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RICHARD AND HELEN DEVOS CENTER FOR RELIGION AND CIVIL SOCIETY

## About the Author

**Li-ann Thio** is Professor of Law at the National University of Singapore and author of *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Boston, MA: Martinus Nijhoff Publishers, 2005).

This paper is one in a series of essays on the natural law and natural rights foundations of internationally recognized human rights. The “First Principles of International Human Rights” essays propose reforms of the human rights movement for the increased protection of the fundamental and inalienable rights of all people.

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# Equality and Non-Discrimination in International Human Rights Law

*Li-ann Thioa*

*“Equality and non-discrimination” law, much of which impinges on cultural traditions and religious sensitivities, are matters warranting robust public discussion—which is preferable to invoking equality to sneak in a privileged ethic while pretending to be agnostic about the common good. Within a global setting in which fundamental value divergences are acute, it is important to recognise a global margin of appreciation in interpreting contested rights claims and protecting a range of acceptable practices to vindicate the values of pluralism, subsidiarity, and democratic will. No global body is authorised to impose a diktat over a morally charged controversy with a far-reaching social agenda, disregarding the agreement of states and national democratic processes.*

This *Special Report* will examine the original understanding underlying “non-discrimination” in article 2 and associated articles of the Universal Declaration of Human Rights (UDHR). It will examine how these have evolved through the expansive and contested interpretations of human rights bodies as a method of standard-setting, which has been criticized as advancing a subjective ideological agenda, and the problems this has caused when situated against the existing corpus of human rights norms. Policy recommendations are offered with a view to maintain the integrity of international human rights laws, which remains the dominant, if troubled, contemporary language of global morality.

The principle of “non-discrimination” is a key provision in the UDHR,<sup>1</sup> serving both as a foundational principle that informed the reading of all other human rights in the UDHR—as well as a substantive right itself. Article 2 of the UDHR reads:

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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

During much of the UDHR drafting process, it was intertwined with “equality,” both being “two sides of the coin.”<sup>2</sup> Eventually, “non-discrimination” was disentangled from “equality” and found expression in a “strong and lean”<sup>3</sup> article 2, which applies only to UDHR rights. The concept of “equality” took up residence under UDHR article 7, which reads: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

The second paragraph of article 7 of the UDHR only applies to UDHR rights, while the first prohibits “discrimination of any kind.”<sup>4</sup> Egalitarian values permeate the other substantive articles,<sup>5</sup> as did framing other rights in terms of “everyone” and “no one.”

Article 1 of the UDHR declares that “all human beings” as “members of the human family are “born free and equal in dignity and rights.” This supports the inherence theory of rights, without specifying any philosophical basis, whether the Judeo-Christian concept of *imago Dei* or humanist Kantian precepts.<sup>6</sup> It clearly rejects racial discrimination, such as Aristotle’s view that some people were slaves by nature<sup>7</sup> and Nazi Aryanism, which necessitated article 2.<sup>8</sup> While earlier human rights documents addressed the “Rights of Man,”<sup>9</sup> the UDHR was not a sexist document. Originally, article 1 read “[a]ll men,” but was later altered, through the activism of delegates Bodil Begtrup of Denmark and Hansa Mehta of India to read “[a]ll human beings.”<sup>10</sup> Drafting debates also demonstrated a concern about the economic privileges associated with feudal orders.<sup>11</sup>

## Minority Rights Treaties as Prologue

Two primary ways the UDHR radically departed from its precursors are reflected in article 2.

**Universality of Human Rights.** First, it universalized the application of human rights to all persons everywhere. This is reflected in the first

paragraph of article 2 that all persons are entitled to all UDHR rights “without distinction of any kind.” Previously, human rights instruments in the form of the minority treaties underwritten by the League of Nations were confined to protecting ethno-cultural minority groups in certain selected European states emerging out of the dissolution of the Austro-Hungarian empire.

This inter-war experiment held states accountable for the treatment of persons within their jurisdictions by empowering any League of Nations member to draw the League of Nations Council’s attention to a treaty infraction and by providing that treaty-related disputes could be referred to the Permanent Court of International Justice. It was believed that minority issues would be “depoliticized” by being removed from the sphere of diplomatic relations to that of “law” and impartial third-party resolution, minimizing the interference of powerful states in the internal affairs of weaker ones.

One might recognize in this mechanism of providing international accountability through a permanent monitor the infrastructural design for the modern human rights regime, although this was flawed in various aspects. It was selectively applied only to those European states like Poland or Czechoslovakia who were “ beholden ” to the Principal Allied Powers for their territorial gains; these states were disgruntled<sup>12</sup> because they felt they were treated unequally in being subjected to international supervision, compared to other European states. Indeed, Switzerland was celebrated for its treatment of the “ minorities question ” through its focus on common political ideals shared by all citizens, distinct from the German ideology of defining political community by blood (*Volkstrum*).<sup>13</sup>

The prototype of these treaties was the Polish Minority Treaty,<sup>14</sup> in which the rights of “ Polish nationals belonging to racial, religious or linguistic minorities ” were recognized as “ obligations of international concern. ” However, while provisions like article 7 referenced the equality of “ all inhabitants of Poland ” under the law, the international mechanism only applied to members of minorities with grievances. While “ equality and non-discrimination ” found “ judicial recognition ”<sup>15</sup> in these minority treaties, the UDHR applied this more broadly to individuals *qua* human beings, irrespective of membership in a minority group.

**Territorial Status.** Second, the second paragraph of article 2 affirmed that UDHR rights were to be enjoyed wherever a person lived, regardless of territorial status. The reference to “ non self-governing territories ”<sup>16</sup> was designed to ensure that the UDHR included people living in colonies. This is important, considering that article 22 of the League of Nations Covenant provided for civilizationally superior states to “ tutor ” the “ backward ”

people of mandated territories, as a “sacred trust of civilization” until their people were deemed ready for independence. Although mandatory powers were obliged to make annual progress reports to the Permanent Mandates Commission, to be under tutelage connoted the inferior status of a ward, not a co-equal sovereign nation. This scheme sought to mitigate the rapacity of colonialism; however, grading peoples into degrees of being “civilized” cultivated resentment. This was rejected with the advent of the peoples’ right of self-determination, which gained momentum in the 1960s, when “the subjection of peoples to alien subjugation, domination and exploitation” was declared to violate fundamental human rights.<sup>17</sup> Notably, some of the colonial and Allied Powers long resisted the inclusion of racial-equality clauses in general instruments like the League of Nations Covenant and U.N. Charter proposed by Asian and other leaders<sup>18</sup> for fear that this would delegitimize colonial rule or race-based immigration policies such as Australia’s “White Australia” policy.<sup>19</sup>

Today, it is accepted that many of the non-binding UDHR standards<sup>20</sup> have attained the status of customary international law (CIL).<sup>21</sup> They have also been embedded in the major human rights treaties, and their influence is evident in the ubiquity of equality and non-discrimination in constitutions globally. The general human rights corpus today is grounded on the “International Bill of Rights” consisting of the UDHR and the 1966 Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR). These covenants give expression to UDHR standards and elaborate upon them. Subsequently, topic-specific multilateral treaties dealing with the elimination of specific forms of discrimination as they relate to race, women, and disabled persons were adopted. Discrimination was also addressed in numerous non-binding declarations in relation to religious intolerance; indigenous people; and national, ethnic, cultural, religious, and linguistic minorities.<sup>22</sup> Equality and non-discrimination also feature prominently in regional human rights instruments.<sup>23</sup>

The Inter-American Court of Human Rights, a regional human rights court<sup>24</sup> declared “equality and non-discrimination” to be *jus cogens*. Thus, its status as a foundational human rights principle is unquestioned. However, the dynamic concept of equality, like liberty, is an open-textured term whose content is elusive. There are varied conceptions and formulations of equality and a range of grounds or personal characteristics on which basis discrimination is prohibited in law and policy, all carrying different human rights implications in terms of proscribed and prescribed conduct.<sup>25</sup>

## The Challenges of Formal Equality

Formal equality does not address the substantive content of the law but focuses on treating like alike in terms of burden and privilege. It proscribes unequal treatment of persons within the same class, while permitting treating what is unlike differently. All moral and legal arguments can be framed in the form of an argument for equality. Equality is, as Peter Westen forcefully argued,<sup>26</sup> “an empty vessel with no substantive moral content of its own.” It is parasitic on an anterior moral standard; the bare invocation of “equality” provides no moral guidance on permissible differentiation.

Every substantive equality claim<sup>27</sup> draws content from a particular philosophical view of equality, justice, and human flourishing, which determines what differences are relevant and warrant equal or different treatment. None of these are uncontroversial. Substantive equality has led to dissimilar treatment through positive action or methods like quotas and special rights to remove systemic barriers or stereotypes that disadvantage particular groups in terms of their participation in political and economic life. The goal may be to prevent status harms and to secure equality of result in terms of welfare and “equal respect and concern”<sup>28</sup> in terms of equality as lifestyle for all social groups.

The question then is, as a matter of international human rights law, what is the content of “equality and non-discrimination” and who may authoritatively determine this, particularly when morally controversial issues are involved? In an age of identity politics, these principles have become staples in legal and political discourse, shifting away from common humanity by positing a privileged class and a disadvantaged class and prescribing a project of achieving “equality” between them.

From the original focus on combatting racial discrimination, various social agendas, particularly those based on sexuality issues that blur status and conduct, have been polarizing and divisive. While gaining traction amongst a coalition of U.N. experts and officials, supportive states, and non-governmental organizations, the sexuality agenda also attracts strong criticism and rejection. For example, the African Group stated at a Human Rights Council discussion on sexual orientation and gender identity (SOGI) issues that:

[W]e take strong exception to any attempt to try to distort the noble cause of fighting racism to promote and advocate specific forms of unacceptable social behaviour falling outside the scope of internationally agreed human rights norms and protection....[S]uch attempts are condescending

and disoriented, as they constitute a form of imposition of cultural values on others, and undermine the very notion of human rights and their universality.<sup>29</sup>

There is no universally accepted, univocal conception of equality and non-discrimination in a plural world. Norms must be rationally justified—not merely asserted—and enjoy broad support. Equality is not an absolute value and, in particular contests of applications, conflicts between competing rights and goods may arise. Classifications that satisfy tests such as reasonableness, necessity, or proportionality<sup>30</sup> may be considered legitimate in various forums in determining how much “equality” is required. Ultimately, the just interpretation and implementation of human rights requires “sensitivity to cultural diversity and the validity of other ends.”<sup>31</sup>

## Historical Intent: Underlying Philosophy and Relevant UDHR Articles

The UDHR elaborated upon the United Nations (U.N.) Charter’s commitment to “human rights and fundamental freedoms” for all “without distinction as to race, sex, language or religion.”<sup>32</sup> This list of four prohibited categories is the only way the U.N. Charter gave content to human rights,<sup>33</sup> aside from the “principle of equal rights and self-determination of peoples,” which refer to a collective entity. While the list of prohibited grounds expanded in subsequent texts and the jurisprudence of quasi-judicial and judicial bodies, the focus for the first 30 years of the U.N. Charter was on racial discrimination, given issues like U.S. segregationist policies, apartheid in South Africa, and the Indian caste system.<sup>34</sup>

To ascertain what model of equality and non-discrimination is espoused, the UDHR must be read holistically, not discretely, as an integrated document.<sup>35</sup> Articles 1 and 2 have a descriptive function in seeking to guarantee human rights through an equality paradigm applicable to all members of the human family. Article 1 speaks positively of the reason and conscience all humans share, while article 2 is framed negatively as proscription. Equality is not just a right but reinforces the very universality of rights, as everyone is a human rights beneficiary. The U.N. Charter and International Bill of Rights<sup>36</sup> “devote more attention” to preventing discrimination than any other single category of human rights.<sup>37</sup> Freedom from discrimination has been called “the most fundamental of the rights of man...the starting point of all other liberties” and an “indispensable element of the very notion of the rule of law.”<sup>38</sup>

## UDHR Articles 2 and 7: Fused and Later Separated

Article 2 of the UDHR principle of non-discrimination is violated when differential treatment is accorded to an individual or group on the basis of personal characteristics. Any item in article 2 can be used to interpret other UDHR articles. For example, a person cannot be barred from the article 21 right of participation in government on the basis of language.

What UDHR article 7 added to the principle of non-discrimination was positive state obligations to protect individuals from discrimination by ensuring equality before the law and the equal protection of the law, as well as protection from incitement to discrimination.<sup>39</sup> It creates a separate right not to be discriminated against, including rights not mentioned in the UDHR.

Given the UDHR's individual-centric orientation, there is no minority-rights clause. However, it was thought that article 2, in referencing race, color, language, and national origin would provide a "strong protective wall around membership in ethnic, cultural and linguistic minority groups."<sup>40</sup> These adjectives describe the only groups currently recognized as "minority groups" in international law, rejecting a more sociological approach under which any numerical minority could be considered a minority for legal purposes.<sup>41</sup>

The UDHR's drafting history<sup>42</sup> shows that article 2 shared a common origin with article 7. Originally, both were fused in a single draft provision authored by John P Humphrey,<sup>43</sup> divided, merged again,<sup>44</sup> and then finally found expression as two separate articles.<sup>45</sup> Both use the prohibition against discrimination in slightly different ways.<sup>46</sup> Rene Cassin<sup>47</sup> redressed Humphrey's over-emphasis on non-discrimination and discounting of the accountability component of "equality before the law,"<sup>48</sup> by fashioning a separate article with the emphasis on equality before the law, which was removed from the first sentence of draft article 2. He thought that both articles contained similar, but not identical, ideas: Article 2 was the "non-dynamic part of the equality package,"<sup>49</sup> while what became article 7 sought to implement and translate the principle into practical reality by granting everyone legal protection against discrimination within his or her own country.<sup>50</sup>

UDHR Article 2 lists 10 protected categories, which goes beyond the four grounds mentioned in the U.N. Charter. To combat the fascist, racist Nazi denial of equality, the Communist delegates insisted upon adopting the prohibition against discrimination as a "drafting principle" that would "deeply affect the meaning of every article they wrote."<sup>51</sup> Their intent was

to ensure the UDHR was “a secular document,”<sup>52</sup> acceptable to persons from all religious and non-religious persuasions. The use of terms “such as,” which preceded the list, was meant to demonstrate the exemplary rather than exhaustive nature of the list.<sup>53</sup> “no inequality could be justified on the basis that the given distinction was not specifically mentioned in this article.”<sup>54</sup> Nonetheless, article 2, paragraph 1 does not establish a “general rule of equality but only of equality in regard to” UDHR rights. Article 2 does not establish “the right to equal treatment as a human right, *but only as a principle of the Declaration.*”<sup>55</sup>

During the drafting process before the Sub-Commission for the Prevention of Discrimination and Protection of Minorities (SCPDPM) for example, the Indian delegate, Minocheher Masani, proposed adding “color.” The last three items, “property, birth or other status,” at the end of the first paragraph of UDHR article 2 were discussed in depth.<sup>56</sup> In particular, “other status” would seem to encompass any possible basis for distinction, although article 2 itself is confined to UDHR rights—unlike article 7, which is broader in reach, similar to article 26 of the ICCPR.

