Note: This paper has appeared in print in **Peter Baehr, Cees Flinterman, and Mignon Senders (eds.), Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights. Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999, pp. 93-110.** Because that volume is not widely available, I have left it posted here, and added the page numbers from the published version. Please cite the published paper, even if you are working off this online version.

## **Non-Discrimination and Sexual Orientation:**

# Making a Place for Sexual Minorities in the Global Human Rights Regime

Jack Donnelly<sup>1</sup>

Graduate School of International Studies University of Denver

The fiftieth anniversary of the Universal Declaration of Human Rights is an occasion for stocktaking. We can take considerable satisfaction in the immense progress that has been made in the development of multilateral norms and institutions, national and transnational activity by human rights NGOs, and bilateral human rights policies. But there have also been notable shortcomings. As a number of other chapters in this volume show, at the national level, all internationally recognized human rights are implemented unevenly in different countries, and often within particular countries as well. Internationally, multilateral institutions generally lack coercive enforcement powers. In this chapter, however, I want to look at a very different sort

 $<sup>^1</sup>$  I thank Annelies Henstra and Rhoda Howard for helpful comments on an earlier draft. I also thank Matt Weinert for exemplary research assistance. And I owe a special debt to Kees Waaldijk, both for his formal remarks on this paper when it was originally delivered and for his generosity in sharing his considerable knowledge and highly

of shortcoming, namely, the continued exclusion of gay men, lesbians, and other sexual minorities from the full protection of international human rights norms.

## 1. THE RIGHT TO NONDISCRIMINATION

Human rights are the rights that one has simply as a human being. As such, they are necessarily equal rights. Each person either is or is not a human being, and thus has (or does not have) the same rights as all other human beings. As stated in Article 1 of the Universal Declaration of Human Rights, the fiftieth anniversary of which this volume commemorates, "All human beings are born free and equal in dignity and rights."

The right to protection against discrimination is an explicit guarantee of equal -- and thus all -- human rights for every person, despite the myriad other differences between human beings. As Article 2 of the Universal Declaration proclaims, "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."

This statement, however, is in one important way seriously exaggerated. Everyone cannot be entitled to all human rights without distinction of <u>any</u> kind. States are not prohibited from taking into account <u>any</u> status differences. We are entitled only to protection against <u>invidious</u> discrimination, discrimination that tends to ill will or causes unjustifiable harm.

Social life is full of legitimate discriminations. Individuals, groups, and even public authorities often not merely recognize but legitimately act upon differences between groups of people. For example, all societies restrict the rights of children, a distinction [94] based on age or mental capacity. Distinctions of nationality are deeply embedded in international human rights regimes: individuals can claim human rights primarily against the government of which they are a national (or under whose jurisdiction they fall on the basis of residence). Those incarcerated for criminal behavior have a variety of their human rights legitimately restricted, on the basis of their past behavior.

The internationally recognized human right to nondiscrimination prohibits invidious public (or publicly supported or tolerated) discrimination that deprives target groups of the legitimate enjoyment of other rights. Although it may be hateful to choose one's friends on the basis of race, this is not an appropriate subject for regulation through anti-discrimination law. Only when friendships or social contacts systematically influence access to economic or political opportunities do they become a matter of legitimate state regulation. Likewise, discrimination in choice of marriage partners on the basis of family background, though cruel and hurtful, does not fall within the confines of the right to nondiscrimination unless it is publicly supported or required (as, for example, in laws against miscegenation).

But not even all illegitimate discriminations, thus defined, fall under a basic human right to nondiscrimination -- if we insist on the idea that human rights are paramount rights. In particular, we need to focus our human rights attention on egregious or widespread systematic violations. Thus Article 2 of the Universal Declaration highlights race, color, sex, language, religion, political or other opinion, national or social origin, property, and birth. The notion of suspect classifications in American constitutional jurisprudence nicely captures this idea. Because we know that race, for example, has been the basis for invidious discrimination in the past, practices that categorize people on the basis of race are inherently suspect, and thus subject to particularly intensive scrutiny.<sup>2</sup>

Article 2.2 of the International Covenant on Economic, Social, and Cultural Rights provides a slightly more subtle statement of the underlying principle.

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>&</sup>lt;sup>2</sup> Sexual orientation, however, has explicitly not been recognized as a suspect classification in the United States at the federal level. On current American legal practice and its shortcomings, see Evan Gerstmann, <u>The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection</u> (Chicago: University of Chicago Press, 1999).

The language of <u>distinction</u> of any kind is replaced by a prohibition of <u>discrimination</u> of any kind. And rather than present the enumerated grounds as examples of prohibited discrimination -- "such as race ..." -- this formulation is exhaustive: "without discrimination ... as to." (Flexibility is provided through the addition of "other status" at the end.)

**[95]** In either formulation, however, the practical heart of the right is the list of explicitly prohibited grounds of invidious discrimination.<sup>3</sup> Strong and unambiguous protection requires explicit listing of the grounds of impermissible invidious discrimination. And appearance on the list is a reflection of extended and difficult, often violent, political struggles.

The right to nondiscrimination thus includes a central and inescapable historical element. Those whose equal rights are explicitly guaranteed protection against discrimination are members of groups that previously -- but no longer -- have been systematically (and probably officially) treated as less than full rights-holding members of the political community; that is, as in some sense less than fully human. The list of groups explicitly protected against discrimination provides a record of the successful struggles by excluded and despised groups to force full (or at least formally equal) inclusion in political society. And as additional forms of discrimination have come to be recognized as illegitimate, they have been added to our list of prohibited grounds.

#### 2. NONDISCRIMINATION AND POLITICAL STRUGGLE

Consider the enumeration in Article 2 of the Declaration and Covenants. Protections against discrimination based on birth and social origin take us back to the beginning of the modern Western struggle for human rights against aristocratic privilege. Most other societies as well have assigned rights in significant measure on the basis of birth. Today, however, we require that human rights be equally available to those born high or low on society's scale of social status and origins.

<sup>&</sup>lt;sup>3</sup> Although the inclusion of "other status" and "discrimination of any kind" in the international instruments also suggest a potentially expanding range of prohibited discriminations, they do so only abstractly. These formulations are too vague to carry much political or legal force.

Birth, however, was only one ground of institutionalized discrimination in the assignment of basic rights. And in practice those who forced their social "betters" to recognize their equal rights actively denied the same rights to the substantial majority of the population. For example, John Locke used the universal language of natural rights, but developed a political theory that in practice aimed largely to protect the rights of propertied European males. Women, along with "savages," servants, and wage laborers of either sex, were not recognized as right holders.<sup>4</sup>

The history of human rights struggles over the past three centuries can be seen as a process of slowly, with immense difficulty, expanding the recognized subjects of human rights, group by despised group.

