

**New York Law School
Public Law and Legal Theory
Research Paper Series 04/05 # 24**

**The Impact of International Human Rights
Developments on Sexual Minority Rights**

By Arthur S. Leonard
Professor, New York Law School

This paper can be downloaded free of charge from the
Social Science Research Network at:
[http://ssrn.com/abstract= 722124](http://ssrn.com/abstract=722124)

THE IMPACT OF INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS ON SEXUAL MINORITY RIGHTS

ARTHUR S. LEONARD*

International law rarely has played a role in Supreme Court jurisprudence. Recently, however, the Court has indicated a new willingness to look outside the borders of the United States to other tribunals' analysis in examining the issue of anti-sodomy laws. This evolution, illustrated in the shift in reasoning between *Bowers v. Hardwick*¹ and *Lawrence v. Texas*,² presents exciting possibilities for the development of sexual minority rights.

On June 30, 1986, the U.S. Supreme Court rejected a constitutional challenge to Georgia's felony sodomy law in *Bowers v. Hardwick*.³ Justice Byron White invoked a history of universal disapproval of homosexual conduct to find that the presumed moral views of Georgia's citizens provided a rational basis for such a law, rejecting the argument that engaging in such conduct could be protected under the Due Process Clause.⁴ Concurring, Chief Justice Warren Burger invoked "millennia of moral teaching."⁵

But there was hardly an international consensus in 1986 about whether such conduct should be penalized. Consensual sodomy was decriminalized in the French Code Napoleon early in the nineteenth century. Since World War II, the trend in Europe and in countries elsewhere influenced by European legal developments had been towards greater recognition of personal privacy and reform of sodomy laws. During the 1950s, a parliamentary committee in England recommended decriminalization, and in 1967, the Parliament acted on the recommendation for England, Scotland, and Wales. The failure to decriminalize in Ireland led to litigation under the European Convention on Human Rights, which in Arti-

* Professor of Law, New York Law School. This essay is based on a presentation at New York Law School as part of Faculty Presentation Day, March 3, 2004.

1. 478 U.S. 186 (1986).

2. 539 U.S. 558 (2003).

3. *Bowers*, 478 U.S. 186.

4. *Id.* at 192-94.

5. *Id.* at 197 (Burger, C.J., concurring).

cle 8 requires that member states show appropriate respect for the private lives of their citizens. In 1981, the European Court of Human Rights found the Irish sodomy law offensive to this fundamental guarantee in *Dudgeon v. United Kingdom*.⁶ Thus, when *Bowers* was decided in 1986, the country whose law was the source of American sodomy laws had decriminalized sodomy, partly responding to a ruling by a multinational human rights tribunal.

To the U.S. Supreme Court in 1986, this would have been irrelevant. Determining the meaning of the Fourteenth Amendment was solely a matter of interpreting American constitutional text and tradition. The Court rarely paid heed to constitutional or statutory developments in other countries, or to interpretations of international conventions and charters that were not part of self-executing U.S. law. Although our Declaration of Independence called upon the "opinions of mankind" to witness the justice of our break from England, the opinions of mankind were generally deemed irrelevant to judicial construction of American constitutional law.

Seventeen years later, on June 26, 2003, the Supreme Court overruled *Bowers* in *Lawrence v. Texas*.⁷ Much of Justice Kennedy's opinion was devoted to explaining why *Bowers* was wrong at the time it was decided. After pointing out flaws in Justice White's historiography, Justice Kennedy noted developments in England and under the European Convention, specifically citing *Dudgeon*, to make the point that there was, even in 1986, an emerging international view that such laws violated basic human rights. Justice Kennedy said that the *Dudgeon* decision was "at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization."⁸

This drew an angry response from Justice Antonin Scalia in dissent. "The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta," he wrote. "Dangerous dicta," he added, "since 'this Court should not impose foreign

6. 45 Eur. Ct. H.R. 52 (1981). The preceding historical account is taken from Justice Anthony M. Kennedy's opinion for the Court in *Lawrence*, 539 U.S. at 573.

7. 539 U.S. 558.

