

## BOOK REVIEWS

*Sexual Orientation: A Human Right* by Eric Heinze (Dordrecht: Martinus Nijhoff Publishers, 1995) pages i-xxi, 1-307, appendix, bibliography and index 309-416. Price US\$144 (hard cover). ISBN 0 7923 3018 8.

Eric Heinze has produced a scholarly, well-researched and reasonably comprehensive study of sexual orientation and human rights. The book contains a wealth of information, although it is not a study of the human rights abuses suffered by sexual minorities worldwide. It is instead largely a western philosophical work, in the liberal tradition of many recent studies concerning sexual orientation and the law.<sup>1</sup> As such, it provides useful arguments which explore the jurisprudential basis for rights of sexual minorities. However, this philosophical approach does, in my opinion, make the study somewhat 'disembodied'. It doesn't adequately deal with the diversity of claims made by sexual minorities and the fundamental challenges these demands pose to our human rights system. Nor does Heinze's book adequately deal with problems of western chauvinism and problems associated with searching for an impossible universality in values. These (minor) criticisms would have no force if Heinze had included a history/study/strategy based on the experience of gay and lesbian individuals and groups attempting to intervene in the human rights system. Even without such a history, however, Heinze's work puts forward convincing arguments for the recognition of rights of sexual orientation.

Chapter 1 begins with a quick and well referenced survey of the human rights abuses suffered by lesbians and gay men around the world, demonstrating how homophobia has become a cross-cultural phenomenon. Heinze concludes:

Well documented, systemic, often violent persecution, wherever it occurs, is a primary concern of international human rights law. When a similar form occurs from one country to the next throughout much of the world, it becomes indeed a paradigm. It would seem, then, that the international human rights movement should have addressed the problem of sexual orientation long ago.

In fact, it has done nothing of the kind.<sup>2</sup>

With this somewhat ominous beginning, Heinze explores the philosophy and 'doctrine' concerning human rights and the 'problem' of sexual orientation. He seems to assume basic faith in the 'tasks' of human rights law: to *articulate* rights, *identify* violations, *create* the conditions for rights and *enlighten* people

<sup>1</sup> See, eg, Editors of the Harvard Law Review, *Sexual Orientation and the Law* (1990); Richard Mohr, *Gays/Justice: A Study of Ethics, Society and Law* (1988); Kees Waaldijk and Andrew Clapham (eds), *Homosexuality: A European Community Issue. Essays on Lesbian and Gay Rights in European Law and Policy* (1993).

<sup>2</sup> Eric Heinze, *Sexual Orientation: A Human Right* (1995) 9.

about rights.<sup>3</sup> The study examines ‘a core of fundamental rights of sexual orientation’ seeking to develop a ‘normative framework’ based on ‘extant international human rights law’.<sup>4</sup> Heinze thus circumscribes his area of examination from the beginning. He does not seek to fundamentally alter the framework of human rights law nor re-imagine what human rights law might look like if it was based on the experiences of sexual minorities. Such an approach may have produced more interesting results. He assumes sexual diversity yet does not problematise the notion of ‘the proper attitude of a specific, universal system of norms in the face of such diversity’.<sup>5</sup>

His book is divided into five parts. Part One addresses what is meant by ‘sexual orientation’ and ‘sexual minorities’. Heinze notes the cultural and historic specificity of concepts like ‘sexual orientation’ and notes the variety of discourses (‘legal, historical, anthropological, sociological, sociobiological, psychological, psychoanalytical, literary-critical, and theological’<sup>6</sup>) which use different methodology and categories to describe human sexuality. Heinze skilfully demonstrates how the Statist structure of international (and domestic) law supports the ‘normative-heterosexual paradigm of social organisation’.<sup>7</sup> This normative-heterosexual paradigm has in turn been adopted by international human rights law. It has also led to the production of categories of ‘sexual minorities’ defined as ‘people subject to discrimination on the basis of lifestyles, intimate associations, or other forms of personal identity or expression derogating from a dominant normative-heterosexual paradigm’.<sup>8</sup> Heinze asserts that worldwide similarities in statist practices lead to worldwide similarities in the (mis)treatment of sexual minorities. Indeed, this has much to do with religious (evangelical-missionary) and colonial histories. He traces the development of the concept of ‘sexual orientation’<sup>9</sup> and although he notes the ambiguities of the concept, he distinguishes it from a number of other terms such as homosexuality and gender identity. He similarly examines and notes problems with the whole concept of ‘minority’ but concludes ‘in contemporary, post-colonial, statist societies, sexual minorities count among the largest minority groups, sharing common patterns of discrimination worldwide. Today, their rights are an international issue’.<sup>10</sup>