Racist, bourgeois, Christian patriarchs again and again found natural rights arguments that they had used against aristocratic privilege turned against them in a struggle to incorporate new social groups into the realm of [96] equal citizens entitled to participate in public and private life as equal and autonomous subjects and agents.

Having forced themselves into a position of social dominance, propertied white Christian European males were themselves forced to concede that differences of race, color, sex, language, religion, political or other opinion, national or social origin, and property are illegitimate grounds for differential basic rights. These previously accepted grounds of legal and political discrimination have been renounced. Today, through the right to nondiscrimination, we insist that such differences be treated as irrelevant in the assignment and enjoyment of rights. The state may no longer invidiously take these features into consideration when dealing with citizens and subjects.

Such changing conceptions of the criteria for full and equal membership in society have rested on and interacted with wider social, economic, and political transformations. For example, property restrictions on rights were often defended by arguing that those without property lacked the leisure required to develop

<sup>&</sup>lt;sup>4</sup> In the United States, whose Declaration of Independence declared that all men are created equal and endowed by their creator with certain unalienable rights, "until 1815, only those white males who owned property or paid taxes could vote; not allowed to vote were white males who did not own property; all women; all African Americans, including nonslaves; and all Native Americans." Richard H. Ropers, and Dan J. Pence, <u>American Prejudice</u>: <u>With Liberty and Justice for Some</u> (New York: Plenum Press, 1995), p. 16.

their rational capacities sufficiently to be full participants in political society. The rise of mass literacy seriously undercut such arguments. Mass electoral politics, in which participation was conceived more as authorizing and reviewing the actions of others than as direct political decision making, also reduced the plausibility of such arguments.

The claim that the unpropertied lacked a sufficient "stake" in society to be allowed full political participation fell before changing conceptions of political membership, beginning with the American and French revolutions, the rise of popular armies, and growing nationalist sentiments. Legal discrimination based on an alleged lack of independence of the unpropertied gave way to social and economic changes associated with industrialization, particularly the increasingly impersonal relations between workers and employers and the general depersonalization of relations in urban areas. The implicit assumption of the coincidence of wealth and virtue was eroded by general processes of social leveling and mobility.

Likewise, women and non-whites were until well into this century widely seen as irreparably deficient in their rational or moral capacities, and thus incapable of exercising the full range of human rights. These racial and gender distinctions, however, were in principle subject to moral and empirical counter-arguments. Over the past several decades, dominant political ideas and practices in Western and nonwestern societies alike have been transformed by national and international movements to end slavery, and later colonialism; to grant women and racial minorities the vote; and to end discriminations based on race, ethnicity, and gender. A similar tale can be told in the case of Jews, nonconformist Christian sects, atheists, and other religious minorities.

In each case, a logic of full and equal humanity has overcome claims of group inferiority, bringing (at least formally) equal membership in society through explicitly guaranteed protections against discrimination. Signs of difference from the dominant mainstream that previously were seen as marks of moral inferiority and grounds for justifiable subordination have been excluded from the realm of legally and politically legitimate discriminations. Adherents of different, even despised, religions have come to be recognized as (nonetheless) fully human, and thus entitled to the same rights as other (dominant groups of) human beings. Africans, Arabs, and Asians have come to be recognized as no less human than white Europeans. And so

forth.

[97] Such an account emphasizes the progressive development of the right to nondiscrimination -- and human rights more generally -- through processes of social and political struggle. And it implicitly raises the question of other groups currently subject to discrimination, of victims of invidious public discrimination whose suffering remains legally and politically accepted. The remainder of this chapter focuses on those subject to discrimination because of their sexual behavior or orientation.

#### 3. DISCRIMINATION AGAINST SEXUAL MINORITIES

Exactly how to characterize those subject to discrimination because of sexual behavior or orientation is a matter of controversy (as well as changing linguistic styles). "Homosexual" and "gay" have become relatively neutral and fairly inclusive terms in the American mainstream. Among activists in these communities, the formula of "gay, lesbian, bisexual, and transgendered (GLBT)" has considerable currency at the moment.<sup>5</sup> In addition to being more inclusive, this formulation has the virtue of emphasizing differences among those who engage in same sex erotic behavior or relationships. And by explicitly including transvestites and transsexuals it undermines conventional links between sex (defined by genitalia or chromosomes) and gender, sexual orientation, and personal identity.<sup>6</sup>

Following the logic laid out in the preceding section, however, I will adopt the language of sexual minorities. This terminology is even more inclusive, being open to any group (previously, presently, or in the future) stigmatized or despised as a result of sexual orientation, identity, or behavior. Furthermore, the language of minorities explicitly focuses our attention on the issue of discrimination, and at least the

<sup>&</sup>lt;sup>5</sup> "Queer" has been adopted by some radical homosexuals, inverting a term of "straight" abuse into a label of self-assertion and even prideful disdain. In a still homophobic society, however, this language, especially when used by "straights," remains problematic.

<sup>&</sup>lt;sup>6</sup> "Hermaphrodites" or "inter-sexuals" -- understood as persons with a distinctive sexual identity; or at least more than those of physiologically "confused" or "problematic" sex -- probably are also included, further problematizing the conventional dichotomy.

<sup>&</sup>lt;sup>7</sup> This language is itself controversial. Does engaging in same sex behavior make one homosexual, gay, or queer? It depends on one's definition. Must one incorporate same sex behavior or relations into one's identity to be a gay man or lesbian? How does sexual orientation interact with other orientation, identities, and behaviors?

possibility of political action to eliminate it.8

Sexual minorities are not merely people who engage in "deviant" sexual behavior -- for example, fetishists of various types -- or even those that adopt "deviant" (sexual) identities (e.g. "swingers"). They are those despised and targeted by [98] "mainstream" society because of their sexuality, victims of systematic denials of rights because of their sexuality (and, in most cases, for transgressing gender roles). Like victims of racism, sexism, and religious persecution, they are human beings who have been identified by dominant social groups as somehow less than fully human, and thus not entitled to the same rights as "normal" people, "the rest of us."

Although it is unnecessary to spend much time documenting discrimination against sexual minorities, it is essential to emphasize the depth and scope of such discrimination in virtually all societies today. In many countries, the intimate behavior and loving relationships of sexual minorities are defined as crimes. They are singled out for official, quasi-official, and private violence. And in all countries, sexual minorities suffer under substantial civil disabilities.

