M., *Textbook on International Human Rights*, 3. ed., Oxford University Press, 2007, p. 191, where discrimination on grounds of sexual orientation and the position of transsexuals is addressed on, in total, four lines. Cf. Steiner, H. J., Alston, Ph. & Goodman, R., *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, 2008, p. 965-979.

4 *See e.g.* *Gay marriage - Man and man in Maine*, *The Economist*, May 14th 2009, p. 50, and *Gay rights - Until death do us part*, *The Economist*, December 2nd 2006, p. 63; *Marriage and partnership rights for same-sex partners: country-by-country*, ILGA-Europe. Available at “www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country” (last accessed 20 August 2009).

5 *Lawrence v. Texas*, 539 U.S. 558 (2003).

will be used to identify the individuals whose rights are at issue. Obviously LGBT-individuals enjoy other human rights than those somehow associated with their sexual orientation or gender identity. However, those aspects are outside the purview of this study. By referring to lesbians, gays and bisexuals in essence two forms of sexual orientation are identified: homosexuality and bisexuality. With respect to e.g. partnerships and other kinds of relations, the term “same-sex” will be used to identify relationships involving two individuals of the same sex. In the literature, as well as in official documents, “sexual orientation” is increasingly used instead of the LGB of LGBT. In addition to homo- and bisexuality that also covers heterosexuality. For practical reasons LGBT will nevertheless be used here since it is conveniently short and captures both sexual orientation and gender identity issues, while being more precise than those notions. The term is not intended to imply that heterosexual individuals and practices are not covered by the rights discussed. Here, as well as in the general human rights discourse, the LGB of LGBT, to the extent that it refers to sexual conduct, only covers activities involving consenting adults.⁶ The same goes for “sexual orientation”.

The term “transgendered” is used to refer to individuals who transgress the dichotomy of two distinct sexes and encompasses, *inter alia*, transsexuals, transvestites and intersex persons. In practice, the focus will be on the legal situation of transsexuals, since that has attracted most attention within the international human rights discourse. The notion “gender identity” encompasses transgendered identities but also traditional (however defined) male and female identities.⁷

2 Historical Background

LGBT-individuals are present in every society and the legal and social contexts in which they live vary starkly. Initially, it must be noted that the concept of homosexuality, with its European origin, may be alien to many societies even if sexual and/or social practices which could be characterized as homosexual are well-established. A similar situation can be seen with respect to different transgendered behaviours. Many societies and cultures have traditions of recognizing various social and sexual practices of a non-heterosexual character. It has been proposed that by criminalizing certain consensual sexual behaviours

6 When someone is considered “adult” for the purpose of legally consenting to sexual activity differs between jurisdictions and is generally decided by national legislatures.

7 On the issue of terminology see further Hammarberg, T., *Human Rights and Gender Identity*, Council of Europe Commissioner for Human Rights, 2009, CommDH/IssuePaper(2009)2, p. 3; O’Flaherty, M. & Fisher, J., *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 Human Rights Law Review (2008) pp. 207-248 at p. 232; *Love, Hate and the Law: decriminalizing homosexuality*, Amnesty International Publications, POL 30/003/2008, 2008. Retrieved from “www.amnesty.org/en/library/info/POL30/003/2008/en” (last accessed 13 August 2009), p. 7.

or identities governments effectively, and ironically, create categories of individuals identified, and identifying themselves, as e.g. homosexuals.⁸

Many Western societies have a history of strong repression of LGBT-individuals. As an example, homosexual conduct between consenting (male) adults was criminal in Sweden until 1944. In Finland and Austria it was decriminalized only in 1971. In the different parts of the United Kingdom decriminalization occurred in 1967, 1980 and 1982, respectively.⁹ As noted above, criminalizing legislation was retained in some US states until 2003 when such laws were found unconstitutional by the Supreme Court.¹⁰ Until the early 19th century many Western countries even applied the death penalty to consensual same-sex sexual activities.¹¹ These attitudes also made their marks on the evolution of human rights law.¹²

During the area of colonialism Western European, and most notably British, laws on sexual conduct – including homosexual – was introduced into the legislation of many colonies. While the parental laws have now been abrogated, their legal offspring in many cases remain in the now independent former colonies.¹³ Today legally institutionalized repression of LGBT-individuals is predominantly an Asian and African phenomenon with many countries criminalizing same-sex sexual conduct and a few even imposing the death penalty. However, criminalizing legislation can be found also in other parts of the world, such as in countries in Oceania and the Caribbean. Lesbian sexual practices are less often criminalized than their male homosexual counterparts. Whether that reflects a more permissive attitude towards lesbianism is questionable. It may rather follow from the fact that women in many societies are generally denied a sexual identity of their own.¹⁴ Their (sexual) behaviour may nonetheless be subject to extensive social control.

It should also be noted that *de facto* criminalization of homosexual behaviour may exist without any explicit prohibition. It is not unusual for vaguely phrased proscriptions of, *inter alia*, indecent behaviour or prostitution to be applied against homosexuals also when there is no question of prostitution or engaging

8 *Love, Hate and the Law*, p. 44.

9 Wintemute, R., *Sexual Orientation and Gender Identity Discrimination: the Case Law of the European Court of Human Rights and the European Court of Justice*, Summary prepared for ILGA-Europe to submit to Mr. Thomas Hammarberg, Commissioner for Human Rights, Council of Europe, updated to 12 April 2009. Retrieved from “www.ilgaeurope.org/europe/litigation_in_the_european_courts/sexual_orientation_and_gender_identity_discrimination_the_case_law_of_the_european_court_of_human_rights_and_the_european_court_of_justice” (last accessed 13 August 2009), p. 1.

10 *Lawrence v. Texas*, 539 U.S. 558 (2003).

11 Wintemute, p. 1.

12 See further section 3, The evolution of human rights law, below.

13 *Love, Hate and the Law*, p. 28.

14 See further *ibid.*, p. 12 with references.

in sexual activities in public.¹⁵ In total, homosexual activities are explicitly or *de facto* criminalized in about 80 countries.¹⁶

Criminalization is only one, although the most conspicuous, example of legal policies which allegedly constitute or enable repression and/or discrimination of LGBT-individuals.¹⁷ Outside Europe and North America there is, for example, only a handful of States that prohibit discrimination in employment based on sexual orientation.¹⁸ A number of countries also maintain different ages at which one can legally consent to engage in heterosexual and homosexual conduct.¹⁹ Explicit provisions on discrimination based on gender identity are rare also in Europe. Among the currently debated issues in Europe are laws requiring transgendered individuals to undergo sterilization and forced divorces if they want their physical appearance to correspond with their innate perception of themselves.²⁰

To a large extent, the different legal situations are also reflected in the general attitude towards LGBT-individuals' human rights. As shown by the two quotes from statements before the UN General Assembly at the outset of this contribution, the governments of the world are still much divided when it comes to recognizing such human rights. As will be discussed towards the end of this chapter, however, it is not only Western countries that are championing LGBT-individuals' rights. Nor are all such countries adamant defenders of those rights.

In numerous countries it is still usual for public discussions on LGBT-related issues to be characterized by overt hostility. Statements may be unabashedly contemptuous or hateful, but also verging on the ludicrous or absurd.²¹

15 Among the provisions which *de facto* criminalize homosexual conduct or under which individuals have been detained due to their homosexuality or gender identity are "loitering", "unruly behaviour", "habitual debauchery", "disorderly conduct", "crimes against nature", "corruption on earth", "outrages on decency", "carnal knowledge of any person against the order of nature", "unnatural acts", "immoral acts" and "public scandal". *Ibid.*, p. 15 and 17.

16 Ottosson, D., *State-sponsored Homophobia: A world survey of laws prohibiting same sex activity between consenting adults*, ILGA, The International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2009. Retrieved from "www.ilga.org/news_results.asp?LanguageID=1&FileID=1161&FileCategory=1&ZoneID=7" (last accessed 13 August 2009), p. 48.

17 On discrimination in accessing economic, social and cultural rights, see O'Flaherty & Fisher, p. 211.

18 Ottosson, p. 50.

19 *Ibid.* and *Love, Hate and the Law*, p. 21.

20 Hammarberg, p. 6 et seq.

21 By way of example, the derogatory statements by Tasmanian officials and parliamentarians recorded in a document from the UN Human Rights Committee include that "representatives of the gay community are no better than Saddam Hussein" and "you are 15 times more likely to be murdered by a homosexual than a heterosexual...". *Toonen v. Australia*, Communication No. 488/1992, Views adopted 4 April 1994, para. 2.5. The then Namibian Minister for Home Affairs, Jerry Ekandjo, on state television reportedly urged newly graduated police officers to "eliminate" gay men and lesbians "from the face of Namibia". "Namibia gay rights row", *BBC News, World Service, Africa*, 2 October 2000, quoted in "Crimes of Hate, Conspiracy of Silence: Torture and ill-treatment based on sexual identity", Amnesty International Publications, 2001, ACT 40/016/2001. Retrieved from "www.amnesty.org/en/library/info/ACT40/016/2001" (last accessed 14 August 2009), p. 7.