8. *Lawrence*, 539 U.S. at 573. Justice White had stated that Hardwick's claim that engaging in gay sex was protected under the right of privacy was "facetious" in light of the history. *Bowers*, 478 U.S. at 194.

moods, fads, or fashions on Americans,'” quoting from Justice Clarence Thomas’s statement concerning a certiorari petition in another recent case.⁹

Was the Court’s decision imposing “foreign moods, fads, or fashions on Americans?” Were the references to the European Court of Human Rights and English law reform “meaningless dicta?” Justice Kennedy did not purport to base *Lawrence* on the statements of the European Court of Human Rights. Unlike the European Convention, the U.S. Constitution lacks any express reference to “respect for private life.” But Justice Kennedy used European Convention terminology as part of his rhetoric when he wrote: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”¹⁰ Clearly, Justice Kennedy and the justices who agreed to sign his opinion¹¹ were comfortable with importing a concept from an international human rights source into their interpretation of the boundaries of “liberty” protected by the Due Process Clause.

On September 18, 2003, Justice Ruth Bader Ginsburg delivered a lecture at the University of Idaho titled “Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication.”¹² Her theme was that although the United States was at one time almost alone in “exposing laws and official acts to judicial review of constitutionality,” over the past century a new situation had emerged in which “national, multinational, and international human rights charters and tribunals today play a key part in a world with increasingly porous borders. . . . We are the

9. Justice Thomas’s opinion was not an opinion by the Court, but rather a comment concurring with a denial of certiorari and thus of no precedential significance. *Foster v. Florida*, 537 U.S. 990 n.* (2002), *quoted in Lawrence*, 539 U.S. at 598. Justice Scalia’s parenthetical reference to countries that retain sodomy laws fails to specify the countries, of course, because they are mainly theocratic dictatorships, usually of Islamic background. All of the major western democracies have abolished laws against consensual sodomy.

10. *Lawrence*, 539 U.S. at 579.

11. Also signing the Court’s opinion were Justices Souter, Breyer, Ginsberg and Stevens. Justice O’Connor concurred in a separate opinion on other grounds. *See Lawrence*, 539 U.S. 558.

12. Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003).

losers if we do not both share our experience with, and learn from others."¹³

The emergence of the Internet, with easy access to court decisions from all the major constitutional democracies, as well as by international tribunals such as the European Courts of Human Rights and of Justice and the United Nations Human Rights Committee, has made it increasingly easy to share such experiences. Foreign courts frequently cite and discuss decisions by the U.S. Supreme Court and the courts of other countries, in contrast to the paucity of reciprocal citation and discussion by our courts. In South Africa, Canada, Australia, New Zealand, and Great Britain, nations with whom we share the common law tradition, the courts regularly pay attention to developments in the United States.¹⁴ When the South African Constitutional Court struck down that nation's sodomy law,¹⁵ it felt called upon to discuss *Bowers v. Hardwick*, unlike the U.S. Supreme Court's failure in *Bowers* either to note or engage with the argument in the European Human Rights Court's *Dudgeon* decision. And when the Law Committee of Britain's House of Lords, that nation's highest appellate court, faced an issue of same-sex partner tenant succession rights,¹⁶ it cited and discussed the New York Court of Appeals' groundbreaking decision on the same question in *Braschi v. Stahl Associates Co.*,¹⁷ treating it respectfully as a persuasive source of legal argument.

Assuming that there is new receptiveness by the U.S. Supreme Court to considering human rights developments in other countries, what would the Court find concerning human rights claims by sexual minorities? The most pressing constitutional claims from this community now involve legal recognition for same-sex partners, equal access to spousal protection under immigration laws, military service, and legal recognition of acquired gender for transsexuals.

Canadian courts, interpreting their own Charter of Rights and Freedoms, have found that the promised equality in Paragraph 15(1) includes a guarantee against discrimination on the basis of

13. *Id.*

14. *See infra* notes 15, 16, 18, 23, 25, 31-32, 36-39 and accompanying text.

15. *National Coalition v. Minister of Justice*, 1999 (12) BCLR 1517 (SA).

16. *Fitzpatrick v. Sterling House Association, Ltd.*, 3 W.L.R. 1113 (H.L. 1999).