Part Two addresses whether ‘universal law’ is an appropriate mechanism to attempt to deal with sexual orientation. Heinze points out that law is not the only mechanism by which to pursue social change. He addresses this issue by exam-

<sup>3</sup> Ibid 11.

<sup>4</sup> Ibid 23.

<sup>5</sup> Ibid 24.

<sup>6</sup> Ibid 31.

<sup>7</sup> Ibid 33.

<sup>8</sup> Ibid 37. Note that the terms ‘sexual orientation’ and ‘sexual minorities’ are used by Heinze to refer not only to gay men and lesbians but also to bisexuals, transsexuals and transgenderists: *ibid* 59-62.

<sup>9</sup> ‘Sexual orientation denotes real or imputed acts, preferences, lifestyles, or identities, of a sexual or affective nature, in so far as these conform to or derogate from a dominant normative-heterosexual paradigm’: *ibid* 60.

<sup>10</sup> *Ibid* 58.

ining objections which might be raised to pursuing change via human rights law at an international level. '[T]he most passionate objection' is identified as being 'that of cultural and historical relativism'.<sup>11</sup> A second objection is that rights of sexual orientation are qualitatively different from the kinds of rights recognised as fundamental. Recognising such rights destroys the uniqueness of human rights law. Heinze identifies a third objection as being that human rights law itself is ineffective and thus not worth pursuing. He examines each of these issues in separate chapters and, not surprisingly, concludes that the recognition of rights of sexual orientation at an international level is a project worth pursuing.

He begins examining the problem of universality in Chapter 3 by noting that 'sexual orientation' is a problematic concept 'always and everywhere'.<sup>12</sup> He examines the debate about the universality of human rights law in general and gives a number of arguments for its universality (none of them new). He argues that rights of sexual orientation enjoy universality, at the very least, to the same extent as rights such as rights of creed, of conscience and of free speech. Indeed, throughout his book Heinze bases his arguments about sexual orientation on derivation from existing human rights law, thus seeking to avoid the accusation of 'creating' or 'adding' new or special 'western' rights to the accepted international corpus. This seems to avoid the main issue. Surely, demonstrating the 'universality' of such 'rights' could be more usefully argued by demonstrating that sexual minorities all around the world claim such rights.

In Chapter 4, Heinze addresses the objection that adding too many rights to the accepted corpus will 'cheapen' human rights law and make it less effective. He attempts to situate 'rights of sexual orientation' squarely within traditional human rights values, to show they are not qualitatively different. He explains the three generations of rights and places rights of sexual orientation clearly within the first generation. Heinze argues chronological novelty is not important: 'a new right may not, in fact, be new at all'<sup>13</sup> if it fits squarely within human rights values. Chapter 5 is a defence of human rights law in general, in order to answer the question: why bother attempting to establish rights of sexual orientation? Heinze examines the political significance of human rights law, as well as its moral and symbolic significance. He argues that, even though the international system is weak, protection of sexual minorities through human rights law is worthwhile, because the international system does, slowly, have an impact on the policies of governments and the attitudes of individuals.

In Chapter 6, Heinze then turns to briefly examine domestic models for the protection of gay and lesbian rights, in order to point to future possible models for international law. Heinze identifies a range of domestic treatments from 'expansive recognition' (recognition of full rights including relationship recognition) to 'minimum recognition' (mere decriminalisation), all in western countries. He avoids the question of cultural chauvinism by arguing, as earlier, that

<sup>11</sup> Ibid 65.