In numerous countries -- although only the United States among Western developed market economies -- sexual relations among adult members of the same sex are legally prohibited. In Iran and Afghanistan, the proscribed penalty of death is regularly imposed. In Zimbabwe, President Robert Mugabe has for the past three years pursued an unusually active and vocal campaign, claiming that "animals in the jungle are better than these people," and calling homosexuals "worse than dogs and pigs." A number of gay

<sup>&</sup>lt;sup>8</sup> The drawback of this language, as Kees Waaldijk has pointed out to me in private conversation, is that by including those engaging in despised sexual practices that are not related to gender roles, it moves away from the implicit emphasis on gender in the GLBT formulation. For example, were sado-masochists or rubber fetishists to be targets of systematic discrimination, they would fall under my definition of sexual minorities. I am not convinced, however, that discriminations based on sexual behavior but unrelated to gender should not, all things considered, be included. And to the extent that "sex" (sexual behavior) is part of the issue, as I believe it is, the alternative of "gender minorities," besides its rhetorical shortcomings, has its own conceptual problems.

<sup>&</sup>lt;sup>9</sup> On the Afghan practice of execution by collapsing a stone wall on the victims, see http://www.lgirtf.org/newsletters/Summer98/SU98-4.html. On Iran, where ILGA estimates over 800 sodomy executions, see http://www.qrd. org/qrd/world/asia/Iran/ILGA.asks.end.execution.of.homosexuals-08.06.97. See also James D. Wilets, "International Human Rights Law and Sexual Orientation," <u>Hastings International and Comparative Law Review</u> 18 (Fall 1994): 1-120, pp. 28-29.

<sup>10</sup> http://www.qrd.org/qrd/world/wockner/news.briefs/210-05.04.98 and

men have been convicted and received lengthy prison sentences.

Such examples are (sadly) easily multiplied. In Romania, Mariana Cetiner was adopted by Amnesty International as a prisoner of conscience after her incarceration (solely) for homosexual activity. Less prominent, but no less characteristic, are Romanians Gabriel Presnac and Radu Vasiliu, who were beaten by police, prosecuted, and imprisoned for holding hands and kissing in public.<sup>11</sup> In India, where homosexual acts are punishable by life in prison, two men recently were arrested after attempting to be married in public, amid public calls by religious leaders for their execution.<sup>12</sup> [99] China's first gay salon was closed by the authorities because it "was spreading erroneous points of view, and instead of opposing, advocating homosexuality."<sup>13</sup> And so forth.<sup>14</sup>

In addition to the direct threat of prosecution, criminalization leads to restrictions on a wide range of other rights. For example, freedoms of speech and association are limited by laws punishing advocating or organizing to engage in "criminal" behavior.<sup>15</sup> The result often is a pervasive environment of fear in which

 $http://www.qrd.org/qrd/world/africa/zimbabwe/mugabe.renews.attacks. Such high level vilification seems to be spreading regionally, for example, to Namibia, (http://www.iglhrc.org/news/features/1997_review.html) Zambia, (http://www.lgirtf.org/newsletters/Summer98/SU98-4.html) and Kenya (http://www.qrd.org/qrd/world/wockner/news.briefs/226-08.24.98). \\$ 

<sup>&</sup>lt;sup>11</sup> See Amnesty International <u>Romania: A Summary of Human Rights Concerns</u> (AI INDEX: EUR 39/06/98) and http://www.iglhrc.org/world/easteurope/Romania1998Jan\_2.html.

<sup>&</sup>lt;sup>12</sup> http://www.lgirtf.org/newsletters/Summer98/SU98-4.html

<sup>&</sup>lt;sup>13</sup> http://www.qrd.org/qrd/world/asia/china/china.cracks.down-5.31.93

Although the trend is toward decriminalization -- for example, Ecuador and Khazakstan were among the countries removing sodomy laws in 1997 -- the process is neither even nor universal. For example, Nicaragua <u>added</u> sodomy laws to its books in 1992, and they were upheld by the Supreme Court in 1996. In 1997, legislation was introduced in Nigeria to criminalize homosexuality. (http://www.iglhrc.org/news/features/1997\_review.html) And in June 1998, despite intense European pressure, the Romanian Chamber of Deputies defeated legislation to decriminalize homosexuality. (http://www.qrd.org/qrd/world/wockner/news.briefs/219-07.06.98) Cyprus as well, although under intense regional pressure, has proposed to revise its laws against homosexuality in ways that Amnesty International has characterized as inadequate. See AI INDEX: EUR 17/02/98.

<sup>&</sup>lt;sup>15</sup> James D. Wilets, "Pressure From Abroad," <u>Human Rights</u> 21, no Fall 1994), p. 22, and Wilets, "International Human Rights Law and Sexual Orientation," pp. 45-48, 76-81. For example, lesbian NGO delegates to the Beijing women's conference had published materials seized by Chinese authorities. (http://www.qrd.org/qrd/world/asia/china/censors.target.lesbians-wockner-09.07.95) In September 1998, Zambia's Home Affairs Minister, Peter Machungwa, threatened to arrest leaders of a newly formed movement of gays and lesbians, for illegal activity. And the registrar of societies, Herbert Nyendwa, indicated that he would not even consider their application. "The proposed gays' association will not be registered... it is an illegal activity." http://www.lgirtf. org/newsletters/Summer98/SU98-4.html and http://www.qrd.org/qrd/world/wockner/news.briefs/229-09.14.98.

jobs, housing, and social benefits are constantly at risk. In some cases, sexual minorities are targets of active intimidation. For example, in Petaling Jaya Selangor state in Malaysia, political authorities and religious leaders have supported and encouraged local vigilante groups hunting out immoral activities, including homosexuality, in their neighborhoods. An ad in a state-sponsored Zimbabwean newspaper in 1997 read "CRUSADE AGAINST RAPISTS AND HOMOSEXUALS. God commands the death of sexual perverts. Our culture and traditional justice system condemns them to death. Our religion condemns them to death."

