

**“GAY RIGHTS ARE HUMAN RIGHTS”:
THE FRAMING OF NEW INTERPRETATIONS OF INTERNATIONAL
HUMAN RIGHTS NORMS**

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Abstract

“Gay Rights are Human Rights” may have begun as a slogan chanted in the street, but academics and human rights organizations began to use the international human rights frame systematically in the 1990s to argue for universal human rights to fully apply to LGBT persons. This framing gradually began to replace framings based on claims for liberation and emancipation or national conceptions of civil rights. We first trace the early academic writing setting forth the human rights argument for LGBT persons, and then see how the popular media and websites began to share this frame with a much wider audience in the 2010s. We then discuss how the framing of rights for LGBT persons as human rights gradually became institutionalized in various jurisdictions, including Europe (Council of Europe and the European Union), the US, and very recently the UN. The human rights perspective has allowed for significant legal and political gains to be made on behalf of LGBT equality in certain jurisdictions around the world, and holds out the prospect of this international human rights norm spreading further to include more countries and persons under its protection.

The purpose of this chapter is to explore the development of the framing of the rights of lesbian, gay, bisexual, and transgender (LGBT) persons and sexual orientation and gender identity in terms of a human rights paradigm. This decades-long process involved many actors, from within academia, gay and lesbian non-governmental organizations (NGOs) such as the International Lesbian and Gay Association (ILGA) and the International Gay and Lesbian Human Rights Commission (IGLHRC), and within mainstream “gate keeper” human rights NGOs such as Amnesty International (AI) and Human Rights Watch (HRW). News of these developments reached the broader public as news stories and commentary were increasingly reported in the popular media in the early 2010s. The process became more institutionalized as political and judicial bodies in Europe, the United States, and the United Nations began to debate and take action on this emerging conception of human rights. While “Gay rights are human rights” may be succinct as a slogan, it expanded over time to be more inclusive, such as “gay and lesbian rights are human rights”, or more broadly, human rights based on sexual orientation and gender identity.

This chapter will narrow the focus from the broad sweep of developments which led to the framing of LGBT rights as human rights, to focus primarily on the early ground-breaking academic work, and provide a few examples from the popular media and websites which began this process of framing. Secondly, it will provide a brief overview of the institutionalization of this emerging interpretation of international human

rights norms in Europe (within the Council of Europe and the European Union), the US, and the UN.

Earlier theoretical work about the spread of human rights norms has emphasized the “boomerang” effect, in which local activists and NGOs reach up to the international realm to put pressure back on their own state to enforce human rights (Keck & Sikkink, 1998). Recent work within Europe has posited a “ricochet” - the rapid exchange of information and legal and political argumentation between NGOs and European ministerial, parliamentary, and judicial institutions to enforce human rights important for LGBT persons, for example the right of assembly for LGBT Pride marches (Holzhacker, 2013). Before international human rights norms are available for national activists to demand change in their own country across the world, such norms must first be firmly established at the international level.

In many countries, LGBT persons initially conceived their organizing around issues of identity and their movement as part of a liberation movement. Later, when the issue was seen as moving beyond personal identity to include state recognition and protection of an emerging public identity, movements and organizations began to develop a civil rights perspective. Here earlier civil rights movements based on race, for example in the US, or the women’s rights movements in the US, Europe, and elsewhere served as examples to the LGBT movement. However, at the beginning of the 1990s, the globalization of the movement and the desire to bring about more encompassing change led to the push for using an international human rights paradigm.

The value of international human rights law to LGBT persons lies in its ability to make claims against governments for recognition and protection. According to Helfer and

Miller (1996), “by locating sexual orientation within a set of rights claims, lesbians and gay men can link their struggle to a tradition that has transformed a panoply of basic human needs into rights respected under domestic and international law” (p. 85).

Basing an equality and non-discrimination claim on the universality of human rights may be considered a “use” of human rights, as conceived in the introduction to this volume. It is a constructive use of the concept to compel countries to respond to such advocacy, and it activates a plethora of international institutions to be active in interpreting, monitoring, and enforcing such a human right. On the other hand, it would be a “misuse” of such a human rights frame if advocates and institutions began to see this international legal approach as a fully sufficient response by itself to the issues faced by LGBT persons. The approach of situating LGBT equality and non-discrimination, based on claims of universal human rights, must be joined with local advocacy and approaches that insure growing tolerance and acceptance of LGBT persons as part of a broader emancipation strategy.

Framing Processes

First, we will discuss the process of framing of international human rights norms. The concept of framing has been developed in many disciplines, including cognitive psychology, linguistics and discourse analysis, communication and media studies, sociology and social movements, and political science and policy studies (Benford & Snow, 2000, p. 611). At its most basic level, framing refers to the common understanding of a problem and how it might best be solved. Most research focuses in detail on one part of various societal and institutional processes involving framing, for

example, how social movements coalesce and frame an issue to build a collective action frame, or how the media begin to frame issues in a certain way, or how governments and international institutions in the policy making process begin to institutionalize a shared understanding of an issue. Here the focus is broader and involves a decades-long process involving a variety of state and civil societal actors involved in the interpretation of new human rights norms and, ultimately, human rights law. The contribution of this chapter is an overview of how a particular issue—equal rights and emancipation for LGBT persons—began to be framed as a human rights issue by various societal and governmental actors. This process included academic scholars, human rights organizations, the media, and national and international governmental institutions in a multi-actor process over the past quarter century, which has rapidly accelerated in just the past few years.

Framing processes involves the efforts to provide meaning, the “struggle over the production of mobilizing and countermobilizing ideas and meanings” (Benford & Snow, 2000, p. 613). In this view, movement actors are viewed as significant agents “actively engaged in the production and maintenance of meaning for constituents, antagonists, and bystanders and observers” (Snow & Bedford, 1988). These movement actors are thus “deeply embroiled, along with the media, local governments, and state” (Benford & Snow, 2000, p. 613) as part of the “politics of signification” (Hall, 1982). This “signifying work or meaning construction” which has been noted with the verb “framing”, denotes an “active, processual phenomenon that implies agency and contention”. According to Benford and Snow (2000), “it is processual because it is a dynamic and evolving process, and it is contentious because it involves the generation of

interpretative frames that not only differ from existing ones but that may also challenge them”(p. 614).

Scholars have begun to apply the concept of framing also to LGBT issues. For example, in analyzing the framing of same-sex marriage in two particular states or provinces in the US (Massachusetts) and Canada (Ontario), Smith found that despite differences in the legal frameworks, precedents, and existing statutory law, courts in the two jurisdictions reached similar conclusions and endorsed “nearly all of the elements in the rights frame put forth by lesbian and gay litigants” (Smith, 2007, p. 5). Significantly, Smith also viewed academic discourse, in her case - academic legal discourse around human rights, as constituting a discursive legacy important for social movement claimants (Smith, 2007, p. 6).