Whereas most governments either deny practising human rights violations or portray them as rare aberrations, the repression that LGBT people face is often openly and passionately defended in the name of culture, religion, morality or public health, and facilitated by specific legal provisions.²²

Unfortunately, the rhetorical contempt, and even dehumanization, is not seldom coupled with physical assaults by officials as well as private individuals.²³ Often defenders of LGBT-rights are particularly targeted.²⁴

3 The Evolution of Human Rights Law

Even if legislative reform has been instrumental in the advancement of the rights of LGBT-individuals, a very significant role has been played by courts and other judicial or quasi-judicial bodies. As will be shown below, there has also been a strong interplay between legislative and adjudicative action. The relatively rapid developments in the way some international bodies perceive and address the situation of LGBT-individuals also testifies to a high level of dynamism in human rights law. This becomes particularly interesting when considering the conspicuous absence of any explicit mentioning of LGBT-related rights in all the main human rights instruments.

At the time of the drafting of the Universal Declaration of Human Rights (UDHR) homosexuality, or rather the sexual practices associated with it, were, as we have seen, widely criminalized. It is thus little surprise that no explicit mentioning is made of the rights of LGBT-persons. The same holds true for the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as well as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966. Not until the signing in 2000 of The Charter of Fundamental Rights of the European Union was discrimination based on sexual orientation explicitly dressed in a major, although non-binding, human rights instrument.²⁵ This dearth of explicit

22 *Crimes of Hate, Conspiracy of Silence*, p. 6.

23 See e.g. *ibid.* and *Stonewalled – still demanding respect: Police abuses against lesbian, gay, bisexual and transgender people in the USA*, Amnesty International Publications, 2006, AMR 51/001/2006. Retrieved from "www.amnesty.org/en/library/info/AMR51/001/2006/en" (last accessed 16 August 2009); Hammarberg, p. 14 et seq.; *Honduras: End Violence Against Transgender People*, Press release from Human Rights Watch, May 29, 2009. Retrieved from "www.hrw.org/en/news/2009/05/29/honduras-end-violence-against-transgender-people" (last accessed 16 August 2009); *Turkey: Pride and Violence*, Commentary from Human Rights Watch, Jun 22, 2009. Retrieved from "www.hrw.org/en/news/2009/06/22/turkey-pride-and-violence" (last accessed 16 August 2009).

24 Human Rights Council, *Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani*, U.N. Doc. A/HRC/4/37, 24 January 2007, paras 94-96. See, as an example, *India: Stop Abuse of Sexual Rights Activists*, Press release from Human Rights Watch, Oct 29, 2008. Retrieved from "www.hrw.org/en/news/2008/10/29/india-stop-abuse-sexual-rights-activists" (last accessed 16 August 2009).

25 Charter of Fundamental Rights of the European Union, OJ [2000] C 364/1, Art. 21.

recognition has not, however, prevented the development, over the last 20 to 30 years, of a growing body of case law, recommendations, declarations and other legal and policy documents establishing, in one area after another, that not only the right to privacy but also to non-discrimination apply to LGBT-individuals in various contexts. Most of this chapter will be devoted to charting and analyzing this development, focusing on the case law of the European Court of Human Rights (ECtHR) and views on individual communications issued by the UN Human Rights Committee (HRC).

4 Delimitating the Analysis

An LGBT-perspective may be applied to most human rights. Pertinent examples are the right not to be tortured or executed on account of (allegedly) belonging to one or more of the LGBT-categories. The focus here, however, will be on those rights that have attracted most judicial attention in an LGBT-rights context, and where the situation of LGBT-individuals often has been perceived as posing particular questions or problems. These rights are foremost the right to privacy and the right not to be discriminated against. This is not intended to imply that LGBT-persons are not subjected to, for example, torture and rape, sometimes motivated solely by their sexual orientation or gender expression. Unfortunately, examples of this abound.²⁶ However, from a legal perspective, these issues are more clear-cut than those pertaining to privacy and non-discrimination. Whereas few States or scholars – although the figure is clearly not zero²⁷ – contend that e.g. homosexual conduct or transvestism legally justifies torture, rape or executions, the picture has been, and in some cases continues to be, less clear with respect to LGBT-individuals' rights in other contexts. Another aspect of LGBT-individuals rights that will not be addressed here is that pertaining to such individuals as refugees and asylum seekers.

As the case for LGBT-rights has evolved, arguments based on a narrow right to privacy (“leave alone-arguments”) have been replaced or supplemented by the assertion of positive rights demanding recognition and equal treatment – e.g. in the form of a right for openly homosexual persons to participate on the labour market on an equal footing with heterosexuals, a right to adopt children or to enter into legally recognized partnerships.

Inevitably, discussions about non-discrimination to a large extent revolves around what characteristics should be used in determining which cases are similar, thus warranting similar treatment, and what characteristics may be used to distinguish otherwise similar cases. The open-ended language of significant human rights instruments with respect to non-discrimination obligations has

26 On torture *see Crimes of Hate, Conspiracy of Silence*. See also e.g. *Concluding observations of the Human Rights Committee: El Salvador*, U.N. Doc. CCPR/CO/78/SLV, 22 August 2003, para. 16; and HRC, *Report by the Special Representative on human rights defenders, Hina Jilani*.

27 O'Flaherty & Fisher, p. 221 et seq. This is perhaps most starkly evidenced by the imposition of the death penalty or other forms of corporal punishment for same-sex sexual conduct by some States.

contributed to making this a contentious but dynamic debate. It has, as will be clear from the following analysis, been highly influenced by changes in political and moral conceptions.²⁸ The same can be said about the boundaries of the sphere protected by the right to respect for privacy.

5 The European Court of Human Rights

The ECtHR has heard a significant number of cases relating to the human rights of LGBT-individuals. On several issues, such as unequal ages of consent and the right of postoperative transsexuals to full official recognition of their new sex, the Court has at some point explicitly overruled its own previous decisions, referring, *inter alia*, to changes in public attitude, developments in scientific knowledge and legislative changes among the Member States of the Council of Europe. LGBT-human rights in Europe remains a field of law in evolution. Some points, such as the outlawing of legislation criminalizing consensual same-sex relationships and unequal ages of consent, are by now firmly settled. Others, such as the right of LGBT-individuals, individually or as couples, to adopt, appears to be in a stage of continuous change.

The most significant parts of the ECHR for our purpose are Articles 8 and 14:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It must be noted that Article 14 has no independent existence, but is linked to the other substantive rights and freedoms set out in the Convention. In the words of the ECtHR, “[a]lthough the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous,

²⁸ A discussion on the underlying reasons for those changes is beyond the scope of this text.

there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter.”²⁹

This limitation to the Convention’s non-discrimination requirement should, however, be removed through the coming into force of the 12th Optional Protocol.³⁰ Among other things, the Protocol holds that “no one shall be discriminated against by any public authority on any ground” and gives as examples the grounds set out in Article 14 of the Convention. An Explanatory Report also confirms that sexual orientation is among the grounds, not explicitly mentioned in the Convention, which, according to case law, are nonetheless covered.³¹ The Protocol entered into force in 2005 for those States that had ratified it. So far that has been done by slightly less than 20 States.³²

5.1 *Criminalization of Same-sex Relations and Unequal Ages of Consent*

The first landmark case with respect to LGBT-rights under the ECHR was the 1981 *Dudgeon v. The United Kingdom*.³³ Mr. Dudgeon, a gay rights activist in Northern Ireland, alleged that his rights under the Convention had been infringed by the existence in Northern Ireland of laws making certain homosexual activities between consenting adult males criminal offences even if carried out in private. He based his claim on Articles 8 and 14 of the ECHR. Mr. Dudgeon had not himself been sentenced under the laws in question, as had no one else for a number of years. He had, however, been questioned by police in relation to his sexual life.

The UK government did not dispute Mr Dudgeon being directly affected by the laws at issue but submitted that they were necessary in a democratic society for the protection of morals and the rights of other for the purpose of Article 8 (2).³⁴ However, the UK government was hardly a staunch supporter of criminalization since similar laws in England and Wales had already been repealed. In Northern Ireland similar reform had been prevented by strong local opposition.³⁵ The Court found that although no proceedings had been brought in recent years in cases involving consenting adult males, there was no official policy not to enforce the law also in such cases. The law could thus not be considered a dead letter.

29 *Karner v. Austria*, Appl. no. 40016/98, Judgment, 24 July 2003, para. 32. Reference omitted.

30 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 177.

31 Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Retrieved from ”conventions.coe.int/Treaty/en/Reports/Html/177.htm” (last accessed 18 August 2009), para. 20.

32 For information on the number and identity of the States that have ratified the protocol see “conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF=16/08/2009&CL=ENG” (last accessed 16 August 2009).

33 *Dudgeon v. The United Kingdom*, Appl. no. 7525/76, Judgment, 22 October 1981.

34 *Ibid.*, paras. 36 and 40.

35 Sanders, D., *Human Rights and Sexual Orientation in International Law*, International Journal of Public Administration, vol. 25, issue 1 (2002), p. 13-44, at 15.