Such attitudes regularly lead to violence. In some cases, it is quasi-official.<sup>18</sup> Perhaps the most notorious example is "social cleansing" in Colombia, where a general climate of official and quasi-official political violence against "disposable" people has spilled over into death squad attacks on gays, lesbians, and transvestites.<sup>19</sup> In other countries, violence is tolerated but official involvement is more indirect. For example, **[100]** in Brazil Luis Mott has documented over 100 murders based on sexual orientation every year for more than a decade.<sup>20</sup>

Even where violence against sexual minorities is regularly prosecuted, "gay bashing" is often sadly common.<sup>21</sup> Occasionally a case achieves widespread public prominence. For example, in the United States in the fall of 1998, Matthew Shepherd, a Wyoming college student, was brutally beaten and left to die, tied to a

 $<sup>^{16}\</sup> http://www.qrd.org/qrd/world/asia/malaysia/squads.target.gays-02.23.95.$  In Zimbabwe as well, the government has encouraged citizens to turn homosexuals over to the authorities. http://www.qrd.org/qrd/world/africa/zimbabwe/mugabe.renews.attacks

<sup>&</sup>lt;sup>17</sup> See http://www.qrd.org/qrd/world/africa/zimbabwe/homophobic.ad-03.03.97

<sup>&</sup>lt;sup>18</sup> In addition to the examples later in this paragraph, see Wilets, "International Human Rights Law and Sexual Orientation," pp. 29-34, 40-42.

<sup>&</sup>lt;sup>19</sup> Juan Pablo Ordoez, <u>No Human Being is Disposable: Social Cleansing, Human Rights, and Sexual Orientation in Colombia</u> (San Francisco: International Gay and Lesbian Human Rights Commission, 1994).

<sup>&</sup>lt;sup>20</sup> Luiz R. B Mott, <u>Epidemic of Hate: Violations of the Human Rights of Gay Men, Lesbians, and Transvestites in Brazil</u> (San Francisco: International Gay and Lesbian Human Rights Commision, 1996). For news reports on Mott's work, see <a href="http://www.qrd.org/qrd/world/americas/brazil/anti.gay.murders">http://www.qrd.org/qrd/world/americas/brazil/epidemic.of.hate.report-02.11.97</a>.

<sup>&</sup>lt;sup>21</sup> See G. D. Comstock, <u>Violence Against Lesbians and Gays</u> (New York: Columbia University Press, 1991). Homosexual advances have even been accepted as excuses for manslaughter. For a discussion of U.S. practice, see R. B. Mison, "Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation," <u>California Law Review</u> 80, no 1992): 133-178.

fence like a scarecrow, simply because he was gay. More often, it is lost in the everyday flow of crime, <sup>22</sup> or simply unreported.

Perhaps the most distressing feature of contemporary practice with respect to sexual minorities, however, is that gay men and lesbians in every country of the world, even where their behavior, orientation, or identity are neither illegal nor a common motive for violent assault, are subject to civil disabilities and pervasive social discrimination. The depth to which official discrimination runs is perhaps best illustrated by Fiji, which soon after it became only the second country in the world to prohibit discrimination on the basis of sexual orientation in its constitution, introduced legislation banning same sex marriages.

In most countries, sexual orientation is not an accepted ground for discrimination in employment, housing, or access to public facilities and social services. With a few recent exceptions, same-sex couples are denied civil status, resulting in discrimination in inheritance, adoption, and social insurance. In the United States, where health insurance is provided principally through employers, same-sex partners may even be [101] denied health care that would be routinely available were the couple male-female. Evan Wolfson nicely summarizes the contemporary American situation.

Our society forbids gay people to marry, denies us equal pay for equal work, throws us off the job, forbids us from serving our country in the armed forces, refuses us health insurance, forces us into the closet, arrests us in our bedrooms, harasses our daily associations, takes away our children, beats and kills us in the streets and parks, smothers images of ourselves

<sup>&</sup>lt;sup>22</sup> For recent illustrative examples from Jamaica, Latvia, and Italy, see

http://www.qrd.org/qrd/world/americas/jamaica/jamaica.homophobia-UPI,

http://www.grd.org/grd/world/wockner/news.briefs /209-04.27.98,

http://www.qrd.org/qrd/world/wockner/news.briefs/200-02.23.98, and

http://www.qrd.org/qrd/world/wockner/news.briefs/198-02.09.98.

<sup>&</sup>lt;sup>23</sup> Teachers in particular are regularly dismissed. For recent examples, see http://www.iglhrc.org/world/centralamerica/CostaRica1998May.html and

http://www.qrd.org/qrd/world/wockner/news.briefs/208-04.20.98. In Thailand, homosexuals have been prohibited from entering the state teacher training colleges. (http://www.iglhrc.org/world/asia/Thailand1997Mar.html) Cheng Chung-cheng, a director of student affairs at the Ministry of Education in Taiwan recently said in a public meeting that "homosexuals should not pollute others with their relationships," and questioned whether they should have basic human rights. (http://www.qrd.org/qrd/world/asia/taiwan/gays.in.taiwan) For a recent discussion in the context of trade union activity, see Gerald Hunt, Laboring for Rights: Unions and Sexual Orientation Across Nations (Philadelphia:

and others like us, and then tells us we are irresponsible, unstable, and aberrant.<sup>24</sup>

Even excluding violence and legal prohibition from this list, this still very partial accounting of the civil disabilities and social prejudice faced by sexual minorities is depressing.

Discrimination against sexual minorities even has an international dimension. Many countries deny entry to homosexuals as threats to public health or morals.<sup>25</sup> Qatar recently moved to deport foreign homosexuals, reportedly even using forced rectal examinations as "proof."<sup>26</sup> And only recently have a few countries begun to recognize sexual orientation or behavior as a grounds for asylum, which in international law requires establishing that one has a well founded fear of persecution were one to be returned "home."<sup>27</sup>

Such officially mandated or tolerated discrimination reflects deep currents of social prejudice against sexual minorities. Rhoda Howard's chapter in this volume explores some of the roots and dimensions of this prejudice. Here I address whether such social attitudes, no matter how widespread or deeply felt, justify continued exclusion of sexual orientation from the list of prohibited grounds for discrimination. I will argue that they do not. Or, to put the point more positively, gays, lesbians, and others of "deviant" [102] sexuality are, as Evelyn Kallen nicely put it, "a stigmatized minority requiring [and deserving] protection."

Temple University Press, 1999).

<sup>&</sup>lt;sup>24</sup> Evan Wolfson, "Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different," <u>Harvard Journal of Law and Public Policy</u> 14 (Winter 1991): 21-39, pp. 31-33. Wolfson documents each of the denials in his list by references to recent American legal practice.

<sup>&</sup>lt;sup>25</sup> For example, the United States Supreme Court, in <u>Boutilier v. Immigration and Naturalization Service</u>, 387 U.S. 118 (1967), upheld deportation of aliens on grounds that homosexuality counted as "afflicted with psychopathic personality" and thus excludable. This ruling remained in force until the Immigration Act of 1990. See Robert J. Foss, "The Demise of Homsexual Exclusion: New Possibilities for Gay and Lesbian Immigration," <u>Harvard Civil Rights - Civil Liberties Law Review</u> 29, no Summer 1994): 439-475.