<sup>12</sup> Ibid 67.

<sup>13</sup> Ibid 84.

because rights of sexual orientation are derived from the extant system, this problem is no greater than the general question of the relativity of rights. Again, this hardly seems a satisfactory resolution of the problem. What is more, a comprehensive examination of other cultures and other historical periods would provide a more diverse range of models. He locates the jurisprudence of the European Court of Human Rights as within the 'minimum recognition' model. Thus, although the chapter provides a very useful summary of the treatment of gay and lesbian rights in various western States, that focus substantially limits the 'models' Heinze examines.

Part Three continues to build Heinze's western liberal philosophical justification for the recognition of rights of sexual orientation. In order to make this project seem non-threatening, rational and coherent with the status quo, Heinze from the beginning adopts a model of derivation. He justifies this model in Chapter 7, arguing that the goals and assumptions behind human rights law justify and necessitate the derivation of new rights from the existing corpus. Chapter 8 then examines the 'constraints' that this process of derivation imposes, namely, the norms from which they derive must be fundamental, must be extant and must specifically concern sexual orientation.

Chapter 7 notes that a strict positivist approach would resist the notion that rights of sexual orientation 'already' exist within international law. This is because a positivist would be hard pressed to find a textual basis for such rights, although Heinze sees more possibilities in a positivist grounding based on customary law. He concludes that the *deduction* of positive rights of sexual orientation may not be contemplated by a positivist, but that an 'argument for' such rights is not inconsistent with the positivist project.<sup>14</sup> Heinze then examines a naturalist approach, arguing that human rights law, although it may have a positivist basis, inevitably evolves into a naturalist system where rights are recognised as inherent in personhood. Such a naturalist system legitimates a process of analogy and recognition of 'new' rights under 'new' categories, when they are consistent with the basic values of human rights law. By locating rights of sexual orientation in this dialectic of positivism/naturalism, Heinze is able to conclude that 'sexual orientation can claim status as a locus of fundamental human rights even if those rights are proclaimed nowhere explicitly'.<sup>15</sup>

Heinze doesn't problematise either the notion of positivism or naturalism, or the worldviews these ideological positions privilege. To me, rights should be recognised when there is a history/pattern of discrimination and violence systematised by State encouragement and participation. No other basis is necessary. Nevertheless, his arguments are important when our system is dominated by the positivist/naturalist dichotomy he reproduces here. Heinze provides the ammunition to use a positivist's or naturalist's own arguments against them.

After thus justifying the process of derivation, Heinze outlines in Chapter 8 the criteria with which the process of derivation must comply. He notes that this chapter contains the statement of a number of tautologies, which he sees as

<sup>14</sup> Ibid 124.

<sup>15</sup> Ibid 130.

necessitated by the jurisprudential system. It also contains, however, what I consider to be Heinze's most controversial claims. Heinze sets out his three jurisprudential principles for the derivation of rights of sexual orientation. First, the principle of strict egalitarianism, which means that rights of sexual orientation only exist where discrimination occurs on that basis: that is, rights of sexual orientation are not about sexuality generally or oppression generally. This is a controversial claim to many, particularly of a post-structuralist persuasion, who see useful strategies in pointing out the networks of power which exist between sexuality (generally), oppression (generally), the state and sexual orientation.

Heinze's second principle is that of extant rights. Here Heinze states what he calls the tautology that rights of sexual orientation must only be drawn from and be consistent with, rights recognised and developed within international law. This unstartling 'tautology' is then used by Heinze to limit the field of rights of sexual orientation in a way I find very startling. He states that 'family' rights — relationship recognition and adoption — cannot be derived from the existing corpus.<sup>16</sup> Although he recognises the validity of such claims as a matter of social change, he can find no basis in the existing corpus. This is because Heinze sees a fundamental distinction between rights such as those to privacy and freedom of expression, and rights to family and marriage. He asserts that the latter always assumed a normative-heterosexual paradigm whilst the others did not. I find this distinction troubling. The normative-heterosexual paradigm is fundamentally discriminatory (in a malign sense). If we allow human rights laws which assume it to go unchallenged, there is little point in attempting the vast reimaginings of human rights law which need to take place.