The origins of these terms are worth examining. Before the SCPDPM, Soviet Delegate Alexander Borisov proposed including “property status or national or social origin,”<sup>57</sup> clarifying that “national origin” meant national characteristics rather than state citizenship (nationality).<sup>58</sup> There was some contestation over including “property status,” as the U.K. and U.S. representatives thought “property” should be deleted, leaving “status,” which they considered inclusive enough.

## Discussions of Property, Birth, and Other Status in the UDHR

The Soviets considered “property status” necessary as it could affect how other UDHR rights, like the equal right to education, would be enjoyed, as the poor in many countries receive no education or inferior education. The intent was to ensure equal rights for the rich and poor, regardless of economic wealth.

In a later drafting session, Ukraine representative Michael Klekovin wanted to insert the concept of *soslovie* (class or social status) after “property status.” While the concept was discussed, no English equivalent could be identified. The Ukrainian proposal was directed against feudal class privilege, which was determined by birth, not wealth.<sup>59</sup> Klekovin accepted the Chinese representative PC Chang’s proposal to add the word “or other” between the words “property” and “status”, to read “property or other status.”

Soviet delegate Alexei Pavlov later proposed before the Third Committee that the word “class” be added after “property or other status,” explaining that the U.S.S.R. amendment aimed to abolish economic privileges certain groups enjoyed in feudal Europe. While Rene Cassin thought that “property or other status” covered these concerns, he supported the inclusion of “class.”

The Chairwoman of the Human Rights Commission, American First Lady Eleanor Roosevelt, observed that the Commission added the words “or other” to the original phrase “property status” to accommodate views like that of Pavlov’s.<sup>60</sup> A small drafting committee proposed that the Russian version of article 2 should contain the word “*soslovie*”; its literal translation in English should be “estate,” but instead, the term “birth,” rather than “class,” would be used in the English version. Thus “birth” in article 2 was designed to prohibit discrimination “on the basis of inherited legal, social and economic differences” in the enjoyment of all UDHR rights. Morsink noted that many of the drafters understood and accepted this call for “a far-reaching egalitarianism.”<sup>61</sup> Thus, the reference to “birth” in article 2 prohibited discrimination based on socio-economic factors, distinct from the “metaphysical and moral meaning”<sup>62</sup> of birth under article 1.<sup>63</sup>

The importance of the specific meaning of “birth,” which was vigorously debated, was evident in criticism directed at the style committee for shifting the placement of “birth” from the end of the list (when it was associated with the later social and economic items) to the middle (when it was associated with “race, sex, language and religion”). Soviet delegate Alexander E. Bogomolov said such placement deprived “birth” of its intended meaning, rendering it ambiguous or having biological implications. Eventually, “birth” was restored to its original place and context, thereby also restoring “its original meaning of (mostly inherited) social and economic privileges.”<sup>64</sup> In other words, the term “other status” originally was designed to address inherited economic privileges.

## Post-UDHR Developments and International Human Rights Standard-Setting

In 1966, the ICCPR<sup>65</sup> and ICESCR<sup>66</sup> were open for ratification and entered into force in 1976. Article 2(1) of the ICCPR and Article 2(2) of the ICESCR are non-discrimination clauses under which state parties guarantee the enjoyment of covenant rights “without distinction of any kind, such as” (ICCPR) and “without discrimination of any kind as to” (ICESCR) the 10 prohibited grounds listed in article 2 UDHR.<sup>67</sup> General Comment No. 20

of the ICESCR Committee observed the use of “other status” indicated the changing nature of discrimination over time to include grounds comparable to expressly recognized grounds. This process involves value judgements.<sup>68</sup>

Article 2 of the covenants express the principle that “the implementation of human rights under international law is primarily a domestic matter,” reflected in the exhaustion of domestic remedies rule. International implementation “is essentially limited to the supervision of domestic measures by political, quasi-judicial or judicial organs.”<sup>69</sup> Article 2 of the ICCPR has an “accessory character” and can only be violated in conjunction with the concrete exercise of any Covenant right which gives rise to state duties; it does not establish “independent subjective rights.”<sup>70</sup> The covenant does not treat equality and non-discrimination as absolute values as covenant rights draw distinctions: Article 6(2) of the ICCPR prohibits imposing the death sentence on persons under 18 or pregnant women; article 25 confines rights of political participation to citizens; while article 2(3) of the ICESCR allows developing countries to distinguish between nationals and non-nationals in granting economic rights. Both covenants contain articles that specifically mention equality.<sup>71</sup> Article 27 of the ICCPR recognizes the rights of persons belonging to ethnic, religious, or linguistic minorities to individually or communally enjoy “their own culture, to profess and practice their own religion, or to use their own language.” The adjectives qualify and identify which minority groups have rights under the covenant, and General Comment No. 23 recognizes that state parties need to undertake positive measures to ensure this right is not violated.<sup>72</sup> These provisions make non-discrimination the “dominant single theme” in the ICCPR.<sup>73</sup>

Like UDHR article 7, ICCPR article 26 is an autonomous right to equality that applies to rights not mentioned in the covenant.<sup>74</sup> While “equality before the law” relates to enforcing laws, “equal protection of the law” directs the legislature not to enact discriminatory laws, and may entail a positive duty to enact special measures<sup>75</sup> with possible horizontal effects on others, for example, in the workplace.<sup>76</sup> Article 26 explicitly lists grounds of prohibited discrimination by guaranteeing “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.”<sup>77</sup> These “especially reprehended personal criteria” run “an increased risk of a violation of the prohibition of discrimination”<sup>78</sup> and may help to establish or disprove the reasonableness of a classification.

Article 26 of the ICCPR obliges states to take active measures against discrimination. Both ICCPR articles 2 and 26 prohibit discrimination *only*

where distinctions are unsupported by reasonable and objective criteria<sup>79</sup> or where there is no need to secure compelling social values. As such, determining whether there is discrimination and what is reasonable must be done on a case-by-case basis, and this “depends on subjective value judgements as well as on the respective cultural, religious and social traditions of different societies.”<sup>80</sup> For example, a system of progressive taxation requiring people in higher income brackets to pay more taxes does not violate ICCPR article 26, serving the legitimate purpose of equitable wealth distribution.

Nonetheless, the unclear meaning and boundaries of the right of substantive equality in article 26 of the ICCPR is such that the article remains “extremely controversial” with respect to its historical background and interpretation given its “potentially great explosive force.”<sup>81</sup> The Netherlands considered denouncing the ICCPR and re-ratifying it with a reservation to article 26 in response to a Human Rights Committee (HRC) decision relating to equality of women.<sup>82</sup> As prevailing social views are not always determinative of what is reasonable, the question of *who decides* whether a rule is reasonable “may be as significant as the test for what constitutes discrimination.”<sup>83</sup>

Within the U.N. regime, specialist human rights treaties and declarations have been adopted that expand on prohibited grounds of discrimination, including age, disability, nationality, and sexuality, and embracing a complex range of factors including identity, belief, and behavior. Some monitoring bodies have advocated controversial implementation methods, as when the HRC endorsed reverse discrimination through reserved seat quotas in elected local bodies for women and reserved elected positions for certain castes in India.<sup>84</sup>

Unlike the 1966 covenants,<sup>85</sup> topic-specific human rights treaties have described what “discrimination” constitutes.<sup>86</sup> These treaties have expanded upon the specific obligations “equality and non-discrimination” entail,<sup>87</sup> such as positive action, including temporary affirmative action, to eradicate sexual stereotypes (Convention on Elimination of Discrimination Against Women [CEDAW], article 5), or to correct historical injustices. The CEDAW targets both direct and indirect discrimination. The Committee on Elimination of Racial Discrimination (CERD) condemned segregation as discrimination,<sup>88</sup> while the CEDAW committee issued recommendations treating violence against women as systemic discrimination.<sup>89</sup>

Discrimination is addressed through methods like education and laws criminalizing the advocacy of racial or religious hatred, as article 20 of the ICCPR requires. The Convention on Rights of Persons with Disabilities

seeks to promote equal treatment when possible, while respecting the different needs of the disabled by requiring states under article 5(3) to “ensure that reasonable accommodation” is provided. These treaties recognize that adopting special measures to accelerate *de facto* equality do not constitute discrimination, which goes beyond viewing equality and non-discrimination as largely “last resort procedural provisions,”<sup>90</sup> in embracing a substantive conception.

## Developments and Trends: Juridical Status and Interpretive Disagreement

While there are core equality and non-discrimination provisions in primary international human rights instruments, their variable formulation and interpretation has “led” to a spectrum of different results.<sup>91</sup> They contain open-textured terms like “any social condition” or “other status,” catch-all clauses to potentially accommodate any distinction, and which could be abused. This gives rise to the problem of who should decide what constitutes a category of prohibited discrimination and on what basis? Typical of U.N. human rights monitoring bodies, the Human Rights Committee has found that the list of prohibited grounds under article 26 of the ICCPR was not closed and that “nationality” was covered under “other status.”<sup>92</sup>

In one of the great controversies of our time, discrimination on the basis of sexual orientation or preference has been enlisted before domestic courts and international forums in matters relating to laws criminalizing homosexual conduct, efforts to equalize the age of consent regarding heterosexual and homosexual conduct,<sup>93</sup> and same-sex marriage. Such issues may be characterized as a matter of public morality to be determined by elected legislatures or as implicating justiciable constitutional rights to equality or privacy. Although a constitutional right in some jurisdictions, the claim that prohibiting discrimination on the grounds of sexual orientation is an international (as opposed to regional) human right is a contested one. The suggestion that equality arguments can add “decisive weight” to complex legal debates by helping “to depoliticize issues or at least to make them more politically digestible”<sup>94</sup> is somewhat disingenuous. This is to use equality rhetorically, in the sense that no one wants to be against “equality”—but it evades the need to justify an alternative ethic privileged under the guise of equality.

While the substantive issues concerning rights based on sexual orientation will continue to be debated globally, we must resort to the test of international legality and the doctrine of sources to ascertain whether a

putative norm has acquired the status of international law (*lex lata*) or whether it remains a political claim/soft law (*lex ferenda*).

## Customary Human Rights Law

In order to be recognized as a matter of customary international law, a putative norm must have both “extensive and virtually uniform”<sup>95</sup> state practice and *opinio juris*, a sense of legal obligation by states as distinct from comity, tradition, or expediency.

In proving consistency of practice, the sample size cannot be selective. For example, the Singapore High Court upheld the constitutionality of a law criminalizing homosexual conduct by males, attributing no weight to jurisdictions that decriminalized homosexual conduct and the positions of international and regional organizations. What is adopted elsewhere may not be suitable in Singapore. While Canada and the United States have decriminalised homosexual conduct, other countries continue to criminalise it “such as Botswana, Malaysia, Sri Lanka, Sudan, Tanzania, Yemen and the Solomon Islands.”<sup>96</sup>

These divergent approaches do not demonstrate the “extensive and virtually uniform” practice required for a norm to attain CIL status. Indeed, the evidence indicates that a significant number of states do not consider there to exist a binding international legal obligation to decriminalise homosexual conduct, given their retention of laws criminalising sodomy. This points to the lack of international legal status of a putative norm prohibiting the criminalisation of sodomy, which is at best *lex ferenda*, not *lex lata*.<sup>97</sup>

Even if a CIL norm evolves with the support of most states, it may not apply to a persistent objector state.<sup>98</sup> When a CIL norm is opposed by a state, the issue is what rank it receives within a monist or dualist municipal legal systems, whether it is superior, co-equal, or inferior to the constitution and statutes, for example. In a monist system, a CIL may be directly received as part of the national legal system and may be applied by a court for various purposes, such as to influence interpretation or to ground a cause of action.

However, the automatic reception of a CIL norm within the domestic legal system does not settle the rank a CIL norm may enjoy within a municipal system. It may carry the same or greater weight than statutes or the common law (case law). In a dualist system that emphasizes national sovereignty and self-determination, CIL is not automatically part of domestic law, but must first be incorporated into national law—such as through express judicial recognition and acceptance or a statutory enactment—in order to have legal effect. There is no uniform global approach on how international

law is ranked within a domestic legal system, whether it has constitutional, statutory, or common law status,<sup>99</sup> such that close attention must be paid to the context.

## Controversial Claims Based on Sexual Orientation

While equality and non-discrimination may be a foundational human rights principle, a controversial interpretation of it involving discrimination on the basis of sexual orientation does not command universal consensus that it enjoys legal status. A global examination of national approaches demonstrates widespread dissent both within and between states and between inter-governmental organisations.

Within the U.N. regime, the creation of the controversial mandate of the U.N. Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity (SOGI) met robust resistance. In particular, the lack of clarity of the vague terms of “sexual orientation” and “gender identity,” which were not enshrined in international law, was such that member states were concerned that the mandate could not be carried out fairly.<sup>100</sup> Political strategies to mainstream the SOGI agenda within the U.N. human rights regimes include groups of states issuing joint statements before the Human Rights Council, rather than risking defeat by introducing it as a resolution for the U.N. General Assembly to vote on. The latter may be met by counter-resolutions.<sup>101</sup> High level U.N. bureaucrats<sup>102</sup> actively support the SOGI agenda, and some states use the Universal Periodic Review process to draw attention to SOGI issues.<sup>103</sup>

## The Absence of Consensus Around New SOGI-Based Rights

For every Council of Europe recommendation to combat SOGI discrimination,<sup>104</sup> there is a competing view that the attempts to add SOGI as protected categories to international treaties does not, in fact, seek equal treatment—but instead seeks special rights for a specific group of individuals united only by their sexual conduct and subjective internal sense of gender. The lack of clarity around the meaning of SOGI discrimination contributes to these concerns. In Western societies that have adopted SOGI non-discrimination laws, mere disagreement over same-sex marriage has led to state punishment of religious believers.<sup>105</sup>

A report prepared for the Organisation of Islamic Conference (OIC) views SOGI-based claims as “the most controversial subject” pitching “traditional societies in the Muslim and most African countries as well as many

of the religious communities against Western societies,” where activists are “lobbying hard” to claim SOGI “as one’s inherent human right based on individuals’ choice and consent.”<sup>106</sup> The OIC Report underscores that Muslims hold “no specific animus against homosexual individuals”; rather, they disapprove of sexual behavior that goes against their religious beliefs.<sup>107</sup> The report considers that special rights for so-called “sexual minorities,” which is not a legal term of art,<sup>108</sup> are unnecessary as international human rights law has enough clear provisions to combat human rights violations, including violence and discrimination, against any person or group on any ground. The report considers that sexual orientation has no legal foundation in human rights law and that this vague term was never defined or accepted in any human rights instrument or U.N. document by the consensus of member states.

