

RELIGIONIZATION OF POLITICS - DOES IT AFFECT THE DEVELOPMENT AND PRACTICE OF HUMAN RIGHTS?

- Illustrated through the struggle to end discrimination based on sexual orientation and conflicts with religious text and doctrine

“Apartheid and homophobia are both crimes against humanity”

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Deadline for submission: August 31st 2006

Number of words: 22360

Date for submission: August 31st 2006

¹ Archbishop Desmond Tutu in an interview with The Times (London), July 1st 2004

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**3. FREEDOM OF RELIGION AND BELIEF AND THE BALANCE AGAINST
NON-DISCRIMINATION BASED ON SEXUAL ORIENTATION:**

**RELIGIOUS ACTORS, POLITICAL AGENDAS AND THE NEED FOR
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Chapter 1 - Introduction

“If gay and lesbian people are given civil rights, then *everyone* will want them.”

Author unknown, text from a button.

1.1 Problem statement – research questions

After World War II the growth of the human rights movement has given it strength and confidence to take on issues that were not discussed at the time the Universal Declaration on Human Rights (UDHR) was drafted and signed by the United Nations (UN) member States. Among the groups that have had their lives made visible are lesbian², gay³, bisexual and transgender⁴ persons.

My main research question is if the principle of non-discrimination in a human rights context de jure and de facto includes protection for sexual orientation⁵ based discrimination, and if so does it come into conflict with the concept of freedom of religion.

I will attempt to show that there is a need in international human rights to have a balance between religious text and doctrine and secular law and human rights, both to uphold freedom from discrimination and freedom of religion and conscience. To explore my research question I will look at international legal arguments and de facto development on non-discrimination and sexual orientation. In particular, can international human rights treaties be interpreted as prohibiting discrimination against same-sex activity, gay, lesbian and bisexual individuals, and same-sex couples? And is there jurisprudence that protects the same from discrimination and human rights violations? Has treaty bodies and Special Rapporteurs included sexual orientation in their cases, review of State reports and reports of human rights violations, and do they raise the issue themselves?

The concept of freedom of religion is to be seen in a context of freedom of religion being used as part of a religious political agenda⁶. The right to freedom from discrimination touches on

² Lesbian is used to describe female homosexuals. - <http://www.britannica.com/ebc/article-9384264>

³ Gay is a colloquial equivalent to homosexuals. It can be used to describe both men and women homosexuals, but is most commonly used to refer to male homosexual persons. - http://www.clgs.org/5/5_2.html – The Center for Lesbian and Gay Studies in Religion and Ministry, University of California - Berkeley

⁴ Transgender: All persons not wishing/wanting to be gender defines as either man or woman.

⁵ Sexual orientation refers to a person's sexual gender and to the way in which a person's emotional and sexual desires and feelings are directed. The common categories of sexual orientation are heterosexual, gay, lesbian and bisexual.

⁶ Religion, a system of thought, feeling, and action that is shared by a group and that gives the members an object of devotion; a code of behavior by which individuals may judge the personal and social consequences of their actions; and a frame of reference by which individuals may relate to their group and their universe. Usually, religion concerns itself with that which transcends the known, the natural, or the expected; it is an acknowledgment of the

most other aspects of human rights. It is a right that everyone in one way or another can be affected by if violated. Freedom of religion or belief is also a right that is connected to the right to freedom from discrimination. At the same time religion and belief is used to impose restrictions on others, and religion is used by politicians with a political agenda. Efforts are being made in the name of religion to impose moral views on others where there is no harm to third parties and the only “offence” is in the mind of the person who feels that the other is acting immorally.

I will look at to what extent respect for various religious and ethical values and cultural backgrounds come into conflict with the right to protection from discrimination on the grounds of sexual orientation and if use of secular law is useful for implementation of international human rights law in domestic legislation. I will attempt to show how State representatives use religious text and doctrine, and how religious fundamentalists⁷ through their added political force constitute a clear threat to the human rights protecting on the basis of sexual orientation.

1.3 Methodological considerations

A look at the issue and implications of these problems requires a clear and in depth legal approach to define non-discrimination based on sexual orientation as included in the human right regime, giving an overview of legal instruments, international jurisprudence and de facto developments within the UN, and to some extent links to regional organizations/bodies such as the Council of Europe and the European Court of Human Rights. The choice of subject indicates a need for an interdisciplinary approach keeping in mind to what extent respect for various religious and ethical values and cultural backgrounds can come into conflict with human rights protection from discrimination based on sexual orientation and its balance against freedom of religion. The cultural difference and the religious difference in the sense of this thesis are to a large extent synonymous.

There is a developing amount of academic literature covering sexual orientation and human rights, but fewer sources that give the links between sexual orientation and freedom of religion. The tying in of religionization of politics connected to sexual orientation and human

extraordinary, the mysterious, and the supernatural. The religious consciousness generally recognizes a transcendent, sacred order and elaborates a technique to deal with the inexplicable or unpredictable elements of human experience in the world or beyond it. - Columbia dictionary - <http://columbia.thefreedictionary.com/Religion>
⁷ By religious fundamentalists I mean conservative religious authoritarianism in all faiths. It is marked by a literal interpretation of scriptures and favors a strict adherence to traditional doctrines and practices. Since the late 1970s fundamentalists have embraced electoral and legislative politics and the “electronic church” in their fight against perceived threats to traditional religious values: so-called secular humanism, Communism, feminism, legalized abortion, homosexuality, and the ban on school prayer. In Islam, the term “fundamentalism” encompasses various modern Muslim leaders, groups, and movements opposed to secularization in Islam and Islamic countries and seeking to reassert traditional beliefs and practices. - The American Heritage dictionaries - <http://www.answers.com/topic/fundamentalism>

rights requires more literature search and linking literature on sexual orientation and human rights, and making comparisons up against secularism and religion.

1.3 Purpose and scope of limitations of thesis

To limit the scope of this thesis I have found it necessary to choose one group that encounters discrimination and is affected by the religionization of politics in human rights. The choice is discrimination on the grounds of sexual orientation, if and how it is affected. In choosing sexual orientation I have also limited this term to, in this thesis, be defined to include lesbian, gay, bisexual and transgender (LGBT) persons. I will however not go into a discussion on transgender people, as this in itself is an issue of such proportion and with a growing jurisprudence, that it could be a thesis on its own.

Looking at the research questions and issues raised I will focus on human rights development and non-discrimination mainly going on within the United Nations. I aim to provide legal proof to substantiate the right to live full lives protected from discrimination based on sexual orientation. I will attempt to show how there has been a growing jurisprudence both within the UN Human Rights Committee (HRC) and in the European Court of Human Rights to support the claims that sexual orientation cannot be the basis of human rights violations.

I will through this attempt to show that there is de facto exclusion of LGBT persons from the full protection of the international human rights and that violations include numerous rights.

1.5 Background

When the Universal Declaration of Human Rights, and then the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were taking form, and then signed by the individual states, homosexuality was still illegal in countries all over the world and the term sexual orientation was not naturally included as a specified ground of discrimination. Between 5,000 to 15,000 homosexuals died in concentration camps during the Holocaust. Homosexual prisoners were forced to wear pink triangles on their clothes so they could be easily recognized and further humiliated inside the camps⁸. Only 21 years ago in 1985 did West German President Richard von Weizaker publicly acknowledged the Nazi murder of homosexuals. This example is used to show one aspect of how unlikely it would have been for sexual orientation to be mentioned specifically in the UDHR in 1948, and interpretation has been left to time and further development of human rights. The declaration and treaties mirror the attitudes of the 1950s and

⁸ <http://www.holocaustforgotten.com/NewsGays.htm>

1960s, and a time when no country had any national, visible and outspoken lesbian and gay movement.

Since the end of World War II and the emergence of human rights, the development of human rights and the LGBT movement have grown and developed alongside each other.⁹ The developing public identity, demands for rights and changes have come as part of a wider social, political and economical development. From being looked at by medicine as an illness, by the churches and religion as sinful and by the law as immoral, sexual orientation has become visible through demands for protection through basic human rights. Approximately 80 of the UN's member states still prohibit homosexuality¹⁰ and LGBT within both those and other countries face all sorts of persecution. 9 countries in the world have a death penalty for homosexuality, and among them are Afghanistan, Iran, Sudan and Saudi Arabia¹¹. Stigma is still attached to sexual orientation through branding homosexuality a "perversion", to be "against nature", not being "normal", or being deviant¹². The global progress is slow in changing legislation and social attitudes and reports by human rights organisations show great differences between the countries that still have death penalties and regulations of long prison sentences in their penal codes and countries that have amended their laws to also include same-sex marriages¹³. Approximately 25 countries in the world have either amended their marriage laws to not discriminate¹⁴, or have included specific legal recognition of same-sex partnerships. The latest country to be added to the list of equality in marriage is South Africa, after a decision by the South African Constitutional Court in December 2005¹⁵ and supported by the South African government in a decision August 2006¹⁶.