That the interference with Mr Dudgeon's private life was "in accordance with the law" was plain. The case thus centred on whether the law was aimed at the protection of morals or the protection of the rights and freedoms of others and whether it was necessary in a democratic society. The ECtHR accepted that it was concern for strong sentiments relating to the moral fabric of the Northern Irish society and the protection of the moral interests and welfare of certain individuals that had prompted the UK government not to take certain steps for the amendment of the impugned laws.³⁶ It also noted, however, that the legislation prohibited certain activities in all circumstances, irrespective of the involvement of anyone belonging to a vulnerable group.

As to the necessity-assessment, the Court emphasized that "necessary" implies a "pressing social need" for interference to be justifiable. Referring to its previous judgement in *Handyside v. The United Kingdom*³⁷ it emphasized that, where the protection of the requirements of morals is at issue the State's margin of appreciation is extensive.³⁸ However, the scope of that margin is affected by the nature of the activities involved. Since the *Dudgeon* case concerned "a most intimate aspect of private life" there must exist "particularly serious reasons" in order for any interference by the public authorities to be legitimate.³⁹ Having acknowledged the significance of the more conservative moral climate in Northern Ireland on sexual matters compared to that of Great Britain the Court went on to compare the situation in Northern Ireland with that in other Member States of the Council of Europe. It found that the "great majority" of such States no longer considered it necessary or appropriate to treat homosexual practices of the kind in question as a matter to which the sanctions of the criminal law should be applied. Furthermore, the authorities in Northern Ireland itself had refrained in recent years from enforcing the law in respect of private homosexual acts between consenting male adults and no evidence had been adduced to show that this had been injurious to moral standards. In the light of these circumstances the Court found no "pressing social need" for the criminalization.

As to proportionality, the justifications for retaining the law in force unamended were deemed to be outweighed by its detrimental effects. In the absence of any substantive injury, the Court concluded that:

"although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."⁴⁰

36 *Dudgeon v. The United Kingdom*, paras 46-47.

37 *Handyside v. the United Kingdom*, Appl. no. 5493/72, Judgment, 7 December 1976.

38 In the Court's words "State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements". *Dudgeon v. The United Kingdom*, para. 52.

39 *Ibid.*

40 *Ibid.*, para. 60.

The Court did not find reason to address the alleged violation of Article 14 since it amounted, in the Court's view, in effect, to the same complaint as that based on Article 8 alone.⁴¹

Whether the age at which one could validly consent to homosexual conduct could be maintained at 21, despite the corresponding age for heterosexual activities being 16, was explicitly left to the national authorities to decide. The Court indicated, however, that different ages for heterosexual and homosexual acts could give rise to an infringement of Article 14 on non-discrimination.⁴² The issue of differentiated ages of consent has subsequently been addressed by the Court and such differentiation struck down as unjustifiable discrimination according to Article 14 taken in conjunction with article 8.⁴³

The test from *Dudgeon* was subsequently applied in other cases concerning criminalizing legislation which was found to violate Article 8.⁴⁴ In *Norris v. Ireland* the Court made clear that the police investigation into Mr Dudgeon's private life had not been a necessary condition for its finding of a breach of Article 8. The existence of criminalizing legislation in itself constitutes an interference with the right to respect for private life.⁴⁵

5.2 *Homosexuals in the Armed Forces*

In 1999 the Court delivered two judgments concerning individuals who had been discharged from the UK Armed Forces due to their sexual orientation. The circumstances were similar and the Court's reasoning in the two cases is almost identical.⁴⁶ Under the applicable law, homosexual activities, although not illegal, constituted a ground for discharge from the Armed Forces.⁴⁷

As to the background, it suffices to mention that one of the applicants, Mr Lustig-Prean, started his career in the Royal Navy in 1982 and had by 1994 attained the rank of lieutenant-commander. After being informed anonymously about Mr Lustig-Prean's homosexuality the Royal Navy Special Investigation Branch started an investigation which ended in his discharge.⁴⁸

The applicants claimed that the investigations into their homosexuality and their subsequent discharge violated the right to respect for their private lives and

41 *Dudgeon v. The United Kingdom*, para. 69.

42 *Ibid.*, para. 62.

43 *L. and V. v. Austria*, Appl. nos. 39392/98 and 39829/98, Judgment, 9 January 2003 in which the Court reversed its previous case law on this issue. See also the Report of the (now abolished) Commission in *Sutherland v. The United Kingdom*, Appl. no. 25186/94, Judgment, 1 July 1997.

44 *Norris v. Ireland*, Appl. no. 10581/83, Judgment, 26 October 1988; *Modinos v. Cyprus*, Appl. no. 15070/89, Judgment, 22 April 1993.

45 *Norris v. Ireland*, para. 38.

46 *Lustig-Prean and Beckett v. The United Kingdom*, Appl. nos. 31417/96 and 32377/96, Judgment, 27 September 1999; *Smith and Grady v. The United Kingdom*, Appl. nos. 33985/96 and 3986/96, Judgment, 27 September 1999.

47 *Lustig-Prean and Beckett v. The United Kingdom*, para. 37.

48 *Ibid.*, paras 11-16.

constituted unjustified discrimination.⁴⁹ The government conceded, at least for some of the applicants, that there had been interference with their right to respect for their private lives. This was also confirmed by the Court, which then had to establish whether, as the government contended, the interference had been justified.

Referring to the special nature of the Armed Forces and their immediate connection to the nation's security, the government held that no valid comparison could be made to civilian institutions and that a wide margin of appreciation must be open to the State. It further argued that the mere knowledge or suspicion of the fact that a person was homosexual could have significant detrimental effects on the morale and fighting power of the Armed Forces personnel. It referred to a survey showing an overwhelming support among military personnel for the exclusion of homosexuals from the Armed Forces.⁵⁰

The ECtHR found the investigation processes to have been of an exceptionally intrusive character and also noted the profound effects of the discharges on the applicants' careers and prospects. It stressed the absolute and general character of the policy resulting in immediate discharge of any individual whose homosexuality had been established, irrespective of his or her conduct. In the light of this, and despite the margin of appreciation open to the State in matters of national security, the Court found that "particularly convincing and weighty reasons" would be required to justify the interference with the applicants' right to respect for their private lives.⁵¹ It rejected the idea that negative attitudes towards homosexuals in the Armed Forces, expressed by service personnel, could constitute a legitimate ground for the policy:

"To the extent that they [i.e. the attitudes documented by the survey] represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above, any more than similar negative attitudes towards those of a different race, origin or colour."⁵²

The Court also emphasized the lack of any evidence to substantiate the alleged damage to morale and fighting power caused by the presence of homosexuals. It pointed to the possibility of adopting a strict code of conduct applicable to all personnel as an alternative to the current policy. Finally it noted "the widespread and consistently developing views and associated legal changes in the domestic laws of Contracting States" with respect to homosexuals in the Armed Forces which had led to only a small minority of such States operating a blanket legal ban.⁵³ In the absence of weighty and convincing reasons for the UK policy, a breach of Article 8 of the Convention was found. Like in *Dudgeon* the Court did

49 *Ibid.*, paras 62 and 106.

50 *Ibid.*, paras 70-72 and 45.

51 *Ibid.*, paras 83-87.

52 *Ibid.*, para. 90.

53 *Ibid.*, para. 97.

not consider the alleged violation of Article 14 to give rise to any separate issue warranting an assessment.⁵⁴

5.3 *The Enjoyment of Social Protection*

A further area where the economic and social interests of homosexuals have been advanced by the Court is tenancy. In this field, however, the matter has been addressed as one of discrimination. In 2003 the Court ruled on a complaint by the Austrian citizen Mr Kerner.⁵⁵ When his male partner died in 1994 the couple had lived for five years in the partner's flat. The partner had also designated Mr Kerner as his heir. The tenancy was terminated by the landlord shortly after the partner's death. Under the applicable law a "life companion" would, under certain circumstances, be entitled to succeed to the tenancy. Mr Kerner was not accepted as a "life companion" by the Austrian Supreme Court, despite having been so by lower courts. He then turned to the ECtHR, alleging that he was the victim of discrimination. The claim was found to relate to the applicant's respect for his home and Article 14 applied since Mr Kerner could have been entitled to succeed to the lease, had it not been for his sexual orientation.⁵⁶

While conceding that the applicant had been treated differently on the ground of his sexual orientation, the government maintained that the difference was justified as the law aimed at the protection of the traditional family.⁵⁷ The Court accepted protection of "the family in the traditional sense" as, in principle, a weighty and legitimate reason, which could justify a difference in treatment. However, in the light of the narrow margin of appreciation open to the State in cases where difference in treatment is based on sex or sexual orientation, the Court did not find that the government had shown the provision at issue to be necessary in order to achieve the protective aim.⁵⁸ Hence a violation of Article 14 taken in conjunction with Article 8 was found.