 $<sup>^{26}\</sup> http://www.qrd.org/qrd/world/wockner/news.briefs/193-01.05.98.$ 

<sup>&</sup>lt;sup>27</sup> In the United States, the first case was a Brazilian, Marcelo Tenorio, who was severely beaten and hospitalized in a gay bashing incident in Rio de Janeiro in 1989, refused a U.S. visa, and then entered illegally in 1990. See Stuart Grider, "Sexual Orientation as Grouns for Asylum in the United States," <a href="Harvard International Law Journal">Harvard International Law Journal</a> 35, no Winter 1994): 213-224. A recently prominent case involved a gay Iranian refugee to Sweden, who received asylum in 1998 after initially being denied in 1996. See <a href="http://www.qrd.org/qrd/world/asia/iran/gay.iranian.granted.asylum.in.sweden-06.22.98">http://www.qrd.org/qrd/world/asia/iran/gay.iranian.granted.asylum.in.sweden-06.22.98</a>. For more information, with a primarily American orientation, see <a href="http://www.glirtf.org">http://www.glirtf.org</a>. On Australia, see Peter De Waal, <a href="http://www.glirtf.org">When Only the Best Will Do: A Study of Lesbian and Gay Immigration</a> (Darlinghurst: GLITF NSW, 1998).

<sup>&</sup>lt;sup>28</sup> Evelyn Kallen, "Gay and Lesbian rights Issues: A Comparative Analysis of Sydney, Australia and Toronto,

# 4. NATURE, (IM)MORALITY, AND PUBLIC MORALS

The common charge that homosexuality is "against nature" is hardly worth arguing against here. Most thoughtful analysts, at least outside of sociobiology, recognize that sexuality and sexual orientation are constructed sets of social roles.<sup>29</sup> Furthermore, appeals to natural law are largely outside of the discourse of international human rights. And many societies, including currently homophobic societies, have for extended periods tolerated, and even highly valued, (male) homoerotic relationships.

In the West, the best known examples come from ancient Greece.<sup>30</sup> But even the Christian tradition does not seem to have been consistently homophobic during its first millennium.<sup>31</sup> Melanesia, South Asia, and the Muslim Near East also have traditions of male homoerotic relations.<sup>32</sup>

Homoerotic relations in Asia are of special interest because of the prominence of arguments against homosexuality in recent debates over "Asian values." In Singapore and Malaysia in particular, homosexuality is regularity presented as a distinctively Western form of degeneracy by advocates of "Asia's different standard." In fact, however, male-male sexual relationships have a strong traditional basis in both China and Japan. <sup>33</sup> [103] There even seems to be evidence of same sex marriage in Ming dynasty (1368-1644) Fujian. <sup>34</sup>

Canada," <u>Human Rights Quarterly</u> 18, no February 1996): 206-223, p. 209. See also Evelyn Kallen, <u>Label Me Human</u>: <u>Minority Rights of Stigmatized Canadians</u> (1989).

<sup>&</sup>lt;sup>29</sup> The most influential version of this argument is Michel Foucault, <u>The History of Sexuality. Volume I: An Introduction</u> (New York: Pantheon Books, 1978). For somewhat more mainstream presentations, see Edward Stein, ed., <u>Forms of Desire: Sexual Orientation and the Social Constructionist Controversy</u> (New York: Garland Publishing, 1990). With special referenced to the law, see Kristen Walker, "The Participation of the Law in the Construction of (Homo)Sexuality," <u>Law in Context</u> 12, (1994).

<sup>&</sup>lt;sup>30</sup> The standard scholarly study is K. Dover, <u>Greek Homsexuality</u>, Second ed. (Cambridge: Harvard University Press, 1986). See also Eva Cantarella, <u>Bisexuality in the Ancient World</u> (New Haven: Yale University Press, 1992) and, with explicit reference to contemporary debates, Martha Nussbaum, "Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies," <u>Virginia Law Review</u> 80 (October 1994).

<sup>&</sup>lt;sup>31</sup> See, for example, John Boswell, <u>Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century</u> (Chicago: University of Chicago Press, 1980). More controversial is John Boswell, <u>Same-Sex Unions in Premodern Europe</u> (New York: Villard Books, 1994).

<sup>&</sup>lt;sup>32</sup> See, for example, Gilbert H. Herdt, ed., <u>Ritualized Homosexuality in Melanesia</u> (Berkeley: University of California Press, 1984); Rakesh Ratti, ed., <u>A Lotus of Another Color: An Unfolding of the South Asian Lesbian and Gay Experience</u> (Boston: Alyson Publications, 1993); and Arno Schmitt and Jehoeda Sofer, eds., <u>Sexuality and Eroticism</u> Among Males in Moslem Societies (New York: Harrington Park Press, 1992).

 $<sup>^{33}</sup>$  See, for example, Paul Gordon Schalow, "Male Love in Early Modern Japan: A Literary Depiction of the

Nonetheless, as the evidence of discrimination reviewed in the preceding section clearly indicates, homosexuality is widely considered -- by significant segments of society in all countries, and by most people in most countries -- profoundly immoral. The language of perversion and degeneracy is standard.

Drawing on such attitudes, advocates of discrimination are likely to point to provisions in the International Human Rights Covenants that permit restrictions on a number of recognized rights on the grounds of "public morals." For example, Article 19 of the International Covenant on Civil and Political Rights permits restrictions on the right to freedom of expression that are "provide for by law and are necessary ... for the protection of ... public health or morals." The problem with such arguments is that most if not all of the groups explicitly recognized as covered by the right to nondiscrimination were at one time also perceived to be a threat to public morals. Let me simply illustrate this point with some more or less randomly selected historical material from my own country concerning discrimination against those of African and Asian descent.

As is well known, slavery was explicitly permitted and racial discrimination not prohibited in the U.S. Constitution and its Bill of Rights. In fact, for purposes of taxation and legislative representation, slaves -- which James Madison described in <u>The Federalist Papers</u> (Number 54) as a mixture of persons and property and thus "divested of two fifths of the man" -- counted as three-fifths of a person. And just one year after the founding of the republic, a 1790 statute confined naturalization to free white persons. This restriction remained formally on the statute books until 1952.

