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Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity"

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SEXUAL ORIENTATION AND INTERNATIONAL LAW: A STUDY IN THE MANUFACTURE OF CROSS-CULTURAL "SENSITIVITY"

Eric Heinze*

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Interest groups advocating rights of sexual minorities¹ have been lobbying international organizations for years without success.² A

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1. Definitions for terms such as "sexual orientation" and "sexual minority" remain indeterminate, as sexual norms vary over time and from one culture to the next. Moreover, the term "sexual minority" raises questions about the degree of collective cohesiveness that must exist in order to justify minority status. I have argued elsewhere that, for the specific purposes of human rights law, these issues do not in fact create greater obstacles for defining categories of sexual orientation than they do for defining such categories as race, ethnicity or religion. See ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT*, 50-58, 243-57 (1995) [hereinafter HEINZE, *SEXUAL ORIENTATION*]; Eric Heinze, *The Construction and Contingency of the Minority Concept*, in *MINORITY AND GROUP RIGHTS IN THE NEW MILLENNIUM* (Deirdre Fottrell & Bill Bowring, eds.) 25, 62-72 (1999) [hereinafter Heinze, *Construction*]. For purposes of this essay, these terms can be understood as referring to sexual identities or behaviors which are widely deemed to depart from a dominant, "normative heterosexuality." *Id.* at 31-49, 60-62.

2. See, e.g., Douglas Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda*, 18 HUM. RTS. Q. 67 (1996); Douglas Sanders, Kurt Krickler &

standard explanation for that failure is that human sexuality is something complex, even mysterious, which requires that international organizations proceed with special caution.³

In this essay, it will be argued that such an explanation amounts to a self-fulfilling prophecy. Sexual orientation is neither more nor less complex than many other issues, such as race, ethnicity, religion or gender, which have nevertheless found wide recognition within leading intergovernmental organizations. It is not *because* sexual orientation is uniquely complex or mysterious that it is barred from the UN's human rights agenda. Rather, it is precisely that kind of persistent exclusion that keeps the issue of sexual orientation mystified, perpetuating the impression that it is uniquely complex.

It is nothing new to invoke myths of the mystical to deny rights. Pre-colonial African, American and Asian peoples were depicted as mystical inhabitants of irrational worlds, better suited to regimes of (European) moral and religious conditioning than to equal participation as subjects of law.⁴ Similarly, the Victorian woman was depicted as a complex and mysterious being. Her needs and concerns raised "deeply moral" and "deeply religious" issues, better suited to the gentle touch of ethical sensibility than to the iron fist of legal rights and duties.⁵ In the same way, questions of sexual orientation are maintained in a perpetual pre-dawn of "deeply held" moral and religious beliefs that require "delicacy" and "caution."

In this essay, it will be argued that sexual minorities have become pawns in what will be called the international "sensitivity game." The game has two rules. First, autocratic regimes bolster their domestic authority by promoting nationalist campaigns based on ideals of moral (i.e., sexual) purity, which portray minority sexual orientations as manifestations of Western decadence. Those ideals are depicted as stemming from "ancient traditions," which, however, have little basis in historical fact. Meanwhile, Western States are eager to show that they are not steam-rolling a global agenda over "traditional" societies. Welcoming the opportunity to show how sensitive they are to "ancient" beliefs, they decline to insist on rights for sexual minorities.

This essay is divided into two parts. Part One examines developments thus far under existing international instruments. We shall see that sexual minorities have indeed won some recognition, but it has

Rodney Croome, *Finding a Place in International Law* (July 20, 1997), [http:// www.ilga.org/Information/international/finding_a_place_in_international.htm](http://www.ilga.org/Information/international/finding_a_place_in_international.htm).

3. See *infra* Section II.C.

4. See, e.g., PETER FIZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 17-29 (1992).

5. See, e.g., KATE MILLET, *SEXUAL POLITICS* 124-51 (1970).

come either at an unduly late stage or within institutional structures that leave such recognition largely ineffective. Part Two explores whether greater strides can be made within the more political human rights bodies of intergovernmental organizations—notably, the United Nations—toward the drafting of an instrument expressly directed at rights for sexual minorities. It will be argued that the international sensitivity game largely precludes such measures.

I. DEVELOPMENTS UNDER INTERNATIONAL INSTRUMENTS

According to the Universal Declaration of Human Rights of 1948 (UDHR),

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶

That passage provides a standard, contemporary statement of the non-discrimination norm. Unlike older formulations, as found, for example, in the Fourteenth Amendment to the United States Constitution,⁷ this passage has two crucial features. First, it includes an express enumeration of protected categories (“race, colour, sex . . .”). Second, it includes an “other status” clause that, *prima facie*, envisages the incorporation of “unenumerated” categories. One strategy for sexual minorities seeking recognition in international law has been to seek acknowledgment of sexual orientation as a “new” category.

A. *The European Convention of Human Rights*

To date, the most detailed case law on point has arisen under the European Convention on Human Rights (ECHR).⁸ Article 14 of the Convention follows article 2 of the Universal Declaration,⁹

6. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

7. U.S. CONST. amend. XIV, § 1 (providing that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws”).

8. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR], amended by Protocol No. 3 (1970), No. 5 (1971), No. 8 (1990), and No. 11 (1998). For developments within the European Union, see Sanders, Krickler, & Croome, *supra* note 2.

9. Cf. ECHR, *supra* note 8, pmbl. para. 5 (noting the purpose of the Convention to give effect to rights inscribed in the Universal Declaration). See also P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1–2 (3rd ed. 1998) (noting the emergence of the European Convention out of the Universal Declaration).

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.

The original text of the Convention provided for the European Commission of Human Rights and the European Court of Human Rights as the bodies principally responsible for supervising State compliance.¹⁰ When the Commission and Court began interpreting article 14, they might have adopted an attitude of restraint vis-à-vis the "other status" clause. The scope of "new" categories being, arguably, limitless, they might have read the clause as dead letter, on the view that only the States Parties should have the authority to introduce new categories, by amendment or protocol.

That is not the view they adopted, however. The Strasbourg bodies have deemed the enumeration of categories in such provisions to be "illustrative" rather than "exhaustive," thus justifying the recognition of new categories.¹¹ For example, in *Marckx v. Belgium*,¹² the Court held that the Convention prohibits discrimination against unmarried mothers—not a specifically enumerated category within article 14. In *Inze v. Austria*,¹³ the Court held that article 14 prohibits discrimination against children born out of wedlock.

Over the past 20 years, the Court and Commission have made progress towards recognizing sexual orientation as a protected category, albeit with great hesitation. In 1981, in *Dudgeon v. United Kingdom*,¹⁴ the Court, departing from Commission findings in earlier cases,¹⁵ held that a prohibition of consensual, adult homosexual conduct violated the

10. ECHR, *supra* note 8, art. 19. The Commission was abolished under Protocol 11, which provided for a commensurate expansion of the role of the Court as principal supervisory body for the Convention. See Protocol 11 to the ECHR, Restructuring the Control Machinery Established Thereby, 1994 E.T.S. 155 (entered into force Nov. 1, 1998). See also ECHR, *supra* note 8, art. 32, ¶ 1 (providing, before entry into force of Protocol 11, that the Committee of Ministers was to decide whether there had been a violation of the Convention in cases not referred to the Court).

11. See MARC BOSSUYT, L'INTERDICTION DE LA DISCRIMINATION DANS LE DROIT INTERNATIONAL DES DROITS L'HOMME 56–66 (1976); Eric Heinze, *Equality: Between Hegemony and Subsidiarity*, 52 REV. INT'L COMM'N JURISTS 56, 62–63 (1994). Cf. *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A), at para. 56 (1976) (stating that article 14 "prohibits . . . discriminatory treatment having at its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other").

12. 31 Eur. Ct. H. R. (ser. A) at 8 (1979).

13. 126 Eur. Ct. H. R. (ser. A) at 11 (1987).

14. 45 Eur. Ct. H. R. (ser. A) at 18 (1981).

