

LECTURE VI

INTERNATIONAL RESPONSES

Introduction

In this sixth lecture I will gather developments that have been happening in international and transnational law. As the Supreme Court of India pointed out in the *Koushal* appeal from the *Naz Foundation* judgment of the Delhi High Court, international law, and the law of foreign countries, do not necessarily control, or even influence, domestic law in most countries. Yet where international law especially the universal law of human rights – points in a clear direction that fact is, at the very least, a reason to pause and to examine closely any inclination to go off in the opposite direction. Yet respectfully, going in the opposite direction to international law is what the Supreme Court of India has done in *Koushal*.

Article 1 of the *Universal Declaration of Human Rights* states that ‘all human beings are born free and equal in dignity and rights’.¹ The use of the expression ‘All human beings’ is clear and deliberate. The enumerated rights are not confined to ‘citizens’ or other favoured people. There are no exceptions to the principle of equality. The United Nations Secretary-General Ban Ki-moon has emphasized that ‘no one gets to decide who is entitled to human rights and who is not’.² Still, for lesbian, gay, bisexual and transgender (LGBT) people, the *Universal Declaration* promise of a world that is free and equal is yet to be realised.³ People do get to decide whether inequality of rights will end. Those people are legislators and judges.

LGBT people around the world, including in India and Australia, face discrimination at schools, in the workforce, in hospitals and perhaps most tragically, within their own families. LGBT people face death threats or in

¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

² UN Secretary-General, *Remarks to special event on Leadership in the Fight against Homophobia*, 11 December 2012, available at <http://www.un.org/sg/statements/index.asp?nid=6504>.

³ UN Secretary-General, *Message to the International Forum on the international Day against Homophobia and Transphobia [delivered by Navanethem Pillay, High Commissioner for Human Rights]*, 16 May 2013, available at <http://www.un.org/sg/statements/?nid=6822>.

many cases, are killed because of their sexual orientation or gender identity.⁴ At least 76 countries retain laws that criminalise consensual adult same-sex conduct.⁵ Once again, since the *Koushal* decision of the Supreme Court, these countries include India. In Iran, Saudi Arabia, Yemen, Mauritania, Sudan and parts of Nigeria and Somalia, consensual adult homosexual acts are even liable to be punished by the imposition of the death penalty.⁶ The Secretary-General of the United Nations has described this pattern of violence and discrimination as a 'monumental tragedy ... a stain on our collective conscience ... a violation of international law'.⁷

In this lecture I will discuss the international responses to the violations of human rights faced by LGBT people. The evidence is indisputable: LGBT people still do not fully enjoy the protections enshrined by international law, such as the right to life,⁸ privacy,⁹ equality and non discrimination.¹⁰ Nevertheless, in the international arena, we are witnessing a patchy trend towards acceptance of sexual orientation and gender identity issues as global human rights issues.¹¹ Progress is being made. But it is slow and often painful to achieve. And there are setbacks.

I will explore how the international community is responding to issues of sexual orientation and gender identity. I will show that, in the Commonwealth of Nations, an association to which India and Australia both belong, some

⁴ Report of the United Nations High Commissioner for Human Rights on

Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Human Rights Council, 17 November 2011, A/HRC/19/41, 4.

⁵ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State-Sponsored Homophobia, A world survey of laws: Criminalisation, protection and recognition of same-sex love*, May 2013, available at <http://ilga.org/ilga/en/article/o5VIRM41Oq>.

⁶ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State-Sponsored Homophobia, A world survey of laws: Criminalisation, protection and recognition of same-sex love*, May 2013, available at <http://ilga.org/ilga/en/article/o5VIRM41Oq>.

⁷ UN Secretary-General, *Video Message to the Human Rights Council Meeting on violence and Discrimination based on Sexual Orientation and Gender Identity*, 7 March 2012, available at <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx>

⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 6.

⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 17

¹⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 26.

¹¹ M.D. Kirby, 'Globalism-Future Human Rights Issues' (2000) 76 *Reform*, available at <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform76/02.html>.

progress has been made recently on human rights; but clearly the Commonwealth has fallen far behind in the fight against discrimination toward its LGBT citizens. I will also show how the interpretation of international treaties and other human rights instruments has evolved so as to include protection for LGBT people. For the purpose of this lecture, I will focus on the United Nations and European systems for that is where much of the recent action has occurred. Finally, I will show the significant advances have been made towards placing the issue of sexual orientation where it should be – as one deserving of global attention as an important issues of human rights deprivations in our time.¹²

The International Response

Commonwealth Eminent Persons Group

In 2009 the Commonwealth Heads of Government authorized the creation of an Eminent Persons Group (EPG). I was invited to serve on the EPG.¹³ At the conclusion of its work, the EPG unanimously called on the Commonwealth nations to overturn laws that prevent a sustainable response to HIV, such as the laws that still criminalise consensual adult same-sex activity.

The EPG was conceived at the Commonwealth Heads of Government Meeting (CHOGM) Port of Spain in 2009.¹⁴ The EPG spent 16 months producing its report. It contained 106 recommendations on a variety of subjects. These ranged from the response to HIV/AIDS, to the adoption of a *Charter* of Commonwealth values.¹⁵ The recommendations aimed to ensure the relevance of the Commonwealth in the 21st century. The EPG's message was clear: the Commonwealth nations could not continue to ignore their responsibilities to uphold the basic values of democracy and human rights. Of the 54 Commonwealth nations, nearly 80% (41 nations) retained criminal

¹² M.D. Kirby, 'Homosexual Law Reform: The Road of Enlightenment' (1997) *Gay and Lesbian Law Journal* (6) 3.

¹³ *Financial Review* (online), 8 July 2010, available at http://www.afr.com/p/national/kirby_appointed_to_commonwealth_qe67MvMHD90Sa1qNSoOfVP.

¹⁴ Commonwealth Network, Eminent Persons Group, available at <http://www.commonwealthofnations.org/commonwealth/eminant-persons-group>.

¹⁵ Paul Osborne and Adam Gartrell, 'CHOGM ducks two-thirds of agenda' *Sydney Morning Herald* (online) 30 October 2011, available at <http://news.smh.com.au/breaking-news-national/chogm-ducks-two-thirds-of-agenda-20111030-1mq1u.html>.

prohibitions on homosexual acts. So this was indeed a peculiar British legacy.¹⁶ Laws against homosexuals were not a universal feature of other European empires, such as the French, Portuguese and Spanish.¹⁷ As the United Nations Secretary-General has stated, these laws were inherited from colonial rule; they are “rooted in the prejudices of the 19th-century”, which now ‘fuel... 21st-century hate.’¹⁸ The Secretary-General expressed his concern that such laws discriminate against a group vulnerable to HIV infection: men who have sex with men (MSM).¹⁹ Such laws not only perpetuate the stigma of being homosexual; they are ‘an affront to our common humanity’.²⁰

UNDP Global Commission Report

Another body formed at about the same time as the EPG, came independently to similar conclusions: the United Nations Development Programme Global Commission on HIV and the Law (UNDP report). It made clear its conclusion that decriminalisation of homosexuality was an essential prerequisite to reducing the spread of HIV infection. In Caribbean countries of the Commonwealth, where homosexuality is criminalised, the 2012 report noted that almost 1 in 4 gay men are infected with HIV. In the countries where such criminal laws do not apply, the prevalence is significantly lower: 1 in 15.²¹ The UNDP report also demonstrated that many gay men are unable to access treatment. Given where they can secure a place in a health clinic, they often face discrimination from health care workers and other patients. Sometimes health care workers even refuse to assist gay men, for fear of being charged with abetting a crime, because sex between men is illegal.²²

¹⁶Peter Tatchell Foundation, ‘Commonwealth progress but more reform is needed’ (Media Release, 24 April 2013), available at <http://www.petertatchellfoundation.org/commonwealth/commonwealth-progress-more-reform-needed>.

¹⁷M.D. Kirby, ‘Commonwealth must ensure gays are not equated with criminals’ *Sydney Morning Herald* (online) 24 April 2013, available at <http://www.smh.com.au/federal-politics/political-opinion/commonwealth-must-ensure-gays-are-not-equated-with-criminals-20111024-1mgb1.html#ixzz2isNzGk7m>.

¹⁸ UN Secretary-General, *Protecting All Members Of Our Human Family*, 17 December 2012, available at

<http://www.koreatimes.co.kr/www/common/printpreview.asp?categoryCode=197&newsIdx=127185>

¹⁹ UN Secretary-General, *Address to International Aids Conference*, 3 August 2008, available at <http://www.un.org/News/Press/docs/2008/sgsm11727.doc.htm>.

²⁰ UN Secretary-General, *Address to International Aids Conference*, 3 August 2008, available at <http://www.un.org/News/Press/docs/2008/sgsm11727.doc.htm>.

²¹ Global Commission on HIV and the Law Report, *Risks, Rights and Health* (July 2012), 45.

²² Global Commission on HIV and the Law Report, *Risks, Rights and Health* (July 2012), 47.

The UNDP report urged governments worldwide to take urgent steps to repeal laws criminalising consensual adult same-sex activity.²³

The Global Commission on HIV and the Law was amongst a number of organisations and individuals which made submissions to the Commonwealth EPG. It noted that Commonwealth countries, comprising more than 30% of the world's population, contained more than 60% of the people who are living with HIV.²⁴ HIV/AIDS was therefore a specific Commonwealth problem, of law and disease that could not be ignored.

In response to such concerns, the report of the EPG to the Commonwealth Heads of Government emphasized that the repeal of the laws on criminalising consensual same-sex activity would facilitate the 'outreach to individuals and groups at heightened risk of infection'.²⁵ Recommendation Number 60 of the EPG report called on Commonwealth nations to repeal such laws. At the time, because of the decision of the Delhi High Court in the Naz Foundation Case it was believed that India, like Australia, no longer had such criminal laws.