In the infamous Dred Scott case of 1857 (60 US [19 How.]), Chief Justice Taney held that even emancipated negroes do not "compose a portion of this people" and are not "constituent members of this sovereignty" but rather are a permanently "subordinate and inferior class of beings." From colonial times,

<sup>&#</sup>x27;Youth'," <u>Hidden From History: Reclaiming the Gay and Lesbian Past</u>, eds. M. B. Duberman, M. Vicinus and G. Chauncey, (New York: New American Library, 1989); M. P. Lau, and M. L. Ng, "Homosexuality in Chinese Culture," <u>Culture, Medicine and Psychiatry</u> 13 (1989); Bret Hinsch, <u>Passions of the Cut Sleeve</u>: (Berkeley: University of California Press, 1990); and Gary P. Leupp, <u>Male Colors: The Construction of Homosexuality in Tokugawa Japan</u> (Berkeley: University of California Press, 1995).

<sup>&</sup>lt;sup>34</sup> Bret Hinsch, <u>Passions of the Cut Sleeve:</u> (Berkeley: University of California Press, 1990), pp. 127-134.

<sup>&</sup>lt;sup>35</sup> Similar limitations are allowed in Articles 12, 14, 18, 21, and 22.

Taney argued, "a perpetual and impassable barrier was intended to be erected between the white race and the once which they had reduced to slavery." In fact, he argued, throughout American history negroes had been considered by whites as "below them in the scale of created beings."

More than three quarters of a century later, Senator James O. Eastland, on the floor of the United States Senate, publicly proclaimed

[104] I believe in white supremacy, and as long as I am in the Senate I expect to fight for white supremacy, because I can see that if the amalgamation of whites and Negroes in this country is permitted, there will be a mongrel race, and there will come to pass the identical condition under which Egypt, India, and other civilizations. ... The cultural debt of the colored peoples to the white race is such as to make the preservation of the white race a chief aim of the colored, if these latter but understood their indebtedness. That the colored race should seek to 'kill the good that lays the golden egg' is further proof that their inferiority, demonstrated so clearly in cultural attainments, extends to their reasoning processes in general.<sup>36</sup>

Making resistance to domination the decisive sign of inferiority is a rhetorical move as brilliant as it is frightening.

Turning to Asians, at the California Constitutional Convention of 1878-1879, a provision was proposed to prevent Chinese immigration in order to protect Californians "from moral and physical infection from abroad." <sup>37</sup>

The Chinese bring with them habits and customs the most vicious and demoralizing. ...

They are, generally, destitute of moral principle. They are incapable of patriotism, and are

<sup>&</sup>lt;sup>36</sup> Quoted in Stetson Kennedy, <u>Jim Crow Guide to the U.S.A.: The Laws, Customs and Etiquette Governing the Conduct of Nonwhites and Other Minorities as Second-Class Citizens</u> (London: Lawrence & Wishart Ltd., 1959), p. <sup>32</sup>

<sup>&</sup>lt;sup>37</sup> Quoted in Benjamin B. Ringer, <u>"We the People" and Others: Duality and America's Treatment of its Racial Minorities</u> (New York: Tavistock Publications, 1983), p. 590.

utterly unfitted for American citizenship. Their existence here, in great numbers, is a perpetual menace to republican institutions, a source of constant irritation and danger to the public peace.<sup>38</sup>

Although federal preemption of immigration issues led to a somewhat more moderate statement of opposition to Asian immigration (on the ground that by federal law they were not eligible for naturalization<sup>39</sup>), the sentiment was widely shared.

In the same year, a California State Senate Special Committee on Chinese Immigration found that the Chinese seem to be antediluvian men renewed. Their code of morals, their forms of worship, and their maxims of life, are those of the remotest antiquity. In this aspect they stand as a barrier against which the elevating tendency of a higher civilization exerts itself in vain. ... there can be no hope that any contact with our people, however long continued, will ever conform them to our institutions, enable them to comprehend or appreciate our form of government, or to assume the duties or discharge the functions of citizens.<sup>40</sup>

Almost half a century later, in 1921, V. S. McClatchy, publisher of the Sacramento Bee, the leading paper in California's state capital, delivered a speech in Honolulu where he argued that Japanese migrants were "an alien, unassimilable element" in the American [105] population, "because their racial characteristics, heredity and religion prevent assimilation." McClatchy even went so far as to appeal to "the biological law which declares that races of widely different characteristics perpetuate through intermarriage, not their good, but their less desirable categories." And as is well known, even U.S. citizens of Japanese origin were forcibly interned in concentration camps in the American west during World War II.

<sup>&</sup>lt;sup>38</sup> Quoted in <u>Ibid</u>., pp. 606-607.

<sup>&</sup>lt;sup>39</sup> When the law was changed in 1870 to permit naturalization of freed blacks, foreign born Asians continued to be denied the right to American nationality. (The American Constitution explicitly grants American nationality to anyone born in the territory of the United States.)

<sup>&</sup>lt;sup>40</sup> Quoted in Ibid., p. 604.

<sup>&</sup>lt;sup>41</sup> V. S. McClatchy, "Assimilation of Japanese: Can They Be Moulded Into American Citizens," <u>Four Anti-</u>

Such examples could be readily multiplied, for other groups, and other countries. Jews have long been a special target of attack in the Western world. Women were almost universally considered morally inferior to men until well into the twentieth century -- and in many places of the world, such attitudes persist as we move into a new century and millenium. In all such cases, certain marks of difference came to be constructed as "permissions-to-hate," grounds that authorized treating members of the group in question as less than fully human. Erik Erikson's notion of "psuedospeciation" nicely captures the dehumanizing logic, which we saw above in Mugabe's (unfavorable) comparison between gays and dogs.

Just to underscore the parallels with permissions to hate sexual minorities, consider an interim report of a U.S. Senate subcommittee in 1950 investigating the issue of "Employment of Homosexuals and Other Sex Perverts in Government." The subcommittee's charge was "to determine the extent of the employment of homosexuals and other sex perverts in Government; to consider reasons why their employment by the Government is undesirable; and to examine into the efficacy of the methods used in dealing with the problem."

There was no question that these people were perverts who needed to be kept out of government (if they could not be fully purged from society). The only issue was whether enough reasons had been developed to achieve this unquestioned end and whether sufficiently strenuous efforts were being undertaken.

44

The subcommittee found that employment was inappropriate because "first, they are generally unsuitable, and second, they constitute security risks." Their unsuitability, the subcommittee found, arose because "those who engage in overt acts of perversion lack the emotional stability of normal persons. . . . sex

Japanese Pamphlets, ed. V. S. McClatchy, (New York: Arno Press, 1979 [1921]), pp. 5, 10.

<sup>&</sup>lt;sup>42</sup> C. Vann Woodward, <u>The Strange Career of Jim Crow</u>, 2nd ed. (New York: Oxford University Press, 1966), p. 81.