Early Scholarly Work - Emergence of New Human Rights Interpretations

Early scholarly work noted that conceiving of sexual orientation as a human rights issue began as an advocacy tactic, but legal and political analysis quickly followed to develop with more refinement how sexual orientation fits into the existing human rights paradigm. Early work in this regard include Eric Heinze’s *Sexual Orientation: A Human Right* (1995), and the comparative constitutional law perspective taken by Robert Wintermute in *Sexual Orientation and Human Rights* (1995), both discussed in more depth later. Journal articles, for example, in the prominent *Harvard Human Rights Journal* also appeared, discussing the advantages of a human rights perspective for LGBT persons:

...the freedom to establish intimate relationships, to enjoy sexual

practices, and to develop a sexual identity takes on the quality of other fundamental and universally recognized rights... Every human being has a sexual orientation and every individual should have the ability to develop and manifest the sexual activities and identity that reflect that orientation in harmony with his or her own desires, and to receive the respect and protection of the state. (Helfer & Miller 1996, p. 86)

It is fruitful to also look at scholarly work discussing how other groups began the process of framing their grievances in terms of human rights in the early 1990s. Some of the very significant work, related to the topic of the emergence of new human rights interpretations, emerged from efforts to begin to define women's rights as human rights. For example, an article appeared in the highly regarded *Human Rights Quarterly* in 1990 called "Women's Rights as Human Rights: Toward a Re-vision of Human Rights" (Bunch, 1990). Certainly earlier work, in academic writing, NGO reports, and institutional statements, focused attention on discrimination toward women or human rights violations toward women, such as rape or sexual exploitation, but in the mid-1980s and early 1990s there was a more profound turn to linking women's rights and human rights. Bunch argued that since 1948, the world community has debated varying interpretations of human rights, but that little of this discussion has addressed questions of gender. She writes:

The concept of human rights, like all vibrant visions, is not static or the property of any one group: rather, its meaning expands as people reconceive of their needs and hopes in relation to it. In this spirit, feminists redefine human rights abuses to include the degradation and violation of

women. (Bunch, 1990, p. 487)

This is part of the process in which activists, in their individual writing and speaking activities, and civil society organizations meetings in neighborhood centers and cafes, and later more institutionalized and professionalized NGOs begin the process of framing and offering innovative interpretations of human rights.

The feminist language used in some of this work emphasized women's control over their own body:

The physical territory of this political struggle over what constitutes women's human rights is women's bodies. The importance of control over women can be seen in the intensity of resistance to laws and social changes that put control of women's bodies in women's hands: reproductive rights, freedom of sexuality whether heterosexual or lesbian... [D]enial of reproductive rights and homophobia are sex roles and thus have human rights implications. (Bunch, 1990, p. 491)

Bunch sets forth four basic approaches to linking women's rights to human rights. The first is to place women's rights as part of the Political and Civil Rights of the Universal Declaration of Human Rights (UDHR, 1948), the widely recognized and interpreted first generation of rights. An example of this approach provided by Bunch is the Women's Task Force of Amnesty International that pushed AI to launch a campaign on behalf of women political prisoners, which would address the sexual abuse and rape of women in custody. In addition, Bunch notes difficulties in relying solely on this approach. One problem is that it defines rape as a human rights abuse only when it occurs in state

custody, but not on the streets or in the home. She also notes the difficulty in focusing on a violation of the right to free speech when someone is jailed for defending gay rights, but not when someone is jailed or even killed for their homosexuality.

Bunch's second approach is viewing women's rights as socio-economic rights, focused on the role of gender equality in development, so called "second-generation" rights. These rights have traditionally been seen as less amenable to enforcement using international legal mechanisms. Her third approach is women's rights and the law. Here, the focus is on making existing legal and political institutions focus on women. For example, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women in 1979, and created the CEDAW Committee to monitor state compliance with its provisions.

The final approach is the feminist transformation of human rights. According to Bunch (1990), "this approach relates women's rights and human rights, looking first at the violations of women's lives and then asking how the human rights concept can change to be more responsive to women". Here is where grassroots discussions are extremely important in beginning to redefine traditional human rights frames. For example, a women's coalition in the Philippines called GABRIELA stated that "Women's Rights are Human Rights" in launching a campaign in 1989. The coalition saw that "human rights are not reducible to a question of legal and due process" (Bunch, 1990, p. 496).

Bunch (1990) argues that while the previous three approaches may be conceived from a feminist perspective:

[T]his last view is the most distinctly feminist with its women-centered stance and refusal to wait for permission from some authority to determine what is or is not a human rights issue... Those working to transform the human rights vision from this perspective can draw on the work of others who have expanded the understanding of human rights previously. (p.496)

She provides several examples of recent interpretations that expanded the concept of human rights. She notes the efforts of the women of the Plaza de Mayo in Argentina to hold the state itself accountable for the disappearances and death by paramilitary and right-wing death squads. She also notes the developing concept of civil rights violations based on “hate crimes, violence that is racially or religiously motivated or directed against homosexuals” (p.496).

In terms of LGBT rights, certainly Bunch’s first approach focusing on political and social rights is important in terms of organizing a LGBT rights movement and having the right of assembly and free speech. The second approach focusing on socio-economic rights may be useful at times, especially in terms of developing the concept of non-discrimination in employment. The third approach is an area of recent great interest among LGBT activists. For example, during the CEDAW meetings in New York at the Beijing +15 talks in 2010, concerns about lesbians were raised and the right to self-determination in sexual matters. Finally, the efforts by certain countries and both LGBT and mainstream NGOs to have a UN resolution passed focused on sexual orientation, are ways to use existing institutions to expand the interpretation of human rights treaties.

Theorizing in Academia Concerning LGBT Persons and Human Rights

Academics led the way in the 1990s to theorize about gay and lesbian rights as human rights with books and journal articles that advanced the development of the human rights frame, which could be used by human rights NGOs for advocacy and later institutionalized in law and practice by governmental bodies. As previously noted, Eric Heinze in 1995 published *Sexual Orientation: a human right: an essay on international human rights law* (1995). He wrote about how existing international norms should be construed to include rights against discrimination on the basis of sexual orientation, including the rights of privacy, equality, speech, expression, and association. Robert Wintermute, also in 1995, took a comparative constitutional law perspective in *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (1995). Earlier work asserted the argument that institutions like the European Community should address the issue of discrimination based on sexual orientation within European law. Kees Waaldijk and Andrew Clapham published in 1993 the important work *Homosexuality: a European Community Issue – Essays on Lesbian and Gay Rights in European Law and Policy*, which led the way in calling for the institutionalization of rights for LGBT persons in Europe (1993).

Work in this period was not solely the work of legal experts or political scientists, but also philosophers. For example, Thomas and Levin in 1999 wrote *Sexual Orientation and Human Rights*, where these two philosophers debate the place of sexual orientation within a rights frame (1999). More recent work has expanded beyond these beginnings in Europe and North America to take a global perspective. For example, Helmut Graupner and Phillip Tahmindjis in 2005 wrote *Sexuality and Human Rights*. In the book

they illustrate the journey the “worldwide legal systems have traveled, and the path stretching before them, until the destination of equality and acceptance in sexuality may finally be reached” (Graupner & Tahmindjis, 2005, back cover).

The entrance of LGBT rights is still somewhat hesitant in textbooks about human rights. In the concluding chapter of the Oxford textbook edited by Michael Goodhart *Human Rights, politics and practice* (2009), titled “Conclusion: The Future of Human Rights”, Goodhart argues that many people’s human rights are violated because of their sexual identities. He notes that “international human rights instruments do not explicitly mention sexual orientation or gender identity... Still, a broader interpretation of international law encompasses the rights of LGBTIQ people around the world under the rights to privacy, equality, and freedom from discrimination” (Goodhart, 2009, p. 375). He notes that achieving explicit recognition and protection for such rights is likely to prove difficult for some time to come, because of prejudices against people with different sexual identities which are deeply culturally embedded and reinforced by fundamentalist strains of traditional religions. He concludes, “It remains to be seen how, and how effectively, the human rights framework might be used in struggles for greater national and international recognition and protection of LGBTIQ rights” (Goodhart, 2009, p. 375).