In 2011, in Perth, Western Australia, the 106 recommendations were presented to the Heads of Government during the Commonwealth People's Forum (CPF). The distinguished Indian diplomat, now Commonwealth Secretary-General, Kamallesh Sharma, voiced his support for this EPG proposal. He recalled the 2009 *Affirmation of Commonwealth Values and Principles*, which included a clear commitment to tolerance and respect. He called upon the Commonwealth leaders to embrace the challenges of sexual minorities. He pointed out that discrimination and criminalisation on the grounds of sexual orientation were 'at odds' with Commonwealth values.²⁶

The decision adopted by the Heads of Government in relation to this

²³ Global Commission on HIV and the Law Report, Risks, Rights and Health (July 2012), 50.

²⁴ M.D. Kirby, The Commonwealth at the Crossroads: The Eminent Persons Group and the Future' (2011) 92(2) *Parliamentarian*.

²⁵ *A Commonwealth of the People: Time for Urgent Reform* - The Report of the Eminent Persons Group to Commonwealth Heads of Government, 100.

²⁶ Kamallesh Sharma, Commonwealth Secretary-General, *Commonwealth People's Forum Opening Speech*, 25 October 2011, available at <http://thecommonwealth.org/media/news/commonwealth-peoples-forum-opening-speech>

recommendation of the EPG was disappointing. Although the recommendation was formally endorsed, a comment was added asserting that the state members 'have the discretion to identify which, if any, laws are considered discriminatory, and the steps deemed appropriate to address such laws.'²⁷ It is questionable whether Commonwealth countries such as Uganda, Nigeria and Cameroon, where both male and female homosexual activity is still illegal, would recognise that laws criminalising homosexuality were "discriminatory". It is doubtful that they would take the appropriate action. Subsequent events have demonstrated the contrary. They have re-inforced and strengthened their punitive laws against LGBT people.

Recommendation 2, of the EPG report proposed the appointment of a Commissioner for Democracy, the Rule of Law, and Human Rights. That proposal was not adopted. This was also disappointing, leaving a 'missing link' in action on the proposals of the EPG. Such a commissioner would have been an independent office-holder able to respond to serious violations of human rights in member states.²⁸ Clearly, the mandate would have included violations against LGBT people. On the other hand, the Commonwealth leaders did agree to adopt a *Charter* for the Commonwealth.²⁹ It is a document that aims to express the abiding Commonwealth values.³⁰ Although it does not contain an explicit mention of removing discrimination against LGBT citizens, it contains other language that, broadly construed, would hasten progress on that issue.

The adoption of some of the recommendations of the EPG is a positive step towards the recognition of human rights based on sexual orientation and gender identity at the international level. But more urgent reform is needed in

²⁷ The Commonwealth, Agreement by Heads of State of Government to the EPG Recommendations, available at <http://thecommonwealth.org/files/252052/FileName/EPGRecommendationsOutcomes.pdf>

²⁸ Phillip Coorey, Human rights inaction 'a disgrace', *Sydney Morning Herald* (online), 30 October 2011, available at <http://www.smh.com.au/national/human-rights-inaction-a-disgrace-20111029-1mpfz.html>

²⁹ The Commonwealth, Charter heralds new era for Commonwealth (Media Release, 19 December 2012), available at <http://thecommonwealth.org/media/press-release/charter-heralds-new-era-commonwealth>.

³⁰ Justice Michael Kirby, 'Gay people can't fight Commonwealth alone: Kirby' *Sydney Morning Herald*, 25 October 2011, available at <http://www.watoday.com.au/wa-news/gay-people-cant-fight-commonwealth-alone-kirby-20111025-1mhgo.html>

order to empower and protect LGBT people, particularly in Commonwealth countries. The values that unite Commonwealth countries - democracy, human rights and the rule of law – are not enjoyed by a significant number of Commonwealth citizens. Safeguarding those rights should be an obligation of all 54 countries of the Commonwealth of Nations. India, as the most populous nation of the Commonwealth association. It has an important role to make sure that this is done.³¹ So far, it has failed to take a lead.

The International Human Rights Standards

UDHR and ICCPR

International human rights law has proved an important tool in recent decades to support the efforts of LGBT communities around the world seeking to address grave human rights violations.³² The *Universal Declaration of Human Rights* (UDHR), and subsequent international human rights treaties, provide the legal framework for those whose rights are denied at home and who now seek remedies at the international level.

The starting point for analysis of the response of international law is the Preamble to the UDHR. It describes the rights expressed in that instrument as 'inherent', 'equal', and 'universal'.³³ In a subsequent instrument, the *International Covenant on Civil and Political Rights* (ICCPR), the Preamble draws attention to the fact that the rights under the ICCPR 'derive from the inherent dignity of the human person'.³⁴ The preambles of both international instruments set the context for what should be the accepted world standard for the human rights of all people, including those in the LGBT minority.

Other Status

³¹ *The Economist*, "What is it for?", November 16, 2013 (Vol. 409, No. 8862) 22.

³² ARC International, *An Activist's Guide to the Yogyakarta Principles*, P. 20, available at <http://www.ypinaction.org/content/activists>.

³³ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Preamble.

³⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, 173.

Article 2 of the UDHR states that ‘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*.’³⁵ Article 2.1 of the ICCPR reinforces this idea. It calls upon each State member of the United Nations to assure the stated rights to all individuals. Unsurprisingly, given that the UDHR was drafted and adopted in 1948 and the ICCPR in 1966, the list of grounds of discrimination under both instruments do not explicitly mention sexual orientation or gender identity. However, it is important to define clearly what is meant by the use of the expression “LGBT rights”. This is a concept that goes to the heart of the matter.

Sexual identity is now increasingly accepted as an important issue of global human rights.³⁶ When the UDHR was adopted, the concepts of ‘sexual orientation’ and ‘gender identity’ were not present in the minds of the drafters. However, the use of the words ‘other status’, as expressed in Article 2 of the UDHR, show that, when Eleanor Roosevelt and her colleagues penned that instrument UDHR, the list of grounds of discrimination was intended to be ‘open-ended and illustrative’;. Not closed.³⁷ According to the Committee on the companion *International Covenant on Economic, Social and Cultural Rights* (ICESCR):

“The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization”.³⁸

³⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Article 2. (emphasis added)

³⁶ M.D. Kirby, 'Globalism-Future Human Rights Issues' (2000) 76 *Reform*, available at <http://www.austlii.edu.au/au/other/alc/publications/reform/reform76/02.html>.

³⁷ UN Office of the High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation and Gender identity in International Human Rights Law*, September 2012, 40.

³⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on*

The former Secretary of State of the United States of America, Hillary Clinton, in an important speech on the ambit of human rights, given at the United Nations Human Rights Council in Geneva, made the position of her nation clear: 'Some have suggested that gay rights and human rights are separate and distinct; but, in fact, they are one and the same'.³⁹ The 'other status' category in the *Universal Declaration* is never closed.

There is growing acceptance in the international community that the 'catch-all' provision extends to offering dignity and protection to homosexual, bisexual and transsexual people.⁴⁰ This expectation applies to the entire world. The challenge for the world is the interpretation of the 'other status' category to include the rights of LGBT people who face discrimination, threats of harassment, as well as psychological and physical attacks. And to extend practical protection to bisexual, intersex and other "queer" components of the sexual minorities (LBGTIQ).

Privacy

The legal obligations of States to safeguard the specific human rights of LGBT people are also well-established by Article 12 of the UDHR. That article declares that 'No one shall be subjected to arbitrary interference with his privacy'.⁴¹ Article 17 of the ICCPR is similarly worded. Laws criminalising homosexual acts give rise to a number of violations of human rights, including to the right to protection against unreasonable interference with privacy, as stated in Articles 12 and 17.⁴² The right to privacy is one that is familiar to LGBT people. It was the first fundamental right that was successfully invoked in the courts.

Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, Committee on Economic, Social and Cultural Rights, General Comment No. 20, [27].

³⁹ Hillary Rodham Clinton, Former Secretary of State, *Remarks in Recognition of International Human Rights Day, 6 December 2011*, available at <http://www.state.gov/secretary/rm/2011/12/178368.htm>.

⁴⁰ M.D. Kirby, *Bedrock of Universal Human Rights*. Speech at the Global Dignity, Parliament of New South Wales, Human Dignity 14 October 2013, available at

http://www.michaelkirby.com.au/index.php?option=com_content&view=article&id=146&Itemid=9

⁴¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Article 12.

⁴² UN Office of the High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation and Gender identity in International Human Rights Law*, September 2012, 28.

Equality and non-discrimination

Another fundamental principle that underpins international human rights law is the right to equality. This is expressed in Article 1 of the UDHR. The principle of equality is further elaborated in article 26 of the ICCPR. That article guarantees that all people are entitled to the equal protection of the law without discrimination of any kind. Still, on the topic of marriage, international human rights law may not yet be ready to recognise a right to same-sex marriage. Article 23(2) of the ICCPR recognises the right of “men and women to marry”. In the case of *Juliet Joslin v. New Zealand*,⁴³ the United Nations Human Rights Committee, which is concerned in the implementation and interpretation of the ICCPR, found that that the then failure of the law in New Zealand to recognise same-sex marriage did not constitute a breach of the ICCPR. The Committee took the view that Article 23(2) applied only to the right of men and women to marry persons of the opposite sex,⁴⁴ not the rights of “men to marry men and women to marry women”. In 2013 New Zealand enacted marriage equality legislation, making it the first country in the Asia-Pacific to provide for same-sex marriage. Elsewhere in the region heteronormative attitudes continue to prevail, although there have been reports of possible changes to the law on this topic in Thailand and Vietnam.

Despite the foregoing reading of the ICCPR in respect of marriage, the Human Rights Committee has found that laws differentiating between the rights of same-sex and opposite-sex *de facto* couples in relation to financial entitlements probably breach the non-discrimination provisions in the Covenant. In *Young v Australia*,⁴⁵ the Committee found that Mr Young had been subject to discrimination under Article 26 of the ICCPR because, under the Australian war veterans’ entitlement laws, same-sex couples were not entitled to the same veterans’ pensions as opposite-sex *de facto* couples.

⁴³ *Ms Juliet Joslin v. New Zealand* Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

⁴⁴ *Ms Juliet Joslin v. New Zealand* Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002), [8.2].

⁴⁵ *Mr. Edward Young v. Australia* Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003).