5.4 *Rights of Transsexuals*

The rights of transsexuals provide a particularly vivid example of the dynamic development of the ECtHR's views and their relationship to changing moral and social conceptions. In 1986 the Court found that a Mr. Rees had suffered no violation of his right to privacy by the UK authorities' refusal to change his birth certificate so as to indicate his acquired male sex.⁵⁹ Having been born as a girl in the physical sense Mr Reese had undergone surgical treatment for sexual conversion and changed his name. All official documents except the birth certificate had also been changed to indicate his new sex. However, due to the

54 *Ibid.*, paras 104 and 108.

55 *Karner v. Austria*, Appl. no. 40016/98, Judgment, 24 July 2003.

56 *Ibid.*, para. 33.

57 *Ibid.*, para. 35.

58 *Ibid.*, para. 41.

59 *Rees v. The United Kingdom*, Appl. no. 9532/81, Judgment, 17 October 1986.

birth certificate, Mr Reese continued to be regarded as female for such purposes as marriage and pension benefits.⁶⁰

The Court noted that there was little common ground between the contracting States as to the legal status of transsexuals and that States enjoy a wide margin of appreciation in formulating their policies in this area.⁶¹ In ascertaining whether the required “respect” for the individual’s privacy imposes a positive obligation on the State – e.g. to alter a birth certificate – a fair balance has to be struck between the individual and the wider community.⁶² Noting the particular system for registering civil status in the UK – involving separate registers for births, marriages and deaths, often lacking any provisions for subsequent changes – the Court found that requiring the State to amend the system so as to account for changes of sex by transsexuals would go beyond what could be required under Article 8 of the Convention. It also found that changes to a birth certificate, particularly if kept secret as requested by the applicant, could prejudice the function of such registries. However, the Court acknowledged a need for keeping under review scientific and societal developments in this area.⁶³ A similar outcome was seen in *Cossey v The United Kingdom*, delivered in 1990 by a highly divided Court.⁶⁴

In a case concerning a French transsexual, decided in 1992, the Court found the fair balance between the general interest and the interests of the individual to require another outcome.⁶⁵ The situation for transsexuals in France differed from that in the UK on some significant counts. Unlike in the UK, French birth certificates were intended to be updated throughout a person’s life in order to reflect his or her current position. French law also prevented a transsexual from changing his or her name to a name typical for the new sex. Some official documents, apart from the birth certificate, also continued to indicate the transsexual’s sex as his or her biological sex at birth.⁶⁶ In the light of these factors, the Court found the French refusal to change the birth certificate to constitute a violation of the right to respect for privacy.⁶⁷

A decade later the ECtHR once more was charged with assessing the legal situation of transsexuals in the UK.⁶⁸ This time it explicitly reversed its findings

60 *Ibid.*, paras 12-17.

61 *Ibid.*, para. 33.

62 *Ibid.*, para. 37.

63 *Ibid.*, paras 43 and 47.

64 *Cossey v. The United Kingdom*, Appl. no. 10843/84, Judgment, 27 September 1990.

65 *B. v. France*, Appl. no. 13343/87, Judgment, 25 March 1992.

66 *Ibid.*, paras 52-62.

67 *Ibid.*, para. 63.

68 During that decade it had dealt with other cases involving transsexuals in the UK. They had not, however, brought any significant change in the Court’s jurisprudence. *See X., Y. and Z. v. The United Kingdom*, Appl. no. 75/1995/581/667, Judgment, 22 April 1997 and *Sheffield and Horsham v. The United Kingdom*, Appl. no. 31-32/1997/815-816/1018-1019, Judgment, 30 July 1998.

in *Rees*. In its concurrent judgments in *I. v The United Kingdom*⁶⁹ and *Goodwin v The United Kingdom*⁷⁰ the Court made clear that it should not depart, without good reason, from precedents laid down in previous cases. It must, however, have regard to the changing conditions within the respondent State and within Contracting States generally, and respond to any “evolving convergence” as to the standards to be achieved, if it is not to become “a bar to reform or improvement”.⁷¹

Still no common European approach as to how to address the legal challenges posed by a change of sex could be discerned. However, this time the Court held that:

“[It] attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.”⁷²

In the light of this, it was able to conclude that “the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.”⁷³

As no substantial detriment to the public interest had been demonstrated to flow from the change of a transsexual’s birth certificate, no fair balance had been struck between the public interest and that of the individual. Thus, Article 8 had been violated.⁷⁴

Significantly, this time the Court also found a violation of the right to marry set out in Article 12. This issue will be further addressed below.⁷⁵

In a subsequent case, concerning the right to reimbursement from a private health-insurance for costs associated with gender reassignment measures, the Court found that Germany had failed to respect the applicant’s right to privacy by requiring her to show the “genuine nature” of her transsexuality, despite the essential nature and cause of transsexualism being uncertain. Requiring a person to prove the medical necessity of a treatment involving irreversible surgery and relating to the most intimate areas of private life is not proportionate.⁷⁶

69 *I. v. The United Kingdom*, Appl. no. 25680/94, Judgment, 11 July 2002.

70 *Christine Goodwin v. The United Kingdom*, Appl. no. 28957/95, Judgment, 11 July 2002.

71 *Ibid.*, para. 74.

72 *Ibid.*, para. 85.

73 *Ibid.*, para. 90.

74 *Ibid.*, para. 91-92. A similar outcome was seen in *Grant v. The United Kingdom*, Appl. no. 32570/03, Judgment, 23 May 2006, concerning the application of rules on pensionable age to a transsexual when those rules applied differently to men and women.

75 See the section 5.5 below.

76 *Van Küch v. Germany*, Appl. no. 35968/97, Judgment, 12 June 2003, paras 81-82.

In 2007 the Court ruled on a case concerning another aspect of the rights of transsexuals, namely gender reassignment surgery as such.⁷⁷ Lithuanian law recognized the right of transsexuals to change both gender and civil status. However, the legislation needed for regulating gender reassignment surgery was partly missing. This resulted in such surgery not being carried out, something which also had repercussions on the possibility to exercise the right to change of civil status. In the particular case, this left the complainant, who had undergone partial surgery and had certain civil status documents changed, in, what the Court described as “a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity.”⁷⁸ Objections based on budgetary constraints were dismissed by the Court as unable to justify the situation, particularly considering the small number of individuals affected in the country. The failure to pass the necessary legislation was found to result in a failure to strike a fair balance between the public interest and the rights of the applicant.⁷⁹

In a recent case concerning reimbursement for privately funded sex reassignment surgery the Court held that Switzerland had violated Article 8 by rigidly applying a two-year waiting requirement for such surgery and by not sufficiently taking into account developments within the medical and psychological sciences.⁸⁰ The case concerned a woman who was 67 at the time she underwent sex reassignment surgery since she had postponed that step out of consideration for her children and now deceased husband. The Court emphasized the need for considering the circumstances of the individual case and construing the law in an evolutive fashion.⁸¹

5.5 *Marriage*

The right to marry is guaranteed by Article 12 of the ECHR, which reads:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The ECtHR has found that it “refers to the traditional marriage between persons of opposite biological sex.”⁸² This follows from the wording and the fact that the article is “mainly concerned to protect marriage as the basis of the family.”⁸³ However, in *I. v. the United Kingdom* and *Christine Goodwin v. The United Kingdom* the Court held that while Article 12 guarantees the right of a man and a woman to marry and to found a family, the second aspect is not a condition of the first. The inability to conceive or parent a child does not remove the right to

77 *L. v. Lithuania*, Appl. no. 27527/03, Judgment, 11 September 2007.

78 *Ibid.*, para. 59.

79 *Ibid.*, paras 59-60.

80 *Schlumpf c. Suisse*, Req. no, Arrêt, 8 janvier 2009 (not available in English), paras 114-115.

81 *Ibid.*, paras 112-113.

82 *Sheffield and Horsham v. the United Kingdom*, para. 66.

83 *Ibid.*

enter the state of marriage.⁸⁴ It also questioned that purely biological criteria should be used when determining the gender of the man and woman wishing to marry. If a postoperative transsexual lives as a person of his or her new sex, with a person of the opposite sex, with whom he or she wishes to enter marriage, that may not be denied while referring to his or her right to marry a person of the sex opposite to his or her biological sex. That is not a genuine possibility. Although the State may establish various criteria, it is not within its margin of appreciation to maintain a policy which impairs the very essence of someone's right to marry.⁸⁵

The fact that the Court has not recognized a right to same-sex marriage does not detract from the fact that States have only a narrow margin of appreciation to enforce policies which create a difference in treatment based on sex or sexual orientation when it comes to social or economic benefits and that this applies to distinctions between same-sex and heterosexual couples as seen above.⁸⁶

5.6 *Custody and Adoption of Children*

Adoption by homosexual individuals is an issue that has spurred controversy and strong feelings in many countries. Certain aspects have also, on a couple of occasions, been addressed by the ECtHR. It remains, however, a legal area in flux.