The OIC report considers that “the slanted narrative of ‘genderless marriage’ and ‘alternative form of family’” based on one’s “claim of genetically predisposed ‘sexual orientation’” as a basis of seeking “specific protective laws” is a “suicidal social experiment.”<sup>109</sup> Islamic teachings, and indeed, mainstream Judeo-Christian teachings, do not support homosexual conduct as an identity or the norm.<sup>110</sup> It recognises that debates about whether homosexuality is inborn and immutable or whether reparative therapy is possible for gender identity disorder are heavily politicized.<sup>111</sup>

The OIC report supports the traditional view of marriage and family, which it considers “under assault” by those who argue marriage is based on so-called heteronormative biases or based on sex stereotypes and who seek to radically redefine it as the “union of any two persons.”<sup>112</sup> Indeed, a person identifying as homosexual and a heterosexual person have the equal right to marry someone of the opposite sex, provided other conditions are observed, for example, age, blood relation, and not already being married. What is being demanded is not equal access to marriage as an existing good, but demands for “the transformation of that good,”<sup>113</sup> that is, to redefine marriage.

There are, of course, human rights to which *all* human beings are entitled, regardless of sexual orientation or preference, such as the right to vote, to a fair trial, and equal pay for equal work. As such, each claim must be examined on its merits to see if it is based on an objective and reasonable classification. But these sharply divergent views underscore a lack of consensus about the issue of whether the emerging claims of rights based solely upon sexual orientation and gender identity constitute universal human rights.

## Same-Sex Marriage and Subsidiarity in Europe

Some jurisdictions, including Western Europe, have recognized same-sex marriage based on a constitutional right to privacy or equality.<sup>114</sup> However, the European Court of Human Rights (ECHR) in *Schalk and Kopf v Austria* also recognizes that states have a valid interest in legally protecting the traditional definition of marriage.<sup>115</sup> There was little common ground between contracting states in Europe about such sensitive areas of social, political, and religious controversy, owing to the differing cultural, historical, and philosophical differences of these states. Further, the Constitutions of Poland, Bulgaria, Slovak Republic, Croatia, Slovenia and Hungary affirm marriage as a union between a man and a woman, underscoring the lack of even a regional—much less a global—consensus on whether equality and non-discrimination require the recognition of ‘same-sex marriage.’

Thus, regarding controversial issues like same-sex marriage or euthanasia,<sup>116</sup> European states enjoy a wide margin of appreciation, with the ECHR leaving the matter to the national authorities and democratic deliberation. To act otherwise would be to “lose sight of the subsidiary nature” of the ECHR’s international enforcement machinery.<sup>117</sup> The domestic margin of appreciation goes hand in hand with European supervision. The court has permitted restrictions on convention rights such as expressive freedoms where the domestic laws of the contracting parties lack “a uniform European conception of morals” and where the views taken by these laws as to what morals require varies both in time and place. Given that national authorities were in “direct and continuous contact with the vital forces of their countries,” the ECHR considered these state authorities were better positioned than international judges to give an opinion on “the exact content of these requirements” and the necessity of restrictions.<sup>118</sup>

## Human Rights Treaty Law

No U.N. human rights treaty explicitly prohibits discrimination on the grounds of sexual orientation, although regional treaties or some domestic constitutions have done so.<sup>119</sup> Indeed, activists have opined there are “two particular omissions” in the UDHR: Sexual orientation and gender identity are not mentioned in article 2. Nor does article 16 explicitly establish rights for same-sex couples to marry and found a family. The issue was clearly not raised during the drafting of the UDHR in 1948 or during the drafting of the 1966 covenants.

This omission is described as “understandable” since “a new normative context around sexual orientation and transgender status has only emerged in the past 20 years.”<sup>120</sup> While there is a growing trend of international human right bodies recognizing these, the issue remains fiercely contested. The grounds of prohibited discrimination are not closed, and attempts are being made to declare or imply a new right and park it under the apparently all-encompassing category of “other status,” or to expansively read existing rights or principle. This raises the question of what constitutes a legitimate interpretative approach in construing treaties.

If a treaty vests an adjudicatory body with powers to make binding judgments, this creates binding treaty obligations for state parties only, not for third parties.<sup>121</sup> If the treaty declares pre-existing CIL or has the effect of crystallizing CIL at the moment of adoption or subsequently generates a CIL rule through widespread consistent state practice, the treaty norm is generally binding *qua* CIL norm, not *qua* treaty norm.<sup>122</sup> Factors like the extensiveness of ratification, the number of reservations affect the assessment of whether such extensive consensus has been reached, pointing to the generality of a putative CIL norm.<sup>123</sup>

In the absence of a U.N. human rights court, regional human rights courts, such as the Inter-American Court of Human Rights for example, have read “any other social condition” under article 1(1) of the American Convention on Human Rights to include “sexual orientation discrimination,” which could be limited only by “weighty reasons.”<sup>124</sup> These decisions bind state parties in contentious cases as a treaty obligation.<sup>125</sup>

Certain human rights bodies may have monitoring or quasi-judicial powers, but no U.N. treaty authorizes a treaty body to issue binding decisions on state parties when considering their state reports, only “concluding observations”<sup>126</sup> and recommendations; such bodies may also issue general comments on specific treaty clauses that are hortatory, not mandatory. When optional protocols authorize individuals to send communications alleging human rights violations to a monitoring body, that treaty body may examine the communication and transmit its views with its recommendations to the concerned parties.<sup>127</sup> They do not have judicial power to issue binding judgments or to declare law by fiat, though the interactions of these bodies with state parties may provide evidence of emerging norms.

In this dialogical process, these bodies can push an agenda through publicity, as when the HRC frequently raises sexual orientation issues in relation to criminal law, the workplace, and the lack of anti-discrimination legislation or educational programs to combat negative attitudes toward homosexuality.<sup>128</sup>

Many human rights bodies with cosmopolitan drives have sought to promote their vision of substantive equality by expansively interpreting what equality and non-discrimination requires or by a radical interpretation of the text not contemplated by the authors of an instrument. A prominent example is when the HRC, under ICCPR articles 2 and 26, opined that sex (a biological concept) could be interpreted to encompass sexual orientation and gender identity (social constructs) in *Toonen v Australia*.<sup>129</sup> The decision itself was based on the committee's view that the right to privacy under article 17(1) of the ICCPR was violated by the Tasmanian Criminal Code criminalizing homosexual conduct. In a later decision, the HRC stated that sexual orientation was covered by the "other status" grounds of article 26, rather than as an aspect of sex.<sup>130</sup>

To read sexual orientation into "sex" is a method that has no basis in historical intent or, indeed, the conventional method of treaty interpretation, as set out in the Vienna Convention of the Law of Treaties (VCLT).<sup>131</sup> What the text meant to the parties collectively when they were negotiating or ratifying the treaty in question needs to be examined to see whether there was intent to include a particular implicit ground of discrimination.<sup>132</sup> The point is to detect the parties' intention, not to supplant them, as U.N. bureaucrats do not have legislative powers to speak for the international community—nor do U.N. monitoring bodies have determinative power to declare what the treaty means. It does not appear from any of the discussions during the 20 years between the adoption of UDHR article 2 and ICCPR articles 2 and 26 that there was *any* contemplation of the non-discrimination clause requiring states to repeal laws criminalizing certain forms of sexual conduct. During that time, most nations had laws against homosexual conduct and similar practices, which were considered contrary to public morality.<sup>133</sup>

Article 31 of the VCLT provides that treaties shall be interpreted "in good faith" to ascertain the "ordinary meaning" given to treaty terms "in their context" and "in light of its object or purpose."<sup>134</sup> Recourse to the *travaux préparatoires* is permissible to confirm a reading, under VCLT article 31, unless such reading is ambiguous, obscure, or leads to a "manifestly absurd or unreasonable" result under VCLT article 32. Article 31(3) provides that any subsequent agreement or subsequent practice regarding the interpretation of the treaty may be considered. For example, if most state parties, after signing a treaty containing no express "sexual orientation discrimination" prohibition, evince a pattern of repealing laws criminalizing homosexual conduct and relate this to a need to comply with international human rights obligations, this may furnish evidence of state agreement that the treaty was meant to address and invalidate such laws. Absent such patterns, the

evidence is less compelling, as when a state party attaches a declaration or reservation indicating contrary intent. Indeed, if a state repeals such legislation without reference to the need to fulfill human rights obligations, this does not provide material evidence of CIL, as reasons for amending a law may lie in political compromise and desire to please special interest groups or constituents.

There is no necessary connection between legalizing a once-criminalized practice in the name of equality, non-discrimination, and accession to a human rights treaty; what is required is a sense of legal compulsion as proof of *opinio juris*. State parties vary widely in their attitudes and practices toward homosexual conduct, from treating it as a right to treating it as a violation of a public good. Where legislatures genuinely object to certain conduct and are not seeking to persecute people on the basis of a “status,” there can be no consensus that a treaty with a non-discrimination guarantee should be read as prohibiting distinction on grounds of sexual orientation. Even if it is the view of the treaty-monitoring committee, these views do not bind state parties or reflect the emergence of a CIL norm, as the practice of state parties must be factored in.

## Argument by Reiteration

*Toonen* is celebrated as a strategy for advancing the SOGI agenda in an international forum at a stage in history when the agenda had little traction before legislatures and courts, producing a decision that could be used to precipitate domestic legal changes. While the views of human rights treaty bodies are not enforceable and easier for states to ignore than legally binding judgements, it has been noted these are “widely published, and carry significant moral and persuasive authority.”<sup>135</sup> A HRC decision influenced the Australian Parliament to enact laws rendering Tasmania’s law against homosexual conduct ineffective. There is a tendency to use quasi-judicial language to confer an aura of authority upon these bodies’ recommendations.<sup>136</sup> Further, non-binding HRC decisions are treated like precedent, framed as asserted rules of law, and cited repeatedly by U.N. bureaucrats,<sup>137</sup> committees,<sup>138</sup> and even some foreign courts<sup>139</sup> sympathetic to expansive readings of equality, non-discrimination, and privacy rights.

Many U.N. bodies and officials later cited *Toonen* as though it were authoritative precedent: This is an exercise in self-validation and *not* an accurate assessment of state practice and *opinio juris*, nor is it a legitimate interpretation of a legal right. Similar to the “living tree” approach to constitutional interpretation, in which the constitution as an organic instrument

is read in a “progressive” manner to adapt it to changing times, elite judges or bureaucrats are assumed to know what progressivism requires, despite difficulties because “progress is a comparative of which we have not settled the superlative.”<sup>140</sup> This type of interpretive method discounts historical intent, precedent, and even principle, in favor of the judicial imposition of subjective political preferences as an exercise in counter-majoritarianism. It is unclear why a judge would do a better job than “majoritarian politics” in discerning what a progressive rights interpretation might be, given there is no uncontroversial theory of what minority interests deserve protection.<sup>141</sup>

“Living tree” approaches may be endorsed in certain jurisdictions, but they also attract criticisms of judicial overreach or juristocracy. Some consider that the rule of law and separation of powers is undermined where courts operate as second legislative chambers, a role certain judiciaries assiduously reject.<sup>142</sup> Various regional human rights courts and U.N. bureaucrats appear to favor reading human rights treaties as “living instruments,”<sup>143</sup>—discounting historical intent—and allow their preferred value-laden interpretations to be advanced. This renders texts infinitely malleable, enlisted to serve whatever the interpreter deems a worthy cause. The strategy of reiteration is to keep repeating opinions until they achieve actual or perceived canonical status, with successive iterations relying for authority mostly upon one another. Each victory is celebrated as the acme of progressivism, and dissenting views are silenced through intimidation, shaming, and slurs.

State parties of human rights treaties do not regard comments by treaty bodies as legally binding,<sup>144</sup> though their statements may exert political pressure and influence national courts. Hence, a wide divide may exist between state practice and the opinions of treaty bodies and U.N. personnel,<sup>145</sup> which are neither authoritative nor persuasive. The question of how and who should interpret open-textured treaty terms boils down to one of institutional competence and propriety.

## Soft-Law Instruments

Activists have invoked soft international law declarations or political documents in legal non-discrimination arguments as a political strategy to advance certain interpretations of texts or in hopes of generating CIL. While some see soft-law norms in instruments like General Assembly resolutions carrying the support of some states as evidence of an emerging trend pointing to a human rights norm, others view them as indicating the absence of *opinio juris* in the face of sustained opposition, thus depriving the resolution of any legal authority.<sup>146</sup>

Private actors, describing themselves as a “distinguished groups of human rights experts” and activists, have issued non-binding documents such as the 2007 *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (YP),<sup>147</sup> which they characterize as representing the current state of international human rights law as it relates to SOGI issues. This document claims to draw on treaty provisions and CIL norms that deal with equality and non-discrimination in general.<sup>148</sup> The YP were updated and extended in 2017. Efforts have been made to promote it<sup>149</sup> and track its impact.<sup>150</sup>

Rather than reflecting the existing state of international law, the YP introduces radical interpretations of existing and novel rights, raising the banner of preventing “discrimination” to promote a radical agenda with implications for law, family life, and sexuality. These have been challenged as “an affront to all human and especially natural rights”<sup>151</sup> and rejected, demonstrating a failure of consensus.<sup>152</sup> Certain YP principles threaten to truncate other human rights, such as expressive freedoms that, it argues, must not be exercised in a way that “violates the rights and freedom of persons of diverse sexual orientations and gender identities.” Demands that education be enlisted to promote respect for diverse sexual orientations or that society support gender transitioning and reassignment programs are controversial: They seek to use state power to impose moral fiats, precipitating clashes with social conservatives and those of religious conscience, particularly of the Abrahamic faiths.