Another important decision of the Human Rights Committee on this issue was *Toonen v. Australia (Toonen)*.⁴⁶ That was a decision, made in 1994, that created the first precedent within the United Nations system in addressing discrimination against LGBT people. *Toonen* takes its place in developments in international jurisprudence more generally demonstrating how the approach to issues of sexual orientation and gender identity have changed dramatically in the last 60 years. I shall return to *Toonen*. But first a reference must be made to the way the ground was laid for *Toonen* by decisions of the European Court of Human Rights.

The European Convention

European Commission of Human Rights

The *European Convention on Human Rights* (“*The Convention*”), formerly the Convention for the Protection of Human Rights and Fundamental Freedoms, is the major human rights instrument operating in Europe.⁴⁷ The *Convention* was adopted by the Council of Europe in 1950. Cases dealing with violations of rights are now heard directly by the European Court of Human Rights (“ECtHR”) with its seat in Strasbourg, France. Until 1988,⁴⁸ individuals had to apply to the European Commission of Human Rights (“the Commission”), which would assess whether the case was admissible before the ECtHR.

The first application lodged with the Commission relating to homosexuality was made by a homosexual man in Germany. On 10 October 1955, the applicant (known only as WB) complained about convictions of criminal offences recorded against him under paragraph 175 of the *Criminal Code* of the Federal Republic of Germany.⁴⁹ Paragraph 175 criminalised homosexual activity between men, even where involving consenting adults in private. It had come into effect in 1871. Earlier German law had generally followed the Napoleonic penal code and omitted any such criminal offence. During the Nazi Era, paragraph 175 was amended to broaden the scope of the law,

⁴⁶ *Toonen v. Australia* Communication No.488/1992 CCPR/C/ 50/D/488 /1992, March 31, 1994.

⁴⁷ Council of Europe, *European Convention on Human Rights, A convention to protect your rights and freedoms*, available at <http://hub.coe.int/what-we-do/human-rights/european-convention>.

⁴⁸ European Court of Human Rights, *History of the Court's reforms*, available at http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=#n13740528735758554841286_pointer

⁴⁹ Paul Johnson, *Homosexuality and the European Court of Human Rights* (1nd Routledge), 2013, 22.

criminalising any kind of sexual contact between males, 'as little as a little kiss or embrace'.⁵⁰ The change to the legislation resulted in the widespread imprisonment of gay men during and after the Nazi period. Many were sent to concentration camps.⁵¹ In *W.B v Federal Republic of Germany*, the Commission dismissed the case for relief under the *Convention* with brief reasons. It stated that the *Convention* permitted countries to adopt laws that made homosexual acts a criminal offence. Doing so was within the permitted 'margin of appreciation' allowed to each member state.

Between 1955 and 1980, a significant number of gay men from Austria, Germany and the United Kingdom continued to submit complaints to the Commission against laws that criminalised consensual adult same-sex activity. However, the applications during this period were all rejected. They therefore did not reach the Court. This early jurisprudence at the European level relating to homosexuality, persisted into the 1980s, showed 'a fundamental unwillingness by the Commission to regard homosexual acts in any way protectable under the *Convention*'.⁵² The Commission even occasionally described homosexuality as a 'threat' or 'danger', a form of behavior to be avoided at all costs.⁵³ Paul Johnson, the author of *Homosexuality and the European Court of Human Rights* suggests that the decisions between 1955 and 1980 were a reflection of the social, political and cultural landscape of Europe during that period. Homosexuality was still regarded as a 'mental disorder'. Most people still considered criminalisation to be a necessary step in order to prevent the 'spread of the disease' within the wider community.⁵⁴

Despite the lack of success between 1955 and 1980, the applications challenging the criminalization of homosexual acts in Europe continued to be filed. In a hostile environment towards homosexual people, gay applicants persisted in lodging a significant number of complaints. Paul Johnson

⁵⁰ Paul Johnson, *Homosexuality and the European Court of Human Rights* (1st Routledge), 2013, 22.

⁵¹ Paul Johnson, *Homosexuality and the European Court of Human Rights* (1st Routledge), 2013, 23.

⁵² *Ibid*, 21.

⁵³ *Ibid*, 32.

⁵⁴ *Ibid*, 31-34 and 40.

correctly describes the applicants of this period as ‘the first voices in European human rights law’ asserting the equality and normalcy of LGBT people.⁵⁵ Their efforts finally paid off.

Dudgeon and following cases (Article 8)

In 1981, the ECtHR delivered an important decision holding that the criminalisation of consensual sexual acts between male persons violated the right of privacy under Article 8 of the *Convention*.⁵⁶ The *Dudgeon* case, which has been referred to in many later national court proceedings, including in India in the *Naz Foundation* litigation, was the first successful ruling in favour of LGBT people decided by the ECtHR.

In 1976, Mr. Dudgeon, a gay advocate of reform, was arrested by the police in Northern Ireland. He was questioned at length about his sex life. The police seized personal papers, including correspondence and diaries, belonging to Mr. Dudgeon in which were described homosexual relations.⁵⁷ The police recommended criminal charges for the offence of gross indecency between males. However, the Director of Public Prosecutions decided that prosecution would not be in the public interest.

Mr. Dudgeon then brought a case to the ECtHR claiming that the legislation criminalising consensual relationships between adults and the police investigation in 1976 constituted an ‘unjustified interference with his right to privacy’.⁵⁸ Mr. Dudgeon also submitted that he had suffered discrimination on grounds of sex, sexuality and residence.

The majority in the ECtHR found that Mr. Dudgeon had suffered, and continued to suffer, ‘an unjustified interference with his right to respect for his private life’.⁵⁹ The majority noted that, in a number of European States,

⁵⁵ Paul Johnson, ‘Homosexuality and the African Charter on Human and Peoples’ Rights: What Can Be Learned from the History of the European Convention on Human Rights?’ (2013) 40 *Journal of Law and Society* (2), 249.

⁵⁶ *Dudgeon v UK* (1982) 4 HRR 149.

⁵⁷ *Dudgeon v UK* (1982) 4 HRR 149.

⁵⁸ *Dudgeon v UK* (1982) 4 HRR 149.

⁵⁹ *Dudgeon v UK* (1982) 4 HRR 149.

consensual sex between adults was not a criminal offence. It also noted that, in Northern Ireland, the authorities had generally refrained from enforcing the law. Nevertheless, the Court ruled that Mr Dudgeon's right to privacy had been infringed. It declined to make a finding on his discrimination claim. In finding in favour of Mr Dudgeon, the Court made an 'unprecedented statement'⁶⁰ defining homosexuality as an 'essentially private manifestation of the human personality'.⁶¹ In doing this, the Court effectively brought homosexuality into contemporary human rights law'.⁶²

The strong statement by the ECtHR in favour of Mr Dudgeon's claim evoked opposition from dissenting judges. Judge Walsh (Ireland) expressed his opinion that sexuality was determined more by cultural influences than instinctive needs.⁶³ The implication of finding sexual orientation as a result of culture, rather than genetic coding, was that criminal laws to stop behaviors considered 'unacceptable' to the public become, according to Judge Walsh's reasoning, justifiable.⁶⁴ Judge Walsh also noted that the strong religious and moral beliefs held by most citizens in Northern Ireland put the country on a somewhat different footing on the topic of male homosexuality when compared to the rest of Europe. In short, the different laws in Northern Ireland (and by inference, in the Republic of Ireland) were within the 'margin of appreciation'.

In *Dudgeon's* case, the dissenting views expressed in the ECtHR showed how the discourse against gay people had been so far based on a draconian view that homosexuals were 'dangerous, abnormal and monstrous deviants'.⁶⁵ An example appears in the dissenting opinion of Judge Matscher. He found that the arrest of Mr. Dudgeon was justified because homosexual relations with minors were a 'widespread tendency in homosexual circles'.⁶⁶ Similarly, Judge Zekia described homosexuality as an 'unnatural immoral

⁶⁰ Paul Johnson, *Homosexuality and the European Court of Human Rights* (1st ed, Routledge), 2013, 50.

⁶¹ *Dudgeon v UK* (1982) 4 HRR 149.

⁶² Paul Johnson, above n59, 50.

⁶³ *Dudgeon v UK* (1982) (1982) 4 HRR 149, Dissenting Opinion of Judge Walsh.

⁶⁴ Paul Johnson, *Ibid*, above n 59, 51-52.

⁶⁵ Paul Johnson, *Ibid*, above n 59, 51-52.

⁶⁶ *Dudgeon v UK* (1982) (1982) 4 HRR 149, Dissenting Opinion of Judge Matscher.

practice'. He considered it 'odd and perplexing' that the concept of privacy would triumph over the necessity to protect the morals held by the majority of the people.⁶⁷ Such dissenting views became rarer in subsequent European cases. However, they find some reflection in the reasoning of the Supreme "court of India in *Koushal*.

Another successful international human rights case that concerned the privacy of consenting adult, sexual conduct was *Norris v Ireland*.⁶⁸ Mr [later Senator] Norris, like Mr Dudgeon, complained that the prohibition on male homosexual activity constituted a continuing interference with his right to privacy guaranteed under the European *Convention*.⁶⁹ After the *Dudgeon* case, governments had to find more sophisticated arguments to justify the existence of such criminal laws in Europe.⁷⁰ In *Norris*, the Government of Ireland argued that that the complainant had been able to maintain a private life as a gay man, campaigning for gay law reform without the interference of the State. The government argued that 'no derogation from the applicant's fundamental rights' had occurred by virtue of the mere *existence* of such laws.⁷¹ Again there are resonances of this reasoning in the Supreme Court of India where it was emphasised that the law was rarely enforced by criminal prosecutions. However, the ECtHR emphasized its view that the very existence of the legislation affected Mr Norris's right to respect for his private life. Such legislation could not survive consistently with the *Convention*.

The Irish government submitted that the ECtHR should adopt a wider interpretation of what was 'necessary' for the protection of morals. Invoking the 'margin of appreciation' doctrine, the Irish Government argued that national law-makers should enjoy a degree of tolerance in respect of their compliance with Article 8.⁷² However, the European Court did not find a 'pressing social need' to sustain laws rendering consensual homosexual acts criminal offences. Referring to *Dudgeon's* case, the Court held that:

⁶⁷ *Dudgeon v UK* (1982) 4 HRR 149. A Dissenting Opinion of Judge Zekia.