Some legal treatises see a certain trajectory of rights with regard to LGBT, a progression of court and parliamentary decisions which begins with reform to criminal law and extends to family law matters. For example, the *European Human Rights Law: Text and Materials* (2008) by Janis, Kay, and Bradley published by Oxford, discusses an article by Baroness Hale of Richmond, a judge in the House of Lords, which discussed a hypothesis of Kees Waaldijk on a standard sequence of legislative steps:

The first steps are taken by the criminal law; permitting homosexual acts by male adults, and then removing age and other distinctions between same- and opposite sexual activity. The next steps are taken by the civil law: prohibiting discrimination against homosexuals in employment, and in the provision of goods, education, housing, and other services. The final steps are taken by family law, extending laws applicable to unmarried heterosexual parents and their own, their partner's and even other people's children, providing for registered civil partnerships, and finally providing for marriage. (Janis et al, 2008, pp. 431-432; cited from Hale, 2004)

Law is not the only discipline which has been active in this area, others disciplines have also been making important contributions. Recently, international relations theory has discussed the impact of transnational advocacy networks on global policy making.

Carpenter proposes a framework for analyzing variation in issue emergence – the process by which advocacy networks select issues around which to mobilize (Carpenter, 2007, p. 99). She asks why do some issues and population groups attract the attention of transnational advocacy networks (TANs), but not others? She notes that an issue must be defined by entrepreneurs (Keck & Sikkink, 1998) and adopted by major “gate keepers” in the advocacy arena (Bob, 2005a, 2005b). She states that “for the first 50 years of human rights norm development, groups such as gays and lesbians, disabled persons, and those suffering caste-based discrimination attracted very little attention from the human rights network” (Carpenter, 2007, p. 100, citing a working paper of Bob, later published Bob 2007; Lord, 2006; Mertus, 2006). She notes that issue emergence, an early framing

process, exists prior to the construction of campaigns, negotiating treaties, and holding states accountable to new norms.

Here, the distinction made by Keck and Sikkink (1998) between problems, issues, and campaigns is important. Problems are pre-existing grievances; issues emerge when advocates name a problem as a human rights issue and major human rights organizations begin to reference the issue. A campaign is a concerted effort by multiple organizations to lobby for a specific outcome around a specific issue. The efforts of LGBT organizations and broad-based human rights organizations to frame LGBT concerns as human rights issues has reached this evolution from problem identification, issue emergence, to concerted campaign.

In many ways, the growing globalization of the LGBT movement has followed a similar path to the feminist movement. For example, an article by Alvarez (2000) focuses not only on the “globalization of feminism” but also on the impact that it has back on national and local movements (p. 30). Alvarez traces a path in Latin America of a bottom up process of trans-border activism organized into periodic Latin American and Caribbean feminist *encuentros* (region-wide feminist “encounters”) since at least the early 1980s. These encounters focused on identity issues and women sharing their personal experiences. However, the author notes that by the 1990s, this form of social movement “repertoire” (Tarrow, 1994, 2006) began to be replaced by a more top down approach, focused on strategies targeting inter-governmental organizations and international policy arenas, such as the UN World Conferences on Women.

Thus, while earlier transborder connections of women in Latin America were

focused from the bottom-up and based on identity, later, more institutionalized transnational activism at the UN level emerged. According to Baden and Goetz, “Feminist networking and advocacy on a global scale have enabled local women’s advocates to leapfrog past the boundaries of state sovereignty to propose visions of women’s liberation that national governments might not countenance” (1997, p. 12).

Moving north, Mertus (2007), on the other hand, explores the historical trajectory of US based gay and lesbian organizations, and contrasts assimilationist strategies with more confrontational or oppositional strategies pursued by other organizations. The early US based organizations used more of the rhetoric of “civil rights”, like the Black civil rights movement in the 1960s. This framed the debate in terms of national laws and traditions of equality, rather than on international treaty language framed in universal human rights terms. Mertus notes that LGBT advocates have been engaged in two very different ways on the international human rights stage. First, they have used:

...the traditional human rights techniques of monitoring and reporting to apply existing human rights norms to LGBT lives, noting in particular the right to privacy, the right to freedom from torture (used in cases of “forcible cures” for homosexuality), the right to equality and non-discrimination, the right to family, and the right of transsexuals to recognition of their new gender. (Mertus, 2007, p. 1038)

Second, activists have tapped into traditional monitoring techniques and “human rights culture-building” efforts to promote new international human rights understandings that are important to the lives of LGBT persons, including the “right to sexuality”. Mertus asserts that these two types of activism occurred in two distinct time periods, with the

tipping point being when LGBT issues became a concern to the main “gatekeeper” human rights organizations, in particular Amnesty International and Human Rights Watch.

In 2007, a group of human rights experts launched a set of principles intended as a “coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity” (Flaherty & Fisher, 2008, p. 207). These principles are set forth in the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Identity (Yogyakarta Principles, 2007). It is asserted that it is likely that these principles will play a “significant role within advocacy efforts and... in normative and jurisprudential development” (Flaherty & Fisher, 2008).

The Yogyakarta Principles were conceived to have a tri-partite function. First, they should provide a “mapping” of the experience of human rights violations by people of diverse sexual orientations and gender identities in different regions of the world. Second, the application of international human rights law to such experiences should be articulated. Finally, the Principles should detail the nature of the obligation of states for effective implementation of the human rights obligations (Flaherty & Fisher, 2008, p. 233). Twenty-nine experts were invited to undertake the drafting, from 25 countries from all geographic regions. The experts included one former UN High Commissioner for Human Rights (Mary Robinson) and 13 current or former UN human rights special mechanism office holders or treaty body members (Flaherty & Fisher, 2008, p. 233). Authors also discuss the dissemination and the early impact of the Principles by international bodies, states, and NGOs.

It must be noted that not all states regard discrimination based on sexual orientation or gender identity as a legitimate concern of human rights. For example, Pakistan in 2004 delivered a letter to all State Missions in Geneva on behalf of the Organization of the Islamic Conference, which asserted that “sexual orientation is not a human rights issue”.

All of this considerable academic work and reflection, in books and in refereed journal articles framing LGBT issues in terms of human rights, soon began to break out of the universities and reach a wider audience.

Media and the Emerging Framing in the Popular Press

Newspaper and popular websites began to routinely use language framing LGBT rights as human rights in the early 2010s. This is an area where much more systematic research needs to be conducted in a wide variety of languages, but a few articles mentioned here will give an indication of the reporting which began to apply the idea of human rights to LGBT issues in the public debate.

An article appearing in the United Kingdom’s *Guardian* newspaper in 2011 was titled “Gay rights are human rights: More political energy is needed to enforce international human rights laws concerning sexual orientation at a national level”. The article begins by taking a global perspective, pointing out that “when it comes to human rights protection for lesbian, gay and bisexual people, the gap between western liberal democracies and the countries of the global south is widening” (Dayle, 2011). The article discusses institutional developments, for example, recent decisions of international human rights institutions, which struck down legislation that criminalized homosexual

conduct. It first discusses challenges brought in front of the European Court of Human Rights and actions of the UN Human Rights Council. “Before these decisions, the prevailing stance within international human rights was that questions of sexual orientation were exclusively domestic matters – pertaining to the religious, moral and cultural values of individual countries” (Dayle, 2011).