<sup>&</sup>lt;sup>43</sup> Jonathan Katz, ed., <u>Government versus Homosexuals</u> (New York: Arno Press, 1975), p. 1. [81st Congress, 2d Session, Committee on Expenditures in the Executive Departments, Document No. 241, December 15 (legislative day, November 27), 1950.]

<sup>&</sup>lt;sup>44</sup> The committee, with a logic strikingly reminiscent of the red scare that was building at the same time, found that the government was insufficiently vigilant. The State Department, as during the McCarthy witch hunt, came in for special attack for allowing "known homosexuals" to resign for "personal reasons" without properly noting their homosexuality in their official personnel files. <u>Ibid.</u>, p. 11.

perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility." [106] And because homosexuals "frequently attempt to entice normal individuals to engage in perverted practices," and show a strong "tendency to gather other perverts about [them]," they must be rigorously sought out. "One homosexual can pollute a Government office." This language of incorrigible degradation and fear of pollution strongly echoes the passages quoted above on Africans and Asians. The details are different, but the logic is the same.

Rather than continue to recount examples of this sordid history, let me simply conclude that popular beliefs about the inferiority or corruption of homosexuals and members of other sexual minorities simply cannot provide human rights grounds for continued discrimination. Even accepting, for the purposes of argument, that voluntary sexual relations among adults of the same sex and families headed by same-sex couples are a profound moral outrage, discrimination against sexual minorities cannot be justified from a human rights perspective. "Perverts," "degenerates," and "deviants" <sup>46</sup> have the same human rights as the morally pure, and should have those rights guaranteed by law. Members of sexual minorities are still human beings, no matter how deeply they are loathed by the rest of society. Therefore, they are entitled to equal protection of the law and the equal enjoyment of all internationally recognized human rights.

Human rights rest on the idea that all human beings have certain basic rights simply because they are human. Human rights do not need to be earned. And they cannot be lost because one holds beliefs or leads a particular lifestyle, no matter how repugnant most others in a society finds them.<sup>47</sup> How one chooses to lead one's life, subject only to minimum requirements of law and public order, 48 is a private matter -- no

<sup>45</sup> <u>Ibid</u>., p. 4.

<sup>&</sup>lt;sup>46</sup> I trust it is clear that this language is not chosen to be inflammatory, or because it expresses my own views. In order to focus on the central issue of the justifiability of discrimination, I merely repeat, for the sake of argument, some standard moral condemnations of homosexuality.

<sup>&</sup>lt;sup>47</sup> I am implicitly assuming here that sexual orientation is "chosen" rather than given at birth, and thus more like religion than race -- although, of course, racial identity is largely socially constructed. If homosexuality is "genetic," the case for discrimination is even more tenuous, and the appropriate analogy becomes more like race or even disability (another area of lingering legal discrimination in most countries).

<sup>&</sup>lt;sup>48</sup> For example, sexual relations with children may be legitimately prohibited -- so long as same-sex and heterosexual relations are both prohibited.

matter how publicly one leads that life.

Howard's chapter canvasses some of the psychological and sociological barriers to acceptance of this moral position even within relatively "enlightened" or "liberal" groups. And it is disheartening, if historically and sociologically understandable, to see leaders such as Mugabe, who came to power by opposing racist denials of his full humanity, resorting to vicious sexual hate mongering. But such resistance, however widespread, has no more moral force than past and present attitudes of racism, sexism, and religious intolerance. Just as other despised minorities have had to struggle against a dominant [107] oppressive mainstream, ultimately forcing them to renounce their permissions to hate, homosexuals and other sexual minorities face just such a struggle today.

Popular attitudes of hatred and contempt are the problem to be overcome, not the solution to anything.<sup>49</sup> In the case of homosexuals and other sexual minorities, international human rights continues to express such morally indefensible popular sentiments rather than the true human rights logic of equality and nondiscrimination for <u>all</u>. Whatever the state of popular moral sentiments, we must remain committed to the overriding objective of "All human rights for all," the aptly chosen slogan of the High Commissioner for Human Rights for 1998, the fiftieth anniversary of the Universal Declaration,

# 5. STRATEGIES FOR INCLUSION

The moral and conceptual case for extending nondiscrimination protection to gay men, lesbians, and other sexual minorities is overwhelming. They are adult human beings exercising their rights of personal autonomy to speak and behave as they choose, and to associate, in public and private, with whom they choose, as they choose. But until the deep social prejudice against "perverts" is broken down, they will be subject to continued victimization and there is no real chance for explicit inclusion of sexual orientation among internationally prohibited grounds of discrimination.

<sup>&</sup>lt;sup>49</sup> I hasten to add, for those who have not yet read her chapter, that Howard shares this view. Although our two chapters were written entirely independently, there is considerable complementarity between her comparative and sociological perspective and my theoretical and international legal perspective.

As in most other areas of human rights, the central battle grounds are local and national. The international dimension of the human rights movement is, in general, supplementary to and supportive of national struggles. Nonetheless, it is the dimension to which this volume is devoted, and will be my focus here. In this final section I want to consider briefly some of the tactical and strategic issues involved in bringing sexual minorities under international nondiscrimination protections.

One special problem we face is that the authoritative international instruments, the International Human Rights Covenants, are largely fixed standards, reflecting attitudes of the 1950s and early 1960s, when no country had an active gay rights movement. In principle it is possible to "amend" the Covenants. It has been done once, in the Second Optional Protocol, outlawing the death penalty. But this process is extremely difficult. Even the process of supplementary norm creation, through a separate declaration (as, for example, was done from disappearances and the right to development) is not promising. In the short and medium run, there is no chance of anything even close to an international consensus on even a working text for a draft declaration on the rights of homosexuals.

If I am correct that explicit listing as a prohibited ground of discrimination really does make a significant difference, this relative inflexibility in the international human rights "legislative" mechanism of treaties drafted in the Commission on Human Rights, poses serious problems for sexual minorities. But explicit inclusion under Article 2 [108] should be seen as the end point of a long struggle, rather than an immediate aim. For the next decade at least, and quite possibly longer, central attention needs to be focused elsewhere.

If the text can't be changed directly and explicitly, either through "amendment" or a new international declaration, we need to rely instead on "interpretation." Two obvious avenues suggested by Article 2: "other status" and "sex."