The YP are not the product of government negotiation and agreement, but of a group of self-selecting experts, U.N. bureaucrats, and LGBT (Lesbian, Gay, Bisexual, and Transgender) pressure groups attempting to present a radical social policy vision as binding norms. Some states have utilized it as a tool: France made an explicit reference to the YP in a Joint Statement on SOGI it sponsored issued in December 2009, although Ireland, Malta, and Poland demanded this reference be removed.<sup>153</sup> Nonetheless, it is clear that activists will continue to rally around the YP to try shape debate around its terms, to enhance its appearance of being authoritative, and to pass off *lex ferenda* as *lex lata*.<sup>154</sup> This, is in spite of criticisms that it constitutes a misinterpretation of the non-discrimination clauses contained in long-established human rights instruments and that sexual orientation is a vague term lacking legal foundation in any international human rights instrument and not agreed to by the general membership of the UN. Furthermore, Principle 2 of the YP seeks to elevate discrimination on grounds of SOGI to an effective trump—*with no room for reasonable accommodation* since equality is to be realized “whether or not the enjoyment of another human right is also affected.”<sup>155</sup>

This is nothing short of a power grab in service of a political project, without consideration for other human rights. *Yogyakarta Principles* drafter Michael O’Flaherty offered a provocative view that the reference in article 3 of the ICCPR to the “equal right of men and women” to enjoy ICCPR rights gave an elevated status to the prohibition against sexual discrimination. Since he deems sex interchangeable with sexual orientation, he relied on article 3 for the radical proposition that article 3 apparently “appears to elevate the suspect nature of sexual orientation-related discrimination to a higher level than that of the other listed categories.”<sup>156</sup>

Judicial reception towards using the YP as a guide to interpreting broad concepts like privacy and equality have been mixed. While the Nepalese Supreme Court cited YP definitions of SOGI,<sup>157</sup> the Philippines Supreme Court held that the obligations outlined in the YP “were not reflective of the current state of international law,” had no grounding in the list of formal sources under article 38(1) of the Statute of the International Court of Justice, and were not binding at international law.<sup>158</sup> The petitioner, it argued, had not “undertaken any objective and rigorous analysis” to ascertain the “true status” of “these alleged principles of international law” which were at best, *de lege ferenda*, or simply “well-meaning desires.” The court observed:

[N]ot everything that society—or a certain segment of society—wants or demands is automatically a human right. This is not an arbitrary human intervention that may be added to or subtracted from at will. It is unfortunate that much of what passes for human rights today is a much broader context of needs that identifies many social desires as rights in order to further claims that international law obliges states to sanction these innovations. This has the effect of diluting real human rights and is a result of the notion that if “wants” are couched in “rights” language, then they are no longer controversial.<sup>159</sup>

The judicial role in addressing emotionally-charged social issues in which “societal attitudes are in flux,” where even “the psychiatric and religious communities are divided in opinion,” was not to impose its own views. Rather courts should “apply the Constitution and the law,” uninfluenced by public opinion, confident in the belief that “our democracy is resilient enough to withstand vigorous debate.”<sup>160</sup> Soft law norms may precipitate debate, but it is not a foregone conclusion that they will “harden” over time to become binding law.

## Problems with New Interpretations of Equality and Non-Discrimination

In implementing human rights, much harm can be done “if not entrusted to the care of impartial, efficient and reliable institutions.”<sup>161</sup> Within the domestic context, debates over individual rights are struggled over “through a process of public debate, informed by the opinions (rarely unanimous) of professional elites.” Authoritative institutions may revise decisions. To prevent the imposition of the *diktat* of an unelected, unaccountable bureaucratic elite and the politicization of human rights law, “We need to have something like that [the equivalent of domestic processes and debate] in a form suitable to the international arena.”<sup>162</sup>

This is particularly important in relation to equality and non-discrimination, given their potential far-reaching effects in encompassing *all* laws and policies—even their potential horizontal application to private actors. Given the proclivity of many U.N. human rights actors to adopt expansive value-laden interpretations of this principle and to discount historical intent or general state agreement, it is important to be aware of the negative impact certain strains of substantive equality poses to freedom of public discourse, democratic will and other competing human rights and goods, contrary to the principle that human rights should be universal, indivisible, and mutually reinforcing.

## Taking Seriously the Law of Sources and the Universality of Human Rights

The principle of equality and non-discrimination is central to the human rights movement,<sup>163</sup> given that human rights are the only universal rights. However, to assert that everyone should enjoy equal rights is rhetorical, providing little guidance on how to implement and realize a human right. Because of its open-textured nature, there is a danger that equality and non-discrimination may become empty vessels to be filled with one’s preferred political philosophy or prey to political capture. This is evident in the use of non-discrimination to drive changes to law and sexuality, for example. Given the diverse conceptions of equality, this cannot be discussed in the abstract, but must be grounded in history and context. While law is not static and does change, it must be changed by legitimate processes.

In order to uphold the integrity of human rights law, a distinction must be preserved between *core* human rights as legal rights and *contested* political claims. Caution is needed against the sort of reckless activism that ignores the fact that rights have duties and that the existence of a duty “has to be

established beyond pointing to the value of the right to the right-holder.”<sup>164</sup> Attempts to use human rights terminology to legitimate a politically charged agenda will politicize human rights and devalue their currency. The legitimacy of human rights will be undermined where it acts to service the one-sided championing of liberal progressivist or fundamental libertarian values, “some of which run counter to the cardinal beliefs of various religious traditions.” To maintain credibility, human rights law must operate as the “*ius gentium* of our times, the common law of nations.”<sup>165</sup>

The development and application of human rights law must adhere to general international law principles and doctrines that largely rest on state consent, mitigated by the idea that this is constrained by higher law principles drawing from the natural law/natural rights tradition. Human rights law must broadly have the support of the will of the international community *as a whole*, and the views of the international community of states cannot be discounted in ascertaining the juridical status and normative content of a norm. Just as human rights law does not rest in theory on majority will, neither does it turn on minority will. An unrepresentative cosmopolitan elite is not empowered to declare the law for the rest of the world as keepers of the standard of civilization as *they* define it. Soft-law claims should not be carelessly treated as international legal obligations. National courts and authorities have the liberty to receive or reject soft law claims since these only provide guidelines, not obligations.

It undermines the universality of human rights law to claim that a controversial putative right is a human right. All such claims must be assessed and have a basis in treaty, CIL, or possibly general principles of law that would require said right to be present in *all* major legal systems, common and civil law, Islamic, Buddhist, communitarian, and liberal democracies. This is important, to avoid “human rightism,”<sup>166</sup> which confuses and conflates the categories of law and human rights ideology.

On rights claims that implicate matters of political and moral controversy, these should be debated before democratic domestic forums in order to respect the principles of national sovereignty and non-interference in internal affairs. This is distinct from the principle that established human rights are matters of international concern.

## Legitimate Difference of Views and a Global Margin of Appreciation

Author Susan Marks admits that “gender and sexuality politics may well appear less global when viewed from other vantage points,”<sup>167</sup> in which light,

to see sexual orientation discrimination as a settled matter is itself a European or North American perspective. There is a legitimate difference of views in this matter, shaped by national constitutional commitments and varied theories of judicial review in relation to structuring the parameters of rights and public goods and according weight to historical intent, precedent, principles, or moral theory.

Constitutions may specify what constitutes prohibited discrimination that courts are to give effect to or may give courts counter-majoritarian checks to develop these grounds through more open-textured provisions prohibiting discrimination on enumerated and analogous grounds.<sup>168</sup> Courts may demonstrate fidelity to the constitutional text in enforcing an explicit ground of discrimination<sup>169</sup> or in refusing to read in an implied ground on the basis that this should be by way of constitutional amendment where this is a viable possibility. Courts develop tests of legitimate differentiation based on criteria of necessity, reasonableness, or proportionality, which are shaped by contextual factors like culture and political philosophy. Courts may take sides on contested issues, such as whether homosexuality is immutable and warrants protection by prohibiting sexual orientation discrimination, or decline to do so, according to specific conceptions of separation of powers.<sup>170</sup> While some courts have found that laws criminalizing sodomy, which distinguish between heterosexual and homosexual conduct, can be justified on grounds of public morality, others take a contrary view.<sup>171</sup>

In *Toonen*, the HRC opined that treating sodomy laws as “moral issues” for “domestic decision” would immunize state interferences with privacy.<sup>172</sup> Former U.S. Supreme Court Justice Anthony Kennedy in *Lawrence v Texas*<sup>173</sup> noted that the court’s obligation was to “define the liberty of all, not to mandate our own moral code” drawn from tradition and religious beliefs. This is disingenuous insofar as it suggests such a definition of liberty is “neutral” and does not entail imposing a moral norm.

The reality is that moral decisions are unavoidable, with one public morality norm being replaced by the liberal vision of public morality, which treats heterosexual and homosexual sexual expression and partnership as morally equivalent. The latter assumes the state is being “neutral”<sup>174</sup> when allowing individuals to decide on their personal vision of the good, based on the meta-liberal norm of individual autonomy. The liberal theory of the good, based on consent and desire, is not neutral in espousing hedonism.<sup>175</sup> Indeed, the enactment of “hate speech” laws to penalize speech that ostensibly promotes or incites sexual orientation discrimination brings about the re-moralized state that centralizes and deploys power to bring about a certain way of thinking about public sexual morality. This could violate other

human rights like freedom of thought and religious belief, as well as stifle legitimate public debate and free speech. One man's hate speech is another man's political critique. Comparative analysis reveals no uniform approach.

Other courts consider public morality a legitimate legislative purpose since the state is not wholly without authority to regulate matters concerning sexual morality such as bestiality, incest, and child sex grooming; indeed, some courts appreciate that social values shape what equality requires,<sup>176</sup> and that legislation is needed to protect the "moral ethos of society as a whole."<sup>177</sup> However such laws that affect privacy by criminalizing private sexual conduct are subject to tests of proportionality, necessity, and reasonable classification.<sup>178</sup>

To merely invoke "equality" to argue against differing ages of consent for homosexual and heterosexual sex, for example, is to cynically deploy equality as "a mask for a substantive conception of the good which informs the distinctions and values at play."<sup>179</sup> Equality claims disguise hidden assumptions. There is a certain dishonesty, or at least inconsistency, between assertions that "decriminalization does not imply disapproval"<sup>180</sup> (in relation to sodomy law and privacy under the ECHR) and the argument that laws criminalizing homosexual conduct have a negative health impact (in that many homosexuals will not seek medical treatment for fear of the stigma). Implicitly, the assumption is that decriminalizing sodomy will remove the stigma associated with homosexuality and encourage more homosexuals to seek medical care when society approves of or morally equates homosexuality and heterosexuality.<sup>181</sup> Decriminalization, the removal of legal sanction, *does* signify or signal moral approval, which is a precursor for securing the advance of the far-reaching LGBT agenda.<sup>182</sup>

Arguably, when a proposed human right benefits a favored class of society while diminishing the human rights of others, it should be subject to rigorous democratic debate to ascertain the implications of such a claim. A human right not to be discriminated against on the basis of sexual orientation, which implicates a contested vision of equality, should not be prematurely declared a human right in order to quarantine it from further interrogation as to whether it adheres and coheres with the existing human rights corpus.

In this respect, the ECHR in *Frette v France*,<sup>183</sup> held that adoption laws that drew a distinction between would-be homosexual and heterosexual adopters were justifiable, given the diversity of national approaches to gay adoption within contracting states. This same margin of appreciation was recognized in *Schalk and Kopf v Austria*<sup>184</sup> in relation to same-sex marriage. While certain jurisdictions, as in North America, may recognize a constitutional right to same-sex marriage, this does not make it a universal human right. Even U.N. bureaucrats and human rights officials recognize

there is no international human right to same-sex marriage<sup>185</sup> drawing from equality or privacy, although they call for the legal recognition of same-sex couples and conferring upon them the same benefits traditionally married partners enjoy.<sup>186</sup> This, however, skips over the unsettled issue of whether unisex couples should receive this legal recognition or whether homosexual partnerships are morally equivalent to traditional marriage between a man and a woman. Such matters, which impinge on cultural traditions and religious sensitivities, are matters warranting robust public discussion, which is preferable to invoking equality to sneak in a privileged ethic, while pretending to be agnostic about the good.

Within a global setting in which fundamental value divergences are more acute, it is important to recognise a global margin of appreciation in interpreting contested rights claims and protecting a range of acceptable practices to vindicate the values of pluralism, subsidiarity, and democratic will. No global body is authorised to impose a *diktat* over a morally charged controversy with a far-reaching social agenda such as sexual orientation as a prohibited basis of discrimination, disregarding the agreement of states and national democratic processes.<sup>187</sup>

## Clash of Rights: Sexual-Orientation Discrimination and the Assault on the Human Rights and Fundamental Freedoms

Human rights co-exist in the same political space and may sometimes qualify each other. Any new human rights claim must be assessed for how it impacts other human rights and public goods. To exalt one putative human right to trump all others would be one-sided. To be fair, any emphasis on one human right over another must flow from its status as a peremptory norm and, even then, this does not preclude the need to optimize the enjoyment of all human rights.

Principles of SOGI discrimination in particular, have far-reaching<sup>188</sup> and negative effects on public discourse—and threaten to diminish other human rights.<sup>189</sup> This is evident in the far-reaching, intrusive demands of the SOGI discrimination agenda, set forth in documents like the YP and the reports and statements of some U.N. human rights officials that do not carry the broad support of states and the international community as a whole. These “new rights” run roughshod over established human rights with no attempt to achieve a reasonable accommodation or to give due consideration to competing human rights and public goods.<sup>190</sup> To advance these new rights involves promoting soft-law principle in the guise of universally binding norms.

**Right to Education.** Demands that governments should promote tolerance and respect for diverse sexual orientations through public education programs aimed against “homophobia” and “transphobia”<sup>191</sup> through “comprehensive sexuality education”<sup>192</sup> violate the human right of parents to instill values in their children. The failure to allow parents to opt their children out of public education on sexual morality contrary to their convictions would violate the prior right of parents “to choose the kind of education that shall be given to their children” as proclaimed in article 26(3) of the UDHR.