⁶⁸ *Norris v Ireland* (1991) 13 EHRR 186.

⁶⁹ *Norris v Ireland* (1991) 13 EHRR 186.

⁷⁰ Paul Johnson, *Homosexuality and the European Court of Human Rights* (1st ed, Routledge), 2013, 51.

⁷¹ *Norris v Ireland* (1991) 13 EHRR 186.

⁷² *Norris v Ireland* (1991) 13 EHRR 186.

“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”⁷³

In *Modinos v Cyprus*,⁷⁴ the ECtHR reaffirmed *Dudgeon and Norris*. That was a case showing the interaction between domestic legislation, constitutional principles and international law. Article 15 of the *Cypriot Constitution* guaranteed the right to privacy. The Constitution, which was the supreme law of Cyprus, also stated that ‘Treaties, conventions ... have force superior to any municipal law.’ Mr Modinos alleged that he had suffered great strain as a result of the existence of laws criminalising consensual homosexual relations dating back to British colonial days. There was no such law in Greece. The Cypriot Government submitted that the applicant could not be lawfully prosecuted under the *Cypriot Criminal Code*, since its provisions were in conflict with the *Cypriot Constitution*.

In a brief decision, the ECtHR observed that the prohibition on male homosexual conduct in private between adults was still available for prosecution according to the statute book.⁷⁵ Consistently with previous decisions, the ECtHR concluded that the fact that there had been no prosecutions and convictions since 1991 provided ‘no guarantee’ that action would not be taken in the future. In relation to the constitutional argument raised by the government, the Court was not persuaded that the *Cypriot Criminal Code* would be held to be in breach of the Constitution. It made reference to an earlier case, *Costa v. The Republic*,⁷⁶ when a 19 year-old soldier had been convicted of the offence of permitting another male person to have carnal knowledge of him. In comments in the *Costa* case, the Supreme Court of Cyprus had endorsed the dissenting view of Justice Zekia in the *Dudgeon* case. Reflecting on those comments, the ECtHR was not convinced that the Supreme Court of Cyprus would hold that the domestic legislation and

⁷³ *Dudgeon v UK* (1982) 4 HRR 149.

⁷⁴ *Modinos v. Cyprus*, (1994) 16 EHRR 485.

⁷⁵ *Modinos v. Cyprus*, (1994) 16 EHRR 485.

⁷⁶ *Costa v. The Republic* (1982) 2 *Cyprus Law Reports*, pp. 120-133.

the constitution were inconsistent. Accordingly, it concluded that the Cypriot law was inconsistent with the *European Convention*.

The cases so far brought before the ECtHR alleging discriminatory treatment, had been considered in light of Article 8 of the *Convention*. The successful privacy arguments invoked in the three cases sent a strong message to the Contracting States. There is no longer justification for the existence of laws criminalising consensual same-sex activity throughout Europe. This conclusion tackled the most egregious of the unequal laws – those imposing criminal punishment, of the kind dealt with in India in the *Naz Foundation* case. However, this approach was of only limited utility in addressing the inequality faced by LGBT people in respect of their activities in the public zone.

Anti-discrimination provisions (Article 14)

In addition to reliance on the *Convention* ground of privacy, cases involving discrimination based on sexual orientation and gender identity have also been fought in the ECtHR on another footing. Article 14 of the *European Convention* contains a prohibition on discrimination on a number of grounds, including sex, race, and other status. A breach of Article 14, grounded in sexual orientation discrimination, was argued for the first time in 1955. However, it was not until 1999 that Article 14 was successfully invoked.⁷⁷

In *Salgueiro da Silva Mouta v Portugal*,⁷⁸ the applicant was a Portuguese man who had been denied custody of his daughter only because he was shown in the record to be homosexual, living with another man.⁷⁹ In awarding custody of the child to the mother, the Portuguese Court of Appeal noted that the child should live in ‘a traditional Portuguese family’, and that ‘children should not grow up in the shadow of abnormal situations’.⁸⁰ The ECtHR concluded that

⁷⁷ Paul Johnson, *Homosexuality and the European Court of Human Rights* (1st ed, Routledge), 2013, 126.

⁷⁸ *Salgueiro Da Silva Mouta v. Portugal*, European Court of Human Rights, Application Number 33290/96 (21 March 2000).

⁷⁹ *Ibid*, [28].

⁸⁰ *Ibid*, [34].

the applicant's homosexuality had been a decisive factor in the denial of child custody. It held that the finding had been made in violation of Article 8, read in conjunction with Article 14.⁸¹

Article 14 was also successfully argued in relation to discrimination in housing provisions. In *Karner v Austria*,⁸² the ECtHR held that refusing to permit a homosexual man to continue occupying his deceased partner's apartment was discriminatory. The Austrian Government accepted that the applicant had been treated differently on the ground of his sexual orientation. However, it submitted that such a difference in treatment was reasonably necessary for the 'protection of the traditional family'.⁸³ The ECtHR held that Austria had failed to demonstrate how the exclusion was necessary to achieve that aim. The Court observed that the 'the aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it'.⁸⁴

In a later case, the European Court developed further the scope of Article 14 as it concerned to sexual orientation. *Kozak v. Poland* concerned circumstances in which a homosexual man's legal right to succeed to a tenancy after the death of his partner had been denied by Polish authorities.⁸⁵ In that case, the ECtHR expressed in clear terms its conclusion that 'sexual orientation is a concept covered by Article 14'.⁸⁶ The Court noted that, when differential treatment is based on sex or sexual orientation, the margin of appreciation afforded to the State was narrow. The Contracting State had to convince the Court, with solid reasons, that any such discrimination was necessary.

The Polish Government submitted that Polish law only recognised *de facto* relationships between opposite-sex partners. For the government, this was

⁸¹ *Ibid*, [36].

⁸² *Karner v Austria* European Court of Human Rights, Application Number 40016/98 (24 October 2013).

⁸³ *Karner v Austria* European Court of Human Rights, Application Number 40016/98 (24 October 2013), [35].

⁸⁴ *Karner v Austria* European Court of Human Rights, Application Number 40016/98 (24 October 2013), [41].

⁸⁵ *Kozak v. Poland* European Court of Human Rights, Application Number 13102/02 (2 March 2010).

⁸⁶ *Ibid*, [92].

consistent with the Article 18 of the *Constitution*, which defined marriage as ‘a union of a man and a woman’ and also placed marriage, family, motherhood, and parenthood ‘under the protection and care of the Republic of Poland’.⁸⁷ However, the ECtHR noted that:

“Given that the Convention is a living instrument, to be interpreted in the light of present-day conditions, the State (...) must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.”⁸⁸

The ECtHR later reached the same conclusion with respect to Austria's laws containing an unequal age of consent for consenting sexual conduct on the part of homosexual and heterosexual people. The Court found that the difference ‘embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority’. This, it held, could not ‘amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour’.⁸⁹

The Strasbourg case law on the topic of sexual orientation and gender identity is a reflection that the *Convention* is a living instrument that is to be interpreted according to present-day conditions. In fewer than 30 years, the ECtHR's interpretation of homosexuality has moved from the idea that homosexuality was a ‘danger’ and ‘threat’ to a conclusion that it is an ‘essentially private manifestation of the human personality’.⁹⁰ By taking these steps, the ECtHR has not only empowered LGBT people in Europe. It has also provided an authoritative narrative for LGBT people around the world to invoke so as to challenge homophobic legislation and to seek legislative reform or judicial scrutiny, measured against universal human rights standards.

⁸⁷ *Ibid*, [44].

⁸⁸ *Ibid*, [98].

⁸⁹ *L. and V. v. Austria*, Applications nos. 39392/98 and 39829/98 (9 January 2003), [52].

⁹⁰ *Dudgeon v UK* No 7525/76, 22 October 1981, Series A no 45, [60].

The UN Human Rights Committee

The Committee

The United Nations Human Rights Committee (“the Committee”) is another international body that has addressed the problems posed by the criminalisation of sexual orientation. In 1994, the Committee delivered a decision with world-wide implications. The case, *Toonen v. Australia (Toonen)*,⁹¹ has been described by the United Nations High Commissioner for Human Rights Navi Pillay, as ‘mark[ing] a watershed with wide-ranging implications for the human rights of millions of people’.⁹²

In *Toonen*, the Committee held that the criminalisation of consensual same-sex relations by the *Criminal Code* of the State of Tasmania, in Australia, violated the right to privacy provided under Article 17 of the ICCPR. This was an invocation of human rights law of the global community operating through the United Nations. Thus it went beyond a Commonwealth perspective or a regional perspective as offered by the ECtHR. The decision paved the way for sexual orientation to be recognized world-wide as a fundamental ground for the protection of human rights. Since 1994, the Committee has consistently held that laws criminalising same-sex relations violate universal human rights to privacy and to non-discrimination.⁹³ The *Toonen* decision was invoked by the Delhi High Court in the *Naz Foundation Case*. However, it was not regarded as significant in the decision of the Supreme Court of India in the appeal from the Delhi High Court in *Koushal*. It is therefore worth examining what *Toonen* stands for.

The Toonen Case

In 1991, Tasmania was the only state in Australia where consensual sexual acts between adult male partners in private was still a criminal offence. The maximum penalty for conviction under sections 122(a)(c) and s 123 of the *Tasmanian Criminal Code* was 21 years imprisonment. This law, coupled with

⁹¹ *Toonen v. Australia*, Communication No.488/1992 CCPR/C/ 50/D/488 /1992 (31 March 1994).

⁹² UN High Commissioner for Human Rights, Video message: *How gay rights debate began at the UN*, available at <http://www.youtube.com/watch?v=qd9dGN6dBwA>.

