

INTERNATIONAL HUMAN RIGHTS LAW AND THE CRIMINALIZATION OF SAME-SEX SEXUAL CONDUCT

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INTRODUCTION

This ICJ Briefing Paper outlines the current state of international law as it relates to the criminalization of sexual activity between consenting adults of the same sex.

In December 2008, 66 states signed a statement presented to the United Nations General Assembly that affirmed the principle that international human rights law protects against violations based on sexual orientation and gender identity.¹ A counter-statement, signed by 57 states, expressed concern “at the attempt to introduce to the United Nations some notions that have no legal foundations in any international human rights instrument.” Indeed, a common refrain in the debate over sexual orientation, gender identity, and human rights is that the very concept of “sexual orientation” is not part of “universally accepted” human rights discourse.

Much of this debate arises in the context of laws that criminalize sexual activity between same sex partners. In many countries around the world, sexual conduct between consenting adults of the same sex is a criminal offence. The punishments range from a few months in prison to the death penalty. Although in some cases these laws are a colonial legacy, in others criminal offences or stiffer penalties have been only recently introduced. The laws are often defended on the grounds of public morality. Do such laws violate rights guaranteed under international human rights instruments? In other words, is someone’s sexual orientation or private sexual activity a matter covered by international law? Does international law really speak to what people do in their own bedrooms or whom they choose to do it with?

The short answer is yes. A review of international human rights standards and their authoritative interpretation by treaty bodies and human rights courts makes clear that the criminalization of same-sex sexual conduct is a violation of rights guaranteed under international law. Moreover, domestic courts, interpreting the same language or parallel provisions in domestic constitutions, have also found decriminalization of same-sex sexual conduct to be required under international law. International law protects individuals from discrimination based on fundamental personal characteristics. International law also protects individuals’ private lives and their decisions to form intimate personal relationships, which includes the right to engage in sexual activity. Thus sexual orientation is very much a part of human rights law.

The purpose of this ICJ Briefing Paper is to identify and explain the legal sources of the prohibition on the criminalization of same-sex sexual conduct. While the *Yogyakarta Principles* summarize the application of international law to human rights violations based on sexual orientation and gender identity, the ICJ felt it would be useful to offer a detailed legal analysis of a single specific issue.² Since international human rights arguments are increasingly being heard in national courts, domestic jurisprudence is also considered.

¹ A/63/635, 22 December 2008. In March 2009, the United States joined the list of signatories.

² The criminalization of same-sex sexual activity is of course not the only human rights issue involved when we speak about sexual orientation and gender identity. By focusing on this issue, the ICJ does not intend to diminish the importance of other pressing human rights concerns.

UNIVERSALITY OF HUMAN RIGHTS

Human rights apply to everyone simply because they are born human. This means that all human beings, regardless of whether they are lesbian, gay, bisexual or transgender or intersex, are entitled to the full enjoyment of all human rights. As the Vienna Declaration and Programme of Action, adopted unanimously by all States at the World Conference on Human Rights in 1993, states, “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.”³ This principle of the universality of all human rights is enshrined in the Universal Declaration of Human Rights and reflected in all other universal and regional human rights instruments.

- Article 1 of the Universal Declaration of Human Right (UDHR): “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”
- Preamble of the International Covenant on Civil and Political Rights (ICCPR): “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”
- Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”
- Article 1(4) of the Arab Charter on Human Rights: “The present Charter seeks, within the context of the national identity of the Arab States and their sense of belonging to a common civilization, to achieve the following aims . . . To entrench the principle that all human rights are universal, indivisible, interdependent and interrelated.”
- Article 19 of the African Charter on Human and Peoples’ Rights: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”

Laws that criminalize same-sex sexual activity⁴ carve out a category of humans for separate and discriminatory treatment. Although such laws purport to regulate conduct and not status, the reality is that criminalizing sexual conduct between partners of the same sex has the effect of marking individuals as criminal on the basis of their sexual orientation. Thus a conduct crime becomes a status crime.

In *Leung v. Secretary for Justice*, the High Court of Hong Kong noted, “When a group of people, such as gays, are marked with perversity by the law then their right to

³ A/CONF.157/23, 12 July 1993, at para. 1.