An opinion piece written by Desmond Tutu, archbishop emeritus in Cape Town, South Africa, was published in 2010 by the *Washington Post* in the US under a title “In Africa, a step backward on human rights”. The article focuses on the situation faced by LGBT persons in Africa, and Tutu begins with a moral call: “No one should be excluded from our love, our compassion or our concern because of race or gender, faith or ethnicity – or because of their sexual orientation”. He then delivers a call to action stating that “it is time to stand up against another wrong... [P]eople are again being denied their fundamental rights and freedoms” (Tutu, 2010). This article, highlighting opinion from a religious leader in the global South, came at an influential moment because it was published as South Africa was taking a lead in linking LGBT issues to human rights at the UN. The position of Archbishop Tutu on this issue was likely helpful in influencing public opinion and the positions of governments taken at the UN.

Next we will briefly turn to some of the articles on the internet, both internet sites focused on the LGBT community and those reaching a broader audience. An article appearing on the Advocate.com, a website related to the monthly *Advocate* magazine targeting primarily a US-based LGBT audience, is titled “UN Council: Gay Rights are Human Rights” and discusses some of the institutional developments linking LGBT and human rights:

The United Nations' Human Rights Council has approved for the first time a resolution condemning discrimination and violence against LGBT people. In the resolution...the council [expresses] grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity...[T]he resolution calls for the U.N.'s High Commissioner to initiate a worldwide study on “discriminatory laws and practices and acts of violence” research that would be reviewed by the Human Rights Council in a session next year. (Advocate.com, 2011)

This UN resolution, discussed in more detail in the next section of this chapter, was also reported by other news outlets to reach a broad audience. For example, the CNN World website featured an article titled “Human Rights: U.N. Council passes gay rights resolution” that stated:

In what the U.S. State Department is calling a “historic step”, the U.N. Human Rights Council passed a resolution Friday supporting equal rights for all, regardless of sexual orientation. The resolution, introduced by South Africa, is the first ever U.N. resolution on the human rights of lesbian, gay, bisexual and transgendered persons. (Dougherty, 2011)

An article appearing in the popular *Huffington Post* website about this UN resolution focused on the US response, and again repeated the language linking LGBT and human rights:

“This represents a historic moment to highlight the human rights abuses

and violations that lesbian, gay, bisexual and transgender people face around the world based solely on who they are and whom they love”, U.S. Secretary of State Hillary Rodham Clinton said in a statement. (Jordans, 2011)

CBS News on its website published in 2010 an article titled “U.N. U.S. Officials Call for Gay Rights” The article reports that the U.N. Secretary-General Ban Ki-moon called for an end to laws around the world that criminalize homosexuality, stressing the need to pay more urgent attention to LGBT rights as the world marked Human Rights Day. “Today, many nations have modern constitutions that guarantee essential rights and liberties. And yet, homosexuality is considered a crime in more than 70 countries”, Secretary-General Ban Ki-moon said, concluding “that is not right” (CBS News, 2010). Ban Ki-moon noted that the Universal Declaration of Human Rights adopted by the U.N. General Assembly on Dec. 10, 1948, "is not called the 'partial' declaration of human rights. It is not the 'sometimes' declaration of human rights. It is the universal declaration, guaranteeing all human beings their basic human rights - without exception" (United Nations, Secretary General, 2010). Ban Ki-moon stated that:

As men and women of conscience, we reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity...where there is tension between cultural attitudes and universal human rights, universal human rights must carry the day. (UN, Secretary General, 2010)

Another CBS News website article, appearing one year later titled “U.S. makes first-ever push for gay rights abroad” reported that President Obama and Secretary

of State Clinton announced that the US will now use foreign aid as a tool to improve LGBT rights abroad. A Presidential memorandum instructs the State Department, the U.S. Agency for International Development and other agencies to use foreign aid as a mechanism to “build respect for the human rights of LGBT persons” (Montopoli, 2011).

The recent flurry of activity at the UN in 2013 discussing LGBT and human rights is also getting attention by various outlets on the internet. For example, Advocate.com reported on the first ever ministerial meeting on LGBT rights, attended by a core group of countries working to end violence and discrimination among LGBT persons (Brydum, 2013). The attendees included the US Secretary of State and the foreign ministers of Argentina, Brazil, Croatia, the Netherlands, and Norway, the French Minister of Development cooperation, senior officials from the Japan, New Zealand, the EU, and the UN High Commissioner for Human Rights. The U.N public information campaign for LGBT equality, distributed a video capturing highlights of this historic meeting to spread the message further (UN, 2013).

The rapid development of the UN focus on human rights and LGBT is noted by the High Commissioner for Human Rights in published reports. “When I became high commissioner for human rights five years ago, there was almost no discussion at the United Nations on the human rights challenges faced by lesbian gay transgender and intersex people,” said Navi Pillay, later concluding “that is no longer the case” (Brydum, 2013). The *Huffington Post* website also reported this meeting at the UN, noting that the “fact that LGBT rights violations were, for the first time, the subject of a ministerial meeting was widely noticed by diplomats, the media, and others observers”, especially

because it took place during the first week of a new General Assembly meeting (Huffington Post, 2013).

This brief overview of the media attention in the UK and US in the English language linking LGBT to human rights, is designed to provide a few examples where both the specialty media for the LGBT community and broader news outlets like CBS News, CNN and CNN World, and the *Huffington Post* began to report on the conceptual and policy links being made by opinion leaders and institutions with a human rights mandate. More systematic media research is necessary to chart developments in the media over time, and across many more countries involved in this worldwide process of re-framing conceptions of human rights. While we did not find the media making specific references to the academic debate discussed in the part of this chapter, the media did seem to be responding with news reports and opinion pieces related to the institutional developments linking LGBT issues and human rights, discussed in more detail in the next section of this chapter.

Institutional Developments in Europe Adopting the Human Rights Frame for LGBT Persons

We now turn our attention from societal processes of framing, involving academics, human rights NGOs, and the media, to turn our attention to institutional actors of the international state system that have the power to create law at national and international levels to incorporate the concept of “Gay rights are human rights” into the international human rights regime. This is an important step to fully embed the human rights of LGBT persons into the international human rights regime. This process began in Europe,

becoming institutionalized within the Council of Europe and the European Union, and then spread to the United States and most recently in tentative steps at the United Nations.

The Council of Europe

The Council of Europe (CoE) is an international organization focused on human rights with 47 member states across Europe, consisting of various institutions including the Committee of Ministers, the Parliamentary Assembly, the Commissioner for Human Rights, and the European Court of Human Rights (ECtHR). The CoE has played a leading role in incorporating rights for LGBT persons into the European human rights regime. The Committee of Ministers is the executive institution of the CoE. A landmark set of recommendations from the Ministers to member states were issued in 2010 on “measures to combat discrimination on grounds of sexual orientation or gender identity”, which includes sections on hate crimes, hate speech, freedom of association and assembly, respect for private and family life, employment, education, housing, sports, and the right of asylum. The recommendations invite the member states to guarantee these principles and measures and be applied in “...national legislation, policies and practices relative to the protection of the *human rights* of lesbian, gay, bisexual and transgender persons and the promotion of tolerance towards them” (Council of Europe, Committee of Ministers, 2010a, p. 2, *emphasis added*). The Ministers also recommend that the “national human rights protection structures, which may include... equality bodies and ombudsmen, should be given the broadest possible mandate for tackling problems of discrimination on ground of sexual orientation or gender identity...”(CoE, Committee of Ministers, p. 10).