Before turning to adoption, a few words should be said about the seemingly more settled issue of custody. In 2000 the Court ruled on a case originating from a custody dispute between Mr da Silva Mouta – the plaintiff – and his former wife.⁸⁷ Mr da Silva Mouta had separated from his wife, with whom he had a daughter, and was living with a man. The parents initially agreed that the mother would have parental responsibility and the father a right to contact. When that did not work, due to the mother's non-compliance with the agreement, Mr da Silva Mouta applied for parental responsibility. His application was granted by the Family Affairs Court, but rejected upon appeal. In its judgment the appeal court held, *inter alia*, that:

“[t]he child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. ... [Homosexuality] is an abnormality and children should not grow up in the shadow of abnormal situations;”⁸⁸

Mr da Silva Mouta turned to the ECtHR and alleged a violation of Article 8 taken in conjunction with Article 14. Although the Portuguese court nominally based its decision on the best interest of the child, the ECtHR concluded that Mr da Silva Mouta had been treated differently than the child's mother due to his

84 *Christine Goodwin v. The United Kingdom*, para. 98.

85 *Ibid.*, para. 100-103.

86 *See Karner v. Austria* above in section 5.3.

87 *Salgueiro Da Silva Mouta v. Portugal*, Appl. no. 33290/96, Judgment, 21 December 1999.

88 *Ibid.*, para. 14.

sexual orientation.⁸⁹ It made clear that such differences would constitute discrimination under Article 14, unless there is an objective and reasonable justification.⁹⁰ This includes both the pursuance of a legitimate aim and the existence of a reasonable relationship of proportionality between the means employed and the aim sought. The Court did not question that a legitimate aim, namely the protection of the child, had been pursued. However, while the Portuguese government maintained that the appeal court's references to the applicant's homosexuality were merely clumsy or unfortunate, the ECtHR found that Mr da Silva Mouta's sexual orientation had been a decisive factor in the final decision. There was no reasonable relationship between the means and the aim. Accordingly, the decision constituted an unacceptable distinction and a violation of Article 8 taken in conjunction with Article 14.⁹¹

Adoption by homosexuals has been addressed by the Court in a couple of cases, both involving France. In 2002 the Court decided a case originating in an application for prior authorisation to adopt a child, made by a Mr Fretté, a single homosexual man.⁹² The application had been rejected by the Paris Social Services, granted upon appeal and finally rejected by the *Conseil d'Etat*. Mr Fretté's personal qualities were never questioned. What prompted the final decision was rather the general conception that a homosexual man cannot provide the "requisite safeguards" for adopting a child.⁹³ Before the ECtHR Mr Fretté alleged an infringement of his rights under Article 14 taken in conjunction with Article 8.

The Court emphasized that there is no such thing as a right to adopt and that Article 8 on the respect for family life presupposes the existence of the family, it does not guarantee the right to establish one. However, French law undisputedly authorized all single persons to apply for adoption provided that they are granted prior authorisation. If sexual orientation as such was used as a ground to distinguish between applicants, that would constitute discrimination unless there was an objective and reasonable justification. The Court also found Mr Fretté's homosexuality to have been a decisive factor in the decision to reject his application.⁹⁴ It saw no reason to doubt that the decision to reject the application pursued a legitimate aim, namely the health and rights of children who could be adopted.⁹⁵ The issue was then whether the difference in treatment was justified? The national authorities should enjoy a wide margin of appreciation in this type of case since opinions on such social issues may differ widely in democratic societies. Also, there was little common ground among the Member States of the Council of Europe on these issues with the law appearing to be in a stage of transition. Having established this, the Court listed three factors which acted as

89 *Ibid.*, para. 28.

90 *Ibid.*, para. 33.

91 *Ibid.*, paras 35-36.

92 *Fretté v. France*, Appl. no. 36515/97, Judgment, 26 February 2002.

93 *Ibid.*, para. 16.

94 *Ibid.*, para. 32-33.

95 *Ibid.*, paras 34 and 38.

justification for the French authorities' rejection of Mr Fretté's application. These were the division within the scientific community over the possible consequences of a child being adopted by one or more homosexual parents; the wide differences in national and international opinion; and the fact that there are not enough children to adopt compared with the number of persons wanting to become adoptive parents.⁹⁶ In the light of this, the Court found that the rejection of the application had not infringed the principle of proportionality.⁹⁷

Six years later, in 2008, the Court once more ruled on alleged discrimination in a case relating to adoption by a French citizen.⁹⁸ The female applicant, E. B., was a nursery school teacher living in a stable relationship with another woman. Her application for authorisation to adopt a child was denied by the relevant authorities. On appeal, that decision was first set aside but eventually upheld by the *Conseil d'Etat*. Like in the previous case, E. B. alleged an infringement of her rights under Article 14 taken in conjunction with Article 8.

The Court commenced its assessment on admissibility by methodically clarifying the implications of these articles in the present case. Although the case did not concern adoption *stricto sensu*, but a procedure for obtaining authorisation to adopt, it was nonetheless directly linked to adoption since authorisation was a precondition for subsequent adoption. The Court also emphasized that it had not been called upon to rule on the existence of a right to adopt but rather on the alleged discrimination in the application of the authorisation procedure. It made clear that since France, going beyond its obligations under the Convention, had expressly granted single persons the right to apply for authorisation to adopt, and, since that falls within the general scope of Article 8 – although not being a right established by that article – it had also incurred a responsibility not to apply that right, and the attendant procedure, in a discriminatory fashion within the meaning of Article 14.⁹⁹

In its substantive assessment the Court noted a number of differences between *Fretté v France* and the instant case. These included, *inter alia*, that the domestic authorities did not refer to E. B.'s "choice of lifestyle" as they had with respect to Mr Fretté. In the case of E. B. the authorities had also had regard to the attitude of her partner with whom she was in a stable relationship but who did not feel committed to E. B.'s application to adopt.¹⁰⁰ The domestic authorities were found to have based their rejection of the application on two main grounds: lack of a paternal reference in the household and the attitude of E. B.'s partner. The Court found the reliance on the applicant's partner's attitude unproblematic since it was an analysis of a *de facto* situation unrelated to E. B.'s

96 Referring to the mere fact that the number of prospective adoptive parents is larger than that of available children as a (partial) justification for treating applicants differently is odd. Such a relative shortage is clearly found in numerous cases where discrimination may occur and can hardly justify the application of discriminating criteria when prioritizing between potential parents.

97 *Ibid.*, paras 41-42.

98 *E.B. v. France*, Appl. no. 43546/02, Judgment, 22 January 2008.

99 *Ibid.*, paras 44-49.

100 *Ibid.*, para. 71.

sexual orientation. Relying on the lack of a paternal reference in the household could, however, have served as a pretext for rejecting E.B.'s application on grounds of her homosexuality. The case did in fact concern an application for authorisation to adopt by a single person, not by a couple.¹⁰¹ However, the Court considered these two main grounds to form part of an overall assessment why they should be considered concurrently.¹⁰²

In analysing the reasoning by the administrative authority and the courts concerned – emphasising, *inter alia*, that E.B.'s “sexual orientation was consistently at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings” and the systematic reference to the lack of a paternal referent – the ECtHR found that E.B.'s homosexuality had been a decisive factor leading to the refusal of her application.¹⁰³ Noting particularly that the applicant, in the words of the *Conseil d'Etat*, had “undoubted personal qualities and an aptitude for bringing up children” it found that the distinction was incompatible with Article 14 taken in conjunction with Article 8.¹⁰⁴

6 The Human Rights Committee

Like the ECHR the International Covenant on Civil and Political Rights (ICCPR) lacks any explicit reference to sexual orientation or gender identity. Unlike the European Convention, it also lacks a court authorized to make binding interpretations of its provisions. There is, however, a group of experts – the Human Rights Committee (HRC) – which can issue “views” on the correct interpretation of the ICCPR in individual cases. This requires that the State against which a complaint (referred to as a “communication”) is raised has submitted to the particular procedure established by the First Optional Protocol to the Covenant.¹⁰⁵ The HRC consist of eighteen individuals with recognized competence in the field of human rights, elected by the States Parties to the Covenant.¹⁰⁶ At the time of writing 112 States have become parties to the First Optional Protocol, thus enabling the HRC to receive individual communications.¹⁰⁷

Of most interest for our purposes are Article 17 of the ICCPR on respect for privacy and family life and Article 26 on discrimination:

101 *Ibid.*, paras 73-79.

102 *Ibid.*, para. 80.

103 *Ibid.*, paras 87-88.

104 *Ibid.*, paras 94-97.

105 For more details on the individual communications' procedure of the HRC, *see* Steiner et al., p. 891 et seq.

106 ICCPR, arts 28-29.

107 “treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4 &lang=en” (last accessed 27 July 2009).

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The first time the Committee addressed what may be characterized as an LGBT-rights issue was in 1982. It then received a communication alleging that the plaintiffs' right to freedom of expression and information had been violated by the way the Finnish broadcasting company applied a provision in the Finnish penal code criminalizing the public encouragement of "indecent behaviour" between persons of the same sex. The HRC found no violation of the ICCPR since one alleged victim was not considered a victim and the restriction suffered by the others were deemed to be within the national authorities' margin of discretion. The Committee did not question the broadcasting company's decision that radio and TV "are not the appropriate forums to discuss issues related to homosexuality, as far as the programme could be judged as encouraging homosexual behaviour."¹⁰⁸ Seen against the positions subsequently taken by the HRC in cases relating to LGBT-individual's rights it seems unlikely that it would take a similar stance today.