⁴ These laws are sometimes referred to as “sodomy laws.” That name, however, is misleading because some of these laws prohibit sexual activity between consenting female partners and some laws prohibit any kind of sexual contact between consenting male partners, regardless of whether it is sodomy.

equality before the law is undermined.”⁵ Or, as Justice O’Connor wrote in her concurrence in *Lawrence v. Texas*, in which the U.S. Supreme Court invalidated as unconstitutional a Texas state law criminalizing anal sex between men, “[T]here can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”⁶

Even where laws criminalize the same conduct regardless of the sex of the partners – as is the case, for example, where anal sex between a man and a woman is criminalized – their true impact, in the words of Justice Ackermann of the Constitutional Court of South Africa, is to

punish[] a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system, all gay men are criminals.⁷

National courts recognize that human rights are universal. In the 2008 case of *Victor Mukasa and Yvonne Oyo v. Attorney General*, the High Court of Uganda at Kampala heard the case of two individuals who were identified as lesbian and who had been subjected to arbitrary arrest, detention, and physical mistreatment by law enforcement officers. The High Court found that the police had violated a number of human rights instruments, including the Universal Declaration of Human Rights. The Court then quoted Article 1 in its entirety, thus reaffirming the universality of all human rights.

THE RIGHTS TO NON-DISCRIMINATION AND EQUALITY

Laws that criminalize same-sex sexual conduct treat individuals differently on the basis of their sexual orientation.⁸ Because this difference in treatment cannot be justified, as courts around the world have recognized, it amounts to discrimination.⁹ The right to be free from discrimination is guaranteed by international law provisions on non-discrimination and equal protection of the law. While the right to non-discrimination protects against discrimination in the enjoyment of other human rights, the right to equal protection of the laws is an autonomous right. It prohibits “discrimination in law or in fact in any field regulated and protected by public authorities.”¹⁰

This right to non-discrimination is not limited to enumerated grounds. Every international and regional human rights instrument that protects against discrimination includes “other status” or language equivalent thereto.

Non-discrimination in International Law

⁵ *Leung TC William Roy v. Secretary for Justice*, High Court of the Hong Kong Special Administrative Region, 24 August 2005, HCAL 160/2004, at para. 115.

⁶ *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (quoting *Romer v. Evans*, 517 U.S. 620, 641).

⁷ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998 ZACC 15, at para. 28.

⁸ The limitations of defining any person by reference exclusively to sexual behavior have been criticized elsewhere. The conflation of conduct with status, however, persists and it is a principal reason for courts finding that sexual activity laws are in fact discriminatory.

⁹ See National Jurisprudence Section for examples of cases from the USA, South Africa, India, and Fiji.

¹⁰ UN Human Rights Committee, General Comment No. 18, 10 November 1989, para. 12.

- Article 2 of the UDHR: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- Article 2(1) of the ICCPR: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR): “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.”
- Article 2 of the African Charter on Human and People’s Rights (African Charter): “Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.”
- Article 1 of the American Convention: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.”
- Article 14 of the European Convention: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Equal Protection in International Law

- Article 26 of the ICCPR: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- Article 3 of the African Charter: “Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.”
- Article 24 of the American Convention: “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

Although the instruments listed above do not include “sexual orientation” among the enumerated categories, these categories are clearly intended to be illustrative and not exhaustive. The use of the phrase “or other status” means that the list of categories is open-ended. The Explanatory Report to Protocol 12 of the European Convention explains that the option of expressly including additional grounds, such as disability or sexual orientation, was rejected

not because of a lack of awareness that such grounds have become particularly important in today’s societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included.

The UN Committee on Economic, Social and Cultural Rights offered a similar explanation of the term “other status:”

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in Article 2(2). These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation.¹¹

Decisions of UN treaty bodies interpreting international treaties and regional courts interpreting parallel non-discrimination provisions make clear that discrimination on the basis of sexual orientation is prohibited under international law and, furthermore, that criminalization of same sex conduct is a form of prohibited discrimination.

In the 1994 case of *Toonen v. Australia*, the UN Human Rights Committee, the body mandated under ICCPR article 40 with monitoring states’ compliance with its provisions, found that laws in Tasmania criminalizing consensual same-sex sexual conduct violated the privacy provision of the ICCPR. The Human Rights Committee further noted that the reference to “sex” in Articles 2 and 26 were taken as “including sexual orientation.”¹² Later decisions of the Human Rights Committee have found that discrimination based on sexual orientation violated Article 26.¹³ Since 1994, the Human Rights Committee has repeatedly called on countries to repeal laws that penalized consensual same-sex sexual activity.¹⁴

¹¹ General Comment No. 20, Committee on Economic, Social and Cultural Rights, 10 June 2009, at para. 27.

¹² *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992, 4 April 1994, at para. 8.7.