There are problems, too, insofar as the contents of “sexual orientation” are vague, and not every sexual orientation warrants protection, for example, bestiality, incest, necrophilia, pedophilia, polyamory, etc., are legally prohibited or socially frowned upon.<sup>193</sup> Where is the line to be drawn between acceptable and unacceptable sexual orientation, and who has the authority to do this?

**Freedom of Religion and Expression.** Expansive readings of non-discrimination on grounds like sexual orientation promotes liberty and equality for some at the expense of equality and liberty for others—particularly in relation to freedom of religion, conscience and expression, as protected under articles 18 and 19 of the UDHR.

Statement 19(d) of the YP advocates that notions of public order and public morality should not be used “in a discriminatory manner” to restrict free expression “that affirms diverse sexual orientation or gender identities.” In the same breath, statement 19(e) advocates that states ensure freedom of expression “does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities.”<sup>194</sup> This gives one sector of a community superior rights to other sectors, which is inegalitarian. Further, 19(e) of the YP is broad enough to be weaponized to shut down debate on reparative therapy<sup>195</sup> or views questioning the assumptions of the LGBT agenda in relation to “heteronormativity,” by proclaiming views that question LGBT assumptions be hate speech or a form of psychological harm that violates “human rights.” If all that homosexuality activists demonize as heretical is hate speech subject to legal or social sanction, the pillars of a free society that human rights are supposed to support are imperiled as moral dissent is then silenced by law or bullying tactics.

Principle 21 of YP would downgrade freedom of thought, conscience and religion by declaring they cannot be invoked to justify laws denying equal protection on the basis of SOGI and requiring that religious convictions about SOGI and their expression “is not undertaken in a manner incompatible with human rights.”<sup>196</sup> This is vague and could conceivably apply to a religious publication that states that homosexuality is a moral wrong, curbing religious speech.<sup>197</sup>

In the face of increasing calls to SOGI diversity, intolerance is demonstrated toward viewpoint diversity and other liberties like religious freedom, as where religious believers are expected to bear the burden and costs of their own lack of conformity in relation to views of sexual morality contrary to the non-negotiable tenets of their faith.<sup>198</sup> In various sexual orientation discrimination cases, individuals and organizations suffer detriment for adhering to their convictions supporting a more traditional sexual ethic, such as hoteliers who refused to let out rooms to homosexual couples or Roman Catholic adoption agencies who refuse to consider homosexual couples as prospective adoptive parents. If the primary principle is the best interests of the child, can it be argued that same-sex households are not in the child's best interests or must the contrary be assumed? Although co-equal rights may qualify each other, sexual orientation discrimination may operate as a trump card, such that when no reasonable attempt is made to accommodate the conscientious objection of a registrar who refused to conduct a homosexual civil partnership ceremony, as all employees were expected to conform to the council's conception of equality. This coerces individuals to assent to what they do not agree with, which is oppressive.<sup>199</sup>

U.N. bureaucrats have approved the launching of national public education campaigns to "counter homophobia and transphobia,"<sup>200</sup> where a re-moralized state would impose a publicly endorsed ethic towards sexuality. This trivializes freedom of conscience, religious freedom, and the rights of faith communities and their members to free speech and the right to engage in legitimate public debate, as a facet of the right to political participation.<sup>201</sup>

**No Trumping Human Rights.** When rights compete, different weighting of the public values a right embodies takes place. When U.N. officials and bodies are one-sided in privileging only the "human rights" of one sector of the community rather than the human rights of all, this suggests a lack of objectivity. When the prohibition against discrimination on sexual-orientation grounds operates to violate or unduly truncate other human rights, this goes against the principle of treating all human rights "on the same footing and with the same emphasis."<sup>202</sup> This discredits the entire human rights movement.

The bias of U.N. officials is also evident in their ideological, non-scientific use of terms like "homophobia" and "transphobia,"<sup>203</sup> which are not mental diseases (as the term phobia suggests), but are rather pejorative slurs used against those who *morally* dissent from the tenets of the homosexual rights agenda. To presume to intrude into freedom of thought and conscience is to endorse a brand of cultural totalitarianism, enforced by the state or

private actors in the name of human rights through political correctness codes or abusing hate speech legislation to silence dissenting views. Free society is imperiled when the human right to free speech and moral dissent is given insufficient weight, threatening the values of liberty and equality that human rights law is supposed to protect.

**Resistance and Divisiveness.** It is not surprising that the expansive use of non-discrimination on controversial grounds of sexual orientation discrimination has caused polarization and divisiveness among members of the international community who have begun to push back: “Where there is power, there is resistance.”<sup>204</sup>

Religious groups in particular<sup>205</sup> who view the LGBT agenda as a threat to religious and other freedoms have begun to warn against the mainstreaming and presentation of homosexuality as a normal expression of human sexuality (as opposed to morally wrongful conduct or a gender identity disorder). This points to the clash of incommensurate values. An OIC report cautioned against efforts to use the banner of non-discrimination to promote “radical, sexual and gender agendas related to sensitive issues regarding family, family life, or sexuality.”<sup>206</sup> It called out agencies who seek to establish “controversial and unagreed[-]upon so[-]called human rights that may compromise or undermine our religious or cultural norms.”<sup>207</sup> In the long run, this practice in may do harm to the progressive development of international human rights law, including areas where there is hard-earned, established consensus.

Given the arguments that SOGI discrimination is an attempt to impose radical ideologies that gain little traction within national legal systems through the back door of human rights and that the equation of “sex” and “sexual orientation” is controversial, advocates should draft their own declaration or convention on LGBT rights and put it up for free and full debate and for a vote within the U.N. General Assembly and before states for them to consider ratifying such a treaty. This is preferable to piggybacking on other human rights treaties like the CEDAW or the CRC, which were designed to address other pressing matters. A sexual-orientation-specific instrument would provide the forum for LGBT activists and their state allies to put forth their concerns and demands on their own terms, so that these could be clearly understood, assessed as claims for equal or special treatment, fully and honestly debated, and accepted, rejected, or accommodated.

## Recommendations

To maintain the progress in the acceptance and application of human rights globally, it is important that the human rights project not be hijacked

by politicized agendas. To be credible, there must be integrity in maintaining the distinction between *lex lata* (law) and *lex ferenda* (soft law, or an emerging norm which has yet to attain legal status). Policymakers can then with confidence work to ensure the observance and protection of ‘core’ recognized human rights norms, while making arguments about emerging claims in a transparent, reason-based manner to promote their acceptance as legal obligations.

- **Policymakers should guard against the politicization of human rights** by distinguishing between core human rights and contested human rights claims that are not grounded in international sources of law like treaty and CIL. The opinions of U.N. experts and bodies, while influential, are not binding.
- **Policymakers should adopt a holistic view of rights, duties and goods** as reflected in article 29 of the UDHR, rather than a one-sided balancing process that privileges a certain ideology. The right of “equality and non-discrimination” is not an absolute one and should not be treated as a special trump card against competing human rights and goods. Since moral judgements are impossible to evade, the moral dimension underlying law should be part of the balancing exercise, rather than arbitrarily shutting out other visions of public morality (usually the traditional ones). Ignoring religious views in particular will cause disquiet and damage the good the entire human rights project can do. Politicizing human rights has already elicited pushback, as human rights standards and obligations cannot be developed by ignoring an important sector of the international community.
- **Policymakers should be vocal about how it is counterproductive to attempt to create controversial new “rights” or standards** by misinterpreting the International Bill of Rights and other international treaties that U.N. member states never articulated or agreed to. Such attempts devalue the currency of internationally recognized human rights.<sup>208</sup> Aggressive lobbying by LGBT rights activists has been polarizing and divisive. Some states do not consider that action that discriminates on the basis of sexual orientation constitutes a legitimate area of human rights concerns<sup>209</sup> and are critical of over-reaching U.N. bureaucrats<sup>210</sup> and their illegitimate project of moral neo-colonialism in sexuality matters.

Varied conceptions of equality, different interpretive methods, and sexual orientation discrimination in national law have been invoked in ways that violate human rights. Therefore, **policymakers should recognize a global margin of appreciation** to respect principles of pluralism, subsidiary and the democratic will of national societies. While some jurisdictions may, for example, recognize same-sex marriage as part of privacy or equality rights, whether based on the democratic views of that society or their courts, policymakers should respect the political independence of other states by letting their societies decide what they wish their social fabric and sense of social morality to be—without external coercion, pressure, or intervention.

## Conclusion

Human rights law is not made by the pronouncements of human rights experts or monitoring bodies. Though they wield considerable influence in shaping human rights discourse, they have no authority to impose a moral *diktat* by declaring a controversial political claim to be a legal human right.

Attempting to normalize radical interpretations of existing and established human rights norms like equality and non-discrimination through continually reiterating non-binding opinions as authoritative, complemented by aggressive lobbying, thwarts full and free debate on what should and should not be recognized as a universal human right. To shortcut the process by anointing a claim as a human right is an attempt to place the claim beyond questioning. This abuses “human rights” by using it as an illiberal trump card,<sup>211</sup> embodying a form of moral neo-colonialism in which assertions are to be believed, not argued for and justified by appeal to the “reason and conscience” all human beings have.<sup>212</sup>

## Endnotes

1. United Nations, "Universal Resolution on Human Rights," General Assembly Resolution A/RES/217A, December 10, 1948, <http://www.un-documents.net/a3r217a.htm> (accessed December 9, 2020).
2. Johannes Morsink, "World War Two and the Universal Declaration," 15(2) *Human Rights Quarterly*, Vol. 15, No. 2 (1993), pp. 357–405.
3. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 2000), p. 45.
4. *Ibid.*, p. 45.
5. See articles 4 (slavery, servitude); 10 (fair and public hearing); 16 (equal rights to marriage and its dissolution); 21 (participation in government and equal access to public services); 23(2) ("right to equal pay for equal work"); and 26 (right to education).
6. Fernando Teson, "The Kantian Theory of International Law," *Columbia Law Review*, Vol. 92 (1992) pp. 53, 54.
7. Nicholas D. Smith, "Aristotle's Theory of Natural Slavery," *Phoenix*, Vol. 37, No. 2 (1983) pp. 109–122.
8. Morsink, "World War Two and the Universal Declaration," p. 366.
9. See, for example, Institut de Droit "International's Declaration of the International Rights of Man (1929)," reproduced in *American Journal of International Law*, Vol. 43, No. 2 (1941) pp. 662–665.
10. Morsink, *The Universal Declaration of Human Rights*, pp. 116–120.
11. *Ibid.*, pp. 139–152.
12. "Letter to M. Paderewski by the President of the Conference Transmitting to Him and Treaty to be Signed by Poland under Article 93 of the Treaty of Peace with Germany," *American Journal of International Law*, Vol. 13, No. 4, (1919), <https://www.jstor.org/stable/i312411> (accessed December 9, 2020). In the 1930s, Poland unsuccessfully called for a generalizing of the minorities' regime. See Józef Beck (Poland), *League of Nations Official Journal*, Special Supplement, 130, 38 (1934) 2.
13. Julius Curtius (Germany), *League of Nations Official Journal*, Special Supplement, Vol. 90, 41–42.
14. "Treaty Between the Principal Allied and Associated Powers (The British Empire, France, Italy, Japan, and the United States) and Poland," June 28, 1919, <http://www.forost.ungarisches-institut.de/pdf/19190628-3.pdf> (accessed December 9, 2020).
15. Trindade Cancado, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, July 22, 2010, <https://www.webcitation.org/5rRB9e3bz?url=http://www.icj-cij.org/docket/files/141/15987.pdf> (accessed December 9, 2020), p. 83.
16. Dmitry Manuilsky (Ukraine) stated that human rights should extend to non-self-governing territories to eradicate the colonial powers' belief they are superior races governing over the inferior races. Morsink, *The Universal Declaration of Human Rights*, p. 1010.
17. United Nations, "Declaration on the Granting of Independence to Colonial Territories and Peoples," General Assembly Resolution 1514 (XV), December 14, 1960, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf?OpenElement> (accessed December 9, 2020).
18. Baron Makino (Japan) proposed inserting a clause on "equal and just treatment in every respect, making no distinction either in law or in fact, on account of race or nationality" into the League Covenant. Paul Gordon Lauren, "First Principles of Racial Equality: History and Politics and Diplomacy of the Human Rights Provisions in the United Nations Charter," *Human Rights Quarterly*, Vol. 5, No. 1 (1983), p. 14. Later, Wellington Koo (China) suggested inserting, "The principle of all states and all races shall be upheld" into the United Nations Charter. Susan Waltz, "Reclaiming and Rebuilding the History of the UDHR" *Third World Quarterly*, Vol. 23, No. 3 (2002), p. 440.
19. Oscar Janowsky, *The Jews and Minority Rights (1898–1919)* (New York: Columbia University Press, 1933), p. 323.
20. Eleanor Roosevelt noted the UDHR was an aspirational standard, not a treaty, and did not purport to "be a statement of law or of legal obligations." Quoted in M.M. Whiteman, *Digest of International Law*, U.S. Department of State, Publication 7873, 1965, p. 243.
21. See, for example, Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal International & Comparative Law*, Vol. 25 (1996), p. 287.
22. The 1965 Convention against Racial Discrimination (CERD), the 1979 Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, and the 2006 Convention on the Rights of Persons with Disabilities.
23. Equality and non-discrimination also feature in regional human rights instruments, such as article 14 of the European Convention on Human Rights (ECHR) and article 2 of the African Charter on Human and Peoples Rights (ACHPR), which is similar to article 2(1) of the ICCPR (International Covenant on Civil and Political Rights) in being an accessory prohibition of discrimination. A right to equality before and equal protection of the law similar to that of article 26 of the ICCPR and article 7 of the UDHR can be found in article 24 of the American Convention on Human Rights and article 3 of the ACHPR. Protocol 12 of the ECHR was introduced to create a broader, free-standing right to non-discrimination in respect of the enjoyment of any right set forth in law.
24. Inter-American Court of Human Rights, "Juridical Condition and Rights of the Undocumented Migrants Advisory Opinion," OC-18/03, September 17, 2003, No. 34, Paragraph 101, <https://www.brennancenter.org/sites/default/files/legacy/Justice/IACHR%20Opinion%20Final.pdf> (accessed December 9, 2020).