15. See HEINZE, SEXUAL ORIENTATION, *supra* note 1, at 98–99. See also VAN DIJK & VAN HOOF, *supra* note 9, at 496–97.

right to privacy under article 8.¹⁶ Finding the dispute sufficiently resolved under the privacy right, the Court deemed it unnecessary to examine whether there had been a violation of the non-discrimination right.¹⁷ A decade later, in *B v. France*,¹⁸ the Court held that States Parties must take certain minimum steps toward recognizing the sex reassignment of post-operative transsexuals. That case, too, was decided only with reference to article 8. The result of these cases was that the Court was able to reach decisions in favor of the individual applicants, while avoiding the question of whether sexual orientation or identity should be recognized as a new category within the scope of article 14.

In the more recent case of *Sutherland v. United Kingdom*¹⁹, the Commission, examining a British law that set a higher age of consent for male homosexual acts than for heterosexual acts, was unable to avoid that question. The complaint was not that individuals were *denied* the right to engage in homosexual conduct, but only that they faced discrimination, through the higher age of consent, in their enjoyment of it. The Commission noted that the law could be deemed discriminatory in two senses. It could be seen as discriminatory against *homosexuals*, which would warrant the recognition of sexual orientation as a distinct category. Alternatively, it could be viewed as discriminating on the basis of the sex of the participants, in which case it could fall under the already enumerated category of "sex." The Commission found that it was unnecessary to choose between these two interpretations, as either would yield a finding of discrimination.²⁰ Most recently, in *Salgueiro da Silva Mouta v. Portugal*,²¹ the Court, sitting in chamber,²² found that the decision of a Portuguese court to refuse child custody to the applicant

16. Article 8 provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." ECHR, *supra* note 8, art. 8, ¶ 1.

17. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 26. Cf. VAN DIJK & VAN HOOF, *supra* note 9, at 716–18. But see *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 32, (Evrigenis, J. and Garcia de Enterría, J., dissenting) (arguing that the Court should have found a violation of article 14).

18. 232-C Eur. Ct. H. R. (ser. A) (1992).

19. App. No. 25186/94, 24 Eur. H.R. Rep. (Comm'n Supp.) C.D. at 22 (1997).

20. *Id.* at 30. On the question which of these two categories is more appropriate for sexual minorities, see Heinze, *Sexual Orientation*, *supra* note 1, at 216–20.

21. App. No. 33290/96 (Eur. Ct. H.R. 1999), available at <http://hudoc.echr.coe.int/hudoc/> (last visited Mar. 2, 2001).

22. After the entry into force of Protocol 11, a party to a dispute "may, in exceptional cases, request that the case be referred to the Grand Chamber," which consists of 17 judges. ECHR, *supra* note 8, art. 27, art. 43. A panel of judges of the Grand Chamber "shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention . . . or a serious issue of general importance." ECHR, *supra* note 8, art. 43(2). The fact that no such referral was made in this case suggests that the question of sexual orientation as a protected category under article 14 was no longer deemed sufficiently dubious or controversial to require submission to the Grand Chamber.

because of the applicant's homosexuality constituted discrimination on grounds of sexual orientation.²³

At first glance, these developments seem favorable. The Court opinion in *Dudgeon* appeared to give sexual minorities reason for optimism, stating,

There is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied²⁴

In reaching that view, the Court referred to its dictum in the case of *Tyrer v. United Kingdom* that "the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions."²⁵ That doctrine of "evolving consensus" (also referred to as the doctrine of "European consensus," "evolutive interpretation" or "dynamic interpretation")²⁶ appears progressive, insofar as the Court seems to reject any "originalist" premise of limiting the interpretation of the Convention to the intentions of the drafters.

In practice, however, the doctrine has done little to promote the rights of sexual minorities. Where social attitudes do not appear sufficiently evolved, the Court can cite the doctrine to deny rights of sexual orientation or identity altogether. By the time social attitudes *have* sufficiently evolved, the Court merely uses it to recognize rights that, for individuals in many member States, are no longer needed.²⁷ Far from developing protections against majority sentiments—which is, supposedly, a central purpose of human rights—the Court largely endorses them. In the foregoing passage, the Court itself admits that, by the time sexual minorities had finally found favor in its eyes, law reform had

23. By contrast, in *Lustig-Prean and Beckett v. United Kingdom*, 29 Eur. H.R. Rep. 548 (1999), concerning the dismissal of military officers on grounds of homosexuality, the Court, as in *Dudgeon*, found in favor of the applicants, but only on the basis of article 8. That result may suggest a continuing preference on the part of the Court to address the question of discrimination only as a last resort. See also *A.D.T. v. United Kingdom*, App. No. 35765/97 (Eur. Ct. H.R. 2000), available at <http://www.hudoc.echr.coe.int/hudoc> (last visited Mar. 5, 2000).

24. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. at 23, para. 60 (1981).

25. 26 Eur. Ct. H.R. (ser. A), at 15 (1978).

26. See, e.g., DAVID J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 7–11, 294–96 (1995).

27. Cf. ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 138–40 (1995).

already been completed in most member States. Before those domestic reforms had taken place—at the time when gays might genuinely have benefited from the succor which international regimes promise—the Court and Commission were silent.²⁸

Thus, far from challenging prevailing social norms, the “evolving consensus” doctrine makes them a deciding factor.²⁹ The precedent in *Dudgeon* did provide support in a small number of subsequent cases originating from States that had not yet followed the prevailing trend, namely, the cases of *Norris v. Ireland*³⁰ and *Modinos v. Cyprus*.³¹ However, an approach whereby the Convention kicks in only to bring some remaining States into line, is nothing to inspire great faith.³² Similarly, in *Sutherland* and *Mouta*, the Commission and Court only recognized

28. See *supra* text accompanying note 15.

29. In areas concerning “public morals” arising under ECHR articles 8(2), 9(2), 10(2) and 11(2), the Court has promulgated the “evolving consensus” doctrine within the broader context of the “margin of appreciation” doctrine, particularly as expounded in *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976). See HARRIS ET AL., *supra* note 26, at 290–96. In *Handyside*, the Court recognized States’ prerogatives to reach their own determinations about “moral” interests,

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements

24-Eur. Ct. H.R. at 22.

The comments made in this essay about the Court’s application of the doctrines of “dynamic interpretation” and “evolving consensus” thus apply more broadly to its application of the margin of appreciation doctrine in areas concerning “public morals” under ECHR article 8. ECHR, *supra* note 8, art. 8(2).

30. 142 Eur. Ct. H. R. (ser. A)(1988).

31. 259 Eur. Ct. H. R. (ser. A)(1993).

32. Harris, O’Boyle, and Warbrick entertain the opposite view, arguing that “the Court does not necessarily wait until only the defendant state remains out of line before it recognises a new standard.” HARRIS ET AL., *supra* note 26, at 9. Even if that observation is true, it hardly shows the “evolving consensus” doctrine to be progressive, as it adopts the lowest possible benchmark of one last remaining State (or, reading more generously, a small handful of remaining States). The only example that the authors cite, *Marckx v. Belgium*, concerns unwed mothers and children born out of wedlock, who by the 1970’s hardly faced the pariah status of earlier times, as the Court itself acknowledges. See 31 Eur. Ct. H.R. (ser. A) at para. 41 (1979); see also *supra* text accompanying note 12. The fact that the Court applied the “evolving consensus” doctrine to issues such as these—even if, along with Belgium, a handful of other States also still maintained legislation discriminating against unwed mothers or children born out of wedlock—scarcely suggests that the doctrine has been used progressively. If *Marckx* represents the most progressive application, then it is all the more apparent that the doctrine is used more to confirm prevailing social norms than to challenge them.

sexual orientation as protected under article 14 after a significant number of Western European States had already introduced non-discrimination legislation into their domestic laws.³³ If United Nations bodies should ever adopt such a doctrine, seeking favorable developments in a significant number of States before recognizing rights, sexual minorities will have a long wait.³⁴