⁹ Professor Douglas Sanders – Human Rights and Sexual Orientation in International Law 11/05/2005 www.ilga.org

¹⁰ Ban relationships between both men and women: Algeria, Angola, Benin, Burundi, Cameroon, Cape Verde, Djibouti, Ethiopia, Guinea Conakry, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Senegal, Sudan, Swaziland, Togo, Tunisia, Afghanistan, Bangladesh, Brunei, Pakistan, Solomon Islands, Western Samoa, Chechen Republic, Bahrain, Iran, Lebanon, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates, Yemen, Barbados, Grenada, Nicaragua, Puerto Rico, Saint Lucia, Trinidad and Tobago.

Ban relationships between men: Botswana, Kenya, Mozambique, Namibia, Nigeria, Seychelles, Sierra Leone, Somalia, Tanzania, Uganda, Zambia, Zimbabwe, Bhutan, Burma/Myanmar, Cook Islands, Fiji, India, Kiribati, Malaysia, Maldives, Marshall Islands, Nauru, Nepal, Niue, Papua New Guinea, Singapore, Sri Lanka, Tajikistan, Tokelau, Tonga, Tuvalu, Uzbekistan, Kuwait, Guyana, Jamaica, and certain states of the USA.

¹¹ http://www.ilga.org/statehomophobia/LGBcrimallaws-Daniel_Ottoson.pdf

¹² Professor Douglas Sanders – Human Rights and Sexual Orientation in International Law 11/05/2005 www.ilga.org

¹³ Gay LawNet - <http://gaylawnet.com/laws/laws.htm>

¹⁴ See as examples - British Columbia: *Barbeau v British Columbia*, 2003 and Ontario: *Halpern et.al. v Attorney General of Canada*, 2003

¹⁵ http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=3&ZoneID=2&FileID=726

¹⁶ Newsarticle in *Fædrelandsvennen* 24.August 2006 – Sør-Afrikas regjering godkjenner homoekteskap. <http://www.fvn.no/nyheter/utenriks/article392336.ece>

Chapter 2

Non – discrimination and sexual orientation

“First they ignore you, then they laugh at you, then they fight you, then you win.”

Mahatma Gandhi

2.1 International law: de jure and de facto developments

In this chapter my aim is to show the development regarding protection based on sexual orientation and its inclusion in the principle of non-discrimination and equality in international law through the interpretation and practice of various UN organs, using both treaties and soft law. I will attempt to show how non-discrimination in international human rights law also has been interpreted to de jure include sexual orientation.

As States ratify a treaty they become bound by legal obligations set up by the treaty, and each treaty has a distinct international enforcement system set up to ensure that the State Parties follow up on their obligations. A State can enter reservations to a treaty as long as the reservations do not come in conflict with the object and purpose of the treaty¹⁷. In a human rights treaty context that means that reservations cannot be made related to non-derogable rights, and as the Human Rights Committee say in CCPR General Comment 24 “...it is desirable in principle that States accept the full range of obligations, because the human right norms are the legal expression of the essential rights that every person is entitled to as a human being.”¹⁸

The principle of non-discrimination is one of the cornerstones of rights in international human rights law and it applies to all other rights. This has been stated and repeated in numerous interpretations and writings on human rights and non-discrimination¹⁹. The system is based on equality and non-discrimination and the principles are part of numerous international instruments with different scopes and use.

The UN Charter has a limited non-discrimination clause in its article 1 on the purposes and principles of the United Nations. Article 1(3) states that the purpose of the UN also is *“promoting and encouraging respect for human rights and for the fundamental freedoms for all*

¹⁷ Vienna Convention on the Law of Treaties – May 23, 1969. Article 20 (2)

¹⁸ In depth interpretation of reservations is found in CCPR General Comment 24

¹⁹ The Universal Declaration of Human Rights. A Common Standard of Achievement. Martinus Nijhoff Publishers 1999. Article by Sigrun Skogly on Article 2 (pages 75-87).

without distinction as to race, sex, language or religion".²⁰ Marc Bossuyt in his book from 1976 does an exhaustive analysis on the concept of non-discrimination in international law²¹ and among his conclusions he points to the fact that the UN Charter misleadingly suggests an exhaustive ordering of the categories of discrimination. There is no proof that this was the intention of the authors of the Charter, as the preparatory documents and then the UDHR show that the enumeration has a clear illustrative character.²² In relevance to my question there is no limitations in the UN Charter that should exclude any groups or limit the interpretations.

The non-discrimination and equality principles also have references in the International Covenant on Civil and Political Rights, Article 2 and Article 26, International Covenant on Economic, Social and Cultural Rights, Article 2 (2), Convention on the Elimination of all form of Discrimination against Women, Article 2, Convention on the Rights of the Child, Article 2, European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14 and Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights, Article 1 and African Charter on Human and People's Rights Article 2. In addition the principle is also in the EU Charter.

2.1.1 Universal Declaration of Human Rights (UDHR)

When the foundations were laid down through discussions between experts and state parties, to what was to become the UN Charter and the Universal Declaration of Human Rights (UDHR), there was a strong belief that the notion of treating people differently would be contrary to equality and therefore a hindrance to equal opportunity to enjoyment of the freedoms and rights that is the basis for human rights protection and equality²³. The delegate from Chile reminded his colleagues in the drafting process that "the United Nations has been founded principally to combat discrimination in the world"²⁴.

The Universal Declaration of Human Rights sends a clear message from its first word of the preamble – "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*" stating the inherent dignity and the equal and inalienable rights of all. The first sentence of Article 1 further underlines equality – "*All human beings are born free and equal in dignity*

²⁰ (My emphasis added)

²¹ Bossuyt, M. (1976) L'interdiction de la discrimination dans le droit international des droit de l'homme.

²² Page 56

²³ See Johannes Morsink in The Universal Declaration of Human Rights. Origins, Drafting and Intent. University of Pennsylvania Press 1999

²⁴ Ibid. page 92

and rights.”²⁵, while Article 2 states that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, **without distinction of any kind, such as**²⁶ race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.”²⁷

The right to protection from discrimination is guaranteed without distinction and also guaranteed to every person. The protection is defined as to be given individually²⁸. Jack Donnelly has pointed out the limitations of the wording *any kind*, saying that States are not prohibited from taking into consideration *any* status differences. Individuals are only entitled to protection against discrimination against the individual, discrimination that tends to ill will or causes unjustifiable harm²⁹, and in addition discrimination that is systemic. This would then in my view indicate an interpretation that included LGBT individuals that are discriminated against.

Eric Heinze, in his book *Sexual Orientation: A Human Right*, points out that wording such as “without distinction of any kind” was introduced into human rights instruments to indicate that it is representative categories such as race, ethnicity, religion, gender or political affiliation that historically have been clear targets of human rights violations worldwide³⁰. The special focus given to such categories is a tool in targeting discrimination. In my opinion it is difficult to limit the number of categories that is to be included by non-discrimination clauses without ending up in a discussion of possible discrimination, both for present categories and possible future new ones. The open-endedness is further strengthened by the wording “**such as**”, as it gives the intention of being illustrative and not exhaustive in its meaning³¹.

As the listing of grounds for being given protection from discrimination ends with the words “**other status**”, it has been interpreted as open ended through the first almost 60 years since it was adopted and proclaimed by General Assembly resolution 217 A (III) of December 10th 1948. The meaning of this is that other status was included to leave it open to the development of human rights and other groups in need of protection from discrimination. As I see it this open ended interpretation has also been used to argue the inclusion of such distinctions as sexual orientation, and viewing the different interpretations on the inclusive intent of the non-discrimination clauses it seems to me that there is no legal argument that would exclude sexual

²⁵ Bertie Ramcharan provides a basic distinction between equality and non-discrimination. Equality may mean only “equal treatment for those equally situated....indeed, equal treatment for unequals is itself a form of inequality”. Non-discrimination clauses, on the other hand, are designed to make clear that certain factors are unacceptable as grounds for distinction”, such as race, religion, gender, and other human classifications. In *Equality and Nondiscrimination* (1981, p.252).

