

HEALTH AND RIGHTS

Presentation at Male Sexual Health: Risks
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International human rights law got started with the *United Nations Charter* in 1945 and the *Universal Declaration of Human Rights* in 1948. Then nothing much for twenty years.

Real progress began with the *International Convention Against Racial Discrimination* in 1965. Racism was the first broad human rights issue supported by the Eastern bloc, the Western bloc and the developing world.

Countries that signed the treaty on racism had to report periodically on what they were doing. Then, after they reported, they were questioned by members of a UN committee set up under the terms of the treaty. The committee could say that a country was failing to meet international standards. And if a country signed onto an extra procedure, individuals could take a case to the treaty committee, after exhausting domestic remedies.

All this was new. International law had never had such provisions. This breakthrough could occur because everyone officially condemned racism.

Two more human rights treaties were approved by the UN General Assembly in 1966 – the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. It took ten years before enough countries signed the covenant on civil and political rights for it to come into force in 1976. Gradually more countries have signed. Indonesia ratified both treaties in 2005.

Gradually more treaties have been added: on women in 1979, on torture in 1984, on children in 1989, on migrant workers in 1990. The work of developing international standards is not finished. Work is currently underway on cultural minorities, indigenous peoples and the disabled. More is yet to come.

Because a special ‘treaty body’ had been established under the convention against racism in 1965, similar committees were set up under each of the later human rights treaties. These treaty bodies are now a key part of the international human rights system.

Where are we in this new international human rights system? Does it apply to gays, lesbians, transgenders, hijras, waria, kathoeys, fa’afafine, MSM?

At this point in time, there are no references to ‘sexual orientation’, ‘gender identity’ or ‘gender expression’ in the declarations, the treaties or the conclusions of UN world conferences. Nothing. Nowhere.

The *International Covenant on Civil and Political Rights* prohibits discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...” Our words are not in the list.

WHAT HAS HAPPENED?

In 1981 the European Court of Human Rights decided the case of *Dudgeon v United Kingdom*. This was our first breakthrough. The Court said that the anti-homosexual criminal law in Northern Ireland denied Jeffrey Dudgeon, a gay activist, the right to personal privacy. The court repeated the decision in similar cases from Ireland and Cyprus. But, otherwise, there were no victories for the next sixteen years. No protection from discrimination. No recognition of relationships. No equal age of consent. Activists thought the European treaty would have to be amended to get anything more.

But the European Court changed tact without any amendment, catching up with changes throughout Europe. The 1997 *Sutherland v United Kingdom* decision struck down an unequal age of consent. Decisions in 1999 in *Smith* and *Lustig Prean* ruled against a military ban – expanding ‘privacy’ rights to cover discrimination in employment. In 2002 in *Goodwin*, the Court finally came around on transsexual issues, ordering the change of personal documents and upholding the right to marry in the post-operative sex.

WHAT ABOUT THE UN?

TREATY BODIES

The UN Human Rights Committee is the treaty body responsible for the *International Covenant on Civil and Political Rights*. In 1994 the Committee ruled that an anti-homosexual criminal law in Tasmania violated Nicolas Toonen’s right to privacy,

his right to equality and could not be justified as a measure to control HIV infection, for such laws, in fact, made proper education and prevention programs more difficult.

In 2003 the Committee ruled in *Young v Australia* that a same sex partner was entitled to the same pension rights as a heterosexual partner.

INDEPENDENT EXPERTS

In the mid-1960s the practice developed in the UN Commission on Human Rights of appointing independent experts either to report on particular countries – such as Myanmar or North Korea – or particular issues – such as violence against women or extrajudicial executions.

It was the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Asma Jahangir, who first reported on human rights violations based on sexual orientation in her annual report in 1999. The draft resolution renewing her mandate in 2001 specifically mentioned issues relating to sexual orientation. This led to a heated debate in the Commission on Human Rights, and the references were deleted from the resolution.