¹³ *Edward Young v. Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000, 12 August 2003; *X v. Colombia*, Communication No. 1361/2005, UN Doc. CCPR/C/89/1361, 30 March 2007. Relying on Articles 17 and 26 of the Covenant, the Human Rights Committee has urged Kenya to repeal laws that criminalized homosexuality. See, e.g., UN Doc. CCPR/CO/83/KEN, 28 March 2005, at para. 27.

¹⁴ UN Doc. CCPR/CO/83/KEN, 28 March 2005, at para. 27 (Kenya); UN Doc. CCPR/C/BRB/CO/3, 11 May 2007, at para. 13 (Barbados); UN Doc. CCPR/CO/76/EGY, 28 November 2002, at para. 19 (Egypt); UN Doc. CCPR/C/79/Add.111, 28 July 1999, at para.

The UN Committee on the Elimination of Discrimination Against Women, which oversees the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women has also expressed concern about laws that classify sexual orientation as a sexual offence and has recommended that such penalties be abolished.¹⁵

The UN Committee on the Rights of the Child, which monitors States' compliance with provisions of the Convention on the Rights of the Child, issued a General Comment in 2003 explaining that under the non-discrimination provision of Article 2, prohibited grounds of discrimination included "adolescents' sexual orientation."¹⁶

The UN Committee Against Torture, in General Comment No. 2, stated the following:

The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. . . States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of . . . sexual orientation, transgender identity. . . or any other status or adverse distinction.¹⁷

Most recently, the UN Committee on Economic, Social and Cultural Rights, which monitors implementation of the ICESCR, stated that "'Other status' as recognized in article 2(2) includes sexual orientation" and gender identity.¹⁸ The Committee had earlier noted that individuals were protected against discrimination based on sexual orientation in its general comments on the right to health and the right to water.¹⁹

In the 1999 case of *Salgueiro da Silva Mouta v. Portugal*, the European Court of Human Rights concluded that the applicant had been discriminated against on the basis of his sexual orientation, "a concept which is undoubtedly covered by Article 14 of the [European] Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words 'any ground such as' (in French 'notamment')."²⁰

¹⁶ (Romania); UN Doc. CCPR/C/79/Add.106, 18 April 1999, at para. 13 (Lesotho); UN Doc. CCPR/C/79/Add.104, 30 March 1999, at para. 20 (Chile); UN Doc. C/79/Add.85, 29 July 1997, at para. 8 (Sudan).

¹⁵ Concluding Observations on Kyrgyzstan, UN Doc. A/54/38, 20 August 1999, at para. 128. CEDAW has also commended states for enacting laws protecting against discrimination on the basis of sexual orientation. Concluding Observations on Sweden, UN Doc. A/56/38, 31 July 2001, at para. 334; Concluding Observations on Ecuador, UN Doc. CEDAW/C/EQU/CO/7, 2 November 2008, at para. 28.

¹⁶ Committee on the Rights of the Child, General Comment 4, UN Doc. CRC/GC/2003/4, 1 July 2003, at para. 6.

¹⁷ Committee Against Torture, General Comment 2, UN Doc. CAT/C/GC/2, 24 January 2008, at para. 21.

¹⁸ Committee on Economic, Social and Cultural Rights, General Comment 20, UN Doc. E/C.12/GC/20, 10 June 2009, at para. 32.

¹⁹ See General Comment No. 14, UN Doc. E/C.12/2000/4, 11 August 2000, at para. 18; and General Comment No. 15, UN Doc. E/C.12/2002/11, 20 January 2003, at para. 13.

²⁰ Judgment of 21 December 1999, Case of *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, at para. 28.

In *Zimbabwe NGO Human Rights Forum v. Zimbabwe*, the African Commission on Human and Peoples' Rights observed: "Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights . . . The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation."²¹

At the domestic level, the reasoning of the Supreme Court of Canada is instructive. Section 15 of the Charter of Rights and Freedoms guarantees equality and prohibits discrimination on certain enumerated grounds. In a series of cases, the Supreme Court has identified analogous grounds that also qualify for protection against discrimination. In *Egan v. Canada*, the Court held that sexual orientation was an analogous ground to the ones enumerated in section 15 of the Charter.²² In *Corbiere v. Canada*, the Supreme Court explained:

[W]hat these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. . . .To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.²³

Similar reasoning has been used by the Constitutional Court of South Africa. In addition to the grounds specified in the equality provision of the Constitution, a difference in treatment amounts to "discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner."²⁴

Furthermore, arresting or detaining someone under a provision that criminalizes same-sex sexual activity also violates rights under international law. Arrest or detention on the basis of sexual orientation constitutes an arbitrary deprivation of liberty. On several occasions, the UN Working Group on Arbitrary Detention has explained that the detention and prosecution of individuals "on account of their homosexuality" is arbitrary because it violates the ICCPR's guarantees of "equality before the law and the right to equal legal protection against all forms of discrimination, including that based on sex."²⁵

²¹ Communication 245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe, 21st Activity Report, EX.CL/322(X), Annexure III at para. 169.