²⁶ Article 2(1) (emphasis added)

²⁷ Ibid.

²⁸ Njål Høstmælingen in *Internasjonale Menneskerettigheter* (2003, p.137)

²⁹ Jack Donnelly in *Universal Human Rights in Theory and Practice* (2003, p.225-241)

³⁰ *Sexual Orientation. A Human Right*. Eric Heinze (1995, p.222-223)

³¹ Heinze (1995, p.216)

orientation from “other status”, also given the intent behind the wording “without distinction of any kind”.

2.1.2 International Covenant on Civil and Political Rights (ICCPR)

This treaty is built on foundations of the UDHR and has the same first part of its preamble as the UDHR, stating the inherent dignity and the equal and inalienable rights of all. Article 2 (1) of the Covenant puts a clear responsibility on all States that are party to the it “*to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*” The difference between UDHR and ICCPR is that Article 2 here specifies that the non-discrimination clause of the treaty is linked to the other articles and other guaranteed rights of the Covenant. The non-discrimination clause in the UDHR is a general referral to non-discrimination. The same list and wording is repeated in ICCPR Article 26, the treaty’s anti-discrimination article. Together with Article 17 on privacy and family, Article 19 on freedom of expression, Article 23 (1) and (2), Article 2 (1) and Article 26 have been used building jurisprudence on sexual orientation as a human right.

2.1.2.1 Developing jurisprudence within the UN Human Rights Committee

The UN Human Rights Committee (HRC) is the most important human rights bodies in the UN system when it comes to interpretation of the ICCPR. It monitors the State Parties signatory to the Covenant and their compliance with the treaty. As the States have their progress reports reviewed and discussed by the HRC many States also report on positive steps taken to include sexual orientation in their anti-discrimination legislation³². The Committee has welcomed such progress in its concluding observations³³. Similarly the Committee also include comments in its concluding observations on States that have and uphold discriminatory practices based on sexual orientation, and the Committee asks that effective protection be given against such discrimination³⁴. This, in my opinion, goes toward showing that protection against discrimination based on sexual orientation has been recognized in the human right regime of the

³² See for example: Norway CCPR/NOR/2004/5, Canada CCPR/CAN/2004/5 and New Zealand CCPR/NZL/2001/4

³³ See for example: Concluding observations: Ecuador CCPR/C/79/Add.92, August 18 1998, Slovakia CCPR/CO/78/SVK, 22 August 2003, Greece CCPR/CO/83/GRC 2005, Finland CCPR/CO/82/FIN 2 December 2004

³⁴ See for example: Concluding observations: El Salvador CCPR/CO/78/SLV 22 July 2003, Austria CCPR/C/79/Add.103 19 November 1998, Trinidad and Tobago CCPR/CO/70/TTO 3 November 2000, Chile CCPR/C/79/Add.104 30 March 1999 and Poland CCPR/C/79/Add.110 29 July 1999

ICCPR, implemented into the reporting system and observed by States as they do answer to the requests of the Committee by also including information on sexual orientation.

All States that have signed a treaty are obligated to act in a manner not contrary to the object and purpose of the treaty. This is elaborated on in the Vienna Convention on the Law of Treaties Part III³⁵. Since the UN has chosen the HRC to be its main source for interpretation of the ICCPR the decisions that come out from the Committee also has to be viewed as an important subsidiary source of the Covenant itself. Looking at the Statute of the International Court of Justice Article 38 the sources of international law are listed and include judicial decisions as subsidiary means for determining the rules of law³⁶. As a number of treaties and conventions are unclear or of such a general nature that they need interpretation as they evolve international court decisions and international academic research and writings are used as such subsidiary means of law.

In CCPR General Comment 18 on non-discrimination from 1989 the HRC further interprets on the non-discrimination principles in ICCPR. In point 7 the Committee states that they believe;

“that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”³⁷

As the Committee is the appointed main interpreter of the ICCPR their interpretations should be considered legally binding to any State having signed the treaty. Even though the General Comment does not specifically list sexual orientation, the Committee made it clear in their decision concerning Toonen that sexual orientation should be covered by the wording “sex” and should also in such a sense be interpreted as a non-discrimination ground³⁸. The Committee in addition says that;

³⁵ Vienna Convention on the Law of Treaties – May 3, 1969. See specifically art.31. In addition art.27 and art.46 states that internal law conflicting with a treaty may not be used as justification for not performing in line with the treaty in question.

General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant : . 04/11/94.

CCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments) also discusses issues related to object and purpose of the ICCPR in relation to States using their possibility to make reservations to a treaty and how it has to be viewed in a context of not violating the object and purpose of the treaty or convention.

³⁶ Statute of the International Court of Justice – June 26, 1945

³⁷ <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument> – CCPR General Comment 18, see point 7

³⁸ Toonen v. Australia

“While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.”³⁹

In interpreting the above it seems right to say that the Committee gives a clear message to all States party to the Covenant to include wide and inclusive legal interpretations when making new or amending existing domestic laws. Such laws or legal changes should also in my opinion provide protection from discrimination based on sexual orientation, as such inclusion has to be viewed included in the Committee’s referral to all persons being given equal and effective protection. There is a difference between Committee interpretation, new jurisprudence developing and all States that are party to the ICCPR actually agreeing to the point that they will implement sexual orientation protection into domestic legislation. A number of States violate a number of other human rights that they are bound by through being signatories to the treaty. The violations don’t lose validity even though they rights violated are not implemented and followed. They remain violations that need to be addressed.

Another task of the Committee is to hear individual communications or complaints from people who allege their human rights have been violated by their own government, provided that they have first exhausted all available domestic remedies. When a complaint is lodged, the Committee receives information from the complainant and from the Government, and then gives their views as to whether there has been a breach of any of the articles of ICCPR⁴⁰. The complaint mechanism is a quasi-judicial system described in the First Optional Protocol to the ICCPR⁴¹, and can only be used against States who have signed this Protocol. The Optional Protocol does not give any details on follow-up of decisions, but even though the Committee's decisions are not legally binding on the States parties to the Covenant, the Committee's recommendations have in recent years been largely observed by State parties. The Committee

³⁹ General Comment 18- point 12

⁴⁰ See Optional Protocol to the International Covenant on Civil and Political Rights, December 16, 1966

⁴¹ Ibid.

has established a Special Rapporteur position to follow up on States implementations of decisions and to have it reported as part of a State's periodic report⁴². In the early decisions made by the HRC there was a lack of legal analysis, but that has improved in newer decision⁴³. Thomas Buergenthal have referred to the development of a valuable body of case law that has come from the complaint mechanism, and that it is today considered as an important part of contemporary human rights law⁴⁴.

To investigate the first part of my research question I will use three cases that have been raised before the UN Committee on Human Rights, one against Finland in 1979 and two against Australia, all with variations of claims of discrimination based on sexual orientation. Based on the wording of the preamble and Article 2 (1) and Article 26 it is also in my view clear that all other articles of the ICCPR are relevant related to discrimination based on sexual orientation.

*Hertzberg et al. v. Finland*⁴⁵

This was the first case before the HRC where sexual orientation was an issue. It was initiated in 1979, and the Committee gave its views in 1982. It has no visible direct link to a conflict between freedom of religion and non-discrimination based on sexual orientation, but my reason for including it here is that it in my opinion has an indirect relevance. The discussion in the Committee, as shown below, has focus on morality and limiting exposure regarding homosexuality due to this. As issues of morality are often connected directly and indirectly to religion this case is interesting and shows the development that the Committee has gone through on the issue of sexual orientation. I'm not attempting an in depth discussion to show that morality is connected only to religion, but that it in my opinion often is given such a connection.