Similarly, if we examine the cases that preceded *B v. France*, as well as the developments since that case, we see that these doctrines' adverse significance for sexual minorities extends to the Court's decisions on transsexualism. Transsexuals are too few in number, too isolated in society, too different in their concerns from the dominant gay movement,³⁵ to form powerful movements or lobbies. Transsexuals are the very model of the kinds of individuals who need the protections of a human rights regime. However, in *Rees v. United Kingdom*³⁶ and *Cossey v. United Kingdom*,³⁷ the Court, finding that the British government had already allowed changes in some personal documents, declined to find that the government was required to effectuate changes to birth certificates, despite the role of birth certificates in crucial spheres of life, such as employment. It was only because the more integrated French system of personal identification did not even allow partial changes that the Court found in favor of the applicant in *B v. France*. Recent developments have confirmed the Court's reluctance to provide protections precisely when they are most needed. In *X, Y and Z v. United Kingdom*,³⁸ the Court declined to hold that the right to private and family life under article 8 required that paternity be recognized for a post-operative transsexual, notwithstanding overwhelming evidence of the applicant's stable and longstanding family relationship with the children. In *Sheffield and Horsham v. United Kingdom*,³⁹ the Court reaffirmed its findings in *Rees* and *Cossey* that Britain was under no obligation to provide greater legal recognition of the identities of post-operative transsexuals. Despite the largely divergent results in the cases from

33. See, e.g., INTERNATIONAL LESBIAN AND GAY ASSOCIATION (ILGA), WORLD LEGAL SURVEY, at http://www.ilga.org/Information/Legal_survey/Europe/world_legal_survey_europe.htm (last modified Aug. 3, 2000). See also PETER TATCHELL, EUROPE IN THE PINK (1992); Rob Tielman & Hans Hammelburg, *World Survey*, in THE THIRD PINK BOOK 249 (ART HENDRICKS ET AL., EDS. 1993).

34. Of course, as suggested in Part II, there is good reason to believe that the "political" human rights bodies at the United Nations *have*, in effect, adopted this attitude, albeit *sub silentio*.

35. See, e.g., HEINZE, SEXUAL ORIENTATION, *supra* note 1, at 56.

36. 106 Eur. Ct. H. R. (ser. A)(1986).

37. App. No. 10843/84, 13 Eur. H.R. Rep 622 (Eur. Ct. H.R. 1990).

38. 1997-II Eur. Ct. H. R. at 619 (1997).

39. 1998-V Eur. Ct. H.R. at 2011 (1998).

Dudgeon to Mouta and Sheffield and Horsham, what unites all of them is the Court's willingness to apply human rights only in ways that confirm some discernible *status quo* among a sufficient number of member States.

Note that the European Convention represents only one regional human rights system.⁴⁰ Developments under other regional systems, however, are hardly more promising. In view of the more fundamental and systemic problems that have confronted the Inter-American⁴¹ and African⁴² systems, frequently impairing the effective redress even of massive and systemic violations of human rights, significant advances for sexual minorities are unlikely in the foreseeable future.

B. *The International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR),⁴³ too, includes a non-discrimination norm modeled on UDHR article 2. ICCPR article 2(1) states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 provides a further non-discrimination norm:

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.

40. For an overview of the regional human rights systems, see generally HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, ch. 10 (2nd ed. 2000).

41. See Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 32 (David J. Harris & Stephen Livingstone, eds., 1998).

42. Chidi Anselm Odinkalu, *The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 359 (1998).

43. International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171.

Unlike article 2(1), which provides for non-discrimination only with regard to "the rights recognized in the present Convention," article 26 reaches considerably further, providing for "equal protection of the law"—that is, arguably, of "all" law—within the jurisdictions of the States Parties.⁴⁴

The ICCPR provided for the creation of the Human Rights Committee,⁴⁵ whose functions include issuing comments on reports submitted by States parties⁴⁶ and examining individual complaints.⁴⁷ Like the Strasbourg bodies, the UN Human Rights Committee has found the enumeration of categories in article 2(1) to be illustrative rather than exhaustive, foreclosing any relegation of the "other status" clause to a dead-letter status.⁴⁸

Also like the Strasbourg bodies, the Committee's initial disposition towards gay rights was unfavorable.⁴⁹ However, in *Toonen v. Australia*⁵⁰ it found that a prohibition of consensual, adult homosexual conduct under State laws of Tasmania violated the privacy right under article 17.⁵¹ Unlike the European Court in *Dudgeon*, the Committee did expressly "not[e]" its view that the reference to the enumerated category of "sex" in articles 2(1) and 26 included sexual orientation,⁵² and, to be precise, found a violation of article 17(1) *juncto* article 2(1).⁵³ In its more recent comments on individual State reports, the Committee has cited ill-

44. See, e.g., *Communication No. 172/1984: S.W.M. Broeks v. the Netherlands*, U.N. GAOR, Hum. Rts. Comm., 30th Sess., Supp. No. 40, at 149, U.N. Doc. A/42/40 (1987). In *Broeks*, the Committee stated that article 26 "does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination . . . which prohibits discrimination in law or in practice in any field regulated and protected by public authorities." *Id.*; cf. *General Comment 18: Non-Discrimination*, U.N. GAOR, Hum. Rts. Comm., 37th Sess., U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) [hereinafter *Non-Discrimination*].

45. ICCPR, *supra* note 43, art. 28.

46. *Id.* at art. 40(4).

47. First Optional Protocol to the International Covenant on Civil and Political Rights, entered into force Mar. 23, 1976, 999 U.N.T.S. 302 [hereinafter *First Optional Protocol*].

48. *Non-Discrimination*, *supra* note 44, at 26.

49. See *Communication No. R.14/61: Hertzberg v. Finland*, U.N. GAOR, Hum. Rts. Comm., 37th Sess., Supp. No. 40, U.N. Doc. A/37/40, Supp. No. 40, at 161 (1982) (upholding Finland's prerogative to censor radio and television broadcasts dealing with lesbian and gay issues).

50. *Communication No. 488/1992: Toonen v. Australia*, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/50/D/488/1992 (1994), reprinted in 1 INT'L HUM. RTS. REP. 97 (1994).

51. Article 17 provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." ICCPR, *supra* note 43, art. 17(1).

52. *Toonen*, *supra* note 50, at 105.

53. *Id.* at 105-06. But see *id.* at 106 (indiv. op. of Mr. Bertil Wennergren) (arguing that the Tasmanian legislation also violated article 26).

treatment of homosexuals as raising concerns about violations of the Covenant.⁵⁴ In view of its expansive interpretation of the scope of protected categories,⁵⁵ there is good reason to believe that the Committee will be generally willing to include sexual orientation as a protected category.

But there is an important difference between the European Court and the Human Rights Committee. The European Convention largely dominates human rights activity within the Council of Europe, and the Court now dominates the Convention.⁵⁶ The Court's decisions are binding in international law,⁵⁷ and the Court's jurisprudence increasingly pervades the national law of member States.⁵⁸ By contrast, the Human Rights Committee, while highly respected,⁵⁹ does not play such a central role, either within the United Nations or within the national law of many States Parties. Its sphere of activity is limited to the mandate of the ICCPR, and its views, although highly persuasive, are not binding in international law.⁶⁰

More importantly, within the United Nations the Human Rights Committee is but one of several prominent bodies specifically responsible for the promotion of human rights, including the Human Rights Commission, the Sub-Commission on the Promotion and Protection of Human Rights (formerly the Sub-Commission on Prevention of Discrimination and Protection of Minorities) and the Office of the High Commissioner for Human Rights,⁶¹ which largely shape the UN human rights agenda and have failed to take meaningful

54. See, e.g., *Concluding Observations on Colombia*, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/79/Add.75 para. 16 (1997).

55. See *supra* note 48.

56. That is, it dominates after the abolition of the Commission under Protocol 11. See *supra* note 10.

57. ECHR, *supra* note 8, art. 46. But see HARRIS ET AL., *supra* note 26, at 23–36 (noting the divergent effects of Court decisions within the domestic legal systems of the States Parties).

58. See, e.g., P.W.C. AKKERMANS ET AL., *GRONDRECHTEN: GRONDRECHTEN EN GRONDRECHTSBESCHERMING IN NEDERLAND* 23 (1999) (noting the strong influence of the Convention on domestic law in the Netherlands). But see VAN DIJK & VAN HOOFF, *supra* note 9, at 16–18 (noting differences in the effects of Court decisions upon the domestic law of the States Parties). See also HARRIS ET AL., *supra* note 26, at 23–36.