It should be noted, however, that Heinze is not saying that rights based on a heterosexual-normative paradigm should not be challenged, just that they cannot be used to derive rights of sexual orientation. This positivist's distinction is not one which makes a great deal of sense from an activist/strategist point of view. Properly valuing diversity, ensuring respect and building democracies from the 'bottom up' requires a challenge to heterosexism in all its manifestations. There is little point in drawing distinctions between privacy rights, expression rights and relationship rights. Heinze has allowed a positivist strategy to limit the 'legitimate' field of gay and lesbian engagement with law:

Only rights ensuing from a one-step derivation of fundamental rights, directed towards sexual orientation as such, should be pursued. Broader changes in institutions such as the military or ... marriage, unrelated to sexual orientation *per se*, should be undertaken as distinct initiatives, and not as part of a platform of rights of sexual minorities.<sup>17</sup>

Having thus limited the site of his human rights inquiry, Heinze in Part Four sets about deriving his rights of sexual orientation from extant rights. In separate chapters he examines rights along a spectrum from the 'more general' to the 'more specific'. These include rights of personhood, rights to privacy, rights of

<sup>16</sup> Ibid 137-41.

<sup>17</sup> Ibid 148.

liberty and rights of equality. The final chapter in this part includes an examination of more specific rights: conscience, speech, expression, and association; and rights against discrimination in criminal law, employment, enjoyment of goods and services and other areas.

Heinze argues that sexual orientation is fundamental to personhood and he examines many social-scientific empirical studies to this effect. Heinze does not derive any specific rights or strategies from this examination. The chapter is really a debunking of prevalent myths concerning the 'illness' and 'inferiority' inherent in homosexuality and other 'deviations'. His next chapter on the right of privacy does not problematise 'privacy' from a critical perspective, despite the wealth of feminist and other critical writings showing the dangers inherent in this concept. He simply argues that the right to privacy has two aspects: 'decisional' (who you choose to be intimate with) and 'spatial' (not limited to the home).<sup>18</sup> He examines both the jurisprudence of the European Court and the US Supreme Court on this right and is remarkably uncritical of the virulent homophobia in the US Supreme Court case of *Bowers v Hardwick*.<sup>19</sup>

His chapter on liberty is an examination of what liberty and its inherent limits imply with respect to sexual orientation. Heinze argues that rights of sexual orientation must be recognised to the extent they do not cause palpable harm to the (genuine) interests of third parties. Here, he also examines the State's authority to impose limits on such rights. This involves examining the balance between 'morals' and rights struck in both the US Supreme Court and the European Court. Heinze concentrates on those judgments which deny that law can be based on any conception of the morality of the majority, adopting this position himself. Having dismissed 'morality' as a sham limitation on liberty, Heinze examines justified limits, and here deals with the issue of paedophilia. He distinguishes and excludes paedophilia from rights of sexual orientation.

Heinze's two chapters on equality deal with whether 'sexual orientation' should be added to the list of categories mentioned in international instruments, whether it should be 'read in', and the implications of such a category. He argues that 'sexual orientation' should not be read into other categories such as 'sex',<sup>20</sup> but should be recognised as a distinct category within 'other status' provisions. He examines European Court jurisprudence on this point. He argues 'sexual orientation' should be included because it shares the same characteristics as other categories of non-discrimination: invidious treatment and systemic discrimination. He then examines US jurisprudence regarding equal protection (the 14th Amendment) as a model. He argues that sexual orientation should be a 'suspect classification' for the purposes of 'heightened scrutiny' under US constitutional law.

Heinze then examines what impact the recognition of such an equality right would have in terms of the increasing intervention of human rights law into the

<sup>18</sup> Ibid 173.

<sup>19</sup> 478 US 186 (1986).

<sup>20</sup> Compare the Decision of the United Nations Human Rights Committee in the Toonen Case UN Doc CCPR/C/50/D/488/1992 (31 March 1994) para 8.7.