This document is a further explicit naming of LGBT persons into the European human rights system. An explanatory memorandum to the recommendation to the Committee of Ministers notes that, even though the list of grounds of discrimination prohibited by Article 14 of the European Convention on Human Rights and its Protocol No. 12 (together - the general prohibition of discrimination) does not expressly mention sexual orientation or gender identity, “the list is open and there is nothing to prevent their inclusion in practice” (CoE, Committee of Ministers, 2010b, p. 1). The memorandum notes that the ECtHR recognizes that Article 14 covers sexual orientation and the explanatory report to Protocol No. 12 indicates that this human rights instrument would provide protection against discrimination based on sexual orientation (CoE, Committee of Ministers, 2010b). The Parliamentary Assembly (PA) of the CoE backed the Committee of Ministers position and passed a resolution titled “Discrimination on the basis of sexual orientation and gender identity” (CoE, Parliamentary Assembly, 2010a), following a recommendation from its Committee on Legal Affairs and Human Rights (CoE, PA, 2010b).

The PA has taken the position for over a decade that human rights protections of the CoE include LGBT persons. In the early 2000s, the PA passed a resolution stating, “Discrimination based on sexual orientation goes against the European Convention on Human Rights and its Protocol No. 12, Article 1 on the general prohibition of discrimination, and it not acceptable in Council of Europe member states” (CoE, PA, 2003). A recommendation from the full Assembly from 2000 (Recommendation 1474, Situation of lesbians and gays in Council of Europe member states) declares in its first line, “Nearly twenty years ago, in its recommendation 924 (1981) on discrimination against homosexuals, the Assembly condemned the various forms of discrimination

suffered by homosexuals in certain Council of Europe member states”. Recommendation 924 begins with the following preambles:

1. Recalling its firm commitment to the protection of human rights and to the abolition of all forms of discrimination: 2. Observing that, despite some efforts and new legislation in recent years directed toward eliminating discrimination against homosexuals, they continue to suffer from discrimination and even, at times, from oppression. (CoE, PA, 1981)

The CoE appoints a Commissioner for Human Rights who functions independently within his human rights mandate and periodically reports on the activities of the office to the Committee of Ministers. The current Commissioner, Nils Muižnieks, was appointed in 2012, and has been active in promoting LGBT rights. He has been able to build on the major efforts and accomplishments of the previous Commissioner, Thomas Hammarberg. Hammarberg spoke regularly at civil society events, for example at the citizen and NGO conference “World Outgames: 2nd International Conference on LGBT Human Rights” in 2009 in Copenhagen, where he addressed the “persisting problems LGBT face in exercising their human rights, e.g. freedom of assembly and the need for state support to combat homophobia and discrimination based on gender identity and human rights” (CoE, Commissioner, 2009).

The Commissioner for Human Rights in 2011 released a major report titled “Discrimination on grounds of sexual orientation and gender identity in Europe”. The website announcing the release of the report is titled “Human rights of lesbian, gay, bisexual, and transgender persons (LGBT)” (CoE, Commissioner, 2011a). A critically important section of the report, called legal standards and their implementation,

specifically addresses the human rights perspective and LGBT:

In debates on the human rights of LGBT persons it is sometimes assumed that the protection of the human rights of lesbian, gay, bisexual and transgender people amounts to introducing new rights or “special” rights. This line of thinking is misleading, as international human rights law clearly recognizes that all human beings, irrespective of their sexual orientation or gender identity, are entitled to all rights and freedoms deriving from the inherent dignity of the human person without discrimination. Legislative and judicial developments in the last decades have led to the consistent interpretation that sexual orientation and gender identity are recognized as prohibited grounds of discrimination under major human rights treaties and conventions, including the UN International Covenants and the European Convention on Human Rights. (CoE, Commissioner, 2011b)

The new Commissioner for Human Rights, Muižnieks, has also spoken out on the plight of LGBT persons using a human rights discourse. He has stated that “human rights are universal and must be applied to everyone. Politicians at national and local levels should do more to combat prejudices against LGBTI persons and educate the public with factual information about their situation” (CoE, Commissioner, 2012). The Commissioner has commented on recent developments in Croatia, calling on the country to fully respect the dignity of transgender persons in recognizing their preferred gender in legal documents (CoE, Commissioner, 2013).

The CoE’s Directorate General of Human Rights and Legal Affairs in 2011

released a major 111 page compilation of recommendations passed from 1989 to the present by the Committee of Ministers, the Parliamentary Assembly, the Committee on Legal Affairs and Human Rights, the Congress of Local and Regional Authorities of the Council of Europe on freedom of assembly for LGBT persons, and the Human Rights Grouping of the Conference of International NGOs on human rights defenders working for the rights of LGBT persons (CoE, Directorate General of Human Rights and Legal Affairs, 2011).

Now we will turn from the ministerial and parliamentary institutions of the CoE to the critically important judicial institution. While there are numerous decisions of the European Court of Human Rights (ECtHR) from the 1990s to the present, for the moment we will focus on the most recent case which summarizes the progress made in the court's thinking.

In a decision focused on LGBT rights and human rights, the ECtHR in *Alekseyev v. Russia* addressed the Russian government's claim of a "wide margin of appreciation" in granting or denying rights to people who identify themselves as gay men or lesbians, citing an alleged lack of European consensus on issues related to the treatment of sexual minorities. The court ruled very strongly on this point, saying that it cannot agree with that interpretation, and that there is "ample case-law reflecting a long-standing European consensus" on such matters as the abolition of criminal liability for homosexual relations between adults, equal age of consent, access to service in the armed forces, granting parental rights, equality in tax matters, and the right to succeed to the deceased partner's housing tenancy (CoE, ECtHR, *Alekseyev v. Russia*, para. 83). The court also acknowledged that there are issues where no European consensus has been reached, such

as granting permission to same–sex couples to adopt a child, the right to marry, and the “court has confirmed the domestic authorities wide margin of appreciation in respect of those issues” (CoE, ECtHR, *Alekseyev v. Russia*, para. 83).

Recently a group of international legal scholars, the International Commission of Jurists, released a major report titled “Sexual Orientation and Gender Identity in Human Rights Law: Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union”, which summarizes developments in this area over a wide range of institutions (International Commission of Jurists, 2007). The report first sets forth treaty language of the CoE related to human rights, recommendations and resolutions of the Parliamentary Assembly, statements by the Committee of Ministers, reports and others writings and speeches by the Commissioner for Human Rights. Secondly, it focuses on the EU, once again beginning with treaty language, then decisions of the Court of Justice of the European Union, followed by resolutions and statements by the European Parliament, the Council and the Commission with regard to LGBT persons and human rights.

With this brief overview, it is evident that the institutions of the Council of Europe—the Committee of Ministers, the Commissioner of Human Rights, the Parliamentary Assembly, and the European Court of Human Rights—have been a critical and integral part of the emergence and development of the international norm of the rights of LGBT persons as human rights. While further progress is likely to continue across Europe concerning the human rights of LGBT persons, these institutions have made a substantial contribution to the development of the concept and its institutionalization in law, policy, and practice both within Europe and beyond.