6.1 *Criminalization of Homosexual Acts*

The first step towards recognizing the rights of LGBT-individuals was taken in 1992, in *Toonen v Australia*.¹⁰⁹ It was in many respects strikingly similar to *Dudgeon v. The United Kingdom*, decided by the ECtHR 11 years prior.¹¹⁰ Mr Toonen was a gay rights activist living in Tasmania, the only part of Australia which still criminalized sexual activities between consenting male adults. Turning to the Committee, he claimed that the criminalization violated his right to respect for privacy and was discriminating. He also referred to an announcement made by the Director of Public Prosecutions a few years earlier that criminal proceedings would be initiated if sufficient evidence was available, indicating a violation of the pertinent sections of the Tasmanian Criminal Code.¹¹¹

108 *S. E. T. A v. Finland*, Communication No. 61/1979, Views adopted 2 April 1982.

109 *Toonen v. Australia*, Communication No. 488/1992, Views adopted 4 April 1994.

110 On *Dudgeon v. The United Kingdom*, see section 5.1 above.

111 *Toonen v. Australia*, para. 2.1-2.2.

The Federal Australian government – representing Australia as a party to the ICCPR – was not an enthusiastic defender of the Tasmanian criminalization. It conceded that Mr Dudgeon had been a victim of arbitrary interference with his privacy and that the provisions challenged could not be justified on public health or moral grounds. However, it included in its submission the observations of the government of Tasmania, which denied any violation of the Covenant.¹¹² The federal government provided other arguments, partly based on the *travaux préparatoires* of Article 17 of the Covenant, rebutting or undermining the views of the Tasmanian government.¹¹³ Interestingly, the latter conceded that sexual orientation may be subsumed under the term “other status” in Article 26 on discrimination, with the federal government also supporting an inclusive interpretation of that article.¹¹⁴

Due to the position of the Australian government, the HRC found it undisputed that adult consensual sexual activity in private was covered by the word “privacy” in Article 17 and that Mr Toonen was affected by the Tasmanian law at issue. Since there was no guarantee that no action would be brought against homosexuals in the future it also found the pertinent provisions of the Tasmanian Criminal Code to interfere with Mr Toonen’s privacy, although they had not been enforced for a decade.¹¹⁵ The Committee continued to assess whether the criminalization should be deemed arbitrary. Recalling its general comment on Article 17,¹¹⁶ it held that any interference, in order not to be considered arbitrary, must be reasonable in the circumstances. This, in turn, implies a requirement of proportionality between the interference with privacy and the end sought, as well as a requirement that the interference be necessary in the circumstances.¹¹⁷

The Committee rejected the contention, put forth by the Tasmanian government, that the prohibition could be a reasonable means or a proportionate measure to achieve the aim of HIV/AIDS prevention. This was partly because no link had been shown between criminalization of homosexual activity and effective control of that disease. The argument that the prohibition was justified on moral grounds was also rejected. In doing so, the HRC pointed to the following facts: that, with the exception of Tasmania, all laws criminalizing homosexuality had been repealed throughout Australia; that there was no consensus even within Tasmania as to the desirability of continuing criminalization; and the fact that the provisions were not currently enforced, thus implying that they were not essential to the protection of morals in Tasmania. Based on this, the Committee concluded that the criminalizing provisions were

112 Ibid., para. 6.1.

113 Ibid., para. 6.2-6.8.

114 Ibid., para. 6.9.

115 Ibid., para. 8.2.

116 HRC, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17) adopted at the Thirty-second session, 1988.

117 *Toonen v. Australia*, para. 8.3.

not reasonable and constituted arbitrary interference with Mr Toonen's rights under Article 17.¹¹⁸

Significantly, and somewhat unexpectedly considering the positions of the Tasmanian as well as the federal Australian governments, the HRC did not consider sexual orientation to fall under "other status" in Article 26 on discrimination. Instead, it held that sexual orientation should be included in the reference to "sex" in the same article.¹¹⁹ In subsequent views the Committee has referred generally to "the prohibition against discrimination under article 26" as comprising discrimination based on sexual orientation.¹²⁰ In *Toonen* the HRC did not find it necessary to consider whether there had been a breach of that article in addition to Article 17.¹²¹

6.2 *Discrimination in the Enjoyment of Social Protection*

The HRC has also considered two communications resembling the ECtHR's *Karner v. Austria* in that they concern alleged discrimination in the enjoyment of rights of a social or economic character.¹²² In 2003 the Committee gave its views concerning pension benefits. Mr. Young, an Australian citizen, had been in a same-sex relationship for 38 years. Upon the death of his partner, who had been a war veteran, Mr. Young applied for a pension as a veteran's dependent. It was denied since he was not considered a "member of a couple" and could thus not be a "dependent" as defined by the relevant Act. Among other criteria, a "member of a couple" must either have been married to a person, or have been living with a person, of the opposite sex (i.e. the veteran). Mr. Young alleged that his rights under Article 26 of the ICCPR had been violated by the denial of a pension due to his sexual orientation.¹²³

Since the domestic authorities had explicitly referred to Mr Young's failure to satisfy the condition of "living with a person of the opposite sex" the Committee did not find it decisive whether he had in fact fulfilled all other criteria required to qualify for a pension.¹²⁴ It concluded that Mr Young had been effectively prevented from being considered a "dependent" since he could neither marry his partner, nor be recognized as a cohabiting partner and qualify as a "member of a couple". Since the Government had not provided any arguments as to why the distinction between same-sex partners and unmarried heterosexual partners should be considered reasonable and objective, the

118 *Ibid.*, paras 8.5-8.6.

119 *Ibid.*, para. 8.7.

120 *Young v. Australia*, Communication No. 941/2000, Views adopted 6 August 2003, para. 10.4; *X v. Colombia*, Communication No. 1361/2005, Views adopted Colombia, 14 May 2007, para. 7.2. On the implications of where discrimination based on sexual orientation is subsumed, see O'Flaherty & Fisher, p. 217.

121 *Toonen v. Australia*, para. 8.11.

122 On *Karner v. Austria* see section 5.3 above.

123 *Young v. Australia*, paras 2.1 and 3.1.

124 *Ibid.*, para. 10.2.

Committee found a violation of Article 26.¹²⁵ The lack of arguments regarding the reasonableness of the distinction made prompted two members of the Committee to hold that it was, in fact, not a contested case and that the HRC had not canvassed the “full array of ‘reasonable and objective’ arguments” that may be offered.¹²⁶

A similar finding was made by the Committee in 2007 in a case concerning pension rights in Colombia.¹²⁷ X had been in a relationship with his deceased partner for 22 years, living with him for 7. When X, who was economically dependent on his late partner, was denied a pension transfer he alleged discrimination since he would have benefited from such a pension had the relationship been of a heterosexual nature.¹²⁸ The HRC noted that the Colombian law did not distinguish between married and unmarried couples – something which the HRC had previously considered acceptable – but in effect between homosexual and heterosexual couples, the latter of which did not have the option of marrying. Since the Colombian government had not produced any argument demonstrating that such a distinction was reasonable and objective, or provided any evidence of the existence of factors justifying making such a distinction, the Committee found a violation of Article 26.¹²⁹

6.3 *Marriage*

In 2000 the HRC issued its views on a communication in which Ms Jocelyn of New Zealand claimed to be the victim of a violation of her rights under, *inter alia*, Article 23 on the right to marry and Article 26.¹³⁰ Ms Jocelyn and her partner, with whom she shared a common home and jointly raised their children out of previous marriages, had applied for a marriage license. The application was rejected and the rejection eventually upheld by the Court of Appeal.¹³¹ In a very brief consideration the HRC noted that since marriage is addressed specifically by Article 23 of the ICCPR, any claims relating to that right must be considered in the light of that provision. That article is the only substantive provision in the Covenant which defines a right by referring to “men and women” rather than using general expressions such as “every human being” or “all persons”. In the Committee’s view, this is to be understood as indicating that the obligation stemming from Article 23 (2) only applies to the union between a man and a woman wishing to marry each other. Hence, it found no violation.¹³²

125 *Ibid.*, para. 10.4.

126 Individual opinion by Committee members Ruth Redgwood and Franco DePasquale (concurring).

127 *X v. Colombia*.

128 *Ibid.*, paras 1-2.2.

129 *Ibid.*, para. 7.2.

130 *Joslin v. New Zealand*, Communication No. 902/1999, Views adopted 17 July 2002.

131 *Ibid.*, paras 1-2.4.

132 *Ibid.*, paras 8.2-8.3.

7 Summary and Analysis of Case Law and Views

The intention here is not to pinpoint the exact state of the law on all issues of particular relevance to LGBT-individuals. The field is too big and the pace of development too high for that to be a feasible or meaningful endeavour in this context.¹³³ Rather, the main features and developmental directions characterizing this field of law will be identified together with some differences between the European and the global situations.