⁹³ Report of the United Nations High Commissioner for Human Rights on *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Human Rights Council, 17 November 2011, A/HRC/19/41, [14].

the Tasmanian government's resistance to changing the law, 'led to a remarkable story of individual courage and purposeful action by a United Nations agency'.⁹⁴

I first met Nicholas Toonen during a visit to Tasmania to address the National Conference on AIDS. At the time, I was President of the New South Wales Court of Appeal.⁹⁵ Days after our meeting, Mr Toonen's then partner Rodney Croome telephoned me and asked my opinion on whether they should take Australia to the United Nations to complain of a breach of the ICCPR. I had doubts that the Committee would even consider such an application. Neither Mr Toonen nor his partner had ever been prosecuted. There was no likelihood of prosecution. I therefore counselled Mr Croome and Mr Toonen to forget about communication to the United Nations. I urged them to continue his efforts to change the law in Tasmania. Thankfully, they ignored my advice.⁹⁶

On the first day that the First Optional Protocol to the ICCPR became available for invocation by Australians,⁹⁷ Mr Toonen lodged his complaint with the Committee. He did so on the basis that the relevant provisions of the *Tasmanian Criminal Code* violated Article 2 (the enjoyment of rights under the Covenant without discrimination), Article 17 (the right to privacy) and Article 26 (the right to equality before, and equal protection of the law).

The Decision in Toonen

There are a number of important points in the decision of the United Nations Human Rights Committee. One of the issues considered by the Committee was whether Mr Toonen was a 'victim' within the meaning of Article 1 of the *First Optional Protocol*. In other words, Mr Toonen had to establish that his rights under the ICCPR had been violated by the *Tasmanian Criminal Code*. He had not been charged with a criminal offence although he and his partner presented themselves at a police station to confess to 1,000 breaches of the

⁹⁴ M.D. Kirby, 'Globalism-Future Human Rights Issues' (2000) 76 *Reform*, 6.

⁹⁵ M.D. Kirby, 'Seven Lessons from Tasmania', Address to the Tasmanian Gay and Lesbian Rights Group, 28 June 1997, available at

http://www.michaelkirby.com.au/index.php?option=com_content&view=article&id=37&Itemid=65.

⁹⁶ M.D. Kirby, 'Three Tasmanian Law Reformers' (2005) 23(1) *University of Tasmania Law Review* 1.

offending provision, with the intention of provoking a criminal prosecution they could challenge.⁹⁸ No charges followed. On this issue, the Committee noted that the very existence of the laws and the threat of enforcement were sufficient to make Mr Toonen a victim, entitled to invoke the ICCPR. By way of contrast, the common non enforcement of the law appears to have been regarded as highly relevant by the Supreme Court of India in *Koushal*. It was not regarded as significant to the Human Rights Committee.

When analysing the legal merits of the complaint before the Committee, the Australian government conceded that Mr Toonen's rights had been violated. However the Australian government included with its submission the observations of the Tasmanian State government, which resisted the communication. The Tasmanian authorities acknowledged that the *Tasmanian Criminal Code* had violated Mr Toonen's privacy rights. However, it argued that the violation was justified on two grounds: first on a public health ground (that the relevant law was intended to prevent or reduce the spread of HIV/AIDS); and secondly, on a moral ground (that the law was intended to protect public morals).

The Committee rejected both of the arguments raised by the Tasmanian Government. It concluded that the criminalisation of homosexual practices could not be considered a 'reasonable means or proportionate measure' to achieve the aim of preventing the spread of AIDS/HIV.⁹⁹ It noted the Australian Government's argument that criminalisation actually damaged the effectiveness of public health programmes 'by driving underground many of the people at risk of infection'.¹⁰⁰

Referring to the Tasmanian submission that the relevant laws were justifiable on moral grounds, the Committee held that moral issues were not exclusively a matter of domestic concern. This represented a considerable shift from a

⁹⁸ Justice Michael Kirby 'Human rights, sexuality and discrimination' in Helmut Graupner & Phillip Tahmindjis (eds) *Sexuality and Human Rights: A Global Overview* (The Haworth Press, 2005), Page 14, available at www.michaelkirby.com.au/images/2131-Book_Chapter_HumanRight.

⁹⁹ *Toonen v. Australia*, Communication No.488/1992 CCPR/C/ 50/D/488 /1992 (31 March 1994) [8.5]

¹⁰⁰ *Toonen v. Australia*, Communication No.488/1992 CCPR/C/ 50/D/488 /1992 (31 March 1994) [8.5]

previous decision of the Committee, showing once again the fast moving developments in this area of jurisprudence. In 1982 in *Leo Hertzberg et al. v. Finland*,¹⁰¹ the Committee had held that censorship of radio and TV programmes dealing with homosexuality did not breach Article 19 of the ICCPR (protecting freedom of expression), as 'public morals differ widely' and there is no 'universally applicable common standard'. Those conclusions allowed a wide 'margin of discretion' to domestic authorities.¹⁰² In *Toonen*, the Committee noted that all laws criminalising homosexuality had been repealed in other states in Australia and were not enforced in Tasmania. In the circumstances of the case, it then concluded that the laws were not essential to the protection of morals in Tasmania. They did not meet the 'reasonableness' test. Non-enforcement of the law was, unlike in *Koushal* turned against the governments defending the unenforced law.

In the end, the Committee held that adult consensual sexual activity in private was covered by the concept of 'privacy' under Article 17 of the ICCPR. It recommended that Tasmania repeal sections 122 (a) and (c) and 123 of the *Tasmanian Criminal Code*.¹⁰³ Since the Committee found a violation in Article 17, it did not need to consider whether there had also been a violation of Article 26. However, some reasoning of the Committee supported an inclusive interpretation of the word 'sex' in Articles 2 and 26 of the ICCPR, so as to include the 'sexual orientation' of the persons complaining.¹⁰⁴

In the *Naz Foundation* case in India, similar reasoning was adopted by the Delhi High Court. Article 15 of the *Constitution of India* prohibits discrimination on the grounds of caste, creed, religion, sex and place of birth or any of the foregoing.¹⁰⁵ In the *Naz Foundation* case, the petitioner submitted that the Court should interpret the word 'sex' under Article 15 as

¹⁰¹ *Leo Hertzberg et al. v. Finland* No. 61/1979, U.N. Doc. CCPR/C/OP/1 (2 April 1982) [10.3].

¹⁰² *Toonen v. Australia*, Communication No.488/1992 CCPR/C/ 50/D/488 /1992 (31 March 1994) [10.3].

¹⁰³ *Ibid*, [10].

¹⁰⁴ *Ibid*, [8.7].

¹⁰⁵ Article 15 (1) of the *Constitution of India 1949* 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them'.

including sexual orientation.¹⁰⁶ The Delhi High Court, referred to the *Toonen* decision and also to reasoning in Canadian and South African courts. It held that 'sexual orientation' was a ground analogous to 'sex' and that discrimination on the basis of sexual orientation was therefore not permitted by Article 15 of the *Constitution of India 1949*.¹⁰⁷ The description of three decades of decision-making within the councils of the Commonwealth of Nations, in the European Court of Human Rights and in the United Nations Human Rights Committee, shows how the decision of the Delhi High Court in *Naz Foundation* was in the mainstream, so far as these bodies were concerned. Unless the doctrine in India was very different, the same conclusion would apparently follow as a matter of legal interpretation. However, the Supreme Court of India decided otherwise in *Koushal*. With respect, it did so without providing any persuasive reasons.

Australian Follow-Up

The Tasmanian Response

In Tasmania, Mr Toonen received the ruling of the United Nations by fax on 8 April 1994. Three days later the decision was reported on the front pages of the major Australian daily newspapers, and also media and other interested groups around the world.¹⁰⁸ There was little time to celebrate. After having been successful at the United Nations, Mr Toonen had to face another, local, challenge. This is quite common on human rights matters: the need for enforcement of international human rights decisions under domestic law.

In Australia, a difference continued between the State and the Federal Governments in response to the Human Rights Committee's decision. In Tasmania, the issue polarised the community, with widespread support. The Committee's decision attracted support in Southern Tasmania, but resistance in the north of the state.¹⁰⁹ The Tasmanian government defended the sodomy

¹⁰⁶ *Naz Foundation v. Government of NCT of Delhi*, [2009] 4 LRC 838 at 984 [99]. (Emphasis added).

¹⁰⁷ *Naz Foundation v. Government of NCT of Delhi*, [2009] 4 LRC 838 at 886 [104].

¹⁰⁸ 'The legacy of Toonen v Australia', *Star Observer* (online), 11 April 2009, available at <http://www.starobserver.com.au/news/local-news/new-south-wales-news/the-legacy-of-toonen-v-australia/5739>

¹⁰⁹ Charles P. Wallace, 'Gay Australian Takes Complaint to U.N. Panel and Wins' *Los Angeles Times*, 10 September 1994, p.A4.

laws. Ron Cornish, the Tasmanian Attorney-General, a former police officer, set the tone for the debate. He described the Human Rights Committee's decision as the act of 'a faceless group of people telling' Tasmanians how they should legislate.¹¹⁰ He maintained that the repeal of sodomy laws would lead homosexuals to a life of 'misery, disease and death'.¹¹¹ Conservative groups, such as the Homophobic Activists Liberation Organization, pushed the government to keep the sodomy laws in place.¹¹² The Australian people became so involved in the controversy that it led to a boycott of the island's food exports. Gay advocates in Sydney, campaigned for a boycott of food produced in Tasmania. This campaign received the support of 400 restaurants and around 10,000 signatures around Australia.¹¹³

Two years after the Committee's decision, Tasmanian electors went to the polls. In the days leading up to the election, the conservative government promised not only to keep the sodomy laws in place but also to increase the penalties. However, at the same time, it pointed out that the government had not enforced the law and considered that the issue was not significant.¹¹⁴ In the elections, the government suffered a large electoral swing against it. However, it remained in office, and the controversial sections of the *Tasmanian Criminal Code* survived.

The Federal Response

Under the Australian Constitution, criminal law is generally administered by the States and Territories. However, under the *Constitution*, the Federal Parliament is empowered to enact legislation to enforce international treaties to which Australia is a party. This meant that the state-based administration of criminal law was no necessary impediment to the federal government's

¹¹⁰ 'UN Ruling on Gays puts State in Hot Seat', *The Australian*, (12 April 1999).

¹¹¹ 'Providing guidance in an age of moral uncertainty', *The Age*, (16 April 1999).

¹¹² Charles P. Wallace, 'Gay Australian Takes Complaint to U.N. Panel and Wins' *Los Angeles Times*, 10 September 1994, A4.