25. Jarlath Clifford, "Equality," in Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013), pp. 427–430.
26. Peter Westen, "The Empty Idea of Equality," *Harvard Law Review*, Vol. 59 (1995), p. 537.
27. Catharine Barnard and Bob Hepple, "Substantive Equality," *Cambridge Law Journal*, Vol. 59, No. 3 (1995), pp. 562–585.
28. Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) pp. 180–183. Dworkin's idea was appropriated by Jack Donnelly, who argues that human rights law applies to "equal and autonomous agents living in states that treat each citizen with equal concern and respect," the foundational basis for the UDHR. Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed., (Cornell University Press, 2003) p. 46.
29. Egypt (on behalf of the African Group) in United Nations, "Discussion of SOGI Issues," Human Rights Council, 8th Session, and ARC International, "Recognizing Human Rights Violations Based on Sexual Orientation and Gender Identity at the Human Rights Council," Session 8, June 2–18, 2008, <http://arc-international.net/wp-content/uploads/2011/09/SOGI-report-HRC8.pdf> (accessed December 7, 2020).
30. For example, for differential treatment to be justified, there must be a "reasonable relationship of proportionality" between substantial factual differences between individuals and the legislative object. Inter-American Court of Human Rights, "Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica," January 19, 1984, Advisory Opinion, [http://www.worldcourts.com/iacthr/eng/decisions/1984.01.19\\_Proposed\\_Amendments.pdf](http://www.worldcourts.com/iacthr/eng/decisions/1984.01.19_Proposed_Amendments.pdf) (accessed December 9, 2020). See *In the Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, ECHR Application No. 1474/62, para. 10, July 23, 1968. See also S. M. Huang-Thio, "Equal Protection and Rational Classification," 1963, Public Law 412.
31. Joseph Raz, "Human Rights in the Emerging World Order," *Transnational Legal Theory*, Vol. 1 (2010), pp. 31–47.
32. Article 1(3), Charter of the United Nations, T.S. 993, EIF Oct. 24, 1945, <https://www.un.org/en/charter-united-nations/> (accessed December 29, 2020). Chilean delegate Santa Cruz told his Third Committee colleagues that article 2 expressed a basic charter provision, noting that the United Nations was created "principally to combat discrimination in the world." Morsink, *The Universal Declaration of Human Rights*, p. 92.
33. *Ibid.*
34. Dinah Shelton, "Prohibited Discrimination in International Human Rights Law," in Aristotle Constantinides and Nikos Zaikos, eds., *The Diversity in International Law: Essays in Honour of Professor Kalliopi K Koufa* (Brill, 2009), pp. 265. See generally Titia Loenen and Peter R. Rodrigues, eds., *Non-Discrimination Law: Comparative Perspectives* (The Hague/Boston: Kluwer Law International, 1999).
35. Mary Ann Glendon, "Knowing the Universal Declaration of Human Rights," *Notre Dame Law Review*, Vol. 73 (1998), p. 1153.
36. From inception, the Declaration was considered "as part of an International Bill of Rights" together with a covenant, plus rules of implementation." Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (New York: Institute of Jewish Affairs, World Jewish Congress, 1958), p. 29.
37. Sigrun Skogly on Article 2 in Asbjorn Eide, ed., *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992), p. 57.
38. Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, New York, 1945), pp. 115–116.
39. Jakob Th. Moller on Article 7, Eide ed., *The Universal Declaration of Human Rights*, pp. 115–141.
40. Morsink, *The Universal Declaration of Human Rights*, pp. 103, 105.
41. Other groups, like women and children, are addressed through the general human rights regime, focusing on individual rights. Li-ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Brill, 2005), p. 9.
42. William A Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, Volume 1 (October 1946–November 1947) (Cambridge University Press, 2013).
43. Humphrey's original single article provided, "No one shall suffer any discrimination whatsoever on account of race, sex, language or political creed. There shall be full equality before the law in the enjoyment of the rights enunciated in this Bill of Rights" Cassin reinstated "religion," which was in the charter's original list of four grounds, which Humphrey had replaced with "political creed." Morsink, *The Universal Declaration of Human Rights*, p. 45.
44. United Nations Doc. E/CN.4/57 united the principle of non-discrimination and equality before the law in one article, in separate paragraphs. United Nations, "Report on the Working Group Working Group on the Declaration of Human Rights," Doc. E/CN.4/57, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/GL9/001/07/PDF/GL900107.pdf?OpenElement> (accessed December 9, 2020).
45. The reason article 7 does not list grounds of non-discrimination is because when the one long non-discrimination clause was finally split into two, the list went with what became article 2. Morsink, *The Universal Declaration of Human Rights*, p. 47.
46. *Ibid.*, p. 92.
47. *Ibid.*, p. 46. French delegate Cassin's new clause read: "All are equal before the law and entitled to the equal protection of the law. Public authorities and judges, as well as individuals are subject to the rule of law."
48. "No one shall suffer any discrimination whatsoever on account of race, sex, language or political creed. There shall be full equality before the law in the enjoyment of the rights enunciated in this Bill of Rights." Johannes Morsink, "Colonies, Minorities and Women's Rights," in Stephanie Farrior, ed., *Equality and Non-Discrimination Under International Law: Volume II* (The Library of Essays on International Human Rights) (Routledge, 2015), 1st ed., p. 149.

49. Evelyn Ellis, "The Principle of Equality of Opportunity Irrespective of Sex: Some Reflections on the Present State of European Community Law and Its Future Development," in Alan Dashwood and Siofra O'Leary, eds., *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, 1997), p. 180.
50. Morsink, *The Universal Declaration of Human Rights*, pp. 128–129.
51. *Ibid.*, pp. 129 and 363
52. *Ibid.*, p. 96.
53. Skogly in Eide, ed., *The Universal Declaration of Human Rights*, p. 62.
54. Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (New York: Institute of Jewish Affairs, World Jewish Congress, 1958), p. 104.
55. *Ibid.*, p. 105 [emphasis in original].
56. Morsink, *The Universal Declaration of Human Rights*, pp. 113–116.
57. *Ibid.*, p. 113.
58. *Ibid.*, pp 102–103. National origin was thus linked to "race" and "color," strengthening the protection of members of ethnic and cultural groups.
59. *Ibid.*, p. 13.
60. *Ibid.*, p. 114.
61. *Ibid.*, p. 114
62. *Ibid.*, p. 116. In the context of children's rights under article 24(1) of the ICCPR, non-discrimination on the basis of birth (based on the drafting debates) referred to the permissibility of distinctions between legitimate and illegitimate children; the *travaux* indicated that this would not prohibit distinctions made by the law of succession.
63. *Ibid.*, p. 115.
64. *Ibid.*, p. 114.
65. United Nations, "The Policies of Apartheid of the Government of the Republic of South Africa," General Assembly Resolution 2202A (XXI), December 16, 1966, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/05/IMG/NR000505.pdf?OpenElement> (accessed December 9, 2020).
66. *Ibid.*
67. The grounds: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Discrimination, in contrast to distinction, implies action.
68. United Nations, "General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Article 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)," Committee on Economic, Social and Cultural Rights, July 2, 2009, E/C.12/GC/20, p. 27, <https://www.refworld.org/docid/4a60961f2.html> (accessed December 2, 2020).
69. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, Germany and Arlington, VA: NP Engel, 1993), p. 27.
70. *Ibid.*, p. 33.
71. The "equal right of men and women" to enjoy Covenant rights (articles 3 of the ICCPR and the ICESCR); equality before the courts (article 14 of the ICCPR); equal rights and responsibilities of spouses during marriage (article 23 of the ICCPR); the right of children to enjoy rights without discrimination (article 24 of the ICCPR); and equal pay for equal work and equal rights to promotion opportunities (article 7 of the ICESCR).
72. United Nations, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)," Human Rights Committee, April 8, 1994, CCPR/C/21/Rev.1/Add.5, para 6.1, <https://www.uio.no/studier/emner/jus/humanrights/HUMR5508/v12/undervisningsmateriale/ICCPR%20General%20Comment%2023.pdf> (accessed December 29, 2020).
73. Shelton, "Prohibited Discrimination in International Human Rights Law," in Constantinides and Zaikos, p. 270.
74. United Nations, *F. H. Zwaan-de Vries v. The Netherlands*, Human Rights Committee, Communication No. 182/1984, U.N. Doc. CCPR/C/OP/2, April 9, 1987, p. 209, <https://www.escri-net.org/caselaw/2006/f-h-zwaan-vries-v-netherlands-communication-no-1821984-9-april-1987-un-doc-supp-no-40> (accessed December 9, 2020). For example, there is no covenant right to sit on a park bench, but if a law forbids an ethnic group from sitting on park benches, this would violate article 26.
75. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 468.
76. The Human Rights Committee in *Nahlik v. Austria*, in relation to a collective agreement, noted that the covenant might require regulation of private sector discrimination in the "quasi-public" sphere, such as employment or access to publicly available goods and services, without requiring regulation with the personal sphere, such as the home and family, where discriminatory attitudes may be better addressed by educative rather than coercive measures. The desire to horizontalize the application of non-discrimination law is also evident in the observation that the lack of official recognition of same-sex relationships and absence of legal prohibition on discrimination can also result in same-sex partners being discriminated against by private actors. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, May 4, 2015 at 68.

77. United Nations General Assembly, "International Covenant on Civil and Political Rights," December 16, 1966, in United Nations, *Treaty Series*, Vol. 999, p. 171, <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf> (accessed December 29, 2020).
78. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 474.
79. United Nations, "CCPR General Comment No. 18: Non-Discrimination," Human Rights Committee, November 10, 1989, para 13, <https://www.refworld.org/pdfid/453883fa8.pdf> (accessed December 2, 2020).
80. Manfred Nowak, "Civil and Political Rights," in Janusz Symonides, ed., *Human Rights: Concept and Standards* (Dartmouth: Ashgate & UNESCO Publishing, 2000).
81. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 461.
82. *S. W. M. Broeks v. Netherlands*, Communication No. 172/1984, U.N. Doc CCPR/C/29/D/172/1984, [http://www.worldcourts.com/hrc/eng/decisions/1987.04.09\\_Broeks\\_v\\_Netherlands.htm](http://www.worldcourts.com/hrc/eng/decisions/1987.04.09_Broeks_v_Netherlands.htm) (accessed December 9, 2020). The Human Rights Committee found that article 26 of the ICCPR was violated by a Dutch unemployment benefits law that required married women to prove "breadwinner" status to receive benefits, something married men did not have to prove. The differentiation in question related to sex and the right in question did not relate to any ICCPR right, with the committee underscoring that article 26 did not merely duplicate the article 2 guarantee. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 461.
83. Shelton, "Prohibited Discrimination in International Human Rights Law," in Constantinides and Zaikos, p. 292.
84. United Nations, "Concluding Comments on India," 1998, U.N. Doc CCPR/C/79/Add.91, para 10.
85. United Nations, "General Comment No. 18 of November 10, 1989," Human Rights Committee, HRI/GEN/1/Rev.8, May 8, 2006, p 185. This provides the Committee's view that "discrimination" in the ICCPR implies "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."
86. Article 1(1) of the CERD states that "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Article 1(2) provides that CERD does not apply when a state party makes distinctions between citizens and non-citizens. Article 1 of the CEDAW considers that "discrimination against women" means "any distinction, exclusion or restriction" made on the basis of sex that has "the effect or purpose" of depriving women the enjoy of their human rights on a basis of equality of men and women. It covers both direct and indirect discrimination, encompassing both civil-political and socio-economic human rights.
87. See generally Wouter Vandenhoe, *Non-discrimination and Equality in the View of the U.N. Human Rights Treaty Bodies* (Antwerp/Oxford: Intersentia, 2005). Individuals may suffer multiple discriminations in belonging to more than one disfavored group. See the Durban Declaration, adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001, para. 2, <http://www.un-documents.net/durban-d.htm> (accessed December 9, 2020).
88. Committee on the Elimination of Racial Discrimination, General Recommendation 19, "The prevention, prohibition and eradication of racial segregation and apartheid," 1995, U.N. Doc. A/50/18 at 140, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 208, 2003.
89. United Nations, "Convention on the Elimination of All Forms of Discrimination Against Women," 1992, General Recommendation No. 19, "Violence Against Women," <https://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (accessed December 9, 2020).
90. Clifford, "Equality," in Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law*, p. 443.
91. Shelton, "Prohibited Discrimination in International Human Rights Law," in Aristotle Constantinides and Nikos Zaikos, p. 262.
92. *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, U.N. Doc.CCPR/C/35/D/196/1985 (1989) (the giving of inferior pensions to Senegalese soldiers serving in the French Army before independence, compared to retired soldiers of French nationality, was not considered a distinction based on reasonable and objective criteria).
93. *Sutherland v. United Kingdom* at 50 where different ages of consent for heterosexuals and homosexuals was found to be discriminatory treatment with regard to the article 8 right to private life and was an unjustified "difference based on sexual orientation." See *Sutherland v. United Kingdom*, European Commission of Human Rights, Application no. 25186/94, at 50. See also *L and V v. Austria*, 2003-I 29, European Human Rights Report, Vol. 36 (2003).
94. Clifford, "Equality," in Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law*, p. 444.
95. *North Sea Continental Shelf Cases*, 1969 International Court of Justice Reports, p. 42, <http://www.courses.kvasaheim.com/ps376/briefs/ojf38491brief4.pdf> (accessed December 9, 2020).
96. *Lim Meng Suang v. Attorney-General*, [2013] Singapore High Court SGHC 73 at [133].
97. A May 2012 report of the international lesbian and gay alliance indicates that homosexual sexual acts are illegal in some 78 countries. See International Lesbian, Gay, Bisexual, Trans, and Intersex Association, *State Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts Between Consenting Adults*, ILGA Report, May 2012, <https://ilga.org/state-sponsored-homophobia-report-2012-ILGA> (accessed December 2, 2020).
98. Dino Kritsiotis, "On the Possibilities of and for Persistent Objection," *Duke Journal of Comparative & International Law*, Vol. 21, No. 1 (2010), p. 121.