The European Union

Within Europe, while the Council of Europe historically has been the organization principally focused on human rights, the European Community (and later the European Union) was primarily focused on questions of economic integration. But that began to change in the early 1990s, as the EU continued toward closer political integration, and questions of employment, social policy, and rights issues rose on the agenda. The member states of the EU, in the Treaty of Amsterdam that entered into force in 1999, gave the EU the power to combat discrimination based on six grounds - sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Subsequently, The European Commission successfully passed directives pursuant to the Treaty to begin the process of implementation throughout the member states with the enactment of new laws and the creation of national equality bodies. The EU has been active in monitoring these developments and has been attempting to make access to such rights a reality for everyone to enjoy (Holzhacker, 2009).

Recent changes in the human rights architecture of Europe means that a potential opportunity has opened to deepen the enjoyment of rights based on sexual orientation and gender identity internally in the member states, and to better integrate the promotion and respect for human rights externally. Internally, the coming into force of the Lisbon Treaty in 2009 opened the way for the incorporation of the Charter of Fundamental Rights into the EU legal framework. Article 21 of the Charter, titled “Non-discrimination” states, “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion,

membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited” (European Union Charter of Fundamental Rights, 2010). Externally, the establishment of new bodies, such as the High Representative for Foreign Affairs and the External Action Service in the Lisbon Treaty, advances the foreign policy coordination of the EU with the member states, including the promotion of human rights issues abroad.

The Council of Ministers of the EU, composed of representatives from the member states, released in 2010 a “Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People” (EU, Council of Ministers, 2010). The first line of this document underscores that the document should be used by the EU itself, by member states, in embassies abroad in contacts with third countries, as well as with international and civil society organizations. It seeks to enable the EU to proactively react to cases of human rights violations of LGBT persons and to the structural causes behind these violation, and declares that the promotion and protection of human rights features as a key objective of the EU’s external action” (EU, Council of Ministers, 2010, p. 2). The document encourages the support of civil society efforts by providing messages of political support, funding, and the promotion of visibility, as well as includes a checklist for the analysis of the situation regarding LGBT human rights issues.

The document notes the legal basis for EU action in this area. According to the Article 2 of the Treaty on European Union (TEU), the ”Union is founded on the value of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” (European Union,

Consolidated Version of Treaty on European Union, 2010). Furthermore, the document cites Article 3 TEU, which “commits the Union to promote these values, combat social exclusion and discrimination, equality between women and men and uphold its values in its relations with the wider world” (EU, TEU, 2010). Finally, the document notes that the Treaty of Lisbon considerably expanded the EU’s binding obligation on human rights, establishing the rights and freedoms set out in the Charter of Fundamental Rights of the European Union, including the prohibition of discrimination on the grounds of sexual orientation (Article 21 of the Charter). The European Commission, as the executive arm of the EU, has a strong role to play in implementing this Toolkit promoting and protecting the human rights of LGBT persons, and monitoring its implementation by the member states.

The EU in 2013 further strengthened its commitment to actively pursue a common foreign policy approach to protect the human rights of LGBT persons, when a Foreign Affairs Council meeting issued “Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons” (EU, Council, 2013). The document lists various operational tools which EU institutions and EU member states should use, including incorporating the situation of LGBTI persons in “human rights country strategies” and “monitoring of human rights of LGBTI persons, raising LGBT issues in public statements, individual cases, court hearings, and political dialogues” (EU, Council, 2013). The document also calls on the EU and the member state to raise the issue in multilateral forums, including the UN, OSCE, and CoE, and lists the international and regional legal instruments and other relevant documents for the “promotion and protection of the human rights of

LGBTI persons” (EU, Council, 2013,p.13-15, Annex 1).

The European Parliament has been very active in raising the issue of LGBT and human rights and in supporting the efforts of the Council of Ministers. An EP resolution dated December 16, 2010 regarding the “Annual Report on Human Rights in the World 2009 and the European Union’s policy on the matter”, states that “in light of the numerous human rights abuses suffered by [LGBT] people throughout the world” the parliament welcomes the adoption by the Council of the aforementioned “Toolkit to Promote and Protect human rights of LGBT”, and calls on the European External Action service to fully implement the guidelines (EU, Parliament, 2010a).

With regard to enlargement of the EU, the EP on February 10, 2010 confirmed that candidate countries wishing to join the EU must provide protection for LGBT persons (EU, Parliament, 2010b). As the EP was debating reports on the accession to the EU for Croatia, the Former Yugoslav Republic of Macedonia, and Turkey, a cross-party group of MPs, the Intergroup on LGBT Rights, introduced amendments for human rights before the progress reports were adopted (EU, Parliamentary Intergroup on LGBT Rights, 2010). These developments followed a report of the European Commission to the EP and the Council on the main challenges of enlargement (EU, Commission, 2009).

The EU has established an agency to provide assistance in the implementation of human rights. The objective of the European Union Agency for Fundamental Rights (FRA) is to “provide assistance and expertise to relevant institutions, bodies, offices and agencies of the Community and its Member States, when implementing Community law relating to fundamental rights” (EU, Fundamental Rights Agency, 2008, p. 5). The principle of equal treatment constitutes a fundamental value of the EU. A recent report

by the FRA notes that the EU Charter of Fundamental Rights, Article 21 is the first international human rights charter to explicitly include the term “sexual orientation” (EU, FRA, 2009, p. 3). FRA issued two major studies concerning homophobia across Europe: one focused on legal issues (EU, FRA, 2008, 2010) and the other - on social aspects (EU, FRA, 2009).

Up until now, the Court of the Council of Europe, has been the key court dealing with human rights issues. Although this is likely to continue, the incorporation of the Charter of Fundamental Rights into the EU legal framework after the Lisbon Treaty will likely mean that the Court of Justice of the European Union (CJEU) in the future will be called upon to assure that the EU and the member states respect human rights in the implementation of EU law. Here the prior reasoning presented in ECtHR opinions are important, because the CJEU gives special significance to the ECHR and uses the decisions of the ECtHR to provide guiding principles.

Some additional language in the Lisbon Treaty may help guide decisions related to the human rights of LGBT persons. First of all, there is a new explicit reference in the Treaties to persons belonging to minorities stating that “respect for human rights, including the rights of persons belonging to minorities” is a value the “Union is founded on” (European Union, Charter of Fundamental Rights, 2009, Article 2). Additionally, there is a new general obligation for the EU to combat exclusion and discrimination: “...the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” (European Union, 2007, Article 10).

Judges of the Court of Justice of the European Union occasionally appear at law

programs at universities across Europe, for an exchange of views on the development of fundamental rights in Europe. These appearances help link academic thinking on human rights to the Court and may assist academics in gauging the future direction of the Court. Sacha Prechal, a judge on the CJEU, spoke in 2010 at the University of Groningen in the Netherlands, in an address titled “Fundamental Human Rights and the EU” (Prechal, 2010). She responded to a question during the question and answer period asking her to compare the progress made by the CJEU and the ECtHR in incorporating LGBT rights into the human rights architecture in Europe. The question began by stating that the ECtHR, most recently in the *Alexseyev vs. Russia* case, alongside a whole line of decisions, has laid out the European consensus on the rights of LGBT persons and anti-discrimination based on sexual orientation. The CJEU has been considered more limited in interpreting language which would be helpful in combating discrimination based on sexual orientation. She was asked if she thinks that the incorporation of Fundamental Rights into the EU will give the CJEU new opportunities to address issues related to discrimination based on sexual orientation and gender identity.