Background of the case

The Finnish Penal Code did not allow any objective descriptions of homosexuality⁴⁶. The State controlled Finnish Broadcasting Company (FBC) was, according to the complainants, in violation of Article 19 of the Covenant having interfered with the right to freedom of information and expression and they claimed that the FBC had censored radio and TV programs dealing with

⁴² See Buergenthal, Shelton and Stewart in *International Human Rights in a Nutshell* (p.59-63)

⁴³ See Chapter 1 in; *An overview of international human rights and humanitarian law development and their protection mechanisms*, in *International Human Rights and Humanitarian Law. Treaties, Cases and Analysis*. Francisco Forrest Martin. Schnably, Wilson, Simon and Tushnet, Cambridge 2006

⁴⁴ *Ibid.*

⁴⁵ *Leo Hertzberg et al. v. Finland*, Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985)

⁴⁶ The Finnish Penal Code in Chapter 20, paragraph 9 had a provision that read; "If someone publicly engages in an act violating sexual morality, thereby giving offence, he shall be sentenced for publicly violating sexual morality to imprisonment for at most six months or to a fine. Anyone who publicly encourages indecent behaviour between persons of the same sex shall be sentenced for encouragement to indecent behaviour between members of the same sex as decreed in subsection 1."

homosexuality⁴⁷. The Finnish State on its part argued that no one had been convicted using the paragraph in question, and that there was no indication that there would be an unduly limiting of freedom of expression through an interpretation of the paragraph⁴⁸.

The Committee came to the conclusion that there was no violation of Article 19, stating that the FBC had a right to make decisions regarding the use of radio and TV to discuss homosexuality. The Committee in addition said that programs could be judged as encouraging homosexual behaviour, and that harmful effects on minors could not be excluded⁴⁹.

One member of the Committee, Torkel Opsahl, said in an individual opinion that he disagreed with the conclusion of the Committee. He built his opinion on reference to Article 17 on the right to privacy and stated that the right to be different and live accordingly was protected through Article 17. Adding reference to the article in question (Article 19) he argued that everyone must have a right to impart information and ideas that are both positive and negative about homosexuality and then discuss it through the media of choice and on the person's individual responsibility.

In addition Mr. Opsahl wrote that in his view "the conception and contents of "public morals" referred to in Article 19 (3) are relative and changing. Use of Article 19 should not be used by States to "perpetuate prejudice or promote intolerance", as it is especially important to protect minority views in relation to freedom of expression. The State party must show that the contested paragraph in the Penal Code has a restriction that is necessary.

This decision, in my view, shows in retrospect how attitudes and society has changed when it comes to perceptions of homosexuality and sexual orientation. Mr. Opsahl was in that sense ahead of his time by pointing out that the right to privacy also includes homosexuals and the right to live "differently". He additionally reminded the State of the obligation to show the necessity of such legal restrictions. At the same time the majority of the Committee upheld their view of the time on public morals by being afraid that homosexual lifestyle could spread by way of information and radio and TV and that it could be harmful for children to be exposed to any information regarding homosexuality. By not even taking the actual program transcripts into consideration⁵⁰ the Committee seemed to be lacking the will to look at the content in question. What they then ended up with was just as much a defence of public morals as a defence of Article 19. Today we see totally different attitudes, and if this case had been deliberated on by the Committee today my view is that they would reach a different decision, possibly with an

⁴⁷ Leo Hertzberg et al. v. Finland, Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985). See 2.6.

⁴⁸ Ibid.6.2.

⁴⁹ Ibid.10.4 and 11.

⁵⁰ See Human rights and sexual orientation in international law – article by Professor Douglas Sanders April 20th 2001.

individual minority opinion disagreeing. The case additionally shows that homosexuality was seen as a possible reason for discrimination as the Committee never questioned that aspect, but the Committee did not in this case find a violation to be present.

*Toonen v. Australia*⁵¹

Background of the case

Nicolas Toonen was a GLBT rights activist in Tasmania, one of Australia's six constitutive states. He challenged sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code, which criminalized various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private. In practice the provisions were not in use and not being enforced by the police, but the Director of Public Prosecutions announced, in August 1988, that proceedings pursuant to these sections would be initiated if there was sufficient evidence of the commission of a crime. Toonen argued that because of his active work for lesbian and gay rights, his HIV/AIDS work and media exposure because of this, combined with his long-term relationship with another man, his private life and liberty were threatened by the provisions in the Tasmanian Criminal Code. He also argued that the criminalization of homosexuality in private had not permitted him to expose openly his sexuality and to publicize his views on reform of the relevant laws on sexual matters, as he felt that this would have been extremely prejudicial to his employment. Toonen claimed that sections 122 and 123 of the Tasmanian Criminal Code violated Articles 2(1), 17; and 26 of the Covenant. He also contended that no judicial remedies for a violation of the Covenant were available, as the Covenant had not been incorporated into Australian law, and Australian courts had been unwilling to apply treaties not incorporated into domestic law.

In 1992 the Human Rights Committee reviewed the case and the Australian authorities did not contest the admissibility. These legal provisions only remained in Tasmania while the other Australian jurisdictions similar laws had been repealed⁵². The Committee concurred with the view from Australia that the laws were in violation of the right to privacy, stating that “adult consensual sexual activity in private is covered by the concept of “privacy”⁵³” and came to the conclusion that moral issues can not be viewed exclusively as a matter of domestic concern. In the Committee’s view this would be seen as a hindrance to the work of the Committee as it would limit the ability to look at issues concerning “privacy”⁵⁴. Looking at a possible violation

⁵¹ CCPR/C/50/D/488/1992 (1994).

⁵² Ibid.6.8.

⁵³ Ibid.6.9.

⁵⁴ Ibid.8.7.

of Article 26 the Committee also here found in favor of Toonen, saying that even though the Covenant does not specifically prohibit sexual orientation discrimination the reference to "sex" in Articles 2(1), and 26 is to be taken as including sexual orientation⁵⁵. As a result of this case, Australia repealed the law criminalizing sexual acts between males in its state of Tasmania.

With this case the HRC, in my view, created a precedent within the UN human rights system in addressing discrimination against lesbian, gays and bisexuals. As referred to earlier case law from the HRC is considered to be an important part of contemporary human rights law⁵⁶. The States are bound by their treaty commitments and in ICCPR Article 2 a State Party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind ...”, and as sexual orientation has been defined as included in the reference “sex” the States are in my opinion bound to protect also against discrimination based on sexual orientation. This case is widely used by scholars when referring to non-discrimination and the visible inclusion of discrimination based on sexual orientation. In my view it is of interest that the Committee included sexual orientation in the reference to the term “sex”. If you use the “but for” –principle sex discrimination is present if by changing the complainant’s sex for the opposite one and leaving all other relevant factors unchanged the plaintiff would have received a different treatment. That was in my view the case here.

*Young v. Australia*⁵⁷

Background of the case

Larry Cains was an Australian World War II veteran who served in Borneo. He met Edward Young in London in the early 1960s and the couple then shared their lives until Larry’s death in 1998. After Cains’ death, Young was informed by another surviving spouse of a veteran that spouses were entitled to certain benefits. When he inquired, these were refused to Young. This refusal led to domestic legal action and ultimately, the HRC decision. The Committee referred to its earlier jurisprudence regarding Article 26 and sexual orientation. At the same time it pointed out that if a distinction is based upon objective and reasonable criteria it might not be in violation of the Covenant’s interpretation on discrimination. When it came to the case of Mr. Young the Committee found no argument presented by the State party that would indicate any objective and reasonable criteria for treating heterosexual couples and same-sex couples different when it came to pension benefits under the law. The reasoning was also that the benefits were

⁵⁵ Ibid.8.7.

⁵⁶ See Buergethal, Shelton and Stewart in *International Human Rights in a Nutshell* (p.59-63)

⁵⁷ *Young v. Australia* - CCPR/C/78/D/941/2000 18 September 2003

not only given to heterosexual married couples but also to heterosexual unmarried couples who could prove they lived in a “marriage-like” relationship. The difference in Australian pension benefit practice was found to be in violation of Article 26, by denying pension on the basis of sex or sexual orientation, and the Committee concluded that the Australian authorities should reconsider the pension application and prevent further similar violations by amending the law⁵⁸.

The case of Young, in my opinion, brought the issue of discrimination based on sexual orientation from an issue of same-sex activity debated in Toonen to the issue of equal rights on a broader basis not to be based on sex or sexual orientation. The Committee in this case made its decision on protection from discrimination based on sexual orientation, not just with reference to Article 17 and the issue of privacy but with sole focus on Article 26. The Committee recognized the equal validity of heterosexual and homosexual relationships, in this case regarding equal right to pensions. This can in my view be used extended to also include the equal right on other areas, like for example inheritance, employment benefits given to spouses and housing rights.