99. For example, while CIL norms such as the prohibition against torture, which is also a peremptory norm, may be invoked to invalidate an amnesty law, as it was by the Chilean Supreme Court in *Re: Victor Raul Pinto* (Supreme Court of Chile, Case No 3125-04; ILDC 1093 (CL 2007), it failed to invalidate a law permitting corporal punishment in *Yong Vui Kong v. Public Prosecutor* [2015], 2 SLR 1129. The Singapore Court of Appeal (at 35) found there was no reason “why the elevation of a particular norm to the highest status under one legal system (international law) should automatically cause it to acquire the same status and take precedence over the laws that exist in another system (domestic law)” within a dualist system. It noted that peremptory norms as understood during the drafting process of what became the Vienna Convention on the Law of Treaties were meant to apply to inter-state (and not intra-state) matters. To accord a peremptory norm constitutional law status would mean “the content of our Constitution could be dictated by the views of other states,” regardless of the popular will as expressed through elected representatives [38]. The Supreme Court of Canada in *R. v. Hape* [2007] 2 SCR 292, noted that the legislature may violate international law pursuant to parliamentary sovereignty, but had to do so expressly. This could incur international responsibility.
100. News release, “Intense Debate, Close Voting as Gender Identity, Sexual Orientation, Digital-Age Privacy Take Centre Stage in Third Committee,” United Nations, GA/SHC.4191, November 21, 2016, <https://www.un.org/press/en/2016/gashc4191.doc.htm> (accessed December 9, 2020).
101. A 2008 Joint Statement issued by the European Union and other states for signature by U.N. member states urged that sexual orientation or gender identity should not be the basis for criminal penalties. Sixty-seven member states signed this statement, while a competing statement circulated by Egypt and other member states affirming the right of states to regulate homosexual acts was signed by about 60 member states. Partick Worsnip, “U.N. Divided Over Gay Rights Declaration,” Reuters, December 19, 2008, <https://www.reuters.com/article/us-un-homosexuality-idUSTRE4BH7EW20081218> (accessed December 9, 2020).
102. For example, Former High Commissioner for Human Rights Louise Arbour identified SOGI issues as “priority concerns” in 2008. ARC International, “Recognizing Human Rights Violations.” See also United Nations, “Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity.”
103. For example, in 2011, 85 countries issued a Joint Statement entitled “Ending Acts of Violence and Related Human Rights Violations based on Sexual Orientation and Gender Identity”, <http://2007-2017-blogs.state.gov/stories/2011/03/23/ending-acts-violence-and-human-rights-violations-based-sexual-orientation-and.html> (accessed December 9, 2020).
104. See Council of Europe, “Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity,” *Explanatory Memorandum* to the Recommendation, CM (2010)4, Add3 Rev2E, March 29, 2010.
105. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). The Supreme Court of the United States overturned the Commission’s finding that cakeshop proprietor Jack Phillips violated Colorado SOGI non-discrimination law for declining to create a cake in celebration of a same-sex wedding. The Court ruled that the state of Colorado violated Phillips’ religious freedom by demonstrating animus towards his Christian beliefs that marriage is between a man and a woman. See also *Lee v. Ashers Baking Company Ltd. and Others* [2018] UKSC [Supreme Court of the United Kingdom] 49 (2018), in which bakery owners in Northern Ireland were charged with discrimination under the United Kingdom’s SOGI non-discrimination law for declining to create a cake in celebration of same-sex marriage. The Supreme Court of the United Kingdom ruled for the bakers on the grounds that the state could not be compelled to speak a message that violated their consciences.
106. See Organization of Islamic Cooperation and Independent Permanent Human Rights Commission, “OIC-IPHRC Study on SOGI in the Light of Islamic Interpretations and International Human Rights Framework,” May 2017, paras. 1-3, <https://www.oic-iphrc.org/en/data/docs/studies/46303.pdf> (accessed December 15, 2019) (also known as “OIC Study”).
107. *Ibid.*, paras. 2-4, 22, 25.
108. The only “minorities” international human rights law recognizes a group with specific legal rights (as opposed to the general human rights available to all) those identified in the title of United Nations, “Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities,” General Assembly Resolution 47/135, December 18, 1992.
109. “OIC-IPHRC Study on SOGI,” para. 4.
110. *Ibid.*, at 105.
111. Robert L. Spitzer, “Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation,” *Archives of Sexual Behavior*, Vol. 32, No. 5 (2003), pp. 403-417.
112. “OIC-IPHRC Study on SOGI,” para. 2.
113. Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford, Clarendon Press, 1995), p. 23.
114. *Lawrence v. Texas*, 539 U.S. 558 (2003), and “German Parliament Votes to Legalise Same-Sex Marriage,” *Guardian*, June 30, 2017 (by a vote of 393 to 226 with abstentions).
115. In *Schalk and Kopf v. Austria*, Application No. 30141/04, June 25, 2010 at 54-64, the ECHR observed that the use of the term “men and women” in article 12 of the ECHR rather than “everyone” meant that the article must be regarded as deliberate and seen in the context of marriage in the traditional sense of one between persons of opposite biological sex. In contrast, article 9 of the Charter of Fundamental Rights of the European Union omits any reference to man or woman in stating, “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

116. This putative right to assisted suicide failed in *Pretty v. United Kingdom*, Application No. 2346/02, European Court of Human Rights, Judgement of April 29, 2002. The Indian Supreme Court in *Common Cause (A Reg'd Society) v. Union of India* (2018) 5 SCC 1, held that the article 21 clause protecting the right to life included a right to die with dignity in terms of passive euthanasia under strict guidelines.
117. *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (No. 2), No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, §10, European Court of Human Rights, 1968, A6.
118. *Handyside v. United Kingdom*, European Court of Human Rights, No. 5493/72 (November 4, 1976), para. 48.
119. Mark Bell, "The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?" *Maastricht Journal of European and Comparative Law*, Vol. 6, No. 1 (1999), p. 5. See also Ian Bryan, "Equality and Freedom from Discrimination: Article 13 EU Treaty," *Journal of Social Welfare and Family Law*, Vol. 24, No. 2 (2002), pp. 223–238; Constitution of South Africa, § 8(3), 1994, <https://justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf> (accessed December 2, 2020); and European Union, "Treaty of Amsterdam," Article 13 (Office for the Official Publications of the European Communities, 1997).
120. Gordon Brown, *Global Citizenship Commission, The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Open Book Publishers, 2016).
121. Pacta Tertiis rule, rticle 34, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980.
122. Even if an international norm such as the prohibition against torture may co-exist as both a treaty and customary international law norm in accordance with the doctrine of parallel obligations articulated in *Nicaragua v. USA* (1986) International Court of Justice 1, it may not have the same content. For example, "torture" under the Convention against Torture (1465 U.N. Treaty Series 85, [1989] U.N. Doc. A/RES/39/46) may cover a discrete instance executed by a public official, while torture as an international crime under customary international law would need to be widespread and systematic. See *R. v. Bow Street Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No.3), [1999] 2 All E.R. 97, [https://learninglink.oup.com/static/5c0e79ef50eddf00160f35ad/casebook\\_155.htm](https://learninglink.oup.com/static/5c0e79ef50eddf00160f35ad/casebook_155.htm) (accessed December 9, 2020).
123. *North Sea Continental Shelf (Germany v. Denmark and the Netherlands)*, Judgement, I.C. Reports 1969, p. 3, paras. 71–73.
124. *Atala v. Chile*, Case No. 12.502, September 17, 2010, paras. 88–95 (judgement of February 24, 2012).
125. Article 46, ECHR (1950), Article 28(2), Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights (2004), and Article 68, American Convention on Human Rights (1969).
126. Former Human Rights Council Member Michael O'Flaherty noted, "These Concluding Observations have a non-binding and flexible nature. As such, they are not always a useful indicator of what a Committee may consider to be a matter of obligation under the Covenant." Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," *Human Rights Law Review*, Vol. 8, No. 2 (2008), p. 215.
127. Convention of the Elimination of All Forms of Discrimination Against Women, Article 21; Convention on the Rights of the Child, Articles 44 and 45; and Internation Covenant on Civil and Political Rights, Article 40.
128. O'Flaherty and Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," p. 218.
129. Human Rights Committee Communication, No. 488/1992, CCPR/C/50/D/488/1992, April 4, 1994. See David Lee Mundy, "Hitting Below the Belt: Sex-ploitive Ideology & The Disaggregation of Sex and Gender," *Regent University Law Review*, Vol. 14 (2001–2002), p. 215.
130. *Young v. Australia*, CCPR/C/78/D/941/2000 (August 6, 2003). See also *X. v. Colombia*, CCPR/C/89/D/1361/2005.
131. United Nations Treaty Series, Vol. 1155, p. 331 (EIF January 27, 1980), <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (accessed December 2, 2020).
132. Ian Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities," *Michigan Journal of International Law*, Vol. 12 (1991), pp. 380–403.
133. Similarly, when article 12 of the UDHR and article 17 of the ICCPR were drafted in the 1940s–1960s, it was unlikely that the state parties thought that the right to privacy, home, and correspondence would extend beyond the typical "search and seizure" intrusion into the home model to include a right to sexual autonomy requiring the invalidation of certain state laws at the time the treaty entered into force. In the American context, the fashioning of a right to privacy from a constitutional penumbra was not to take place until *Griswold v. Connecticut*, 381 U.S. 479 (1965), and extended to encompass a right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). This instance of heavy-handed judicial intervention ahead of democratic change caused (and continues to cause) disquiet. Even Justice Ruth Bader Ginsburg has criticized *Roe v. Wade* not for its substance but because "it moved too far, too fast" as "the majoritarian institutions" in the 1970s were listening but not acting swiftly enough for advocates of quick change, which "appears to have provoked, not resolved" conflict. See Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review*, Vol. 63 (1985), pp. 385–386.
134. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
135. Nick Poynder, "When All Else Fails: The Practicalities of Seeking Protection of Human Rights Under International Treaties," Castan Centre for Human Rights Law, April 28, 2003, <https://www.safecom.org.au/poynder.htm#bio> (accessed December 15, 2019).
136. See Torkel Opsahl, "The Human Rights Committee," in Philip Alston ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992) pp. 369, 407–408. Opsahl argues that many HRC members considered their role was to cooperate with state parties rather than to criticize individual states or determine they had failed to fulfill their treaty obligations.

137. For example, U.N. High Commissioner for Human Rights N. Pillay in 2011 cited *Toonen* for the proposition that states were obliged to protect individuals from sexual orientation discrimination. See United Nations, “Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, Office of the High Commissioner, A/HRC/19/41, <https://www.icj.org/wp-content/uploads/2012/06/laws-acts-individuals-annual-report-2011.pdf> (accessed December 2, 2020)
138. Various treaty-monitoring bodies have issued general comments stating that implicit grounds like gender identity (transgender, transsexual, intersex) were prohibited grounds of discrimination. United Nations “General Comment No. 20 on Non-Discrimination in Relation to Economic, Social and Cultural Rights,” United Nations, Committee on Economic, Social and Cultural Rights, E/C.12/GC/20, July 2009, para. 32; United Nations, “General Comment 4,” Committee on the Convention of the Rights of the Child, U.N. Doc. CRC/GC/2003/4, July 1, 2003, para. 6; and United Nations, “General Comment 2,” Committee on the Convention Against Torture, U.N. Doc. CAT/C/GC/2, January 24, 2008, para. 2. While the CEDAW Committee has not addressed sexual orientation in a general comment, it has criticized laws criminalizing homosexual acts and praised states who enacted laws prohibiting such discrimination. See United Nations, “Concluding Observations, Kyrgyzstan,” U.N. Doc. A/54/38, August 20, 1999, para. 128; United Nations, “Uganda,” U.N. Doc. CEDAW/C/UGA/CO/7, October 22, 2010, paras. 43–44; United Nations, “Sweden,” U.N. Doc. A/56/38, July 31, 2001, para. 334; and United Nations, “Ecuador,” U.N. Doc. CEDAW/C/ECU/CO/7, November 2, 2008, para. 28.
139. *Orozco v. Attorney-General of Belize* (Supreme Court of Belize), Judgement of August 10, 2016). By acceding to the ICCPR in 1996, Chief Justice Benjamin held that the reference to “sex” in section 16(3) of the Belize Constitution should be read to include sexual orientation, following *Toonen*, which was also referenced by the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* (Delhi High Court), July 2, 2009.
140. G. K. Chesterton, *Heretics*, Ch. 2 (1905), <https://www.gutenberg.org/files/470/470-h/470-h.htm> (accessed December 7, 2020).
141. Michael J. Klarman, “What’s So Great About Constitutionalism?” *Northwestern University Law Review*, Vol. 93 (1998), p. 145.
142. In discussing the separation of powers, the Singapore Court of Appeal noted the “fundamental proposition” that “the courts are *separate and distinct from* the Legislature. More specifically, whilst the courts do “make” law, this is only permissible in the context of the interpretation of statutes and the development of the principles of common law and equity. It is *impermissible for the courts* to arrogate to themselves *legislative powers*—to become, in other words, “*mini-legislatures*.” This must necessarily be the case because the courts have no mandate whatsoever to create or amend laws in a manner which permits recourse to *extra-legal policy factors as well as considerations*. The jurisdiction as well as the power to do so lie exclusively within the sphere of *the Legislature*....Hence, the duty of a court is to *interpret* statutes enacted by the Legislature; it *cannot amend or modify statutes* based on its own personal preference or fiat as that would be an obvious (and unacceptable) usurpation of the *legislative function*.” (emphasis in original) *Lim Meng Suang v. AG* 1 SLR 26 (2015) at 77. See also Chief Justice Sundaresh Menon’s Bernstein Lecture in Comparative Law delivered at Duke Law School and published as Sundaresh Menon, “Executive Power: Rethinking the Modalities of Control,” [2019] 29 *Duke Journal of Comparative & International Law*, Vol. 29 (2019), p. 297 (noting that the case of *Griswold v. Connecticut* [381 U.S. at 492] had the effect of moving the U.S. Supreme Court “to the center of the culture wars and therefore to the center of American political life, which may not be a comfortable place for every court.”)
143. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (Ser. A) March 23, 1995, para. 71. The Inter-American Court of Human Rights also favored “an evolutionary interpretation” of human rights instruments. See *Awas Tingi Community v. Nicaragua*, Inter-Am Ct HR (judgement of August 31, 2001) paras. 147–153.
144. See, for example, United Nations, “Report of the Human Rights Committee,” 50th Sess., Supp. No. 40, Annex VI, “Observations of States Parties Under Article 40, Paragraph 5, of the Covenant,” at 135, U.N. Doc. A/50/40, Oct. 5, 1995 (“The United Kingdom is of course aware that the General Comments adopted by the [Human Rights] Committee are not legally binding”). See also the United States’ statements at 131 that the ICCPR “does not impose on States Parties an obligation to give effect to the [Human Rights] Committee’s interpretations or confer on the Committee the power to render definitive or binding interpretations” of the ICCPR. The “Committee lacks the authority to render binding interpretations or judgments,” and the “drafters of the Covenant could have given the Committee this role but deliberately chose not to do so.”
145. Elizabeth Baisley, “Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity,” *Human Rights Quarterly*, Vol. 38, No. 1 (2016), pp. 134–163.
146. For example, Judge Schwebel’s individual opinion in *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice Advisory Opinion of July 8, 1996.
147. International Commission of Jurists, “Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,” March 2007, <https://www.refworld.org/docid/48244e602.html>, (accessed December 11, 2020).
148. O’Flaherty and Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law,” p. 218.
149. Inter-American Commission on Human Rights, the African Commission on Human and Peoples Rights, and United Nations Human Rights Mechanisms, *Joint Thematic Dialogue on Sexual Orientation, Gender Identity and Intersex Related Issues*, Final Report, 2018, [https://www.ohchr.org/Documents/Issues/SexualOrientation/ReportSecondTrilateralDialogue\\_InterAmericanAfricanExperts\\_EN.pdf](https://www.ohchr.org/Documents/Issues/SexualOrientation/ReportSecondTrilateralDialogue_InterAmericanAfricanExperts_EN.pdf) (accessed December 15, 2019).
150. Paula L. Ettlbrick and Alia Trabucco Zerán, “Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007–June 2010,” Final Report, <https://www.asiapacificforum.net/resources/impact-yogyakarta-principles-international-human-rights-law-development/> (accessed December 7, 2020).
151. O’Flaherty and Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles,” p. 247.
152. Pierro A Tozzi, “Six Problems with the Yogyakarta Principles,” C-FAM International Organizations Research Group *Briefing Paper* No. 1 (February 12, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551652](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551652) (accessed December 22, 2020).