17. 74 N.Y.2d 201 (1989).

sexual orientation, and that this also encompasses a right to have long-term committed relationships of same-sex partners recognized in law. The courts came to this recognition in stages, at first requiring equality of treatment in particular government programs or benefits, but ultimately coming to the view, in decisions announced in 2003 by the highest appellate courts in two provinces, that the logical direction of human rights law was to culminate in equal access to marriage.¹⁸ These decisions built on prior rulings by Canada's Supreme Court¹⁹ and seemed to government leaders so soundly reasoned that the federal government and the governments of both affected provinces decided not to appeal. The federal government then in office referred to the Supreme Court the question whether a proposed marriage bill would satisfy all constitutional requirements, and a successor government broadened the reference to ask the court whether marriage for same-sex couples is required to satisfy the equality standard.²⁰ In December 2004, the Court responded, declining to answer the additional question because the government had failed to appeal the lower court rulings directly and finding that the Parliament could adopt a federal definition of marriage that would be binding on the provinces.²¹ The Canadian courts invoked the U.S. Supreme Court's decision in *Loving v. Virginia*²² in characterizing the same-sex marriage question as raising issues analogous to the race discrimination identified by the U.S. Supreme Court in anti-miscegenation laws and specifically ref-

18. *EGALE Canada Inc. v. Canada*, 2003 BCCA 251; *Halpern v. Canada*, [2003] 65 O.R. 3d 161. Subsequently, the highest court of Quebec has reached the same conclusion. See *Henricks v. Canada*, [2004] D.L.R. 577 (in French, available at <http://www.jugements.qc.ca/primeur/documents/liguecatholique-19032004.doc>).

19. In particular, relying upon cases such as *Canada (Attorney General) v. Mossop*, [1993] S.C.R. 554, *Egan v. Canada*, [1995] S.C.R. 513.

20. The Supreme Court heard argument on this issue on October 7 through 9, 2004. Janice Tibbets, *Same Sex Marriage Top Court Challenges Opponents: Last Day of Arguments*, NAT'L POST (Canada), Oct. 8, 2004, at A9; Kirk Makin, *Supreme Court Date Set on Same-Sex Marriage Bill*, GLOBE & MAIL (Toronto), Feb. 21, 2004, at A16.

21. Reference re Same-Sex Marriage, 2004 SCC 079 (Dec. 9, 2004). The only fault the Court found with the proposed bill was in its provision excusing objecting religious organizations from performing same-sex marriages. The Court observed that under principles of Canadian federalism, the Parliament has no authority to legislate with respect to the question who can perform weddings. However, elsewhere in the opinion the Court opined that objecting religious organizations could refuse to perform same-sex weddings as an aspect of the religious liberty protected by the Charter.

22. 388 U.S. 1 (1967).

erenced the U.S. Supreme Court's rejection of the concept of "separate but equal."

The Canadian decisions may presage a similar development in Europe, as the European Court recently ruled, in *Goodwin v. United Kingdom*,²³ that Britain's failure to recognize a long-term marriage because one of the spouses was a post-operative transsexual violated the right to respect for private life. The *Goodwin* case, apart from its meaning for marriage rights, was also significant in signaling to those states bound by European law that respect for private life includes the right of transgendered persons to legal recognition of their desired gender identity, an issue as to which state courts in the United States are sharply divided and the Supreme Court has yet to speak.²⁴

In 2003, the Human Rights Committee of the United Nations ruled that Australia had violated the International Covenant on Civil and Political Rights by denying pension rights to the surviving same-sex partner of a military veteran.²⁵ Although neither this decision nor *Goodwin* directly embraces the right of same-sex partners to marry, both signal an emerging view internationally that same-sex partners are entitled to form legally-recognized relationships;²⁶ what rights and responsibilities would accompany such partnerships

23. 35 Eur. Ct. H.R. 18 (2002).

24. In recent years, appellate courts in Kansas and Texas have ruled that biological sex at birth is determinate on the question of a person's legal sex for the duration of their life, while the highest court in Maryland has taken the contrary view, relying in part on a much older appellate decision from New Jersey. Compare *Estate of Marshall Gardiner*, 42 P.3d 120 (Ka.), cert. denied, 537 U.S. 825 (2002) and *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Civ. App. 1999), cert. denied, 531 U.S. 872 (2000) with *In re Heilig*, 816 A.2d 68 (Md. 2003) and *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. App. Div.), cert. denied, 364 A.2d 1076 (N.J. 1976).

25. *Views of the Human rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. Human Rights Comm., 78th Sess., Communication No. 941/2000 (2003).

26. This is also supported by the wide array of legislation in Europe according recognition to same sex partners for various purposes, particularly in France, Germany, Switzerland, and the Scandinavian countries, which have legislated forms of registered partnership, and the Netherlands and Belgium, which allow same-sex partners to marry. In *Fourie v. Minister of Home Affairs*, Case No. 232/2003 (South Africa Supreme Court of Appeals, Nov. 30, 2004), the court ruled that the common law definition of marriage in South Africa must be changed to include same-sex marriage. The government has appealed this ruling to the Constitutional Court.

would be matters of national law, subject, of course, to the equality principles embodied in international human rights law.