59. See, e.g., A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 66–72 (4th ed. 1996).

60. See ICCPR, *supra* note 43, art. 40(4) (providing only that the Committee may prepare and transmit “reports” and “general comments” on State submissions to those States and to the Economic and Social Council). See also First Optional Protocol, *supra* note 47, art. 5(4) (providing only that the Committee may prepare and transmit “views” on individual complaints to the State Party). Cf. ROBERTSON & MERRILLS, *supra* note 59, at 39–72.

61. Cf. ROBERTSON & MERRILLS, *supra* note 59, at ch. 3; STEINER & ALSTON, *supra* note 40, at 599–602.

steps to recognize sexual minorities.⁶² Unlike the relatively “non-political” character of the Human Rights Committee,⁶³ these bodies are more overtly “political.”⁶⁴ Any evaluation of the status of sexual minorities within the context of the United Nations must take the more political bodies into account.

II. HUMAN RIGHTS BODIES AT THE UNITED NATIONS: THE BROADER CONTEXT

The Universal Declaration of Human Rights (UDHR) of 1948⁶⁵ represented a decisive step in international law towards a comprehensive catalogue of individual rights, as confirmed in 1966 through the adoption of the International Covenant on Civil and Political Rights (ICCPR)⁶⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶⁷ These three instruments purport to set forth interests of all human beings. In the following discussion, they will therefore be called “general” instruments. Further general instruments adopted in regional organizations included the European Convention on Human Rights (ECHR),⁶⁸ the American Declaration⁶⁹ and American

62. See *supra* text accompanying note 2.

63. Under Article 28, Committee members are appointed not as representatives of their States, but rather “in their personal capacity”, as independent experts possessing “recognized competence in the field of human rights [with] consideration being given to the usefulness of some persons having legal experience.” ICCPR, *supra* note 43, art. 28. It is generally accepted that most Committee members have maintained high standards of independence and insulation from political pressures. See, e.g., STEINER & ALSTON, *supra* note 40, at 707.

64. The creation of a Human Rights Commission is directly authorized under Article 68 of the United Nations Charter, which does not require appointment of members in their personal capacities. Its members are government representatives, and, not confined, like the Human Rights Committee, to the specific application of a treaty, has inevitably been subject to political influence. The members of the Sub-Commission on Human Rights, by contrast, are appointed in their personal capacity, and while having generally displayed greater independence than the Commission members, have not been immune from political pressures. While the creation of the office of the High Commissioner for Human Rights, currently held by former Irish President Mary Robinson, is perhaps still too recent to allow any clear assessment, the high profile of the office holder also creates considerable pressure to avoid controversial issues. For an overview of these three bodies, see ROBERTSON & MERRILLS, *supra* note 59, at 78–95, 112–15; STEINER & ALSTON, *supra* note 40, at 599–602.

65. G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948).

66. 999 U.N.T.S. 171 (*entered into force*, 23 Mar. 1976).

67. 993 U.N.T.S. 3 (*entered into force*, 3 Jan. 1976).

68. See ECHR, *supra* note 8, amended by Protocol No. 3 (1970), Protocol No. 5 (1971), Protocol No. 8 (1990), and Protocol 11 (1998).

69. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. II (1948), reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration].

Convention on Human Rights⁷⁰ and the African Charter on Human and Peoples' Rights.⁷¹ With the adoption of these general instruments, one might have expected the process of international norm creation to have been largely completed. The remaining work would consist of promoting and interpreting them.

But something different happened. The idea that the interests of all human beings could be written down on a few dozen pages was soon found to be inadequate. Subsequent developments have moved towards increasing recognition of human differences. In the same year as the adoption of the ICCPR and ICESCR, the United Nations General Assembly also adopted the International Convention on the Elimination of All Forms of Racial Discrimination.⁷² Since that time, instruments have been promulgated for distinct subjects of international human rights law, such as women,⁷³ minorities,⁷⁴ children,⁷⁵ the disabled,⁷⁶ or workers.⁷⁷ Further, instruments have also been promulgated for purposes of focusing on specific kinds of rights or abuses, including instruments on such matters as torture,⁷⁸ slavery and

70. 1144 U.N.T.S. 123, art. 1(1) (*entered into force* 18 July 1978) [hereinafter American Convention].

71. OAU Doc. CAB/LEG/67/3 rev. 5, art. 2 (*entered into force* 21 Oct. 1986) [hereinafter African Charter].

72. 660 U.N.T.S. 195 (*entered into force*, 4 Jan. 1969) [hereinafter ICERD]. *See also* Declaration on Race and Racial Prejudice, E/CN.4/Sub.2/1982/2/Add.1, annex V (1982) [hereinafter DRRP].

73. *See, e.g.*, Convention on the Elimination of all Forms of Discrimination against Women, Mar. 1, 1981, 1249 U.N.T.S. 13 [hereinafter CEDAW]; *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, 48 U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993) [hereinafter DEVAW].

74. *See, e.g.*, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, G.A. Res. 47/135, U.N. GAOR, 48th Sess., Supp. No. 49, at 210, UN Doc. A/47/49 (1993) [hereinafter Minority Rights].

75. *See, e.g.*, Convention on the Rights of the Child, U.N. Doc. A/RES/44/22 (*entered into force* Sept. 1, 1990) [hereinafter CRC]; *Declaration on the Rights of the Child*, G.A. Res. 1386(XIV), U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959) [hereinafter DRC].

76. *See, e.g.*, *Principles for the Protection of Persons With Mental Illnesses and the Improvement of Mental Health Care*, G.A. Res. 46/119, U.N. GAOR, 46th Sess., Supp. No. 49, at 189, U.N. Doc. A/46/1/49 (1991) [hereinafter PPPMI]; *Declaration on the Rights of Disabled Persons*, G.A. Res. 3447(XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 88, U.N. Doc. A/10034 (1975) [hereinafter RDP]; *Declaration on the Rights of Mentally Retarded Persons*, G.A. Res. 2856(XXVI), U.N. GAOR, 26th Sess., Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971) [hereinafter DRMRP].

77. Employment Policy Convention (ILO No. 122), July 13, 1964, 569 U.N.T.S. 65.

78. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, *available at* <http://www.pch.gc.ca/ddp-hrd/english/cat/cat.htm>; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1975).

slave-like practices,⁷⁹ or conditions of detention.⁸⁰ We shall refer to these as "special" instruments.⁸¹ Although regional human rights systems have also produced special instruments,⁸² United Nations human rights bodies have been particularly active in promoting them.

A. *The Dual Effect of Special Instruments*

The proliferation of special instruments might appear to augur well for sexual minorities. It might seem that, with the acknowledgment of so many other interests, it can only be a matter of time before sexual minorities get an instrument of their own.⁸³ Alternatively, one might maintain that "a rising tide raises all ships": the progressive recognition of ever more specialized interests must surely promote an overall climate of tolerance and broad-mindedness that will benefit sexual minorities in the long run.

Yet the trend towards special instruments is a double-edged sword. It indeed represents progress, for those who get one. At the same time, despite the curious way in which the special instruments tirelessly

79. See, e.g., Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, entered into force Apr. 30, 1957, 226 U.N.T.S. 3 [hereinafter Slavery Supp.].

80. See, e.g., *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 298, U.N. Doc. A/Res/43/173 (1988).

81. This distinction between the emergence of general and special instruments refers only to a trend. It should not be taken to suggest that special instruments were unknown until 1966, as bilateral minority rights treaties have a long history. See PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES*, chs. 2-4 (1991). Similarly, well before the United Nations came into being, the International Labor Organization had produced important multilateral instruments of special character. See, e.g., Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; Convention Concerning Forced or Compulsory labour, June 28, 1930, 39 U.N.T.S. 55. However, before the advent of the Universal Declaration, special instruments had served to address human rights issues in a world which was not yet willing to accept general, universal human rights in international law, as witnessed by the rejection of proposals to include human rights as binding provisions within the United Nations Charter. See, e.g., ROBERTSON & MERRILLS, *supra* note 59, at 25-27. After the adoption of the UDHR, ICCPR and ICESCR, special instruments played that role only in the sense that they might be directed at States still not accepting the general ones. Increasingly, the role of the special instruments would be not to *anticipate* general instruments, but to supplement and indeed improve them.