Sexual orientation is on its face an obvious case of an "other status" by which human beings are singled out for invidious discrimination. A campaign to emphasize these status disabilities can at least highlight the suffering publicly imposed on sexual minorities. This strategy may be particularly promising is some linkage can be established with struggles of those subject to discrimination on the basis of disability or

age. The idea would be to emphasize that the list of explicitly prohibited grounds in Article 2 is illustrative, not exhaustive, and that there remain a number of other statuses that are still widely used to justify public discrimination. Even if successful, there is likely to remain an implication that discrimination against sexual minorities is in some way less important than discrimination against explicitly recognized groups.

Nonetheless, recognition under the rubric of other status would represent considerable progress. And it might represent a step toward a separate declaration on the rights of homosexuals.

A more radical strategy of interpretative incorporation of gay rights would to be read "sex" in Article 2 to include sexual orientation. This was done by the Human Rights Committee in Toonen case. Although a clever and provocative move, the Committee provided no grounds for such a finding. In its report, it simply stated, without further elaboration, "that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation. But this certainly was not what was intended at the time the provision was drafted; it is not even a widely held view even in legally "advanced" European countries. And it is substantively problematic. For example, sexual minorities are in many ways no more analogous to women than they are to religious minorities. Although involving issues of sex and gender, and although women and homosexuals share many similar experiences of victimization, sexual minorities also suffer in systematically different ways from women.

In addition to such problems, there are procedural problems with existing international mechanisms for interpretation. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights are <u>not</u> authorized to make authoritative interpretations (let alone act to enforce their understandings of the meaning of the Covenants). It is not even clear that these bodies are authorized to use what within the European regime is called "evolutive interpretation," a reading of the meaning of the text based on current understandings, rather than on those at the time of drafting (when sexual orientation clearly was <u>not</u> intended to be a prohibited ground).

<sup>&</sup>lt;sup>50</sup> Human Rights Committee, Communication 488/1992, submitted by Nicholas Toonen against Australia. UN Document CCPR/C/50/D/488/1992, 4 April 1994. http://www.unhchr.ch/html/menu2/8/oppro/vws488.htm.

<sup>&</sup>lt;sup>51</sup> <u>Ibid.</u>, par. 8.7.

The other principal source of interpretation in our decentralized international legal system is national legislatures and courts. These are authoritative -- but only <u>nationally</u>. As part of a long term struggle, precedents set in one national jurisdiction may be drawn [109] on by others. And as more and more national systems are changed, pressure for international changes may increase, and resistance may be eroded. In the short run, this is much better than nothing. But it is are only a start, not an ultimate solution. In the long run, we must work back up to the global dimension of Universal Declaration and the Covenants.

One other prominent place for international action should be noted. Article 17 of the International Covenant on Civil and Political Rights includes a right to privacy. Toonen brought his case against a Tasmanian sodomy law criminalizing consensual sex among members of the same sex. The Human Rights Committee found that "it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy'." Although perhaps true in this particular case, where Australia did not deny the private nature of the acts, such an understanding, as we have seen above, is anything but undisputed in many countries of the world. But precisely in such countries, privacy and the decriminalization of same sex relations would represent an important foot in the door.

The limited nature of the progress represented by mere decriminalization needs to be emphasized. It does nothing directly to eliminate civil disabilities, let alone address the roots of social prejudice. Real <a href="mailto:protection">protection</a> for sexual minorities must involve inclusion within the right to nondiscrimination (and probably also incorporation under the rubric of equal protection of the laws). But while struggling for that full protection and inclusion, an expanding sphere of privacy and protection against criminal prosecution are extremely valuable resources.

We have thus worked backward from an ultimate aim of explicit recognition as a prohibited ground of discrimination to the very minimal (and relatively intolerant) toleration of decriminalization of private same-sex relations. But if we think historically and politically, rather than conceptually and theoretically, we can reverse the direction of the flow and see an implicit strategy for achieving full inclusion.

\_

<sup>&</sup>lt;sup>52</sup> <u>Ibid</u>., par. 8.2.

Kees Waaldijk has found something very much like such a sequence in the European recognition of legal rights for homosexuals.

The law in most countries seems to be moving on a line starting at (0) toal ban on homo-sex, then going through the process of (1) the decriminalisation of sex between adults, followed by (2) the equalisation of ages of consent, (3) the introduction of anti-discrimination legislation, and (4) the introduction of legal partnership. A fifth point on the line might be the legal rocognition of homosexual parenthood.<sup>53</sup>

The basic logic is one of gradual inclusion, beginning with decriminalization and moving through increasingly active measures of nondiscrimination in a wide range of areas of public activity.

[110] Waaldijk identifies ten principal areas of legal change: touching, safety, organizations, leisure, information, nondiscrimination, services, employment, partnerships, and parenthood. And within each domain there is a similar functional logic of progress from minimal toleration through active recognition and support. For example, within the category of homosexual safety, he identifies three principal areas of activity, ranging from ending of official repression (e.g. police raids, safety in prisons, official registration), through the application of general laws to crimes against homosexuals, to special provisions to protect lesbians and gays. In the area of lesbian/gay organizations, progress can be measured from permission to organize, through official recognition as legal persons, to support from the authorities.<sup>54</sup>

Waaldijk's concluding advice bears for national activists bears repeating here.

- 1. Think of the legal recognition of homosexuality as a number of parallel developments in more than ten different fields.
- 2. Think of the developments in each field as a series of many small steps
- 3. Look at the experiences in other countries to find out what these steps normally are, and

<sup>&</sup>lt;sup>53</sup> Kees Waaldijk, "Standard Sequences in the Legal Recognition of Homosexuality: Europe's Past, Present, and Future," <u>Australasian Gay and Lesbian Law Journal</u> 4, no 4 1994): 50-72, pp. 51-52.

<sup>&</sup>lt;sup>54</sup> Ibid., pp. 69-72.

what their standard sequence is.

- 4. Look at the experiences in other foureign countries to find out where, at this moment of time, political pressure for legal refrom can be most effectively applied.
- 5. Do not try too hard to make your legal system jump; be content with it only taking steps. But do keep the system walking.<sup>55</sup>

At the international level, similar advice seems warranted. Keep in mind the ideal of full explicit inclusion under international nondiscrimination law. But don't expect miracles. Take advantage of whatever avenues are available to transform international human rights norms in ways that can contribute to lifting the burden imposed on sexual minorities. Remain ready for a long struggle. And as the continuing problems of women, racial and ethnic minorities, and some religious minorities remind us, even after formal protection is granted, at the national, regional, or international level, the struggle for effective enjoyment of rights to nondiscrimination can remain a difficult one.

\_

<sup>&</sup>lt;sup>55</sup> <u>Ibid</u>., p. 68.