I have shown here that the Committee have been given the task by the UN to be its main source of interpretation of the ICCPR. Through its individual case decisions, which are viewed as an important part of contemporary human rights law, and General Comments the Committee creates and develops the interpretation of the Covenant. As I have shown above it’s not binding for the States, but no States have contested in any way the decisions shown here, as they have had the opportunity to have their views heard as the Committee deals with the individual case. In addition they have chosen to recognize the optional protocol and by that the competence of the Committee⁵⁹. Viewing the developments of jurisprudence and the conclusions of the HRC my claim is that sexual orientation based discrimination has been given visible inclusion in the non-discrimination principle of human rights.

2.1.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)

In Article 2(2) the States party to the treaty are bound to guarantee that the rights included “will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” In addition the covenant has the same preamble starting point as the ICCPR with the referral to the UN Charter and the UDHR. Why the content of the ICESCR is of importance also when it comes to discrimination based on sexual orientation is for example through the Covenant’s Article 12, which guarantees the right of everyone to the enjoyment of the highest attainable

⁵⁸ Ibid.10.4. and 12.

⁵⁹ See ICCPR Optional Protocol Article 1 to Article 5

standard of physical and mental health. Even though the articles of the ICESCR give the signatory States more room to implement the full meaning of the rights over time and connected to their economic ability articles like the right to health combined with the Article 2 (2) on discrimination strengthens the right to health in a non-discrimination and equality perspective. As I have shown above sexual orientation is defined through development and jurisprudence giving protection from discrimination. This is important when looking at some countries where homosexuality is still viewed as a mental illness and where “reparative therapy” is one way of handling this, forcing gay men and lesbians to undergo harsh psychiatric treatments to become “normal”.

The Committee on Economic, Social and Cultural Rights have focused on discrimination in CESCR General Comment 3 on the nature of State obligations⁶⁰ and with referral to ICCPR and “the “undertaking to guarantee” that relevant rights “will be exercised without discrimination ...”.” The Committee says that “.... it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures.⁶¹” In addition the Committee have included specific reference to sexual orientation in General Comment 14 – The right to the highest attainable standard of health, Article 12⁶² and in General Comment 15 – The right to water, Article 13⁶³, when discussing the use of the articles and their application regarding non-discrimination and equality. As the Economic and Social Committee has been appointed to be UN’s prime interpreter of the ICESCR the Committee formulate General Comments in order to assist and promote their further implementation of the Covenant and to assist in achieving progressively and effectively the full realization of the rights recognized in the Covenant⁶⁴. The two General Comments referred to here were passed respectively in 2000 and 2003⁶⁵. In my view they can be seen as part of a picture that shows the increased reference to sexual orientation and open reference to non-discrimination inclusion as seen by the Committee.

2.1.4 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

In the context of this thesis I’m including CEDAW to discuss inclusion of protection from sexual orientation discrimination with focus on lesbians. The start of the preamble is built

⁶⁰ The nature of States parties obligations (Art. 2, par.1):. 14/12/90. CESCR General comment 3. (General Comments)

⁶¹ Ibid.

⁶² E/C.12/2000/4 - CESCR General Comment 14, on Article 12

⁶³ E/C.12/2002/11- CESCR General Comment 15, on Article 13

⁶⁴ Overview of the present working methods of the Committee.

<http://www.ohchr.org/english/bodies/cescr/workingmethods.htm>

⁶⁵ Ibid.

on the same principles of equality and dignity for all women. It does not specify that the convention was only meant for heterosexual women, but has the principle of everyone and no one.

As many women all over the world still suffer under lack of equality and being controlled by family and/or a husband, this is a problem that also strongly affects many lesbians in their process of trying to be able to live their own full lives. There are numerous examples provided by international human rights organizations like International Gay and Lesbian Human Rights Commission (IGLHRC), International Lesbian and Gay Association (ILGA) and Human Rights Watch, where being anything but heterosexual is strongly condemned by a mix of religion and culture. Examples include lesbians who have been raped by male members of their family in an effort advised to “convert them”, and then they are married to someone against their will to save the family from shame⁶⁶. Article 5(1) (a) of CEDAW should also protect lesbians from this kind of human rights violations through the wording and the obligation of the State party “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) have made several references to the discrimination of lesbians, or more in general to sexual orientation, when reviewing periodic State Reports. Concluding observations have been made positively to reports from for example Sweden, Canada, Netherlands and Ireland⁶⁷, while criticising legislation or lack of legislation in countries like Mexico and Kyrgyzstan⁶⁸. Those States that received positive comments from the Committee on progress were commended for having passed new legislation or amending existing legislation to further protect or give equal rights based on sexual orientation. As examples, Canada was commended for amendments to the Canadian Human Rights Act granting protection against discrimination on the basis of sexual orientation⁶⁹ and Ireland for outlawing discrimination on the basis of sexual orientation in their Employment Equality Act⁷⁰. As for Kyrgyzstan the Committee voiced their concern that lesbianism is classified as a sexual offence in the Penal Code, and recommended “that lesbianism

⁶⁶ Amnesty International report – Crimes of hate Conspiracy of silence. Amnesty International Publications 2001 ISBN: 0 86210 302 9

⁶⁷ Concluding observations, Sweden, A/56/38, July 31, 2001, Canada, A/52/38/Rev.1, August 12, 1997, Netherlands, A/49/38, April 12, 1994 and Ireland, A/54/38, July 1, 1999

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

be reconceptualized as a sexual orientation and that penalties for its practice be abolished”⁷¹. These examples show how the Committee in a number of reports up for review, and when it’s relevant, comment on sexual orientation and by doing so shows that it’s included in the Committee’s interpretation of CEDAW. It goes to support the part of my research question that inquires whether non-discrimination is included. The Committee is appointed as a direct consequence of Articles 17 – 22 of the CEDAW and has among its tasks to view and report on legislative, judicial and administrative or other measures that have been adopted by States party to CEDAW to fulfil its obligations relating to the Convention. In my view the inclusion of sexual orientation in a non-discrimination perspective from the Committee shows that such comments have been included since the early part of the 90’s. When comments are made praise is given for legislative changes that include sexual orientation in a non-discrimination framework. Discrimination based on sexual orientation is treated by the Committee as violations of human rights.

2.1.5 Due diligence

Due diligence has been developed in international law as the standard to measure whether a State bears its responsibility to prevent, investigate and punish violations of human rights. The standard has been incorporated into UN documents, and is used to describe the minimum effort which a state must demonstrate to fulfill its responsibility to protect individuals from human rights abuses. The term due diligence has been used since the early 19th century, and then as a term in matters concerning neutrality,⁷² and has since been used in relation to other fields of international law. In human rights the standard has sprung out of the evolving focus on women’s human rights and it was used by the UN as a terminology when the Declaration on the Elimination of Violence Against Women came in 1993⁷³.

At the UN Commission on Human Rights session in 2005 sexual orientation and non-discrimination was discussed as the New Zealand Ambassador Tim Caughley made a public statement on behalf of 33 governments. In the statement he said that “All States must exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of violence committed against individuals because of their sexual orientation.”⁷⁴ In addition human rights organizations

⁷¹ Ibid.

⁷² See Maria Flemme – Due Diligence in International Law. Master thesis, Faculty of Law, University of Lund, Spring 2004.

⁷³ Declaration on the Elimination of Violence Against Women A/RES/48/104 – Article 4 (c) “Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”

⁷⁴ <http://www.ilga.org/campaigning/UnitedNations.pdf>

like Amnesty International also make referrals to due diligence and the lack of such from authorities when preventing and investigation crimes against LGBT people⁷⁵.

Due diligence is in my opinion a good principle in a human rights context to be used to monitor States' compliance with the principle of non-discrimination based on sexual orientation. As I have shown earlier both interpretations of ICCPR, ICSECR and CEDAW include the principle of non-discrimination based on sexual orientation. It should be used to monitor how States' deal with both State and non-State actors' fulfillment of human rights obligations related to sexual orientation. The CEDAW Committee include comments and questions regarding sexual orientation and non-discrimination in their concluding observations when reviewing State party reports. Inclusion of due diligence in reporting on human rights also on this issue would in my opinion make it easier to track discrimination and responding to human rights abuses targeting LGBT. In the context of this thesis I have used due diligence to show that legal possibilities have been developed that can be effectively used when responding to discrimination based on sexual orientation.