82. See, e.g., European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, entered into force Feb. 1, 1989, E.T.S. No. 126; Inter-American Convention to Prevent and Punish Torture, entered into force Feb. 28, 1997, O.A.S. Treaty Series No. 67, OEA Ser.L.V/II.82 doc.6 rev.1, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* 83; African Charter on the Rights and Welfare of the Child, O.A.U. Doc. CAB/LEG/24.9/49 (1990).

83. See HEINZE, *SEXUAL ORIENTATION*, *supra* note 1, at ch. 15.

affirm the universal character of the general instruments,⁸⁴ it raises the stakes for those who have no realistic hope of getting one. The factory-like way in which international organizations now churn out specialized instruments only reinforces the sense they are not hard to get. In the crudest terms: *anyone* can get one, even common criminals.⁸⁵ Each new instrument has the—perhaps inadvertent, but nevertheless pernicious—effect of underscoring the fact that sexual minorities still do *not* have one. The longer sexual minorities fail to get one, the greater the suspicion that there must be some good reason. In short, the increasing inclusion of certain issues itself serves to highlight the continued exclusion of sexual orientation.

An example of this process of inclusion-as-exclusion is found in the genesis of the Beijing Declaration and Platform for Action,⁸⁶ adopted upon conclusion of the Fourth World Conference on Women. Human rights instruments have traditionally been drafted in very general language. The Universal Declaration can be printed on a page or two; the two 1966 Covenants are rather more detailed, but still remarkably brief in view of their enormous substantive scope. By contrast, the Beijing Declaration and Platform includes 346 detailed paragraphs, easily covering over 100 printed pages. Its aim is not to state norms in general terms, but to set forth the problems of women in an exhaustive, indeed definitive, statement.⁸⁷

There was, however, one exception. Any mention of women's problems arising from sexual orientation was expressly excluded, under threats by States to refuse to endorse the document.⁸⁸ While the drafting histories (*travaux préparatoires*) of the leading human rights instruments are merely inconclusive on the drafters' intentions relevant to sexual orientation—not clearly alluding to it one way or the other—the Beijing Declaration now delivers affirmative evidence that sexual minorities are specifically meant to be excluded.⁸⁹ With the Beijing

84. See, e.g., CRC, *supra* note 75, pmbl. para. 3; CEDAW, *supra* note 73, pmbl. para. 2; DEVAW, *supra* note 73, pmbl. para. 2; DRMRP, *supra* note 76, pmbl. para. 3; DRC, *supra* note 75, pmbl. para. 2; DRRP, *supra* note 76, pmbl. para. 6; ICERD, *supra* note 72, pmbl. para. 2, art. 7; Minority Rights, *supra* note 74, pmbl. para. 3, art. 8(3); PPPMI, *supra* note 76, at I(5); Slavery Supp., *supra* note 79, pmbl. para. 2.

85. See *supra* note 80.

86. Beijing Declaration and Platform for Action, Fourth World Conference on Women, 16th Sess., U.N. Doc. A/CONF.177/20 (1995), U.N. Doc. A/CONF.177/20.Add.1 (1995), reprinted in 35 I.L.M. 401 (1995) [hereinafter Beijing Declaration].

87. See, e.g., *id.* paras. 22–34.

88. See Sanders *et al.*, *supra* note 2.

89. Cf. Vienna Convention on the Law of Treaties, May 23, 1964, 1155 U.N.T.S. 331, art. 32 [hereinafter VCLT] (providing that records of preparatory work may be used as a “supplementary” means of interpreting treaties). While a non-binding instrument such as the Beijing Declaration is not subject to the stringent canons of interpretation applicable to trea-

Declaration, the international human rights movement does not merely give sexual minorities “nothing.” It actively brands them as unsuitable for human rights protections.

The parallel to the European Court’s decisions in the transsexualism cases is striking. The substantial line of failures of transsexuals before the European Court (with the extremely limited exception of *B. v. France*) does not leave transsexuals with a legal status quo. The European Court does not merely leave States free to refuse rights for transsexuals. Rather, the Court repeatedly *confirms* that transsexuals do not merit the full protections of the Convention’s privacy, marriage or non-discrimination rights. If no less authoritative a body than the European Court has reached such a conclusion, then States *a fortiori* can deem themselves justified in reaching it. Transsexuals would not merely be in the same position if the European Convention did not exist. Arguably, they would be better off.

B. “Soft” Law

One objection to the thesis of inclusion-as-exclusion might be that it places undue emphasis on written instruments. After all, such documents are mere pieces of paper. Rarely do they guarantee effective implementation. There is arguably an indirect proportion between the effectiveness of UN enforcement of its human rights instruments, and the number of such instruments that it has generated. To see the proliferation of special instruments as particularly significant is to exaggerate their utility.

Yet that objection is unpersuasive. Questions of enforcement become relevant only after there is agreement about the norms themselves. It is true that UN enforcement of human rights standards has enjoyed limited success.⁹⁰ However, for the purposes of sexual minorities, our first concern is with norm *production*—an activity in which international organizations, and notably United Nations bodies, excel. Thus Robertson and Merrills argue that, despite its unimpressive record of supervision, “the United Nations has achieved a great deal in developing the international law of human rights, particularly as regards international standards, which are increasingly significant as conventional or customary rules of law.”⁹¹

ties, it certainly cannot be assumed *a priori* that a drafting history would be irrelevant to its interpretation or application.

90. See *supra* text accompanying note 59; see also ROBERTSON & MERRILLS, *supra* note 59, at 115.

91. ROBERTSON & MERRILLS, *supra* note 59, at 114–15.

The role of normative instruments within the leading international organizations is particularly well illustrated through the concept of “soft” law. “Soft” law is a new idea, largely the creature of post-World War II international law and institutions. It refers to a process whereby norms contained within resolutions adopted by international organizations—resolutions not in themselves legally binding—can nevertheless come to acquire legal force, particularly when they are adopted by the larger or more authoritative bodies, such as the General Assembly or the Economic and Social Council.⁹² A prominent example is the Universal Declaration of Human Rights.⁹³

Such resolutions are ordinarily adopted by a majority rather than a unanimity of States members.⁹⁴ Once an issue gets an instrument of its own—despite the fact that significant numbers of States may have voted against the instrument—that issue can steadily rise to the status of being a generally recognized human rights concern. For example, the problems of indigenous and tribal peoples now count among the well-recognized concerns of leading international human rights bodies,⁹⁵ although only fourteen States⁹⁶ have ratified the Convention on Indigenous and Tribal Peoples, the text of which was adopted by the International Labor Organization in 1989.⁹⁷ That reticence is all the more puzzling, insofar as many States that do not have peoples recognized as indigenous could become Parties to the Convention, thus promoting the recognition of indigenous and tribal peoples without incurring obligations under it.⁹⁸ The prominence of the issue on the human rights agenda suggests that the Convention represents norms which have acquired authoritative status merely through the—in itself, non-binding—adoption⁹⁹ of the Convention text by member States of the

92. See, e.g., PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 54–55 (7th ed. 1997).

93. See, e.g., ROBERTSON & MERRILLS, *supra* note 59, at 29.

94. See, e.g., U.N. CHARTER, art. 18 (setting forth voting requirements for the General Assembly) and art. 67 (setting forth voting requirements for the Economic and Social Council).

95. See *Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub.2/1994/2/Add. 1 (June 8, 1994) (prepared by the Chair-Rapporteur of the Working Group on Indigenous Populations). See also THORNBERRY, *supra* note 81, at chs. 38–41.

96. The States are Argentina, Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, and Peru. See International Labour Organization, *Convention No. C169 Was Ratified by 14 Countries*, <http://ilolex.ilo.ch:1567/scripts/ratifice.pl?C169> (last modified March 7, 2000).

97. See, e.g., Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), June 27, 1989, 72 INT'L LAB. ORG. 59 [hereinafter ITP].