²² *Egan v. Canada*, [1995] 2 S.C.R. 513 at 528.

²³ *Corbiere v. Canada*, (1999), 2 S.C.R. 203, at para. 13.

²⁴ *Harksen v. Lane*, (19997) ZACC 12, at para. 46.

²⁵ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3, 15 December 2003, para. 73; see also Working Group on Arbitrary Detention, Opinion No. 7/2002 (Egypt), para. 27, UN Doc. E/CN.4/2003/8/Add.1; Opinion No. 22/2006 (Cameroon), para. 19, UN Doc. A/HRC/4/40/Add.1.

THE RIGHT TO PRIVACY

Just as individuals are protected from discrimination on grounds of sexual orientation, sexual activity between consenting adults is protected from interference by the right to privacy.

- Article 12 of the UDHR: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”
- Article 17(1) of the ICCPR: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.”
- Article 11(2) of the American Convention: “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”
- Article 8 of the European Convention: “Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
- Article 21 of the Arab Charter: “No one shall be subjected to arbitrary or unlawful interference with regard to his privacy, family, home or correspondence, nor to unlawful attacks on his honour or his reputation.”
- Article 11(2) of the American Convention on Human Rights: “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”

As long ago as 1981, the European Court found that such laws violated the privacy provision of the European Convention. Specifically, in *Dudgeon v. United Kingdom*, the European Court held that laws that criminalized sexual acts between consenting adult males constituted an “unjustified interference with [the applicant’s] right to respect for his private life” and thus breached Article 8 of the European Convention.²⁶ The European Court has consistently reaffirmed this holding.²⁷

In 1994, in finding that the Tasmanian penal code was inconsistent with Australia’s human rights obligations under the ICCPR, the Human Rights Committee noted, “[I]t is undisputed that adult consensual activity in private is covered by the concept of ‘privacy.’”²⁸

²⁶ *Dudgeon v. United Kingdom*, Application No. 7525/76, Judgment dated 23 September 1981, at para. 63. Article 8 provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

²⁷ See, e.g., *Norris v. Ireland*, Application No. 10581/83, Judgment dated 26 October 1988; *Modinos v. Cyprus*, Application No. 15070/89, Judgment dated 22 April 1993.

²⁸ *Toonen v. Australia* at para. 8.2.

It is important to recognize that privacy is both spatial – the home and the bedroom are places that the State may not invade without compelling cause – and also decisional. Thus a person is entitled to privacy for decisions he or she makes about personal relationships and activities. In *Lawrence v. Texas*, which held unconstitutional a Texas state law criminalizing sexual conduct between men, the U.S. Supreme Court explained that decisional privacy involves “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”²⁹

In *National Coalition for Gay and Lesbian Equality*, the Constitutional Court of South Africa held:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.³⁰

NATIONAL JURISPRUDENCE

The European Court of Human Rights decided the case of *Dudgeon v. United Kingdom* in 1981 and the UN Human Rights Committee issued its decision in *Toonen v. Australia* in 1994. In more recent years, a number of national courts have heard challenges to laws criminalizing same-sex sexual activity.³¹

National court decisions striking down these criminal laws share several common features. First, in addition to finding that such laws violate rights to privacy and equality, courts also pay attention to the concept of dignity. Dignity, which is closely related to privacy, is protected in many national constitutions as well as the African Charter on Human and Peoples’ Rights. Article 5 of the Charter provides in part: “Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status.”

In *National Coalition for Gay and Lesbian Equality*, the Constitutional Court of South Africa held that “the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.” The Court then concluded:

²⁹ *Lawrence v. Texas*, U.S. Supreme Court, 539 U.S. 558, 574, 26 June 2003.

³⁰ *National Coalition for Gay and Lesbian Equality*, at para. 32.