Prechal answered by stating that the CJEU was an early mover in these matters, beginning with the protection of transsexuals in the *P & S v. Cornwall County Council* (EU, CJEU, 1996) case, with the ECtHR court in Strasbourg following its steps. She pointed out that this was part of the “mutual dynamics” between the two courts. She also said that the CJEU went far in the recent *Maruko* (EU, CJEU, 2008) case concerning pensions and same-sex couples in protecting the rights of LGBT persons. The mutual dynamics between the two courts may indicate that future decisions by the CJEU could over time also have a “spin off” further in Europe to the CoE countries to the east, which

are not part of the EU, thus expanding the protection of human rights. Prechal closed her remarks by saying that the interaction of the CJEU judges with academics is critical, and that law review articles on the development of human rights are important to the thinking of the Court.

The EU—through the Council, Commission, Parliament, and Court of Justice—has played a decisive role within Europe and beyond in the development of LGBT rights as human rights, often through constructive cooperation with the Council of Europe.

The United States

Whereas the development of the framing of LGBT equality and non-discrimination as human rights issues within the European institutions began decades ago and intensified in the decades of the 2000s and 2010s, similar developments in the US only took concrete form after the change of the administration from Republican to Democratic with the election of President Barak Obama in 2008. The advancement of LGBT issues at the national level was an important development in the long domestic struggle for civil rights in the US. But its framing as a human rights issue also provided momentum for the inclusion of LGBT issues into US foreign policy for the first time and in supporting and contributing to the efforts of the Europeans to bring resolutions to the UN Human Rights Council and to the floor of the UN General Assembly.

The term “Gay rights are human rights” was first used publicly by the US Secretary of State Hillary Clinton in her official capacity in 2010, when she addressed a reception at the State Department in Washington (Labott, 2010). The reception was celebrating Lesbian, Gay, Bisexual, and Transgender Pride month, officially proclaimed

by President Obama. Later, in 2011, the Secretary of State marked the International Human Rights day at the UN in Geneva, declaring “(G)ay rights are human rights, and human rights are gay rights”, to an international audience (Capehart, 2011). It is interesting to note that this great evolution in the US policy stance toward LGBT rights could first be implemented in the international arena, where the President of the US possesses great executive power in making foreign policy; whereas in the domestic arena progress was hindered by the need for Congressional action.

In conjunction with this speech in Geneva by the Secretary of State, President Obama released a presidential memorandum which directed federal agencies doing work overseas to improve the protections for LGBT asylum seekers and to strengthen opposition to the criminalization of LGBT status or conduct (United States, White House, 2011; Montopoli, 2011). It also directed the State Department and the U.S. Agency for International Development to use foreign aid as a mechanism to “build respect for the human rights of LGBT persons” (US, White House, 2011). While the *New York Times* noted that “Neither Mr. Obama nor Mrs. Clinton specified how to give the initiative teeth”, it concluded, “Still, raising the issue to such prominence on the administration’s foreign policy agenda is important, symbolically, much like President Jimmy Carter’s emphasis on human rights” (Myers & Cooper, 2011).

This change in the US position toward acknowledging rights for LGBT persons from the previous Bush administration is evident in the US reports issued each year by the State Department addressing human rights violations around the world. The US Secretary of State is required to provide to Congress human rights reports with “a full and complete report regarding the status of internationally recognized human rights” (United

States, Department of State, 2009). The 2009 reports, issued in the spring of the following year, for the first time began to systematically address LGBT issues. This is an important step forward under the leadership of Secretary of State Clinton and President Obama, which has substantially improved this coverage in these reports over President George W. Bush and previous Presidents.

Key for our purposes here is the prominent display of the following line in the introductory paragraph of the reports on the State Department website “The reports cover internationally recognized individual, civil, political, and worker rights, as set forth in the **Universal Declaration of Human Rights**” (bold in original) (US Department of State, 2009). This indicates that when the reports contain reference to human rights violations based on sexual orientation and LGBT, the State department is asserting its position that these rights are part of the community of nation’s declaration in the UN concerning human rights in the Universal Declaration.

The introduction of the reports contains the following paragraph:

Persons around the world continue to experience discrimination and intimidation based on their sexual orientation or gender identity. Honduras saw an upsurge in killings of members of the LGBT community by unknown perpetrators. Meanwhile, in many African, Middle Eastern, and Caribbean nations, same-sex relations remain a criminal offense, and through such laws and other measures the state reinforces and encourages societal discrimination and intolerance. In Uganda, for example, intimidation and harassment of LGBT individuals worsened during the

year, and some government and religious leaders threatened LGBT individuals. (US, Department of State, 2009)

To provide another example of the inter-play between academic scholars, civil society organizations and governmental institutions which are engaged in the development of human rights norms, we turn to an event held in New York in 2010. The New York University law school (Center of Human Rights and Global Justice) invited Michael Posner (Assistant Secretary of State for Democracy, Human Rights and Labor) and Larry Cox (Executive Director of Amnesty International USA) to talk about the US Country Reports on Human Rights the day after they the reports were released. Posner said that US embassies abroad were given special guidelines by the administration for including LGBT issues in their reports that year. Various human rights NGOs, Human Rights Watch in particular, were involved in advising the US government on these guidelines.

The State department in their introduction to the reports states that the purpose is to raise awareness about human rights conditions, in particular as these “conditions impact the well-being of women, children, racial minorities, trafficking victims, members of indigenous groups and ethnic communities, persons with disabilities, *sexual minorities*, and members of other vulnerable groups” (US, Department of State, 2009).

Later, in detailing more specifically the members of vulnerable groups, the report delineated “lesbian, gay, bisexual, and transgender individuals, who were often marginalized and targets of societal and/or government sanctioned abuse” (US, Department of State, 2009).

A question to Posner was posed during the question and answer period by the author of this chapter about the procedures and directions the State department used for

uncovering and discussing human rights violations against LGBT persons. He replied that this is an area of “priority for (Secretary of State) Clinton”, as well as himself. He noted in particular a focus on the situation in Uganda. He said there is more reporting on LGBT issues than ever before in the reports, but it is still a job to “sensitize” people in the Embassies around the world and the State department to be aware of these issues.

There have been additional initiatives by the Obama administration to raise the profile of the US on LGBT issues internationally by working through regional human rights mechanisms. For example, during a trip of President Obama to Brazil, he and Brazilian President Dilma Rousseff announced the creation of a “special rapporteur” for LGBT issues at the Organization of American States (US, Department of State, 2011a). The White House Press release said that this was part of the President’s efforts to promote respect for the human rights of (LGBT) individuals. The President’s Press secretary said that “The President is proud of the work we have done to build international consensus on this critical issue and is committed to continuing our determined efforts to advance human rights of all people, regardless of their sexual orientation or gender identity” (US, White House, 2011b).

The current U.S. Secretary of State, John Kerry, has continued the focus and declarations of the Obama administration on LGBT and human rights. For example on a State Department website humanright.gov under the heading “Advancing the Human Rights of LGBT Persons on the occasion of Lesbian, Gay, Bisexual, and Transgender Pride month,” Kerry said in a message:

This month is about the assertion of equality and dignity. It is about the affirmation of fundamental freedoms and human rights. It is about people

taking pride in who they are, no matter their sexual orientation or gender identity. Protecting universal human rights is at the very heart of our diplomacy, and we remain committed to advancing human rights for all, including LGBT individuals.