2.1.6 Convention on the Rights of the Child (CRC)

Children are those defined by the convention as being under the age of 18 years old. Coming to terms with ones own sexual orientation is something that for many will start to become obvious during the late child or teenage years. It is important to recognize the CRC as an important convention for all children and adolescents, and as a means of protection from discrimination for LGBT youth. CRC Article 2 prohibits discrimination and requires governments to ensure protection against discrimination. In its annual report to the Nineteenth Session of the UN General Assembly the Committee on the Right of the Child referred to homosexual boys and girls often facing acute discrimination based on sexual orientation in a context of HIV/AIDS and as belonging to a particularly vulnerable group⁷⁶. The Committee here naturally and without further question or discussion defines sexual orientation in as include in the CRC's non-discrimination definition. This is of relevance to my research question and shows that the CRC, as interpreted by the Committee, includes protection against sexual orientation discrimination as part of their framework. The Committee is not a legal body, but has been elected to be the main interpreters of the CRC and to give observations, recommendations and

⁷⁵ Amnesty International report – Stonewalled: Police abuse and misconduct against lesbian, gay, bisexual and transgender people in the US. AI Index: AMR 51/122/2005 22 September 2005.

⁷⁶ CRC/C/80, October 9, 1998

suggestions to achieve the realization of obligations undertaken by State Parties who have signed the Convention⁷⁷.

To further show the intent of the Committee and the inclusion of protection the Committee has in General Comment 3 - HIV/AIDS and the right of the child, Article 8⁷⁸ and General Comment 4 – Adolescent health and development in the context of the Convention on the Rights of the Child, Article 6⁷⁹ included sexual orientation as covered by the convention, focusing specifically on Article 2 and the right to non-discrimination. As the Committee has the task of interpretation of the CRC through its General Comments these have to be seen as subsidiary means for determining the rule of law, as stipulated by the Statute of the International Court of Justice in Article 38⁸⁰. As such they are also used by the Committee when reviewing State reports and specific parts or wording of comments can be used by the Committee for follow-up questions, request for issues to be included in the next due report or as requests for new legislation or legislative changes⁸¹. Concerns voiced include “access to appropriate information, support and necessary protection to enable them to live their sexual orientation.”⁸² Praise being given to inclusion of sexual orientation in non-discrimination legislation⁸³. As with the other Committees the CRC also actively comments on sexual orientation in positive terms and as inclusive in the convention’s framework, showing that sexual orientation is seen in a context with referral to children and adolescents.

In 2004, as part of a UN Secretary General’s study on violence against children, a questionnaire was sent out to all signatories of the CRC. This study came after a suggestion from the Committee. The questionnaire included specific inquiries concerning legal framework and inclusion of sexual orientation in definitions of violence and what legal framework exists, and variations in age of consent connected to sexual orientation⁸⁴. This also in my opinion goes to show the inclusion sexual orientation is given and that all States are requested to answer questions regarding their legal framework and sexual orientation.

I interpret the non-discrimination article of the CRC to include sexual orientation and oblige State Parties who have signed the treaty to respect, protect and promote the rights of all children. My interpretation is supported by the documentation given above of the comments,

⁷⁷ CRC Article 43 - 45

⁷⁸ CRC/GC/2003/1

⁷⁹ CRC/GC/2003/4

⁸⁰ Statute of the International Court of Justice – June 26, 1945

⁸¹ Concluding observations: Belgium CRC/C/15/Add.178, June 13, 2002, United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188, October 9, 2002.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ United Nations Secretary-General’s Study on Violence against Children Questionnaire to Governments - <http://www.ohchr.org/english/bodies/crc/docs/study-quest-E.doc>

suggestions and observations given by the Committee and their inclusion. The fact that violations based on sexual orientation still take place in a number of States should not make the right less important or give it a weaker status.

2.1.7 Reports from UN Special Rapporteurs

The Special Rapporteurs appointed by the UN to look in depth specific issues or country situations have become important in bringing issues to the surface and showing violations of human rights. My inclusion is connected directly to my non-discrimination discussion as several of the Special Rapporteurs on thematic issues have become more visible in interpreting into their mandates the possibility to request information on and report about human rights violation based on sexual orientation.

The Special Rapporteur on violence against women has repeatedly included sexual orientation references in her reports. One of her focuses have been on sexual assaults and coercion, and how lesbians are being targeted for rape because of their sexual orientation to “convert them back to heterosexuality“ or as a method of torture by government officials⁸⁵. Lesbians are acting in ways that in many countries still are looked at as sexually inappropriate or morally wrong, as sexual activity is seen as something that is confined to a marriage with someone of the opposite sex⁸⁶. In her report from 2002 the Special Rapporteur on violence against women used an example from Zimbabwe, where a young lesbian woman was locked up by her family and forced to submit to rape by an older man to “correct” her orientation. She was raped until she became pregnant⁸⁷. In my view, as long as women in general continue to be oppressed and discriminated against the same will be happening to lesbians. The only possibility of changes is the continued visibility given to women’s discrimination in general and lesbians in this context especially as that increases pressure on States to amend their laws and give increased focus to sexual orientation discrimination. As it is relevant that the CEDAW Committee focuses on issues related to sexual orientation it is also of relevant that Special Rapporteurs like Yakin Ertürk makes the issues visible in her reports.

Among the issues presented by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt in his

⁸⁵E/CN.4/2005/72, January 17, 2005. See also the report by Amnesty International from 1997 titled Breaking the Silence. Human Rights Violations Based on Sexual Orientation (p.28-29)

⁸⁶ In Amnesty International’s report Crimes of hate, conspiracy of silence. Torture and ill-treatment based on sexual orientation.

⁸⁷ E/CN.4/2002/83 31 January 2002

report to the Commission in 2004 was sexual orientation discrimination⁸⁸. Mr.Hunt wrote that discrimination based on sexual orientation is “impermissible under international human rights law⁸⁹” and that the “widespread lack of support or protection⁹⁰” against violence and discrimination obstructs the enjoyment of sexual and reproductive health for many LGBT persons. He also referred to the HRC’s decision on *Toonen v. Australia* in relation to criminalizing same-sex activity and the implications it can have on HIV/AIDS education and prevention⁹¹. He pointed out that States have obligation to ensure that health information and sexual and health services are available to LGBT persons⁹². Mr.Hunt wrote that “sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.⁹³” Additionally he wrote that he had no doubt that a correct understanding of human rights included "recognition of sexual rights as human rights"⁹⁴.

The Special Rapporteur is here, in my opinion, using the interpretation of Article 12 that has been used in CCPR General Comment 14, and further referring to *Toonen v.Australia* and the Committee on Human Rights decision. Mr.Hunt has later commented that he adopts the view that is now well established in international human rights law: sexual orientation is a prohibited ground for discrimination and that while the issue remains controversial in some societies the position of being a Special Rapporteur is not a popularity contest⁹⁵. Mr. Hunt’s comment is included to substantiate my own view, as shown when looking at all of the above discussed conventions that sexual orientation is included. This in my opinion makes the reporting done by Special Rapporteurs such as Mr.Hunt all the more relevant, as it makes it possible to make violations visible and included in reports connected to the appropriate conventions.

There are numerous other examples from Special Rapporteurs on issues such as extrajudicial, summary or arbitrary executions, torture and other cruel, inhuman or degrading treatment or punishment, right to freedom of opinion and expression, situation for human rights defenders and right to education, to mention some. The Special Rapporteur on extrajudicial, summary or arbitrary executions have on almost 20 different occasions reported on murders

⁸⁸ In April 2006 the Commission, as part of a needed reform to strengthen the role of this body, became the Human Rights Council - A/RES/60/251

⁸⁹ E/CN.4/2004/49 16 February 2004, point 38

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid., point 39

⁹³ Ibid., point 54

⁹⁴ Ibid

⁹⁵ Essex Human Rights Review Vol. 2 No. 1. The Right to Health: An Interview with Professor Paul Hunt <http://projects.essex.ac.uk/ehrr/archive/pdf/File4-Hunt.pdf>

based on sexual orientation in a number of countries, summary trial of homosexuals who were convicted and buried alive during the period of the Taliban in Afghanistan and death threats⁹⁶. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression have sent letters to a number of States concerning blocking of sexual orientation information websites, such as www.gaymiddleeast.com, which was blocked by Saudi Arabian authorities⁹⁷ and Iran where crimes were punished linked to the Internet. The Special Rapporteur on the right to education have reported on a Colombian school not allowing two boys to continue their education because of their homosexuality, because the school claimed that “homosexuality is sinful”⁹⁸. All in all at least 10 Special Rapporteurs have reported on sexual orientation based discrimination⁹⁹. In my opinion, increased reference to sexual orientation discrimination in reports has to be seen as taking positive steps forward in relation to achieving a full de facto inclusion of non-discrimination based on sexual orientation in numerous UN foras.