¹¹³ Peter Urmson, 'Buying into Tassie's stand on marriage equality', *Sydney Morning Herald* (online) 21 August 2012, available at <http://www.smh.com.au/federal-politics/political-opinion/buying-into-tassies-stand-on-marriage-equality-20120820-24hrz.html>.

¹¹⁴ Elizabeth Young, Parliament of Australia, *Background Paper 8 1996-97 Tasmanian Election 1996*, available at

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9697/97bp8.

challenge to the *Tasmanian Criminal Code*. The Federal Parliament thereupon enacted legislation to implement Australia's international obligations under Article 17 of the ICCPR as declared by the United Nations Committee.¹¹⁵ It enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth). This federal law overrode the *Tasmanian Criminal Code*¹¹⁶ in respect of the criminalisation of same sex conduct.

The ruling in *Toonen* illustrates the way in which today international law can sometimes influence domestic law, including in the field of criminal law.¹¹⁷ Since *Toonen*, the UN Human Rights Committee has repeatedly urged States that are parties to the ICCPR to repeal similar laws. Some progress has been made.¹¹⁸ Since 2000, the decriminalisation of homosexuality has become a reality several jurisdictions worldwide, including Armenia, Azerbaijan, Bosnia and Herzegovina, Cape Verde, Georgia, Fiji, the Marshall Islands, Nepal and Nicaragua.¹¹⁹ In India, the *Naz Foundation* decision in the Delhi High Court achieved similar consequences. There is no question that the *Toonen* decision sent a strong message to countries worldwide: criminalisation of consensual same-sex relations is incompatible with the fundamental principles of privacy and non-discrimination in international human rights law. Just as the Commonwealth of Nations, the United Nations Development Programme and the European Court of Human Rights had concluded.

Inter-American Commission and Court Of Human Rights

The movement towards the recognition of gay rights as human rights by international tribunals was meantime gaining momentum in Latin America. In

¹¹⁵ M.D. Kirby 'Human rights, sexuality and discrimination' in Helmut Graupner & Phillip Tahmindjis (eds) *Sexuality and Human Rights: A Global Overview* (The Haworth Press, 2005), Page 25, available at www.michaelkirby.com.au/images/2131-Book_Chapter_HumanRight

¹¹⁶ Section 4(1) of the *Human Rights (Sexual Conduct) Act 1994* states: 'Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the *International Covenant on Civil and Political Rights*'

¹¹⁷ M.D. Kirby, 'The future of criminal law' (1999) 3 *Criminal Law Journal* 263.

¹¹⁸ Report of the United Nations High Commissioner for Human Rights on *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Human Rights Council, 17 November 2011, A/HRC/19/41, [40]-[44].

¹¹⁹ Report of the United Nations High Commissioner for Human Rights on *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Human Rights Council, 17 November 2011, A/HRC/19/41, [40]-[44].

2012, the Inter-American Court of Human Rights, an organ of the Organization of American States, delivered an important decision condemning the Government of Chile and ordering it to pay damages to a party who had been denied custody of her three daughters on the basis of her sexual orientation.¹²⁰ Time does not permit sharing the travails of Atala Riffo. But the story is the same: hostility and hatred; courage and challenge; and eventual legal vindication.

In 2006, the case of Ms Atala had been taken to the Inter-American Commission on Human Rights, which concluded that Chile had violated the right of Ms Atala to live free from discrimination as provided in Article 24 of the *American Convention*. The Commission called on Chile to make reparations to Ms Atala and to enact legislation to prohibit discrimination on the basis of sexual orientation.¹²¹ When the Chilean government failed to uphold the Commission's ruling, Ms Atala and the Commission took the matter to the Inter-American Court of Human Rights. It also found in favour of Ms Atala.

United Nations

Leadership and Resistance

In recent years the leadership of the United Nations has repeatedly called for an end to violence and discrimination based on sexual orientation or gender identity. Such violations of human rights have been a focus of the United Nations agenda since the early 1990s.¹²² They present Secretary-General, Ban Ki-moon, has become one of the strongest advocates of an end to violence and discrimination based on sexual orientation and gender identity.

In a number of speeches, the United Nations Secretary-General has voiced 'outrage' at the fact that draconian laws to criminalise and punish LGBT people are still in force in many countries. He has said that the repeal of those laws is an obligation of State members of the United Nations, based on the

¹²⁰ *Atala Riffo and daughters v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 239 (24 February 2012).

¹²¹ *Atala Riffo and daughters v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 239 (24 February 2012),[1]-[4].

¹²² Report of the United Nations High Commissioner for Human Rights on *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Human Rights Council, 17 November 2011, A/HRC/19/41, [24].

principle of equality and non-discrimination.¹²³ He has also advocated the enactment of legislation, that will provide adequate protection against discrimination. He has said repeatedly that ending homophobia is a 'matter of personal security, dignity and even survival for countless individuals'.¹²⁴

The endeavor to secure global recognition of the rights of sexual minorities at the United Nations is a battle that is currently still unfolding.¹²⁵ In the last 20 years, the UN has taken significant steps on LGBT issues, despite deep divisions within the Organisation. On the one hand, a group of State members is advocating acceptance, equality and respect towards LGBT people. On the other hand, another group of State members insists on describing such advocacy as a claim for 'special rights', or 'new rights' applicable to a specific group of people. These countries resist viewing 'sexual orientation' and 'gender identity' as protected by of the *Universal Declaration* and the international treaties that have followed it. They oppose change as every opportunity.

Extrajudicial killings

One issue that has drawn particular attention to the situation of LGBT rights in the United Nations has concerned the plight of people who have been killed for their actual or imputed sexual identity. Since 1999, the United Nations' Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has examined the vulnerable position of LGBT people in many countries. The evidence is now well-documented. A recent report by the United Nations High Commissioner for Human Rights has found that homophobic violence remains widespread throughout the world.¹²⁶ The report describes how LGBT people are at particular risk due to the actions of religious extremists, paramilitary groups, neo-Nazis and extreme nationalists.

¹²³ UN Secretary-General, *Remarks to special event on Leadership in the Fight against Homophobia*, 11 December 2012, available at <http://www.un.org/sg/statements/index.asp?nid=6504>.

¹²⁴ UN Secretary-General, *Message to the International Forum on the international Day against Homophobia and Transphobia*, 16 May 2013, available at <http://www.un.org/sg/statements/?nid=6822>.

¹²⁵ UN High Commissioner for Human Rights, Video message: *How gay rights debate began at the UN*, available at <http://www.youtube.com/watch?v=qd9dGN6dBwA>.

¹²⁶ Report of the United Nations High Commissioner for Human Right on *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Human Rights Council, 17 November 2011, A/HRC/19/41, [8].

Reports of homophobic incidents reveal that a high degree of cruelty and brutality still exists in many countries. According to the Organization for Security and Cooperation in Europe, 'murders of gay men frequently involved torture, cutting, [and] mutilation (...) showing the absolute intent to rub out the human being because of his [sexual] preference'.¹²⁷ The report of the UN Special Rapporteur in Mexico also detailed the brutality faced by LGBT people there. Between 1995 and 1997, at least 125 persons were murdered in Mexico apparently because of their sexual orientation: 120 of the 125 were men. In many cases, the bodies of the victims were found 'naked with hands and feet tied and with signs of torture, stabbing, strangulation or mutilation'.¹²⁸ In South Africa, the United Nations Special Rapporteur on Violence against Women has highlighted the specially vulnerable position of lesbians, describing one case in which a lesbian couple were beaten, stoned and one stabbed to death.¹²⁹

In addition to extreme violence on the streets, the prejudiced attitude of the public authorities in many countries and the lack of action from law enforcement officers constitute another problem faced by LGBT people. For example in the case of El Salvador, the Human Rights Committee expressed 'concern at the incidents of people being attacked, or even killed, on account of their sexual orientation, and over the small number of investigations mounted into such illegal acts'.¹³⁰

These targeted killings of LGBT people have not passed unnoticed at the United Nations. In 2003, the United Nations General Assembly adopted a

¹²⁷ Office for Democratic Institutions and Human Rights, 'Hate Crimes in the OSCE Region – Incidents and Responses, Annual Report for 2006, OSCE/ODIHR, Warsaw, 2007, 53.

¹²⁸ UN Commission on Human Rights, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, summary or arbitrary executions / Report of the Special Rapporteur, submitted pursuant to Commission on Human Rights resolution 1999/35*, 25 November 1999 E/CN.4/2000/3/Add.3, [91].

¹²⁹ UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, *submitted pursuant to Commission on Human Rights resolution 1/102*, 17 January 2007A/HRC/4/34/Add.1

¹³⁰ UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee on El Salvador*, 22 July 2003, (CCPR/CO/78/SLV), available at <http://www.unhchr.ch/tbs/doc.nsf/0/3557ff1fd8be8377c1256db200552abe?Opendocument>.

resolution condemning extrajudicial, summary or arbitrary executions of people for any discriminatory reason, including sexual orientation.¹³¹ Despite some resistance by a number of member states, the relevant words were added to the resolution. A small step forward, won with the suffering of victims. The resolution requires that States ensure the protection of the right to life of all persons under their jurisdiction, and calls upon Governments to investigate all cases of killings.¹³²

In 2012, in another positive development, the term 'gender identity' was added to the list of categories vulnerable to extrajudicial killings.¹³³ The resolution was introduced by Sweden with the support of 34 Member States. The representative of Sweden explained that the sad reality was that 'sexual orientation and gender identity had often been behind extrajudicial killings (...) Denying the right to life and disregarding the plight of persons who were vulnerable could never be acceptable'.¹³⁴ Ultimately, a majority of the states participating in the General Assembly agreed.

Yogyakarta Principles

The well-documented pattern of violence, discrimination and hostility towards LGBT people has led to another significant development. In March 2007, the International Commission of Jurists and the International Service for Human Rights launched the Yogyakarta Principles.¹³⁵ These Principles are based on international human rights law and elaborate that law. They draw upon international and regional treaties and the jurisprudence of human rights courts and other bodies. The Principles provide a useful guide on applying international law to violations based on sexual orientation and gender identity.