Later in 2001 the office of the High Commissioner for Human Rights circulated a letter indicating that six special rapporteurs “were interested in receiving information on sexual minority issues falling within their respective mandates...” When the mandate of the Special Rapporteur on Extrajudicial Executions was debated again in the Commission in 2002, the vote changed. The references to sexual orientation stayed in the mandate.

This was the first vote in any UN political body recognizing LGBT human rights. A first – and only four years ago. At the moment it stands not simply as the first, but also as the only decision of a UN political body recognizing LGBT rights.

The report of the Special Rapporteur on Health in 2004 dealt with sexual and reproductive health issues. He said these rights were central to efforts to achieve gender equality, poverty reduction, to combat HIV/AIDS and to achieve the Millennium Development Goals of the UN.

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

implementation of effective education programmes in respect of HIV/AIDS prevention.” ...

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

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

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

Egypt and Saudi Arabia agreed. Canada and Switzerland disagreed.

POLITICAL BODIES

It is in the political bodies of the UN, including the big world conferences, that we have yet to make any real progress.

- We lost in 1993, when a reference to sexual orientation was dropped from the final statement of the World Conference on Human Rights.
- We lost again in 1995 when wording was dropped at the Women’s Conference in Beijing.
- We lost again at the South Africa Racism conference.
- We lost in the Commission on Human Rights when the states that hate us the most blocked any discussion of the Brazilian resolution on sexual orientation in 2003.

Arvind Narrain was at one of the sessions of the Commission when the Brazilian resolution was supposed to be discussed. He talked to government representatives from Asia. They gave two reasons for opposing the resolution. They said the issue was a “northern issue.” Secondly, they cited religion.

In international human rights law it is clear that religion, customs, culture and traditional practices do not justify discrimination on the basis of race. It is also clear that religion, customs, culture and traditional practices do not justify discrimination on the basis of sex. As Louise Arbour, the High Commissioner for Human Rights, suggested in her presentation in Montreal in July, 2006, religion, customs, culture and traditional practices, equally, do not justify discrimination on the basis of sexual orientation.

Voting at the moment in UN political bodies seems about evenly split. There will be a vote in December in the Economic and Social Council on accrediting LGBT NGOs. It is possible we will win that vote. That would mark a tipping point in political bodies in the UN system.

AND WHAT ABOUT ASIA?

On the first evening of this gathering we heard some old hands talking about the bad old days when government representatives would say that there were no homosexuals in their country. There were no homos in India, in Pakistan, in China. Today there is only one country in Asia that says that it has no homosexuals – North Korea.

China now has homos. You can go to gay bars in Beijing and Shanghai. At the same time, police continue to close down LGBT film festivals and cultural events – most recently in Beijing last December. But a year ago I was giving lectures at Fudan University in Shanghai in the Graduate School of Public Health and in the Faculty of Arts. As an out gay man, it was exciting to be able to do this at one of the top universities in China.

In Hong Kong the trial court struck down the unequal age of consent law last year – a decision just upheld on appeal the week before this conference. There is a court challenge to the criminal law here in India, described in Arvind Narrain's paper prepared for this meeting.

Let me end by picking out one country for some praise – South Korea.

South Korea established a National Human Rights Commission with a mandate that specifically included a reference to 'sexual orientation'. No other commission in Asia has this express mandate. The inclusion of 'sexual orientation' had all-party support in the often heated process of the passage of the legislation. The parties argued, but they argued about other things.

Activists in Korea brought a court case against a government ban on gay web sites. They lost. The National Human Rights Commission looked at the issue and said the censorship violated the constitution. The government dropped the full ban.

The Commission has dealt with a series of issues – set out in some detail in my longer paper. Now the Commission is holding consultations on its proposal for a national

anti-discrimination law. The Commission funded Chingusai, the gay men's group, to hold public meetings on the issue.

Who would have thought that South Korea would lead in Asia? It had everything going against it

- a very difficult political transition from authoritarian governments,
- a strong patriarchal Confucian tradition,
- very influential conservative Christian churches,
- and the distraction of North Korean missiles within target range of Seoul.

Change often comes where you don't expect it. It's happening in India. In time it will even happen in North Korea.