The criminalization of homosexual conduct between consenting adults in privacy has been clearly rejected as incompatible with human rights law by both the ECtHR and the HRC. The ECtHR has also been very clear in stating that the non-application of such laws does not render them acceptable. The repeal of criminalizing legislation also appears to have become a precondition for accession of new members to the Council of Europe.¹³⁴ The HRC also struck down criminalizing legislation that had not been applied for years, although without any guarantee that it would never be applied in the future. In the much-publicized case of *Lawrence v. Texas* the US Supreme Court, in 2003, also outlawed criminalizing legislation throughout the US. It then became the last country generally categorized as “western” to do so. The findings have all been centred on the right to respect for privacy. The US Supreme Court, however, made a clear connection between privacy and discrimination when holding that “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”¹³⁵ Despite this, criminalizing legislation – explicit or *de facto* – is still found in many countries, even if not all actually apply it.

Differing ages of consent for sexual activities between heterosexual and same-sex couples have also, eventually, been unequivocally rejected by the ECtHR. In this case the argument has been one of unjustifiable discrimination, which has gradually replaced previous deference to the right of States’ to protect certain vulnerable groups which would, supposedly, be at risk of being “lured” into homosexual behaviour. The HRC has not considered any communication pertaining to ages of consent. However, only a rather small number of countries worldwide maintain such a distinction in law.¹³⁶

As to social protection the ECtHR has made it very clear that States have virtually no room to make a distinction based on sexual orientation in the field of employment. If arguments based on the morale and fighting ability of the armed forces don’t suffice, it is hard to see how such a distinction could be found acceptable in any other field of work. Existing case law does not actually rule out that legislation which discriminates against homosexuals could strike a fair balance between the interests of the affected individuals and some societal

133 For an account of LGBT-relevant cases pending before the ECtHR as of April 2009 and the issues which they concern, see Wintemute.

134 Sanders (2002), p. 17.

135 *Lawrence v. Texas*, 539 U.S. 558 (2003), Opinion of the Court, p. 14.

136 Ottosson, p. 50.

interest, if such an interest could somehow be substantiated, and if the consequences for the individuals concerned would not be as grave as those following from dismissal from the armed forces for someone trained to be a soldier. However, such an argument seems extremely unlikely to succeed considering that the Court explicitly equates negative attitudes based on sexual orientation with those based on e.g. race. It would also require “particularly convincing and weighty reasons”.¹³⁷ Whether States are also under an obligation to outlaw discrimination based on sexual orientation by private (i.e. non-State) parties is not clear.¹³⁸

The HRC has not addressed the issue of work discrimination with respect to LGBT-individuals. However, the Committee under the ICESCR has held, in one of its general comments, that the Covenant proscribes discrimination based on sexual orientation “that has the intention or effect of nullifying or impairing the equal enjoyment or exercise” of the right to work.¹³⁹

The same narrow margin of appreciation as with public employment applies if States want to make a distinction based on sexual orientation with respect to social or economic benefits. This has been demonstrated in Europe in relation to tenancy and by the HRC with respect to pension benefits.

The human rights’ situation for transsexuals has changed very significantly in the European context over the last two decades. Reversing its previous case law, the ECtHR has made it abundantly clear that States have far-reaching obligations to accommodate the legal and administrative needs – such as change of official documents – of postoperative transsexuals and also, under certain circumstances, to provide medical treatment, including sex reassignment surgery. Transsexuals may not, against their own will, be left in “an intermediate zone as not quite one gender or the other”.¹⁴⁰ States also have limited room to question the veracity of someone’s desire to change sex, particularly if that person has undergone considerable personal hardships in order to realize such a change. The domestic laws in many European States have not, however, kept pace with the findings of the ECtHR, meaning that many transsexuals find themselves in situations which violate the ECHR. This goes, *inter alia*, for access to adequate healthcare.¹⁴¹ Issues pertaining to gender identity have not featured in the views of the HRC. However, the Committee on Economic, Social

137 *Lustig-Prean and Beckett v. The United Kingdom*, para. 87.

138 Wintemute, p. 6. On the implications of the general discrimination prohibition in Optional Protocol 12 for discrimination by private parties, *see* Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, paras 22-28.

139 CESCR, General Comment No. 18: The right to work, adopted 24 November 2005, U.N. Doc. E/C.12/GC/18, para. 12. *See also* O’Flaherty & Fisher, p. 215.

140 *Christine Goodwin v. The United Kingdom*, para. 90.

141 Hammarberg, p. 11.

and Cultural Rights has made clear that gender identity is among the prohibited grounds of discrimination under the ICESCR.¹⁴²

The ability of same-sex couples to gain legal recognition and treatment equal to that of heterosexual couples has attracted consideration by both the ECtHR and the HRC. None of them has recognized a right to marry for same-sex couples. This is not too surprising, considering both the “sex specific” language of the ECHR and the ICCPR on this point and the still small number of countries that have recognized such a right in domestic law. Postoperative transsexuals, however, may no longer be denied the right to marry in their new sex, at least not in Europe. Both the ECtHR and the HRC have found non-discrimination requirements to prohibit the exclusion of individuals in a same-sex relationship from social benefits which would have accrued to members of a heterosexual relationship in a similar situation. The HRC has also indicated that treating those in a same-sex relationship less well than those in a marriage, with respect to social benefits, may not be acceptable if the choice of marrying is not open to same-sex couples.¹⁴³

When it comes to biological children the ECtHR has made it clear that homosexuality as such may not be a decisive factor when deciding on custody. As to adoption, the Court has emphasized that it has not established any right to adopt, neither for singles nor for couples. What it has arrived at so far, with respect to adoption by a single person, is that any procedure for adoption – or authorisation to adopt – under domestic law may not be applied so as to distinguish between prospective parents according to their sexual orientation, i.e. existing rights pertaining to adoption may not be applied in a discriminatory fashion. It is not certain that the same principle can be applied to adoption by same-sex couples, particularly in countries that only allow adoption by couples.¹⁴⁴

It is interesting to note that many cases which have significantly furthered the rights of LGBT-individuals have only been half-heartedly argued by the States concerned. This is most striking in the surprisingly similar landmark decisions of *Dudgeon* and *Toonen*, but also in other cases the ECtHR or the HRC has noted the absence of arguments aimed at justifying differences in treatment once such have been established. Potentially this keeps the door open for such arguments to be successfully made in the future. Overall, however, that seems unlikely to happen considering the continuous move towards stronger recognition of LGBT-rights in the regional as well as global settings.

As has been noted repeatedly above, the ECtHR often undertakes a comparative analysis of the domestic laws of the Council of Europe Member States and uses any clear tendencies among those as a basis for its findings.

142 CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), advance unedited version, 10 June 2009, U.N. Doc. E/C.12/GC/20, para. 32.

143 Although not explicit, this seems to be implied in *X v. Colombia*, para. 7.2. See also the concurring opinion by two members of the Committee in *Joslin v. New Zealand*.

144 Wintemute proposes that a right for same-sex couples to adopt, when such a right applies to different-sex couples, should follow from the Court’s findings in *Karner v. Austria*. See Wintemute, p. 9 and section 5.3 above.

However, the Court appears to be far from rigorous in the criteria it applies to those analyses. It has found it advisable to attach more importance to “a continuing international trend” than to actual evidence of a common European approach to a particular legal issue.¹⁴⁵ The HRC does not seem inclined to conduct similar international comparisons. It has confined itself to arguments based on the situation in a particular state in a federation compared to that in the rest of the states. Both the HRC and the ECtHR have relied on the actual non-application of laws to show their redundancy for obtaining a particular aim. That may make the conclusions arrived at less persuasive with respect to States that have actually found it motivated to enforce similar laws. One more, however, this becomes less likely when seen against the general trend towards continued strengthening of LGBT-rights, both in domestic and international law. So far, neither the ECtHR, nor the HRC, have backtracked on any interpretation which strengthens LGBT-rights.

8 Other International Developments

The last 10 to 15 years have seen significant developments within the UN system, primarily with respect to expert bodies and Special Rapporteurs. Attempts at bringing the issue of LGBT-rights on to the agendas of the Human Rights Council, or its forerunner, the Commission on Human Rights and the UN General Assembly have generally been stifled by strong opposition from Member States.

The first explicit reference to homosexuals in a resolution of the Commission on Human Rights or one of its subcommittees appears to have occurred only in 1996 in a resolution on discrimination on the basis of HIV/AIDS.¹⁴⁶ The HRC, however, has been concerned with “anti-homosexual” criminal laws in its reviews of compliance reports from States Parties ever since its findings on the *Toonen* communication.¹⁴⁷ Now it urges States not only to repeal laws criminalizing homosexuality but also, *inter alia*, to “take all necessary actions to protect homosexuals from arrest, discrimination and violence.”¹⁴⁸

In 2001 it was publicly announced that a number of Special Rapporteurs of the, then, Commission on Human Rights, wish to receive information on issues pertaining to sexual minorities within their respective mandates.¹⁴⁹ As an example of the subsequent development the Special Representative on Human Rights Defenders reported in 2007 that she had acted on 36 cases of alleged attacks and threats against defenders of LGBT-rights in all regions.¹⁵⁰ The

145 *Christine Goodwin v. The United Kingdom*, para. 85.