98. The Netherlands, for example, which does not have any population recognized as indigenous, ratified the treaty in 1998. See International Labour Organization, *supra* note 96.

99. Cf. VCLT, *supra* note 89, art. 9(2) (setting forth the means of adoption of a treaty at an international conference), art. 24(2) (providing that, absent a contrary provision as set

International Labor Organization (and the adoption of similar—in themselves non-binding—texts in the United Nations or in regional bodies),¹⁰⁰ irrespective of the actual number of States that ultimately consent to be bound.

Fourteen states—arguably more—could probably be found to ratify a binding Convention guaranteeing at least basic civil rights and liberties to sexual minorities,¹⁰¹ even if some of them refused to include more controversial norms, such as gay marriage. The provisions of such an instrument would merely confirm that the standard civil rights and liberties of the UDHR or ICCPR *do indeed* apply to sexual minorities.¹⁰² Alternatively, a non-binding instrument could be proposed which, under classical international legal principles, should pose no threat to unwilling States.

Why, then, are no such instruments adopted? Arguably, because those classical principles no longer prevail. Once such an instrument exists, the prospect of its ripening into soft law means that it almost does not matter which States did and did not originally favor it. With an instrument of their own, sexual minorities would assume their place on an internationally recognized human rights agenda. They would become recognized subjects of international law. Of course, that is a step that the Human Rights Committee, constrained by its mandate, cannot take. But it is also a step which the more political UN bodies *will* not take. Why?

C. Local and Global

“A distinction must be drawn between homosexuals who are such because of some kind of . . . pathological constitution judged to be incurable, and those whose tendency comes from a lack of normal sexual development [S]o far as the incurable category is concerned, the activities must be regarded as abnormalities”

“While considering the respect due to the private life of a homosexual . . . respect is also due to the people . . . who are completely against unnatural immoral practices.”

forth under art. 24(1), a treaty shall enter into force after all negotiating States have consented to be bound), and art. 11 (setting forth the means by which States consent to be bound by a treaty).

100. See *Draft Declaration on the Rights of Indigenous Peoples*, *supra* note 95.

101. In a recent report, Wintemute has identified more than 20 countries whose national laws expressly prohibit discrimination on grounds of sexual orientation. See Wintemute, *supra* note 27, at x–xi, 265–67 (supplement on file with author).

102. See HEINZE, SEXUAL ORIENTATION, *supra* note 1, at ch. 15.

Who might have made such statements? Robert Mugabe? Mohatir Mohammed?

In fact, they were made, respectively, by two human rights judges—Judges Walsh¹⁰³ and Zekia¹⁰⁴ of the European Court of Human Rights, dissenting in *Dudgeon*. Those dissenting opinions have gone largely unnoticed, as Mr. Dudgeon's comfortable victory (15 votes to 4), followed by similar victories in *Norris* and *Modinos*, seems to suggest that such views need no longer be taken seriously. In two senses, however, such a conclusion would be a mistake. First, it cannot be assumed that such views are now obsolete in Western Europe. In *Mouta*, the national court (Tribunal da Relação), in a 1996 judgment, had denied child custody to a homosexual father, reasoning as follows:

The child should live in . . . 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 . . . It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature[,] and . . . [the applicant] himself . . . acknowledged this . . . in stat[ing] that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.¹⁰⁵

There is a more important sense, however, in which the views of Judges Walsh and Zekia remain relevant. Their views are significant not only within the jurisdictional bounds of the Council of Europe, but rather as part of a wider, global controversy. Judge Zekia, for example, writes,

Christian and Moslem religions are all united in the condemnation of homosexual relations and of sodomy. Moral conceptions to a great degree are rooted in religious beliefs. . . . [Both Cyprus and Northern Ireland] are religious-minded and adhere to moral standards which are centuries old.¹⁰⁶

103. 45 Eur. Ct. H. R. (ser. A) at 43, para. 13 (1981).

104. *Id.* at 30, para. 3.

105. *Mouta*, App. No. 33290/96, at para. 14 (Eur. Ct. H.R. 1999), available at <http://hudoc.echr.coe.int/hudoc/> (last visited Mar. 2, 2001).

106. *Id.* at 30, para. 3.

Today, there are still many legislatures and courts throughout the world in which such a view would be embraced.¹⁰⁷ Although the controversy between normative universality and cultural relativism is more commonly associated with a confrontation between Western and non-Western cultures,¹⁰⁸ *Dudgeon* and *Mouta* show how, within the boundaries of Western Europe, the same kinds of arguments emerge which would be voiced in many non-Western jurisdictions.¹⁰⁹ Even on what appear to be “deeply moral,” “deeply religious,” or “culturally specific” issues, differences between Western and non-Western approaches should not be exaggerated.

Placing Judge Zekia's views within that more global perspective, it would seem that we should now understand why United Nations bodies resist recognizing sexual minorities. After all, is it not true that much of the world continues to adhere to ancient moral and religious codes which are hostile to minority sexual identities such as homosexuality, transgenderism or transsexuality? Would it not be “cultural imperialism” to disregard such beliefs?

D. Sexuality: Then and Now

No sexual identity or relationship exists in abstraction from a wider social context. Scholars setting out to study sexual norms have inevitably had to examine entire systems of family and social organization, including such factors as class structure, gender roles, courtship, marriage or child rearing.¹¹⁰ It is not uncommon for the social arrangements of a given period to be characterized as “ancient”—as having always and ever been as they are. For example, Cotterrell notes how claims about “ancient” legal rules have commonly turned out to date back no further than two or three generations.¹¹¹ Similarly, history suggests that

107. For comprehensive and periodically updated accounts, see ILGA, *World Legal Survey*, *supra* note 33. See also Tielman & Hammelburg, *supra* note 33.

108. See Ludger Kühnhardt, *Die Universalität der Menschenrechte* (1987). For a useful overview, see also STEINER & ALSTON, *supra* note 40, at chs. 5, 6.

109. Cf. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (White, J.) (claiming that Western prohibitions of homosexuality have “ancient roots”). Cf. also HEINZE, *SEXUAL ORIENTATION*, *supra* note 1, at 181 n.73. But see *Romer v. Evans*, 517 U.S. 620 (1996) (striking down an amendment to a state constitution prohibiting the extension of legal protections to individuals based on sexual orientation).

110. See, e.g., GISELA BLEIBTREU-EHRENBERG, *HOMOSEXUALITÄT: DIE GESCHICHTE EINES VORURTEILS* (1981); JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994) [hereinafter BOSWELL, *SAME-SEX UNIONS*]; JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY* (1980) [hereinafter BOSWELL, *CHRISTIANITY*]; J.K. DOVER, *GREEK HOMOSEXUALITY* (1989); SUSANNE FRAYSER, *VARIETIES OF SEXUAL EXPERIENCE* (1985); DAVID GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988).

111. ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE* 27 (1989).

personal identities and relationships, and the norms governing them, have been in flux throughout time and across cultures.¹¹²

How, then, are we to interpret what, until the post-World War II period, appears to have been the conspicuous lack of norms hospitable to minority sexual identities? How shall we construe the often-heard claims that such identities are “un-Asian,” “un-African,” “un-Islamic”? Is President Daniel arap Moi of Kenya not right to claim that “[h]omosexuality is against African norms and traditions?”¹¹³

If minority sexual identities are situated within the larger context of individual freedom to make choices about sexual conduct or expression, then such claims are, in an important sense, valid. For example, by definition, identities specifically linked to technological intervention, such as advanced gender modification, would be new for many non-Western societies just as they are rather new in the West. More broadly, identities strongly associated with individual “lifestyle choices” are new to societies that have long adhered to arranged marriages, or in which gender differentials remain strongly defined. D’Emilio argues that a gay identity—in the sense of a distinct lifestyle choice, forming the basis of a sociopolitical movement—only emerged in the West during the periods of 19th and 20th century industrialization and urbanization, which accompanied the decline of the family as an economic unit, and the emergence of individuals able to make personal choices about family and social arrangements, free of the watchful eye of a closely knit community.¹¹⁴