One American court has already been influenced by the recent Canadian decisions. When the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health*,²⁷ that same-sex partners are entitled to marry, it referred to the Ontario decision, borrowed its reformulation of the common law definition of marriage, and appropriated its analysis of some of the asserted state justifications. The Canadian justices had demolished arguments that U.S. state governments continue to make in opposition to marriage claims, especially those involving the role of procreation in marriage and the contention that the optimum setting for child-raising is a two-parent household consisting of a father and a mother. The Canadian courts pointed out that opposite-sex couples are not required to prove fertility or a desire to have children in order to marry, and that the denial of marriage to same-sex couples raising children actually penalizes such children by denying them the stability and benefits provided by marriage. Although some American courts, most recently in Arizona²⁸ and New Jersey,²⁹ have refused to engage with the Canadian courts' arguments, the Massachusetts Supreme Judicial Court apparently found them to be persuasive.³⁰

27. 798 N.E.2d 941 (Mass. 2003).

28. *Standhardt v. Superior Court*, 77 P.3d 451 (Az. Ct. App. 2003), petition for review denied, 2004 Ariz. LEXIS 62 (2004). On January 20, 2005, the Court of Appeals of Indiana rejected a constitutional claim for same-sex marriage, finding that under the relatively undemanding requirements of the state constitution's equal benefits clause, the state's interest in promoting "responsible procreation" by heterosexuals sufficed to justify making marriage a solely heterosexual institution. *Morrison v. Sadler*, 2005 WL 107151.

29. *Lewis v. Harris*, 2003 WL 23191114 (N.J. Super.L.) (appeal filed).

30. *Goodridge*, 798 N.E.2d at 949 n.30. The court stayed its ruling for six months to give the legislature an opportunity to conform existing laws to the new marriage regime. Instead, the legislature spent the time trying to figure out ways to evade the ruling, asked the court whether a civil union law would meet the constitutional requirements, and having received a negative response from the court (*see* *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004)), voted to recommend passage of a state constitutional amendment banning same-sex marriages and establishing same-sex civil unions. Under Massachusetts law, the proposed amendment will not come before the voters until November 2006 and must be approved without modification by a subsequently elected session of the legislature before it can be placed on the general ballot. Another example is *People v. West*, 780 N.Y.S.2d 723 (Justice Court of N.Y., Town of New

Turning to immigration, the Constitutional Court of South Africa has ruled that the principle of equality enshrined in that country's post-apartheid constitution mandates that the government recognize committed same-sex partners for purposes of immigration rights in South Africa,³¹ a position that has made no headway in the United States. Many bi-national same-sex couples in this country face separation or forced exile because U.S. law treats their relationships as legally insignificant. The South African court noted that many other countries had extended recognition to same-sex partners in various contexts, citing cases from Canada, Israel, the United Kingdom, and New York's *Braschi* decision. Justice Ackerman's opinion took particular note of how Canadian courts tied together the concepts of equality and human dignity when dealing with anti-gay discrimination, concepts which the South African Constitution explicitly embraces in Sections Nine (Equality) and Ten (Human Dignity). Justice Ackerman stated:

This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.³²

Paltz 2004), in which a trial judge ruled that the state's refusal to let same-sex couples marry violates the federal and state constitutions, in the context of dismissing criminal charges against Jason West, the mayor of New Paltz, who performed weddings for same-sex couples who had been denied licenses. Judge Jonathan D. Katz did not cite any New York case authority, but referred generally to decisions from other states.

31. National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs, 1999 (2) SA 1 (CC).

32. *Id.* at 36.

U.S. Representative Jerrold Nadler (D.- N.Y.) has introduced a bill, the Permanent Partners Immigration Act,³³ that would establish such a policy, but has not been able to obtain hearings in the Republican-controlled House of Representatives. Before that bill advances, U.S. courts will likely face the issue directly when a binational couple in which one member is an American citizen, having married in Canada or Massachusetts, seeks the benefit of spousal preference provisions.³⁴ If the promise of equality for gay Americans embodied in *Lawrence v. Texas* is meaningful, might an American court be inspired by the South Africa Constitutional Court's ruling on immigration rights, based on the same concepts of equality and human dignity described by Justice Kennedy?