¹³¹ UN General Assembly, *Extrajudicial, summary or arbitrary executions: Resolution adopted by the General Assembly*, 25 February 2003, A/RES/57/214.

¹³² General Assembly resolution 57/214, 18 December 2002.

¹³³ UN General Assembly, *Extrajudicial, summary or arbitrary executions: Resolution adopted by the General Assembly*, 9 November 2012; A/C.3/67/L.36.

¹³⁴ Department of Public Information, United Nations General Assembly Will Condemn in Strongest Terms Use of Extrajudicial Executions, Demand States End Practice, Under Terms of Text Approved by Third Committee (Media Release, GA/SHC/4059, 20 November 2012), available at <http://www.un.org/News/Press/docs/2012/gashc4059.doc.htm>.

¹³⁵ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <http://www.refworld.org/docid/48244e602.html>.

The Principles result from collaborative efforts. In 2006, a group of 29 international human rights experts from 25 countries met in Yogyakarta, Indonesia, to develop the Principles. The group unanimously adopted the document, which is formally described as the '*Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*'. As the introduction of the document acknowledges: 'The international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent.'¹³⁶ To address these problems, in a single document, the Principles explain, the obligations of States under existing international human rights law must be re-stated to promote and protect human rights for all, without discrimination, and on the basis of equality and non-discrimination.

In total, there are 29 Principles. Each Principle is followed by a detailed explanation of the obligations of States in relation to that Principle. For example, the first sentence of Principle 1 states that 'all human beings are born free and equal in dignity and rights',¹³⁷ the same wording as the first words of the *Universal Declaration*. The second sentence of Principle 1 states that 'human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.'¹³⁸ After the statement of these Principles, four State obligations are listed under Principle 1, including the obligation to 'amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of human rights'.

The Yogyakarta Principles do not mention the terminology gay, lesbian and transgender or inter-sex. By expressing the rights in neutral and generic terms, 'the drafters have (...) sought to avoid the necessity of requiring individuals to categorise themselves by identity labels that may not be appropriate for all cultural contexts.'¹³⁹

¹³⁶International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Introduction, 6.

¹³⁷ International Commission of Jurists (ICJ), *Yogyakarta Principles*, *Ibid*, Principle 1.

¹³⁸ International Commission of Jurists (ICJ), *Yogyakarta Principles*, *Ibid*, Principle 1.

¹³⁹ ARC International, *An Activist's Guide to the Yogyakarta Principles*, Page 23, available at http://www.ypinaction.org/content/activists_guide.

Principle 2 focuses on the rights to equality and non-discrimination.¹⁴⁰ Principle 3, the Right to Recognition before the Law, states that persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of their lives. It notes that sexual orientation and gender identity is 'one of the most basic aspects of self-determination, dignity and freedom'.¹⁴¹ This Principle makes it clear that a person's freedom to change their gender should never be based on the obligation to undergo surgical procedures.¹⁴²

Professor Michael O'Flaherty, one of the signatories to, and Rapporteur for, the Yogyakarta Principles, and John Fisher, co-director of the ARC International, explain that the experts placed Principles 1-3 at the beginning of the text 'in order to recall the primordial significance of the universality of human rights and the scale and extent of discrimination targeted against people of diverse sexual orientations and gender identities, as well as the manner in which they are commonly rendered invisible within a society and its legal structures.'¹⁴³

Since the launch of the Yogyakarta Principles in 2007, a number of States have expressed a willingness to draw upon the Principles as a guide to policy-making.¹⁴⁴ The High Court of Delhi in the *Naz Foundation* Case evoked the Yogyakarta Principles in support of its constitutional ruling on section 377 of the *Indian Penal Code* in the *Naz Foundation* Case. The judges made extensive references to the Yogyakarta Principles, in particular, to the definitions of 'sexual orientation' and 'gender identity'.¹⁴⁵ The *Naz Foundation* decision in the Delhi High Court was described as 'one of the world's most extensive and important judicial decisions incorporating the Yogyakarta

¹⁴⁰ ARC International, *An Activist's Guide, Ibid*, Page 10, available at http://www.ypinaction.org/content/activists_guide.

¹⁴¹ ARC International, *An Activist's Guide, Ibid*, Pages 11-12, available at http://www.ypinaction.org/content/activists_guide.

¹⁴² ARC International, *An Activist's Guide, Ibid*, Pages 11-12, available at http://www.ypinaction.org/content/activists_guide.

¹⁴³ M. O'Flaherty, & J. Fisher 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' *Human Rights Law Review* 8:2 (2008) 207, 234.

¹⁴⁴ M. O'Flaherty & J. Fisher, *ibid*, *Human Rights Law Review* 8:2 (2008) 207, 237-238.

¹⁴⁵ *Naz Foundation v. Delhi* [2009] 4 LRC 838 at 861-863, [43]-[46].

Principles'.¹⁴⁶ The Yogyakarta Principles constitute a significant step towards acknowledging LGBT people as fully equal members of society divested of the past discrimination, hostility and hatred. The document provides a tool and framework for those who are seeking change or further change.

UN Declaration on Human Rights, Sexual Orientation and Gender Identity

There are at least three additional milestones that should be mentioned, affecting the global community. One took place in 2008, a year after the Yogyakarta Principles. In May 2008, the French Government announced its intention to launch a move at the United Nations General Assembly, calling for a worldwide decriminalisation of homosexuality.¹⁴⁷ The idea was greeted with scepticism even from activists. Critics thought that it would be impossible to win approval at the General Assembly. The reason was simple: there had never been a statement on the issue of sexual orientation and gender identity from the General Assembly.¹⁴⁸

On 18 December 2008, the representative of Argentina, delivering a statement on behalf of 66 states, took the floor of the General Assembly to express deep concern and alarm at the ongoing exclusion, harassment, stigmatisation and prejudice of gay people and to condemn all human rights violations based on sexual orientation or gender identity, in particular the imposition of the death penalty and the use of torture.¹⁴⁹ For the first time, the status of rights for LGBTI people was expressly brought before the General Assembly.

The text of the *Declaration on Human Rights, Sexual Orientation and Gender Identity* reaffirms the principle of the universality of human rights, as

¹⁴⁶ Ettelbrick, Paula L. & Trabucco Zerán, *Alia Impact of the Yogyakarta Principles on International Human Rights Law Development. A Study of November 2007 Final Report, June 2010*, available at <http://www.ypinaction.org/content/Home>

¹⁴⁷ Sheill, *Ibid.*, (2009) 1(2) *Journal of Human Rights Practice* 315.

¹⁴⁸ Kate Sheill, Human Rights, "Sexual Orientation, and Gender Identity at the UN General Assembly *Journal of Human Rights Practice*" (2009) 1(2) *Journal of Human Rights Practice* 315, 316.

¹⁴⁹ UN General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity*, 18 December 2008.

established by Article 1 of the *Universal Declaration*.¹⁵⁰ It also reaffirms the principle of non-discrimination. For the first time, a document called upon States to mobilise and become active in eradicating the criminalisation suffered by the LGBT people.

The statement by Argentina proved controversial. After delivery of the statement, the representative of Syria took the floor to propose a rival Arab-backed statement supported by more than 50 countries.¹⁵¹ That statement was based on the view that homosexual behavior posed a risk to society and threatened the institution of the family. The representative of Syria expressed concern that the declaration was an attempt to legitimize 'deplorable acts', such as pedophilia.¹⁵² Ignoring scientific evidence, the statement went on to suggest that homosexuality was not genetic but a choice.

These declarations showed the United Nations to be divided on the issue of the rights of LGBT people. The division is a reflection of the conflicting laws operating in the world at large.¹⁵³ Both statements remain open for signature. The Syrian declaration, which was initially sponsored by 57 member states, has received strong support from African countries and from members of the Organization of the Islamic Conference and the Holy See. On the other hand, the declaration calling for decriminalisation of homosexuality won broad support in Europe and Latin America. To date, 67 UN member states have signified support, including the United States of America, which initially refused to support the 2008 Declaration during the G.W.Bush administration.¹⁵⁴ Consideration of the proposed Declaration remains pending.

Commonwealth Lawyers' Association and the IBA

¹⁵⁰ UN General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity*, 18 December 2008.

¹⁵¹ Neil MacFarquhar, In a First, Gay Rights Are Pressed at the U.N., *The New York Times (online)*, 18 December 2013, available at http://www.nytimes.com/2008/12/19/world/19nations.html?_r=0

¹⁵² General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee on Broad Range of Human Rights, Social, Humanitarian Issues, 18 December 2008, GA/10801, available at <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>

¹⁵³ Ibid

¹⁵⁴ Ibid

A year after the *Declaration on Human Rights, Sexual Orientation and Gender Identity* was introduced at the UN General Assembly, the Commonwealth Lawyers' Association (CLA) adopted a position on the issue. In 2009, the CLA endorsed a resolution on the decriminalisation of adult consensual sexual conduct in the Commonwealth.¹⁵⁵ Its resolution noted that 41 of 53 Commonwealth jurisdictions (including India) retained legislation punishing adult consensual sexual conduct by LGBT people. The CLA expressed deep concern that such laws could damage the strategies in Commonwealth countries necessary to reduce the spread of HIV/AIDS.

In 2010, the Council of the International Bar Association's Human Rights Institute also adopted a resolution opposing discrimination, violence and other breaches of human rights directed against people on the grounds of their sexual orientation. The same resolution called for the global repeal of criminal laws imposing penalties for consensual, adult, private sexual conduct.¹⁵⁶ That resolution is currently before the IBA's governing board for adoption in 2014. Lawyers necessarily play a key role in prosecuting and enforcing such laws. So lawyers have a special obligation to call their flaws to attention.

Ending Violence Based on Sexual Orientation and Gender Identity

The second milestone at the UN Level occurred in March 2011, when the United Nations Human Rights Council adopted a statement, supported by 85 states. The *Joint Statement 'Ending Violence Based on Sexual Orientation and Gender Identity'* was presented to the Council by Colombia. It called on States to 'take steps to end acts of violence, criminal sanctions and related human rights violations committed against individuals because of their sexual orientation or gender identity'.¹⁵⁷ This was the first United Nations resolution

¹⁵⁵ Commonwealth Lawyers' Association (2009) *Resolution on Decriminalization of Sexual Orientation*. 16th Commonwealth Law Conference, 16th Commonwealth Law Conference Hong Kong SAR 5th-9th April 2009.