153. Pierro Tozzi, "French U.N. 'Sexual Orientation' Push Linked to Radical Yogyakarta Principles," January 5, 2009, <https://www.lifesitenews.com/news/french-un-sexual-orientation-push-linked-to-radical-yogyakarta-principles> (accessed December 7, 2020).
154. Michael O'Flaherty, former HRC member and lead drafter of the Yogyakarta Principles, has explicitly appealed to these principles to define the terms "SOGI" in the French lead Statement of December 2008, supported by 66 U.N. member states. O'Flaherty and Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," p. 247.
155. *Ibid.*
156. *Ibid.*, p. 217. Notably the European Court of Justice has criticized reliance on the category of "sex" to address matters of "sexual orientation," as the latter is different from the binary man/woman issues that "sex" is perceived to address. *Grant v. SouthWest Trains Ltd.*, C-249/96 [1998] ECR I-621 (1998), 1 CMLR 993.
157. "Decision of the Supreme Court on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People," *National Judicial Academy Law Journal*, Vol. 2, No. 1 (2008), pp. 261–286.
158. *Ang Ladlad LGBT Party v. Commission on Election*, Supreme Court of the Republic of the Philippines, G.R. No. 190582 (2010), [https://www.lawphil.net/judjuris/juri2010/apr2010/gr\\_190582\\_2010.html](https://www.lawphil.net/judjuris/juri2010/apr2010/gr_190582_2010.html) (accessed December 9, 2020).
159. *Ibid.*, p. 52.
160. *Ibid.*, p. 53.
161. Joseph Raz, "Human Rights in the Emerging World Order," *Transnational Legal Theory*, Vol. 1 (2010), pp. 31–47.
162. *Ibid.*
163. Jerome Shestack, "The Jurisprudence of Human Rights," in Meron, ed., *Human Rights in International Law: Legal and Policy Issues*, Vol. 2 (Clarendon, Oxford, 1984), p. 101.
164. Raz, "Human Rights in the Emerging World Order," p. 154.
165. John Witte and M. Christian Green, *Religion and Human Rights: An Introduction* (Oxford University Press, 2012), pp.18–19
166. Alain Pellet, "'Human Rightism' and International Law," Gilberto Amado Memorial Lecture, July 18, 2000, <http://pellet.actu.com/wp-content/uploads/2016/02/PELLET-2000-Human-rightism-and-international-law-G.-Amado.pdf> (accessed on December 23, 2020).
167. Susan Marks and Andrew Clapham, *International Bill of Rights Lexicon* (Oxford University Press, 2005), p.340.
168. This has been the approach of Canadian courts. *Egan v Canada*, 2 SCR 513 (1995), paras. 111, 176, 177, and *Vriend v. Alberta*, SCR 493 (1998), paras. 102–103
169. The South African Constitution explicitly prohibits sexual orientation discrimination and, understandably, the court found a law that discriminates against homosexual men on the basis of sexual orientation to be unfair and invalid as an aspect of constitutional morality. *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (Constitutional Court of South Africa).
170. *Lim Meng Suang v. AG* [2014] SGCA 53 at [26], [176], [186] (Singapore Court of Appeal) (noting there was no definitive evidence whether sexual orientation was biologically determined or otherwise and that the legislature should address such scientific and extra-legal arguments), and *Corbiere v. Canada* 2 SCR 203 (1999), para. 3.
171. *Lawrence v. Texas*, 539 U.S. 558 (2003) overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the U.S. Supreme Court held that the fact the governing majority in a state considered homosexuality immoral was not sufficient to uphold a prohibitive law without more; the law furthered no legitimate state interests that could justify intruding on privacy rights. The U.S. Supreme Court majority effectively conflated "status" with "conduct" in finding that laws criminalizing acts that define a person as homosexual or transgender effectively target homosexual or transgender people as a class, i.e., the law did not target merely sexual conduct but also sexual identity. The European Court of Human Rights took a similar position in *Norris v. Ireland* (judgement of October 26, 1988, Series A, No. 142, pp. 20–21) in relation to applying penal sanctions against consenting homosexual adults. The Zimbabwean court in *Banana v. State* ([2004] 4 LRC 621), drawing inspiration from *Bowers*, found that that the term "gender" under section 23(2) of the Constitution of Zimbabwe did not include sexual orientation. As such, the crime of sodomy was not unconstitutional. As foreign cases are not precedents, but merely persuasive, the fact that *Bowers* was later overruled in *Lawrence v. Texas* does not mean that its reasoning could not continue to find favor in other jurisdictions.
172. *Toonen v. Australia*, No. 488/1992 (March 30, 1994), para. 8.7.
173. *Lawrence v. Texas*, 539 U.S. 558 (2003) at 571.
174. This assumption of neutrality is also evident in human rights discourse, as where former U.N. Secretary General Ban Ki Moon called for the worldwide decriminalization of homosexual acts, arguing that "cultural practice cannot justify any violation of human rights," as if human rights themselves, or the human rights model being espoused, is somehow *above* culture when human rights culture is itself a cultural project. News release, "Secretary-General Urges Human Rights Council to Avoid Narrow Considerations, Selectivity; Supports Independence while Condemning 'Inflammatory Rhetoric,'" January 25, 2011, SG/SM/13366-HRC/12, <https://www.un.org/press/en/2011/sgsm13366.doc.htm> (accessed December 9, 2020).
175. James Kalb, "Tyranny of Liberalism," *Modern Age* (2000), p. 247.

176. *Lim Meng Suang v. Attorney-General*, 1 SLR 26 (2015) at 92, 176, and 185.
177. *Nadan & McCoskar v. State*, FJHC 500 (2005) (High Court, Fiji).
178. *Ibid.*
179. Julian Rivers, "Promoting Religious Equality," *Oxford Journal of Law and Religion*, (2012), p. 12.
180. *Dudgeon v. U.K.*, No. 7525/76 (October 22, 1981), Series A, No. 45 at 49.
181. United Nations "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 51, and Amnesty International, "Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity," Amnesty International *Index*, ACT 40/016/2001, August 2001, p. 21, <https://www.amnesty.org/en/documents/ACT40/016/2001/en/> (accessed December 29, 2020).
182. See also Kees Waaldijk, "Standard Sequence in the Legal Recognition of Homosexuality: Europe's Past, Present and Future," *Australasian Gay and Lesbian Law Journal*, Vol. 4 (1994) 50 (observing in 1994 at 51–52 a sequence that has empirically been borne out: "The law in most countries seems to be moving on a line starting at (0) total 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 recognition of homosexual parenthood. From the perspective of the 21st century, one could include in the sequencing calls for same-sex marriage and hate speech laws to punish 'homophobia' and 'transphobia', which effectively is oppressive in silencing moral dissent. This displays a remarkable display of certainty with respect to the question of morality, in an age of postmodernism and pluralism, reflecting the use and abuse of human rights as a sort of 'secular religion.'")
183. *Frette v. France*, 2002-I 345 (2004), 38 EHRR 21.
184. *Schalk*, Application No. 30141/04, June 25, 2010, <https://servat.unibe.ch/dfr/em301410.html> (accessed December 29, 2020).
185. The Human Rights Committee has rejected arguments that restricting marriage to heterosexual couples violates article 26 of the ICCPR as the article 23 ICCPR right to marry explicitly refers to "men and women." See *Joslin v. New Zealand*, CCPR/C/75/D/902/1999 (2002), Human Rights Committee, July 30, 2002. Nonetheless, given the legalization of same-sex marriage in various jurisdictions since 2002, advocates argue that the Human Rights Commission should reexamine this opinion. Paula Gerber and Adiva Sifris, "Marriage: A Human Right for All?" *Sydney Law Review*, Vol. 36, No. 4 (2014), p. 643.
186. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 79h.
187. For example, in *Botswana-Kanane v. State 2003 (2)* BLR 67 (CA), the Botswana court held that the decriminalization of sodomy law was treated as a matter to be decided by public opinion, and since there was no evidence of a change in public opinion, the sodomy law was upheld.
188. While some have tried to argue that decriminalization of sodomy does not necessarily lead to same-sex marriage, conceptually and logically, as sodomy laws are based on a distinction between heterosexual and homosexual conduct (as are laws on traditional marriage), if this is considered discrimination in one case, it paves the way for marriage between a man and a woman to be considered discriminatory as well.
189. Douglas W. Kmiec, "Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion," in Douglas Laycock et al., eds., *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Rowan and Littlefield Publishers, 2008).
190. Marta Cartabia, "The Challenge of 'New Rights' and Militant Secularism," in Mary Ann Gledon and Hans F. Zacher, eds., *Universal Rights in a World of Diversity: The Case of Religious Freedom* (Vatican City: Pontifical Academy of Social Sciences Acta 17, 2012), pp. 428–455, <http://www.pass.va/content/dam/scienze-sociali/pdf/actapass17.pdf> (accessed December 15, 2019).
191. International Commission of Jurists, "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity," and United Nations, "Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 7.
192. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 51.
193. The view that privacy was a form of "blanket libertarian permission for people to do anything they like provided that what they do is sexual and in private" was rejected by J. Sachs in *National Coalition for Gay and Lesbians v. Minister of Justice* (1999) (1) SA 6 (South Africa, Constitutional Court). He noted that most states criminalize incest, bestiality, and sexual conduct involving violence and deception, though it is unclear on what principle this rests. If private and consensual homosexual activity is protected as a human right to privacy, why should consensual incest between two adults not also be protected as part of the sexual autonomy component of privacy rights and non-discrimination, since the criminalization of such activities also rest on grounds of public morality. A law prohibiting adult consensual incest was upheld in *Williams v. Morgan* (478 F 3d. 1316, 1318). If public morality is not a justification for limiting the scope "sexual rights," why are laws against prostitution, bigamy, polygamy, bestiality, incest, and statutory rape not struck down? This foregrounds the point that moral decisions have to be made, and will be enforced by law, so who has the legitimacy to do this within the international legal order, and on the basis of what criteria?
194. International Commission of Jurists, "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity."
195. This is supported by principle 18, which claims that a person's sexual orientation and gender identity are not medical conditions and do not need to be "treated, cure[d] or suppressed." Science has been politicized by ideology such that no view—including a scientific view—that disrupts the dominant narrative of the LGBT agenda is allowed.

196. International Commission of Jurists, "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity."
197. M. H. Ogvile, "After the Charter: Religious Free Expression and Other Legal Fictions in Canada," *Oxford University Commonwealth Law Journal*, Vol. 2 (2002), p. 219, and Hans C Clausen, "The Privilege of Speech in a Pleasantly Authoritarian Country: How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty," *Vanderbilt Journal of Transnational Law*, Vol. 38 (2005), pp. 443–500.
198. See Council of Europe, "Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity." The marginalization of religious freedom is evident in the following statement: "[T]he principle that neither cultural, traditional nor religious values, nor the rules of a 'dominant culture' can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity."
199. *Ladele v. Islington LBC*, [2010] 1 WLR 995.
200. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 75.
201. See United Nations, "Universal Declaration of Human Rights" at 21, [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) (accessed December 29, 2020)
202. United Nations, "Vienna Declaration and Programme of Action," A/CONF.157/23, June 25, 1993, para. 5.
203. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 78.
204. Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction* (New York: Pantheon, 1978), p. 125.
205. Ilias Tirsplotis, "Discrimination and Civil Partnership: Taking 'Legal' Out of Legal Recognition," *Human Rights Law Review*, Vol. 14, No. 2 (2014), pp. 343–358. The Greek Orthodox Church warned members of parliament they would be excommunicated if they voted for the legal recognition of homosexual civil partnerships.
206. "OIC–IPHRC Study on SOGI," paras. 1–3.
207. *Ibid.*, p. 10.
208. *Ibid.*, para. 31.
209. On behalf of the OIC, Pakistan distributed a letter to all Geneva missions stating that "sexual orientation is not a human rights issue." See "Letter from the Ambassador and Permanent Representative of the Permanent Mission of Pakistan, Geneva," February 26, 2004.
210. Nigeria argued that the death penalty by stoning for homosexual acts as lawful punishment under Shariah law should not feature in a report by the Special Rapporteur for extrajudicial killings. ARC International, "Recognizing Human Rights Violations."
211. Stephen Hall, "The Persistent Spectre: Natural Law, International Law and the Limits of Legal Positivism," (2001) 12(2) *European Journal of International Law*, Vol. 12, No. 2 (2001), pp. 301–305.
212. United Nations, "Universal Declaration of Human Rights," Article 1.



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