One could give more examples, but I have time for only one: the ability of openly-gay people to serve in the military. The U.S. Supreme Court has denied review to numerous cases in which federal appeals courts rejected First and Fifth Amendment challenges either to the current "don't ask, don't tell" policy or its predecessor exclusionary policies.³⁵ If Congress does not repeal the ban, some day the Supreme Court must confront this question, and in so doing it could look to a pair of 1999 rulings by the European Court of Human Rights, *Lustig-Prean and Beckett v. United Kingdom*³⁶ and

33. H.R. 832, 108th Cong. (2003). Representative Nadler enlisted 128 co-sponsors for the bill in the House.

34. See 8 U.S.C. § 1101(a), which would be amended by adding the phrase "or permanent partnership" after "marriage" and by providing a definition for permanent partners.

35. See, e.g., *Holmes v. California Army National Guard*, 124 F.3d 1126 (9th Cir.), cert. denied, 525 U.S. 1067 (1999); *Thorne v. U.S. Department of Defense*, 139 F.3d 893 (4th Cir.), cert. denied, 525 U.S. 947 (1998); *Selland v. Perry*, 100 F.3d 950 (4th Cir.), cert. denied sub nom *Selland v. Cohen*, 520 U.S. 1210 (1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.), cert. denied, 519 U.S. 948 (1996); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir.), cert. denied, 506 U.S. 1020 (1992); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied sub nom *Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Beller v. Mitten-dorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Plaintiffs in these cases have argued that the service ban violates rights of equal protection and privacy, and under the "don't ask, don't tell" policy, the right of freedom of speech, but none of the challenges has succeeded. The lack of a split in circuit authority has undoubtedly contributed to the Supreme Court's refusal to take a gay military case for review, but it seems likely that after *Lawrence v. Texas*, a circuit split will eventually develop if Congress does not repeal the policy.

36. *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. Ct. H.R. 548, 587 (1999) (finding that the plaintiffs were wrongly discharged "on the grounds of their homosexuality"), available at <http://www.echr.coe.int/eng/Judgments.htm>.

Smith and Grady v. United Kingdom,³⁷ holding that Britain's ban on military service by gay people violated the European Convention's requirement that member nations show respect for the privacy and family lives of their citizens. The European Court found that the military policy, which necessarily involved intrusive investigations into the sex lives of military applicants and members, had not been justified by the government sufficiently to support abridging basic human rights. Responding to the ruling, Britain repealed its ban, and has not experienced any significant problems integrating openly-gay members into its forces. Neither have the many other U.S. military allies who now allow openly-gay members to serve, including Canada, the other European Union countries, and Israel.

Although the U.S. Constitution does not specifically mention respect for privacy or family life, the U.S. Supreme Court has embraced those concepts in cases arising under the Due Process Clause, especially those protecting the autonomy of parents to decide how to raise their children,³⁸ and the right of individuals to control their procreative functions.³⁹ The Supreme Court has only begun to apply those concepts to sexual minorities in *Lawrence*. Justice Kennedy spoke in terms of "liberty" rather than "privacy" when striking down the Texas sodomy law, confirming a trend in the Court away from privacy rhetoric in Due Process cases.⁴⁰ But the European Court's application of this concept in the context of military personnel investigations falls comfortably within the same ideas of respect for privacy and individual dignity. Perhaps, especially as all of our major military allies let openly gay people serve, a Supreme Court newly sensitive to situations where America is out of

37. *Smith & Grady v. United Kingdom*, 29 Eur. Ct. H.R. 493, 523 (1999) (finding that the applicants were denied "respect for their private lives" when dismissed from the military on the grounds of their homosexuality), available at <http://www.echr.coe.int/eng/Judgments.htm>.

38. See, for example, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), cases frequently invoked for the proposition that the Due Process Clause protects parental discretion in making decisions about how to raise their children from government interference.

39. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of South-eastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

40. This trend was first signaled in *Casey*, 505 U.S. 833, where the Court upheld a woman's constitutional right to chose abortion during the first trimester of pregnancy based on the concept of "liberty" rather than "privacy."

2004]

SEXUAL MINORITY RIGHTS

535

step with the world community will see fit to overturn the ban. A court that has stated that our Constitution does not recognize “classes among citizens”⁴¹ should do no less.

While decisions by international human rights tribunals and the high courts of other countries do not establish binding precedents for the interpretation of our Constitution, they can provide persuasive precedents, as well as evidence of widely accepted propositions concerning the basic rights that lesbians and gay men ought to enjoy in any democratic republic.

41. *Romer v. Evans*, 517 U.S. 620, at 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion)).