That observation cannot be limited to homosexuality. Those same historical developments gave rise to what can be called “lifestyle heterosexuality,” in which marriage and family have come to be based more on individual choice than on parental or community dictates, and which, historically, is no more familiar in many cultures than lifestyle homosexuality or other comparable—in the sense of being individually adopted—identities or relationships. Within the framework of individuals as free agents making autonomous choices, the heterosexual *identity* is just as novel as homosexual, transgender, transsexual or other identities.¹¹⁵

112. See works cited *supra* note 110.

113. See ILGA, *World Legal Survey*, *supra* note 33, at http://www.ilga.org/Information/legal_survey/africa/kenya.htm.

114. John D’Emilio, *Capitalism and Gay Identity*, in MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 3 (1992).

115. Note, however, that we should not confuse the ideal of personal freedom promised by liberalism with the actual personal freedom enjoyed by individuals in liberal society. Simone de Beauvoir documented the increased capacity for individual choice delivered by post-industrial society, while expressing doubt about whether the relaxation of formal, legal constraints inevitably entailed a lifting of constraining social norms. See, e.g., 2 SIMONE DE BEAUVOIR, *LE DEUXIÈME SEXE* pt. 3 (1949). Her 1943 work *L’Invitée* documents lifestyle

Concepts like "homosexuality," "transgenderism" or "transsexualism" do not emerge against the background of some constant and eternal "heterosexuality"; such concepts arose simultaneously, each with reference to the other, within the newly emerged social scientific discourses of the 19th century.¹¹⁶ A genuinely "scientific" discourse of sexuality had to strip away the layers of social factors—wealth, class, religion, status—until the only factor which remained was biological sex: marriage became *scientifically* meaningful not as a union of aristocrat with aristocrat, of Catholic with Catholic, of worker's child with worker's child, but only as a union of male and female, only as a biological (i.e., "heterosexual") union. Any other kind of relationship, or identity, became constructed with reference to that one.

Despite this parallel emergence of the concept of heterosexuality with that of other sexual identities, there is a world of difference in the moral consequences that have become attached to such terms. With regard to heterosexual identity, moral or religious resistance against the shift toward more liberal values may sometimes be fierce, but never challenges heterosexuality *as such*. Persons making socially deviant heterosexual choices may be accused of disobedience to elders, loose morals, sinful conduct, but not of heterosexuality as such. By contrast, with regard to sexual minorities, resistance against a freely chosen identity, relationship or lifestyle is articulated as a rejection of those minority identities *as such*. In a word, heterosexuals are immoral *despite* their sexual orientation; sexual minorities are immoral *because* of it. A gaping divide arises between the evils *of heterosexuals* and the evil *of homosexuality, of transgenderism, of transsexualism*.

But if the concept of heterosexuality is as much of an historical construction as any other sexual category, then what came before it?

While we cannot overlook theories of social constructionism, nor should we exaggerate them. Social constructionism does not postulate a prior Rousseauvian state of untarnished human society which "civilization" then comes along to corrupt. There never was an Arcadian golden age in which anyone could freely engage in mutually satisfying sexual relations with anyone else. The 19th century construction of sexual categories marked not a "clean break" in history, but a shift in emphasis. In the norms governing sexual conduct, biological sex has always played a prominent role—but alongside such equally prominent factors as class, status, wealth or religion.¹¹⁷ Only since the 19th century

heterosexuality not as a haven of individual choice, but as a minefield of interpersonal power relationships. SEE SIMONE DE BEAUVOIR, *L'INVITÉE* (1943).

116. MICHEL FOUCAULT, *HISTOIRE DE LA SEXUALITÉ I: LA VOLONTÉ DE SAVOIR* (1976).

117. See works cited *supra* note 110.

has there emerged such a detailed epistemology of sexual conduct that is so thoroughly cleansed of those other factors, and thus so strongly focused on biological sex.

While pre-liberal discourses of sexuality do indeed refer to biological sex, that is not where all emphasis lies. In Plato's Athens, while distinctions were indeed drawn, for example, between same-sex and opposite-sex partners, sexual norms were dictated largely by the status of male heads of households, and by their assertion of that role through their sexual activity. The roles of other individuals, male *or* female, were defined largely with reference to the role of those males.¹¹⁸ Similarly, the role of the Native American *berdache*¹¹⁹ or the Indian *hijra*¹²⁰ did represent respected non-"heterosexual" identities. However, in no sense did those identities reflect versions of a 20th century transgender or homosexual lifestyle choice. Norms governing the behavior of *berdaches* or *hijras* were not "liberal": they were constrained by prevailing community expectations governing, for example, conduct, dress, or division of labor.¹²¹ But so were the norms governing *all* individuals in the same societies at the same times: sexual identity was subject to rules and restrictions not because it was "transgender," "homosexual," or "heterosexual," but because it was *sexual*. *All* known societies have regulated sexual identity and conduct, be it through formal law or through social norms.¹²²

Yet we still have not answered the question: Why until recent times have non-heterosexual identities been so widely condemned? And how are intergovernmental organizations responding?

E. *Two More Commodities in the Global Marketplace: "Tradition" and "Sensitivity"*

The first global sexual revolution did not occur in the 1960's. It occurred from the 16th through 19th centuries, through European colonialism. Germane to the depiction of colonized peoples as savages was the depiction of their sexuality, including, in many cases, same-sex or transgender practices, as sinful, primitive, or bestial. Native inhabitants of Asia, Africa, and the Americas were burned, tortured or

118. See Dover, *supra* note 110.

119. David Greenberg, *Why Was the Berdache Ridiculed?*, in ANTHROPOLOGY AND HOMOSEXUAL BEHAVIOR 179 (Evelyn Blackwood, ed., 1985).

120. S. Nanda, *The Hijras of India: Cultural and Individual Dimensions of an Institutionalized Third Gender Role*, in ANTHROPOLOGY AND HOMOSEXUAL BEHAVIOR 35 (Evelyn Blackwood, ed., 1985).

121. See Greenberg, *supra* note 119, at 179; Nanda, *supra* note 120, at 35.

122. Cf., e.g., Frayser, *supra* note 110 and Greenberg, *supra* note 110 (noting the range and changing nature of sexual norms and behaviors across societies and historical periods).

punished for "deviant" and "sinful" sexual practices during the 16th and 17th centuries. Subsequent attempts to "mainstream" colonized peoples, enduring into the 20th century, included the thoroughgoing eradication of "un-Christian" social and sexual norms.¹²³

The human rights movement has taken inconsistent positions towards this history. One of the defining features of the post-World War II human rights movement has been its mission to dismantle vestiges of European colonialism, notably in Asia and Africa.¹²⁴ Preliminary documents to the drafting of the African Charter on Human and People's Rights refer to European colonialism and racism largely to the exclusion of other forms of oppression.¹²⁵

Yet today, in defense of discrimination against sexual minorities, a characterization of, for example, homosexual conduct as "un-African" or "un-Asian" is promoted by political élites in non-Western States routinely relying upon European colonial statutes. For example, Kenya and Singapore—whose peoples had no relevant contacts with each other in pre-colonial history—both maintain 19th century penal codes prohibiting "carnal knowledge against the order of nature."¹²⁶ Carnal knowledge? Against the order of nature? Such a vocabulary has more to do with Victorian readings of the Old Testament Sodom and Gomorrah story¹²⁷ than with anything that can clearly be called "traditional African values" or "traditional Asian values." Similar statutes abound in post-colonial States.¹²⁸ 20th century Marxist movements disseminated a comparable global influence. While some early Marxists had in fact been favorable to the abolition of discriminatory laws and practices, the post-Stalinist period promoted ideals of national—sexual—purity through a

123. HEINZE, *SEXUAL ORIENTATION*, *supra* note 1, at 37–39, 42–44.

124. *E.g.*, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4682. *See also* DRRP, *supra* note 76, pmbl. para. 11; ICERD, *supra* note 72, pmbl. para 4.

125. *See* Declaration and Resolutions of the First Conference of Independent African States (1958), Resolutions of the Second Conference of African States (1960), and Resolutions of the First Assembly of the Heads of State and Government of the Organization of African Unity (1964), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 540–50 (Ian Brownlie, ed., 3rd ed. 1992).