2.2 UN World Conference on Human Rights – Vienna 1993

The first global meeting on human rights took place in Teheran in 1968. In 1989 the UN General Assembly requested a world meeting that would review the progress made in the field of human rights since the adoption of the UDHR. The UN through the years has arranged a number of different human rights conferences such as this one on a number of topics. These conferences are meeting points for UN member states, and NGOs and function largely to develop policies on specific issues, such as women’s rights, or to get State parties to commit in final documents or action plans to further development of important issues. The documents are not legally binding, but by signing such a final document or agreeing to a plan of action the States commit and their failure to follow up can then be questioned as States report to the different treaty bodies of the UN or when specific topics are discussed in special sessions of the General Assembly. My reason for including discussions on the Vienna conference here is because it was the first time in a global human rights setting that lesbian and gay advocates were visible and had a possibility to be seen and heard. 8 activists from three lesbian and gay organizations were officially accredited¹⁰⁰. It is important to show how protection from sexual orientation discrimination became a visible part of the UN agenda and how interpretation of international human rights law develops.

⁹⁶ In International Human Rights References to Human Rights Violations on Grounds of Sexual Orientation and Gender Identity. International Commission of Jurists March – April 2005

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Rodney Croome. See footnote 64

Resolution 47/122 of the United Nations General Assembly, adopted on December 18, 1992¹⁰¹, established a Provisional Agenda for the World Conference emphasizing the need to consider the realization of all human rights “including those of persons belonging to vulnerable groups” (Agenda item 11). As the World Conference on Human Rights opened in Vienna in June 1993 the UN Secretary General Boutros Boutros-Ghali said in his opening statement; “As an historical synthesis, human rights are, in their essence, in constant movement. By that I mean that human rights have a dual nature. They should express absolute, timeless injunctions, yet simultaneously reflect a moment in the development of history. Human rights are both absolute and historically defined¹⁰².” This is also a quote that gives the essence of why sexual orientation has been given visibility in recent years as a right connected to for example non-discrimination and the right to privacy. Earlier cultural prejudices have overshadowed this fact. The continued expansion to other areas of international law and by other branches and bodies of the UN is evolving.

At the Conference itself four governments gave clear support to lesbian and gay rights (as was the term used at the time on what now has expanded to LGBT rights)¹⁰³. One of the members of the Dutch delegation made a statement to the Main Committee and said that the plight of lesbians and gays “has not been adequately identified as a problem, therefore no solutions have been formulated. Lack of identification is indeed a potent obstacle to realization of the human rights of these groups.”¹⁰⁴ By this statement the Dutch delegate pointed out one of the main problems in regard to non-discrimination on the basis of sexual orientation, namely that the invisibility and silence upheld by a majority of the UN’s member States that had been surrounding the issue of sexual orientation had made discussion on the issue and visible inclusion in human rights difficult. In the process of drafting the final statement of the conference Canada moved to include “sexual orientation” in a general paragraph dealing with equality. The wording failed to pass, but instead the drafting committee agreed to include wording that was open-ended and called for human rights to be respected “without distinctions of any kind.”¹⁰⁵ The open-ended prohibition of discrimination version was still seen as a victory, as the alternative could have been a listing where sexual orientation was not included in the list

¹⁰¹ A/RES/47/122

¹⁰² <http://www.unhchr.ch/html/menu5/d/statemnt/secgen.htm>

¹⁰³ Ibid. and Press release by the International Lesbian and Gay Association June 20, 1993 – Lesbians and Gay Men get recognition at the UN Conference in Vienna. ILGA to Address the UN World Conference on Human Rights.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

of grounds¹⁰⁶. In retrospect the Vienna conference, in my view, was an important step forward, but at the same time showing what obstacles lay ahead, not from other NGOs, but from the States themselves. When only four out of almost 200 UN member States spoke out in support of non-discrimination based on sexual orientation those wanting change had to know that they had a long way to go to ensure rights and protection from discrimination that the Dutch Foreign Minister in his speech to the plenary session called one of the “central evils” of our time¹⁰⁷. The non-government organization conference, that preceded the actual World Conference, made clear references in their final statement to sexual orientation and specifically condemned such discrimination¹⁰⁸.

As I see it the developments since the Vienna conference have been positive in increased de facto recognition to protection from sexual orientation discrimination. The various treaties remain the same, but the treaty bodies that have been given the task of interpretation and reviewing State reports have shown that sexual orientation discrimination is included in their interpretation of non-discrimination, as I have also referred to previously. The numbers of States speaking in support of protection from sexual orientation based discrimination have increased, and regional and domestic legislative measures have been implemented to include sexual orientation protection.

2.3 European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights

The European Convention on Human Rights (ECHR) has a non-discrimination clause that applies to the “enjoyment of the rights and freedoms” the Convention proclaims. The right to protection from discrimination is seen by the Convention as an unqualified right that States may not interfere with¹⁰⁹. In the convention’s Section II there are provisions for a European Court of Human Rights. The Convention has a set of protocols with amendments to the convention, and among them is Protocol 11, which set up a new judicial system of determination of applications. The present Court handles both admissibility and merits of the applications¹¹⁰. The Court can be used by individuals and during the last 25 years a number of cases concerning different aspects of sexual orientation discrimination have been considered by the court.

¹⁰⁶ Human Rights and Sexual Orientation in International Law. Douglas Sanders

¹⁰⁷ Ibid.

¹⁰⁸ See article by Rodney Croome (published in Capital Q in August 1993)

http://www.rodneycroome.id.au/other_more?id=107_0_2_0_M

¹⁰⁹ See Ovey and White – European Convention on Human Rights. Third edition (pp.4-9)

¹¹⁰ Ibid.

My reason for including discussion on this convention and the court is because court has developed jurisprudence through a large number of cases, starting with the case *Dudgeon v. United Kingdom* in 1981¹¹¹, defining that *Dudgeon* had the right to his private life being violated by the then still existing law in Northern Ireland that criminalized gay male sexual activity. Human rights literature that focus on sexual orientation agree that jurisprudence on sexual orientation saw its first daylight in Europe, and the growing and evolving jurisprudence has influenced international human rights law outside Europe being cited as persuasive authority¹¹². The decision by the Human Rights Committee on *Toonen v Australia* in 1994 has been referred to by Wintemute as “globalizing” *Dudgeon* and making sexual orientation discrimination an issue of human rights law on a global level¹¹³. Cases that have resulted in judgements from the court have also been used as jurisprudence by courts in States that are not party to the European Convention on Human Rights to argue changes or amendments in their own domestic laws¹¹⁴.

I will not here go further in depth into the large number of cases handled by the European Court of Human Rights regarding sexual orientation issues, as this thesis has its focus on the UN and UN instruments, but just refer to the fact that it started viewing cases that related to the European Human Rights Convention’s Article 8 on the right to respect for private and family life, and decisions by the court in these cases led to direct legal changes in Great Britain, Ireland and Cyprus¹¹⁵. Case law has gone on to cover issues related to tenancy rights¹¹⁶, difference in heterosexual and homosexual sexual age of consent¹¹⁷, parental custody rights¹¹⁸, discharge from armed forces because of homosexuality¹¹⁹, legal recognition of sex change¹²⁰, and reimbursement for costs related to sex change¹²¹. The issues that have been cause for decision by the court may not be interpreted as the only forms of discrimination that have protection. When reviewing the *Dudgeon* case in 1981 the Court said in its judgement:

“When a substantive Article of the Convention has been invoked both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, it is not necessary for the Court also to examine the case under Article 14, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.”¹²²

¹¹¹ See *Dudgeon v United Kingdom*, 1981

¹¹² See Wintemute

¹¹³ *Ibid.* p.143

¹¹⁴ See U.S. Supreme Court in *Lawrence v Texas* referring to *Dudgeon v United Kingdom*