'domestic' State-controlled sphere. He argues that the determination of the extent of rights of sexual orientation will depend upon 'the overall resolution of the balance between intervention and autonomy in the interpretation of the non-discrimination norm'.<sup>21</sup>

The final chapter in Part Four examines how far rights of sexual orientation should be recognised in specific areas of activity. Relying on the principle of 'third party applicability' (adopted by the European Court), Heinze outlines the State's responsibility to intervene to prevent abuses of the human rights of individuals by other individuals. He compares US and European Court jurisprudence governing inhuman or degrading treatment, rights of thought and conscience, speech and expression (with brief reference to pornography and vilification laws) and rights of association. He deals with the criminal law including age of consent (although he regrettably concludes that human rights law may not prohibit discriminatory age of consent laws, even upon recognition of fundamental rights of sexual orientation).<sup>22</sup> He also briefly examines issues relating to discrimination in employment, the special position of youth and rights of travel, immigration and asylum. Again, all of this examination is normative rather than descriptive. Heinze is seeking to establish why these rights should be recognised, rather than demonstrating that they already are.

Part Five, titled 'Towards Positive Law', contains Heinze's 'Model Declaration of Rights Against Discrimination on the Basis of Sexual Orientation' and his recommendations for further research and action. The Model Declaration is drafted to protect gay men, lesbians, bisexuals, transsexuals and transgenderists. It contains a prohibition on state discrimination on the basis of sexual orientation and places an obligation on states to prevent discriminatory conduct by individuals. The declaration then contains a code of rights, phrased similarly to texts like the International Covenant on Civil and Political Rights 1966 (ICCPR).<sup>23</sup> It sets out rights of privacy, expression, association, thought and conscience. It prohibits the criminalisation of sexual practices on the basis of sexual orientation, and sets out States' obligations to eliminate discrimination in employment and training, education, child custody and visitation, housing and accommodation, health care and social services. Special measures are included with respect to youth and other provisions deal with 'hate' propaganda and freedom of movement. His 'Model Declaration' does not deal with 'family' rights, for the reasons given earlier, and this seems to me to be a particular shortcoming.

The Appendix contains useful excerpts from the Universal Declaration on Human Rights 1948,<sup>24</sup> the ICCPR, the International Convention on the Elimination of all forms of Racial Discrimination 1966,<sup>25</sup> the Convention on the Elimination Discrimination against Women 1977,<sup>26</sup> and the European Convention for

<sup>21</sup> *Ibid* 241.

<sup>22</sup> *Ibid* 226-7.

<sup>23</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 1976).

<sup>24</sup> GA Res 217A, 3 UN GAOR 135, UN Doc A/810 (1948).

<sup>25</sup> Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 1969).

<sup>26</sup> Opened for signature 1 March 1980, 19 ILM 34 (entered into force 1981).

the Protection of Human Rights and Fundamental Freedoms 1950.<sup>27</sup> The bibliography is extensive and useful, listing cases under subheadings of jurisdiction, as well as extremely valuable listings of books, articles and other works. Indeed, the bibliography shows a diversity of research, at least within western traditions. The Index is divided into geographic, case, and general sections. More detail and/or entries in the Index would have been useful.

In some senses, it could be said that Heinze's book is a call to arms. It convincingly presents a liberal-jurisprudential basis for the recognition of rights of sexual orientation. Indeed, his arguments stand as a ringing indictment of the lack of recognition currently granted to gay men, lesbians and other members of sexual minorities by international institutions. His arguments also show that the silence of (and silencing by) these institutions is unacceptable. I would have liked to see more of an attempt at a jurisprudence built on gay and lesbian experience and the study of political reform struggles (such as the International Gay and Lesbian Association's (ILGA) battles over Economic and Social Council (ECOSOC) consultative status). Nevertheless, Heinze's book is an impressive and comprehensive study of sexual orientation and human rights.

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<sup>27</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome, 4 November 1950, 213 UNTS 221 (1955).

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