126. *See, e.g.*, Unnatural Offences, 2 LAWS OF KENYA § 162 (1985) Unnatural Offences 9 STATUTES OF THE REPUBLIC OF SINGAPORE § 377 (1986).

127. *Genesis* 18:16–19:29; *cf.* BOSWELL, *CHRISTIANITY*, *supra* note 110 *supra*, at 94–95.

128. *See, e.g.*, Maintenance Orders, 1 LAWS OF BECHUANLAND ch. 8, § 1 (1958) (Botswana); Loitering or Soliciting for the Purposes of Prostitution, 2 LAWS OF FIJI ch. 16, § 168 (1978); Suspicious Premises, 2 LAWS OF FIJI ch. 16, § 169 (1978); Of Unnatural Offences, INDIAN PEN. CODE ch. 16, § 377; MALAYSIAN PEN. CODE, § 377; PAKISTANI PEN. CODE § 377; SYRIAN PEN. CODE § 520. *Cf.* HEINZE, *SEXUAL ORIENTATION*, *supra* note 1, at 15–16.

discourse of homosexuality as Western “bourgeois decadence.”¹²⁹ Gone is the language of “carnal knowledge.” Instead we find, for example, homosexuality punishable in Mozambique with up to 3 years’ imprisonment and hard labor for purposes of “re-education.”¹³⁰

We should neither underestimate nor overestimate the significance of such laws. Again, we must not make the mistake of assuming that they were imposed upon civilizations which had earlier been havens of sexual freedom. In a sense, such laws might merely have been substituting some forms of sexual oppression with other forms—many of which can barely be known, due to lack of adequate historical records. However, when post-colonial political élites speak of their pre-colonial ancestors as having categorically condemned homosexuality or transgenderism, they perpetuate the selfsame colonial worldview they accuse Europeans of having imposed. The notion of minority sexual orientation as “un-African” or “un-Asian” is the embodiment of European-style racism, for it does exactly what Europeans were accused of doing: it ignores the histories of thousands of *different* African and Asian peoples, throughout thousands of years of history, each with their own changing patterns of social and sexual norms.¹³¹ It perpetuates the distinctly colonial idea that Africans or Asians are all alike, that their pre-colonial existence was frozen in time.¹³²

When President Daniel arap Moi proclaims that “words like lesbianism and homosexuality do not exist in African languages,” he is right. Nor did those terms—bastardized derivatives from ancient Greek (“hetero-,” “homo-”) and Latin (e.g., “sexual”)¹³³—exist in European languages before the 19th century. He forgets, however, that his concept of “African languages” and “African norms and traditions,” as sharing some intrinsic unity, would have been equally alien to pre-colonial Africa. Moi also asserts that “even in religion [homosexuality] is considered a great sin.”¹³⁴ Yet, throughout its history, African peoples have known thousands of normative systems¹³⁵—which, for lack of a better word, we can denominate with the (also rather Western) term “religions.”¹³⁶ Moi’s claim only begs the question: *Which religion?* (It also raises questions about the origins of the concept of “great sin.”)

129. HEINZE, SEXUAL ORIENTATION, *supra* note 1, at 4–5.

130. MOZAMBIKAN PEN. CODE, §§ 70, 71.

131. See, e.g., GREENBERG, *supra* note 110, chs. 2–5.

132. Cf. FITZPATRICK, *supra* note 4.

133. See, e.g., BOSWELL, SAME-SEX UNIONS, *supra* note 110, at 42–43.

134. See *supra* note 113.

135. See, e.g., NINIAN SMART, THE WORLD’S RELIGIONS ch. 13 (1989).

136. See, e.g., *id.* at 10–11 (noting the ambiguity of the term “religion” across cultures).

In October 1999, Ugandan President Yoweri Museveni ordered police to “look for homosexuals, lock them up and charge them.”¹³⁷ In a public statement, he claimed that “[t]he Bible spells . . . out clearly that God created Adam and Eve as wife and husband, but not men to marry men.”¹³⁸ Traditional “African” values? Zimbabwean President Robert Mugabe, too, asserts that “[h]omosexuality is against all the norms of African society and culture. We don’t believe they have any rights at all.”¹³⁹ Mugabe paints a picture of African purity against the backdrop of Western decadence: “Let them be gay in the United States, Europe and elsewhere. They shall be sad people here.”¹⁴⁰ The irony is that, in the late 20th century, Western societies have liberalized sexual norms, with 19th century colonial laws or moral codes then being invoked by non-Western States as evidence of “ancient traditions” in campaigns against Westernization. It is perhaps no coincidence that, looking beyond discourses of racial purity and impurity, the post-apartheid South African constitution is also the first African instrument to prohibit discrimination on the basis of sexual orientation.¹⁴¹

In global venues such as the United Nations, Western societies show nothing like the enthusiasm with which they promoted the dismantling of colonial influences linked to racism.¹⁴² Quite the contrary: knowing nothing about such States’ “ancient traditions,” Western States remain silent in order to show cross-cultural “sensitivity.” Hence a global normative code in which racism has long been viewed as a pernicious effect of European imperialism, while discrimination against sexual minorities arises from “delicate,” “ancient traditions” that require special deference. The result is comendous all around: *We’ll pretend to have ancient traditions, you’ll pretend to respect them.*

Yet the contemporary discourses of race and sexual orientation are both largely products of 19th century, European social science.¹⁴³ The

137. Chris McGreal, *Gays are Main Evil, Say African Leaders*, DAILY MAIL & GUARDIAN (Johannesburg), Oct. 10, 1999, reprinted in ILGA, *World Survey*, *supra* note 33, at http://www.ilga.org/Information/Legal_survey/africa/supporting%20files/gays_are_main_evil.htm (last modified Aug. 3, 2001).

138. *Id.*

139. *Id.*

140. *Id.* See also Lewis Machipsa, *Mugabe Swipes at Churches and Gays*, DAILY MAIL & GUARDIAN (Johannesburg), Dec. 9, 1998, available at http://www.mg.co.za/mg/news/98dec1/9dec-zim_wcc.html (noting Mugabe’s frequent condemnation of gays and lesbians, whom he has described as “lower than pigs and dogs.”) Such statements coincide remarkably with depictions in the Chinese press of homosexuality (*tongxinglain*) as a “foreigners’ disease.” See Tielman & Hammelburg, *supra* note 33, at 269.

141. S.A. CONST. ch. 2, § 9, para. 3.

142. See generally *Declaration on the Granting of Independence to Colonial Countries and Peoples*, *supra* note 124.

143. See Heinze, *Construction*, *supra* note 1.

histories of race in the American South or of *apartheid* in South Africa, not to mention the history of gender in any number of cultures, suggest that discrimination on grounds of race, ethnicity or gender have been just as fiercely bound to “deeply held” moral and religious beliefs as any norms governing sexual orientation. International condemnation of such discrimination—however deeply rooted it may have been in religious convictions—has nevertheless taken top priority in United Nations human rights bodies.¹⁴⁴ Never did those bodies take the position that, for example, racial discrimination merely represents a given society’s unique or sacred values, which should not be judged from outside; and moral or religious objections to women’s rights did not prevent the drafting of the longest international human rights instrument in history, the Beijing Declaration, accompanied by ongoing UN efforts to realize their normative ideals in practice.

CONCLUSION

Through the proliferation of newly recognized human rights issues, international organizations promote discrimination against sexual minorities, by forever re-confirming that sexual minorities are not included, because of the “delicate” issues which they represent. Sexual orientation becomes the bargaining chip *par excellence* in the negotiation between global human rights and cross-cultural “sensitivity.” However, issues arising around race, ethnicity, religion, gender and sexual orientation are equally simple or complex; equally rational or irrational; equally well or ill-suited to legal regulation; equally contingent upon, or independent of, moral and religious concerns. The idea that highly detailed, global agendas are imperative for issues of race, ethnicity, religion or gender, but distinctly “complex” for questions of sexual orientation, merely becomes a pretext for maintaining sexual orientation in a permanent state of moral-dilemma-beyond-law.

144. See sources cited *supra* note 125.