¹⁵⁶ International Bar Association's Human Rights Institute (2010) *Resolution on Sexual Orientation and Human Rights*, IBAHRI Council Meeting, Denmark.

¹⁵⁷ UN Human Rights Council, *Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity*, 22 March 2011.

solely addressing the issue of human rights violations perpetrated against LGBT people.¹⁵⁸ It was adopted

Resolution on Human Rights, Sexual Orientation and Gender Identify

The third milestone at the United Nations level occurred in June 2011. The Human Rights Council adopted another historic resolution declaring that there should be no discrimination or violence against gay men and lesbians. This resolution, 17/19, the first United Nations resolution on sexual orientation and gender identity, affirmed that 'all human beings are born free and equal in dignity and rights'.¹⁵⁹ The resolution also expressed grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexuality.

The resolution was proposed by South Africa. It was described as a historic step on the rights of gay, lesbian and transgender people. It was adopted despite strong Arab and African opposition.¹⁶⁰ After a sometimes bitter debate,¹⁶¹ the text was approved narrowly, with 23 votes in favour, 19 against and 3 abstentions.

This historic resolution paved the way for two further development. First, the production of the first official United Nations report on discrimination based on sexual orientation and gender identity; and secondly, the report's findings that formed the basis for a panel discussion during the nineteenth session of the Human Rights Council on the issue of discriminatory laws and practices against individuals based on their sexual orientation and gender identity.¹⁶²

The panel debate duly took place in the United Nations Human Rights Council in March 2012. This was the first time a United Nations intergovernmental

¹⁵⁸ Countries must repeal laws that discriminate against LGBT individuals – UN officials, *UN News Centre (online)* 17 May 2013, available at

<http://www.un.org/apps/news/story.asp?NewsID=44931#.UnuHbyRSZXC>.

¹⁵⁹ UN Human Rights Council, *Human rights, sexual orientation and gender identity: resolution / adopted by the Human Rights Council*, 14 July 2011, A/HRC/RES/17/19.

¹⁶⁰ *Ibid.*

¹⁶¹ UN Rights Council passes historic gay rights resolution (ABC online) 17 June 2011 available at <http://www.abc.net.au/news/stories/2011/06/17/3247209.htm?site=news>.

¹⁶² Combatting discrimination based on sexual orientation and gender identity, United Nations Human Rights, available at <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>.

body had held a formal debate on the subject. Speaking by video from New York, the Secretary-General delivered a message urging countries around the world to decriminalise same-sex relationships. The U.N Secretary-General noted that, like many of his generation, he did not grow up talking about gay issues. However, he “learned to speak out because lives are at stake”.¹⁶³ It was not only the speech that attracted international attention. Several Islamic and African States staged a coordinated walkout before the speech began. According to media reports, Pakistan described homosexuality as ‘licentious behaviour’. Mauritania, expressed concern that ‘the controversial topic of sexual orientation’ would undermine discussion about ‘genuine human rights problems’.¹⁶⁴

Presenting the report to the Council at the commencement of that debate, the High Commissioner for Human Rights, Navi Pillay, challenged States to help write a ‘new chapter’ in United Nations history. In her address, she acknowledged the divergent views among States members on this topic. She said:

“People are entitled to their opinion. They are free to disapprove of same-sex relationships, for example. They have an absolute right to believe – and to follow in their own lives – whatever religious teachings they choose. But that is as far as it goes. The balance between tradition and culture, on the one hand, and universal human rights, on the other, must be struck in favour of rights”.¹⁶⁵

Leadership of the global developments on this topic has been provided by High Commissioner Pillay - another lawyer whose forebears derived from the Indian subcontinent via South Africa, like Gandhi. She has been fearless in advocacy on a contested issue whose time has come. The number of Joint Statements and resolutions at the UN level in the last decade is a reflection of

¹⁶³ UN Secretary-General, *Video Message to the Human Rights Council Meeting on violence and Discrimination based on Sexual Orientation and Gender Identity*, 7 March 2012, available at <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx>.

¹⁶⁴ Robert Evans, *Islamic States, Africans walk out on U.N. gay panel*, Reuters (online) 8 March 2012, available at <http://in.reuters.com/article/2012/03/07/un-gays-idINDEE8260GT20120307>

¹⁶⁵ *UN High Commissioner for Human Rights*,

Statement to the Panel on ending violence and discrimination against individuals on the basis of their sexual orientation and gender identity at the Human Rights Council 19th Session, 7 March 2012, available at

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11917&LangID=E>

the growing international support for recognition of the rights of all people, regardless of their sexual orientation or gender identity. The story is still incomplete. The Universal Declaration promise of a world where ‘all human beings are born free and equal in dignity and rights’ is still only an aspiration for a great number of LGBT people today. Continued efforts are needed to bring that promise to actuality.

Conclusions: Unstoppable Movement Sustained By Law

The year of these Lectures, 2013, was another significant one for the LGBT cause. In July 2013, the United Nations Human Rights Commissioner launched an unprecedented UN year-long initiative dedicated to ending violence and discrimination against lesbian, gay, bisexual and transgender individuals. Materials on the campaign are available from a dedicated website,¹⁶⁶ on Facebook¹⁶⁷ and Twitter.¹⁶⁸ There is also an informative website: www.unfe.org. On the website, a video contains a message from the UN Secretary-General to LGBT people everywhere on our planet:

‘To those who are lesbian, gay, bisexual or transgender, let me say: You are not alone. Your struggle for an end to violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values the United Nations and I have sworn to defend and uphold. Today, I stand with you, and I call upon all countries and people to stand with you, too’.¹⁶⁹

In her last report to the Human Rights Council, High Commissioner Navi Pillay added:

“In the past five years, there has been growing awareness of the severity and extent of human rights violations based on sexual orientation. In July 2013, OHCHR launched “Free & Equal”, a global campaign designed to raise

¹⁶⁶ Free & Equal, Office of the High Commissioner for Human Rights, available at <www.unfe.org>

¹⁶⁷ Free & Equal, Office of the High Commissioner for Human Rights, available at <[facebook.com/free.equal](https://www.facebook.com/free.equal)>

¹⁶⁸ Free & Equal, Office of the High Commissioner for Human Rights, available at <[Twitter \(@free_equal\)](https://twitter.com/free_equal)>

¹⁶⁹ UN Secretary-General, *Video Message to the Human Rights Council Meeting on violence and Discrimination based on Sexual Orientation and Gender Identity*, 7 March 2012, available at <<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx>>

awareness of this form of discrimination and violence against lesbian, gay, bisexual and transgender persons. In the six months since it was launched, millions of people have accessed and shared campaign videos, factsheets and other materials.¹⁷⁰

The struggle of activists such as Mr Dudgeon, Mr Toonen and Ms. Atala at the international arena and activists such as the *Naz Foundation*, Vickram Seth Anand Grover and many others in India illustrates the growing role of international human rights law in confronting domestic homophobic laws and attitudes. So does the leadership given by Ban Ki-moon, Navi Pillay and, earlier, Mary Robinson, Louise Arbour, Helen Clark (UNDP), Peter Piot and Michel Sidibé (UNAIDS) in the United Nations. Most of those advocating change are not themselves LGBT. But they are human beings opposed to discrimination, prejudice and inequality based on unscientific grounds. Their efforts show that the protection for LGBT people does not necessarily require the establishment of 'new rights'. The rights, for the most part, already exist: stated in international human rights instruments, and many national constitutions because LGBT rights are human rights. The struggle is to have this fact recognised and accepted everywhere – including by lawyers, advocates and judges.

The message of these Tagore Lectures is that a process has begun which is unstoppable. It is grounded in principle and law.¹⁷¹ The decision of the Supreme Court of India in *Koushal* is disappointing; that is true. But the history bends in the direction of equality and universal human rights. Eventually, the enlightenment of the *Naz Foundation* decision of the Delhi High Court will be restored. Science, not prejudice, will prevail. Fundamental constitutional rights will be given due effect.¹⁷² The future is coming. Freedom and equality for LGBTIQ minorities are coming. Let the last words be those of Rabindrinath Tagore – expressed both in English and in Bengali:

¹⁷⁰ High Commissioner of Human Rights, Navi Pillay, Opening Statement to the United Nations Human Rights Council, Twenty Fifth Session, Geneva, 6 March 2014, pp 2-3.

¹⁷¹ Oral presentation of report E/CN.4/2006/53 by the Special Rapporteur to the Human Rights Council, 19 September 2006, available at 222.un.org/webcast/unhrc/archive.asp?go=060919.

¹⁷² Tarunabh Khaitan, "Reading *Swaraj* in. Article 15: A New Deal for all Minorities" (2009) 3 *NUJS L Rev* 419 at 422 referring to the counter-majoritarian role of a final national constitutional court.

Have you not heard his silent steps?

He comes, comes, ever comes.

Every moment and every age,

Every day and every night

He comes, comes, ever comes.

...

In the rainy gloom of July nights on the thundering chariot of clouds,

He comes, comes, ever comes.

In sorrow after sorrow it is his steps that press upon my heart,

And it is the golden touch of his feet that makes my joy to shine.

তোরা শুনিস্ নি কি শুনিস্ নি তার

পায়ের ধ্বনি ?

ঐ যে আসে, আসে, আসে।

যুগে যুগে পলে পলে দিন রজনী

সে যে আসে আসে আসে।

আমি গেয়েছি গান যখন যত

আপনমনে ক্ষ্যাপার মত

সকল সুরে বেজেছে তার

আগমণী -

সে যে আসে, আসে, আসে

কত কালের ফাগুন দিনে

বনের সাথে

সে যে আসে, আসে, আসে।

কত শ্রাবণ অন্ধকারে মেঘের রথে

সে যে আসে, আসে, আসে।

দুখের পরে পরম দুখে

তার চরণ বাজে বুক,

সুখে কখন বুলিয়ে সে দেয়

পরশমণি, -

সে যে আসে, আসে, আসে।