³¹ See *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, South Africa Constitutional Court, 1998 ZACC 15, 9 October 1998; *Lawrence v. Texas*, U.S. Supreme Court, 539 U.S. 558, 26 June 2003; *Nadan & McCoskar v. State*, High Court of Fiji at Suva, 26 August 2005; *Naz Foundation v. Government of NCT of Delhi and Others*, High Court of Delhi at New Delhi, WP(C) No. 7455/2001, 2 July 2009. In Hong Kong, recent decisions have struck down as discriminatory provisions related to differing ages of consent and public sexual activity between same-sex partners. See *Leung v. Secretary for Justice*, CACV 317/2005, 20 September 2006, and *Secretary for Justice v. Yau and Another*, FACC No. 12 of 2006, 17 July 2007. In Nepal, the Supreme Court ruled that transgender individuals should be recognized as a third gender should be recognized and protected from discrimination. See Writ No. 917 (Blue Diamond Society), 21 December 2007.

Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.³²

Similarly, the High Court of Delhi at New Delhi recently found that Section 377 of the Indian Penal Code (IPC), which criminalized consensual same-sex sexual conduct, was unconstitutional. In explaining the concept of dignity, the Court stated, “At the root of the dignity is the autonomy of the private will and a person’s freedom of choice and of action.”³³ The Court held that Section 377 “denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality . . . As it stands, Section 377 IPC denies a gay person’s right to full personhood which is implicit in the notion of life under Article 21 of the Constitution.”³⁴

Second, the courts squarely confront and reject public morality as a claimed justification for laws that criminalize same-sex sexual activity. In general, the courts reason that public morality, when applied to behavior that is consensual and causes no harm, is a thin veil for prejudice. Writing for the majority in *Lawrence v. Texas*, Justice Kennedy stated that considerations about morality “do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code.” In her concurrence, Justice O’Connor wrote: “[L]egal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law. Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy. . . . And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.”³⁵

In *National Coalition for Gay and Lesbian Equality*, Justice Ackermann wrote: “The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose. There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays. It would therefore seem that there is no justification for the limitation.”³⁶

Likewise, in *Naz Foundation v. Union of India*, the High Court of Delhi at New Delhi rejected the argument that Section 377 had the legitimate purpose of protecting public morality. “The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision’s objective both arbitrary and unreasonable. The state interest ‘must be legitimate and relevant’ for

³² *National Coalition for Gay and Lesbian Equality* at para. 28.

³³ *Naz Foundation* at para 26.

³⁴ *Naz Foundation* at para. 48.

³⁵ *Lawrence v. Texas*, 539 U.S. at 583.

³⁶ *National Coalition for Gay and Lesbian Equality* at para. 37.

the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily the classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.”³⁷

In *Nadan and McCoskar v. State*, the High Court of Fiji held, “Despite the margin of appreciation given to the State to restrict sexual acts on the grounds of morality, the suggested limitations by criminal sanction are wholly disproportionate to the right of privacy. The criminalization of carnal acts against the order of nature between consenting adult males or females in private is a severe restriction on a citizen’s right to build relationships with dignity and free of State intervention and cannot be justified as necessary.”³⁸

A third common feature is the extent to which diverse national courts rely upon international human rights law in reaching their conclusions. Although none of the courts sit in Member States belonging to the Council of Europe, they quote cases from the European Court of Human Rights, including *Dudgeon v. United Kingdom*. They refer to the reasoning of the UN Human Rights Committee in *Toonen v. Australia*. They cite international instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, in their analyses of non-discrimination and privacy. In short, the courts view their obligation to interpret domestic law in conformity with international human rights law as requiring the invalidation of laws that criminalize same-sex sexual activity. For these courts, the fact that international instruments do not explicitly contain the words “sexual orientation” is of no moment. To them it is clear that international human rights law, in practice, protects individuals from discrimination on the basis of their sexual orientation.

CONCLUSION

The argument that sexual orientation and private sexual activity are not protected by international human rights law is based on a series of false assumptions. The first is that the listing of prohibited grounds of discrimination contained in international instruments is a closed one. To the contrary, in every international and regional human rights treaty, the drafters were careful to ensure that the lists were open-ended. The second is that treaty bodies and courts play no role in the development of international law. Yet just as constitutional courts contribute to our understanding of national constitutions as “living” texts that must be interpreted in light of present-day conditions, so too do treaty bodies and regional human rights courts. The authoritative jurisprudence of these bodies is part of international law. Finally, the argument that sexual orientation is not part of “universally recognized” human rights ignores the first principle of human rights law – which is that human rights are universal.

³⁷ *Naz Foundation* at para. 92.

³⁸ *Nadan and McCoskar v. State*.