146 Sanders (2002), p. 24.

147 “Love, Hate and the Law”, p. 35.

148 HRC, *Concluding observations of the Human Rights Committee: Barbados*, U.N. Doc. CCPR/C/BRB/CO/3, 11 May 2007, para. 13.

149 Sanders (2002), p. 25.

150 HRC, *Report by the Special Representative on human rights defenders, Hina Jilani*, para. 94. See further Sanders (2002), p. 26.

inclusion of sexual orientation issues in thematic reports has, however, met with protests from UN Member States on a number of occasions.¹⁵¹

Attempts at having resolutions supporting LGBT-human rights adopted by the Human Rights Council, or its forerunner, the Commission on Human Rights, have so far failed. In 2003 Brazil tabled a resolution confirming the human rights of LGBT-individuals, which spurred strong opposition from members of the Organization of the Islamic Conference and many sub-Saharan countries. The matter was postponed to the following year in which Brazil did not press for a debate on the resolution.¹⁵² Germany considered taking over sponsorship of the resolution but feared that any proposal by a European State would be branded as “western”. Instead of resolutions, New Zealand, and later Norway, began making annual statements on LGBT-rights in the Commission.¹⁵³

In 2008 two significant events occurred in international political bodies. One was the adoption by the General Assembly of the Organization of American States (OAS) of a resolution on Human Rights, Sexual Orientation, and Gender Identity, which, *inter alia*, expressed concern about “acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity”.¹⁵⁴ It also instructed a committee on juridical and political affairs to include human rights issues related to sexual orientation and gender identity on its agenda. A similar resolution was adopted the following year, this time condemning acts of violence committed against individuals because of their sexual orientation and gender identity and urging States to ensure that such acts are investigated and the perpetrators brought to justice.¹⁵⁵

The second significant event took place in the UN General Assembly. There the representative of Argentina made a statement on “human rights, sexual orientation and gender identity” supported by 66 Member States.¹⁵⁶ The

151 Sanders (2002), p. 25 and 28-29.

152 Sanders, D., *The Role of the Yogyakarta Principles*, August 4, 2008. Retrieved from “www.sxpolitics.org/wp-content/uploads/2009/03/yogyakarta-principles-2-douglas-sanders.pdf” (last accessed 20 August 2009), p. 3.

153 Ibid.

154 OAS GA, *Human Rights, Sexual Orientation, and Gender Identity*, AG/RES. 2435 (XXXVIII-O/08), June 3, 2008.

155 OAS GA, *Human Rights, Sexual Orientation, and Gender Identity*, AG/RES. 2504 (XXXIX-O/09), June 4, 2009.

156 The statement was made in the name of the following 66 UN Member States: Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, the Central African Republic, Chile, Colombia, Croatia, Cuba, Cyprus, the Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, the Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, the United Kingdom of Great Britain and Northern Ireland, Uruguay and Venezuela. General Assembly, Sixty-third session, 70th plenary meeting, 18 December 2008, Official Records, U.N. Doc. A/63/PV.70, p. 30.

statement reaffirmed the principle of non-discrimination, requiring the equal application of human rights to all human beings regardless of their sexual orientation or gender identity. It also expressed the Member States' alarm at the "violence, harassment, discrimination, exclusion, stigmatization and prejudice" against individuals owing to their sexual orientation.¹⁵⁷ It called on all States and relevant international human rights mechanisms to commit themselves to promoting and protecting the human rights of all persons, independent of their sexual orientation and gender identity.

The statement by Argentina prompted an immediate counter-statement delivered by Syria, and supported by 59 Member States, which fundamentally questioned the role of the "so-called" notions of sexual orientation and gender identity in the field of human rights law.¹⁵⁸ These notions "are not and should not be linked to existing international human rights instruments." The statement explicitly questioned that sexual orientation can be attributed to genetic factors. It also portrayed the introduction of rights related to sexual orientation and gender identity as threatening to "undermine not only the intent of the drafters of and the signatories to those human rights instruments, but also seriously jeopardize the entire international human rights framework."¹⁵⁹

Leaving the realm of intergovernmental bodies, another occurrence should be noted. In 2006, an international group of academics, activists and UN specialists adopted the so-called "Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity", which aim to facilitate a consistent understanding of international human rights law and its application to issues of sexual orientation and gender identity.¹⁶⁰ The Principles have subsequently been supplemented with jurisprudential annotations in order to show how they reflect the application of binding international human rights law.¹⁶¹ The annotated version provides a comprehensive overview of case law, views, general comments, recommendations and other binding and nonbinding interpretations of regional and global human rights instruments.

Considering that the interpretations of major human rights documents espoused by the Principles are sometimes based solely on European case law or on statements by individual UN experts, they are, at least partially, at risk of

157 *Ibid.*

158 The statement was made on behalf of the following 59 UN Member States: Afghanistan, Algeria, Bahrain, Bangladesh, Benin, Brunei Darussalam, Cameroon, Chad, Comoros, Côte d'Ivoire, Democratic People's Republic of Korea, Djibouti, Egypt, Eritrea, Ethiopia, Fiji, Gambia, Guinea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriya, Malawi, Malaysia, Maldives, Mali, Mauritania, Morocco, Niger, Nigeria, Oman, Pakistan, Qatar, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Saint Lucia, Solomon Islands, Somalia, Sudan, Swaziland, Syria, Tajikistan, Togo, Tunisia, Turkmenistan, Uganda, United Arab Emirates, United Republic of Tanzania, Uzbekistan, Yemen and Zimbabwe. *Ibid.*, p. 31.

159 *Ibid.*, p. 31-32.

160 "www.yogyakartaprinciples.org/principles_en.htm" (last accessed 21 August 2009).

161 Introduction to the Jurisprudential Annotations to the Yogyakarta Principles, retrieved from *ibid.*

being disputed or disregarded by domestic legislatures and judicial bodies.¹⁶² However, this should not detract from the fact that they provide an excellent catalogue of legal and policy arguments for those defending LGBT-rights throughout the world. They are also increasingly being used, and referred to, by States and UN bodies.¹⁶³

9 A Divided World?

The legal situation of LGBT-individuals has seen tremendous progress over the last decades. However, these advances are still largely confined to certain regions. The strongest human rights protection (at least de jure) has been achieved in Europe through a combination of legislative reform and progressive interpretation by the ECtHR. The nonbinding views issued by the HRC on LGBT-issues have mostly been in response to communications originating in States generally perceived as “Western”. They have hardly spurred dramatic shifts in domestic policies in countries with repressive policies towards sexual and gender minorities. It remains a fact that a significant number of States question that LGBT-rights at all belong on the human rights agenda.

This is not the place for a lengthy discussion on cultural and political diversity versus the universality of human rights.¹⁶⁴ It should be noted, however, that intellectual honesty and, not least, the basic tenets of the international legal system, requires that the strong differences on LGBT-rights issues be recognized. Branding LGBT-individuals and those fighting for LGBT-human rights as in some sense alien – e.g. unIslamic, unChristian, unAsian¹⁶⁵ – is a notorious practice. In this context, it is important that those promoting LGBT-human rights are prepared to engage in constructive discussions with those of opposing opinions, and acknowledge that the realization of LGBT-individuals’ full human rights does not necessarily entail the acceptance of “Western” concepts and mores. It is also vital to emphasize that the promotion of LGBT-human rights is not, by far, the exclusive domain of “Western” governments, academics or activists.¹⁶⁶ Recently, Latin American countries have for example been among the leading proponents of LGBT-rights in international forums. And some of the most radical constitutions in terms of explicitly outlawing

162 See e.g. notes 156 and 158 on the right to found a family. *Ibid.*, p. 56-57.

163 See e.g. CESCR, General Comment No. 20: *Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), advance unedited version, 10 June 2009, U.N. Doc. E/C.12/GC/20, para. 32, and O’Flaherty & Fisher, p. 238 et seq.

164 On this conflict, see e.g. Fisher, D., *The Right to Development: Between “Asian Values” and Western Liberalism*, PART I in *Juridisk Tidskrift* Nr 4 2004/05, p. 793-810 and PART II in Nr 1 2005/06 p. 11-26.

165 *Love, Hate and the Law*, p. 15.

166 According to Amnesty International, the North South divide over human rights for LGBT-individuals has inhibited the human rights movement from successfully asserting the universal applicability of the human rights of those individuals. *Ibid.*, p. 34.

discrimination on the basis of sexual orientation have been adopted in South Africa, Fiji and Ecuador.¹⁶⁷

There is likely to be a continued battle between competing conceptions of human rights and their application with respect to LGBT-individuals. Further development is also likely to occur in a continued interplay between international judicial and policy developments and domestic reforms, prompted by more progressive approaches by domestic judiciaries or by legislative reform in response to internal calls for improved recognition of the rights of LGBT-individuals. The need for recognition and respect is undoubtedly universal.

¹⁶⁷ *Gay rights – Until death do us part*, *The Economist*, December 2nd 2006, p. 63; Sanders (2002), p. 35.

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