Kerry has also been involved in efforts at the United Nations concerning human rights and LGBT. As previously mentioned, in 2013, a core group of UN countries working to end violence and discrimination against lesbian, gay, bisexual and transgender (LGBT) people met in New York for the first-ever ministerial meeting at the UN on LGBT rights. The results of these discussions among foreign ministers, the EU, and directors from Human Rights Watch and the International Gay and Lesbian Human Rights Commission were also shared with the wider public by the UN public information campaign for LGBT equality, called “Free & Equal” (UN, Human Rights Office, 2013).

It is important to view these developments in the US foreign policy also in light of very recent domestic gains. As reported by the *Washington Post*, Congressional approval of the Employment Non-Discrimination Act:

...marked the first time federal lawmakers had approved legislation to advance gay rights since repealing the military’s ban on gay men and lesbians in uniform in late 2010. Approval of the measure came two days after Illinois became the 15th state to legalize same-sex marriage and four months after the U.S. Supreme Court sanctioned federal recognition of legally married gay couples. (O’Keefe, 2013)

In that case, the Supreme Court in *United States v. Windsor* on June 26, 2013 held that section 3 of the Defense of Marriage Act is unconstitutional "as a deprivation of the equal

liberty of the person ... protected by the Fifth Amendment”(US, Supreme Court, 2013). In the decision, the federal government is required to recognize marriages performed in states where same-sex marriage has been legalized, and provide federal rights, privileges and benefits (US, Supreme Court, 2013).

Once again, it is interesting to note that the US President first used his powers to discuss the human rights of LGBT persons abroad using his executive authority in foreign policy, and this was followed by landmark gains for LGBT rights domestically made by the other branches of the federal government - the US Congress and the US Supreme Court - as well as by State governors, legislatures, and courts.

The United Nations

The framing of the rights of LGBT persons as human rights, and human rights based on sexual orientation and gender identity, first reached the United Nations in 2008. Dutch and French government representatives, with the backing from the European Union, presented the statement to the UN General Assembly. The statement, backed by 66 states after negotiations was made within the framework of the United Nations General Assembly on 17 December 2008, condemning rights violations based on sexual orientation and gender identity, such as killings, torture, arbitrary arrests, and deprivation of economic, social and cultural rights, including the right to health. The statement garnered support from countries across Europe, the Americas, and Asia. The resolution was strongly opposed by the Islamic federation, while many of the countries with majority Muslim populations opposed the statement. The US initially failed to support the statement under the administration of President George Bush, citing concerns of state

rights under the US system of federalism, but it was subsequently supported by the US once Barak Obama was elected President. These successes at the UN were widely seen by LGBT as well as broad human rights NGOs as an important step forward, related to their considerable advocacy efforts over the years (see Human Rights Watch, 2008; International Lesbian and Gay Association (ILGA), 2008; International Gay and Lesbian Human Rights Commission, 2008).

A further important development at the UN was a resolution in support of LGBT rights proposed by South Africa, which passed in 2011. The UN Human Rights Council issued the resolution backed by 85 countries titled “Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity”, which included a statement welcoming attention to LGBT issues as part of the Universal Periodic Review process (see i.e. US, Department of State, 2011b). It notes the increased attention in regional human rights forums, and encourages the Office of the High Commissioner for Human Rights to continue to address LGBT issues and calls on states to end criminal sanctions based on LGBT status. It was an important milestone that the resolution emerged from South Africa, and garnered support from countries on all continents.

Among other issues addressed, the resolution requests the UN High Commissioner for Human Rights to prepare a report on the situation of LGBT persons worldwide. The report was issued in late 2011, and documented violations of the rights of LGBT persons, including violent hate crimes, the criminalization of homosexuality, and widespread discrimination (UN, Human Rights Council, 2011). The High Commissioner, Navi Pillay, called for the repeal of laws criminalizing homosexuality, comprehensive

laws against discrimination, and investigations of hate crime incidents, and other measures to ensure the protection of LGBT rights (UN, Human Rights Council, 2011).

These developments at the UN framing the rights of LGBT persons as human rights are very recent. Significant progress accelerated when US foreign policy toward the rights of LGBT persons changed under the Obama administration, and the US could support and encourage others to support the European countries and South Africa in their efforts to bring these statements and resolutions to the UN for support. While many of the UN member states have signed the rights resolution of the Human Rights Council, many states remain either indifferent or actively opposed to the evolving international human rights norms.

Conclusion

This chapter has provided a brief overview of the development of the framing of the rights of LGBT persons as human rights in Europe and the United States over the past quarter of a century and its recent global breakthrough among the community of nations at the United Nations. We first traced the early academic writing debating and setting forth the human rights argument for the human rights of LGBT persons in the 1990s, and saw how the popular media and websites began to share this frame with a much wider audience in the 2010s. In the second part of this chapter, we discovered how the framing of rights for LGBT persons as human rights gradually became institutionalized in various jurisdictions, including Europe (in both the Council of Europe and the European Union), the US, and very recently the UN.

The human rights perspective has allowed for significant legal and political gains

to be made on behalf of LGBT equality in certain jurisdictions around the world, and holds out the prospect of this international human rights norm spreading further to include more countries and persons under its protection. However, it should be noted that there are certain limitations to the human rights frame, compared to possible alternative framings for the rights of LGBT persons. First, the human rights frame has sometimes been limited to establishing certain minimum standards of state treatment for LGBT persons, for example statements calling for the decriminalization of homosexual conduct.

On the other hand, the European Court of Human Rights has gone much further with the development of a human rights frame, finding a broad European consensus on a whole range of rights impacting LGBT persons, including not only the abolition of criminal liability for homosexual relations among adults, but the right of assembly, equality in tax matters and housing tenancy, and the granting of parental rights. However, the court has said that despite legislation in numerous states in Europe recognizing partnerships and marriage, there is still no consensus in Europe on the rights of gays and lesbians to same-sex partnership or marriage legislation. This is a substantial limitation on the idea of the universality of human rights and one's right to form a close, intimate partnership with a partner of one's choice, recognized by the state. Nonetheless, the human rights frame has been extremely helpful in beginning the dialogue and setting legal standards to establish minimum human rights standards globally in the UN, and in establishing a much more comprehensive body of legal rights in Europe, especially within the member states of the EU, but also in the states of the Council of Europe.

The human rights frame is also a way to internationalize these debates, so that states and regional bodies with more advanced rights for LGBT persons will make the

global achievement of these rights an integral part of their foreign policy goals. We have seen that, for example, in the external action policy of the EU and the foreign policy of certain member states (for example the Netherlands and France). In the US it is observed in the annual human rights reports and advocacy by the State Department abroad, which began under President Obama and the Secretary of State Clinton.

But even in countries like the Netherlands—with a very advanced legal stance toward LGBT persons, strict anti-discrimination laws in employment and beyond, LGBT persons serving openly in the military, and same-sex marriage—there is a continuing need for an emancipation policy to make sure that these legal changes result in real change in the society. These policies of broader emancipation and acceptance by society have continued to be necessary for women’s rights despite legal changes decades ago in some countries, and will no doubt be helpful and necessary for LGBT emancipation as well. These broader set of policies and programs which facilitate societal implementation of legal change, may be beyond the current conception of the human rights frame but is certainly necessary for the goal of equality and full societal acceptance for all to be realized.

While the inclusion of the rights of LGBT persons and the protection for sexual orientation and gender identity into a human rights frame—by academic scholars, the media, and national and international governmental organizations—is a clear constructive development in the “uses” of human rights, it is important that these legal and political advances are accompanied by continued advances in societal acceptance across Europe and the US, and beyond to all societies that are part of the community of nations assembled at the United Nations.

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