¹¹⁵ See *Dudgeon v United Kingdom*, 1981, *Norris v Ireland*, 1991 and *Modinos v Cyprus*, 1993

¹¹⁶ See *Karner v Austria*, 2003

¹¹⁷ See *L. and V. v Austria*, 2003 and *S.L. v Austria*, 2003

¹¹⁸ See *Salgueiro da Silva Mouta v Portugal*, 1999

¹¹⁹ See *Smith and Grady v United Kingdom*, 1999, and *Lustig-Prean and Beckett v United Kingdom*, 1999

¹²⁰ See *Goodwin v United Kingdom*, 2002 and *I. v United Kingdom*, 2002

¹²¹ See *Van Kuck v Germany*, 2003

¹²² See *Dudgeon v United Kingdom*

Here the Court says that it's not necessary to determine whether there has been a violation of Article 14 if the court first has decided that there is a breach of a substantive article. As for discrimination based on sexual orientation it was made clearer that it's included in the list of grounds of Article 14 with the drafting of Protocol 12. In an explanatory report to the protocol it is explained that the listing of Protocol 12, Article 1 is the same as ECHR Article 14, not from a point of exclusion, but because the article is non-exhaustive. The report also states specifically that sexual orientation is to be seen as included¹²³. In my view this can be seen both as negative and positive from the viewpoint of protection from sexual orientation discrimination. The explicit mention of sexual orientation in the listing would be of important symbolic value, but at the same time the explicit mention in the explanatory report is also of importance. At the same time Protocol 12 meant an important strengthening of the non-discrimination provisions of the Convention. All discrimination with regard to "rights set forth by law" will require an objective and reasonable justification under Protocol No. 12. It will in my view make it easier to establish cases under the convention connected to sexual orientation discrimination, as they no longer will have to have obvious ties to privacy and family life. It is still too early to see the consequences of Protocol 12, as it only has been in force since 2005 and 14 States have ratified it while 21 States still have not done so¹²⁴.

2.4 Sexual orientation as a "new right"?

In 1995, when Eric Heinze published his book *Sexual Orientation: A Human Right*, he included a discussion on whether non-discrimination on the basis of sexual orientation has become an international norm. He used two traditional schools of jurisprudence, namely the positivist and naturalist schools, to reflect on this question. In saying that positivism recognizes rights conservatively, and by that, saying that in general in international law, norms only become rights when they have been adopted by States by word or deed, a positivist approach would largely resist the rights of sexual orientation as already existing within international human rights law¹²⁵. Heinze also points to the fact that international norms have other sources than the international human rights documents, and that these complement or can add greater authority to the conventional norms. Where a large number of countries over time observe or abstain from a particular practice, as a matter of then in their belief respecting a legal obligation (*opinion juris*),

123 Protocol No. 12 To The Convention For The Protection Of Human Rights And Fundamental Freedoms. Explanatory report. <http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>

¹²⁴ Council of Europe -

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=177&CM=7&DF=8/26/2006&CL=ENG>

¹²⁵ Heinze, page 121-125

then in accordance with Article 38(1) of the Statute of the International Court of Justice¹²⁶, such practice may constitute customary law. In 1995 when Heinze published his book the number of States with laws that had decriminalized homosexuality and had introduced anti-discrimination legislation was seen as small, and therefore Heinze hesitated to make a clear case for an emerging customary law, or a set of general principles recognizing sexual orientation as a basis for discrimination.

I would argue that in the more than 10 years that have passed there has been a rapid development in a number of States, both decriminalizing and recognizing discrimination against and rights based on sexual orientation, and that these actions have been done because the States have felt that they have had to do so and are obliged to, and by that the case for *opinio juris* has developed further. A number of European States have changed their laws due to above referred to decisions by the European Court of Human Rights or due to demands made by Council of Europe or the European Union. A number of other States have also changed their legislation due to arguments based on international human rights obligations and cases having been brought before national courts based on discrimination and international legal obligations. States like Ecuador, South Africa, Canada, Portugal, Switzerland, Sweden and Fiji have amended their constitutions or introduced new constitutions with anti-discrimination clauses including sexual orientation¹²⁷. In Norway there is now a proposal for a constitutional change, to be dealt with by the Parliament in 2008, that would include the same anti-discrimination protection including sexual orientation in its listing. The proposal gives direct reference to the non-discrimination principles in UDHR and ICCPR¹²⁸. The number of States now also introducing legal rights and obligations for lesbian and gay couples wishing to regulate their relationships¹²⁹, or even amending their Marriage Acts is growing. The number of States is still few in a global perspective, but the first State to give such rights was Denmark in 1989, and since then more than 35 States have passed legislation¹³⁰.

¹²⁶ The Court. shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law as recognized by civilized nations;
- d.judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the definition of rules of law.

¹²⁷ http://www.choike.org/nuevo_eng/informes/854.html- Choike-Sexual diversity and the law

¹²⁸ <http://www.stortinget.no/dok12/2003/pdf/dok12-200304-016.pdf>

¹²⁹ <http://www.iglhc.org/site/iglhc/content.php?type=1&id=91> - Where You Can Marry: Global Summary of Registered Partnership, Domestic Partnership, and Marriage Laws (November 2003)

¹³⁰ Ibid. and www.ilga.org

On regional levels there are legal changes taking place that sends signals to other States within different regions. Two such examples are North America and Europe. My reason for including this is because it also has important relevance connected to my question on non-discrimination. One of the nations that have had to change its sodomy laws is the USA, where a number of laws are passed on a state level. Here sodomy legislation was first challenged in the Supreme Court in 1986 in the case *Bowers v Hardwick*. Police officers had entered the bedroom of Michael Hardwick to serve a summons for public drunkenness, and had found him engaged in oral sex with another man. They placed him under arrest for sodomy, which was defined in Georgia law to include both oral sex and anal sex. The local district attorney elected not to present the charge to the grand jury, which would have been a prerequisite to any trial or punishment for the offence. Hardwick then sued Michael J. Bowers, the attorney general of Georgia, for a declaration that the state's sodomy law was invalid, charging that as an active homosexual he was liable to eventually be prosecuted for his activities. Following decisions by the lower federal courts, the case ultimately reached the Supreme Court. Hardwick lost his case at that time because the Supreme Court held that this right did not extend to private, consensual sexual conduct, at least insofar as it involved same-sex sodomy. Seventeen years later, in 2003, the Supreme Court explicitly overruled *Bowers* in the *Lawrence v. Texas* decision, and held that such laws are unconstitutional.¹³¹ The reason for including this case at this point is to show how sodomy laws are struck down, and with them also connections to sexual relations being something protected for heterosexuals inside a marriage. In addition the Court made direct reference to the HRC decision in *Toonen v. Australia* in their deliberations. The Supreme Court by its decision also said that consensual acts committed in private are protected by the Constitution which gives all persons an equal right to choose who they want to be with¹³². The sodomy laws have been a way for the State to control and regulate sexual activity and its forms and by that connecting it to moral and religious views of sexual fidelity inside the marriage. The term sodomy has a religious origin used to characterize certain sexual acts¹³³. In *Bowers v. Hardwick* Chief Justice Burger joined the opinion for the Court and further explained his views as follows: “Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”¹³⁴

¹³¹ http://www.anoca.org/court/sodomy/bowers_v_hardwick.html

¹³² Ibid.

¹³³ The Free Dictionary <http://www.thefreedictionary.com/sodomy>

¹³⁴ See *Lawrence v. Texas*

Within the European Union's legal framework sexual orientation is explicitly mentioned as a prohibited ground of discrimination in the Draft Charter of Fundamental Rights of the European Union. The same ground also appears alongside others in Article 13 of the EC Treaty, by that constituting a legal basis for the Council of the European Union to adopt measures to combat discrimination also when founded on sexual orientation.

The Parliamentary Assembly of Council of Europe pass a number of resolutions and recommendations based on the interpretations of the European Convention on Human Rights (ECHR) done by the European Court of Human Rights in Strasbourg. The assembly also discusses and pass a number of resolutions based on general issues outside the scope of the work of the court. In 2000 the Assembly proposed the most comprehensive recommendation on the situation of gays and lesbians in the Member States since 1981. In the recommendation the Committee of Ministers were recommended to explicitly add sexual orientation to the list of grounds for discrimination prohibited by the ECHR, to extend the terms of reference of the European Commission against Racism and Intolerance to cover homophobia, to take positive measures to combat homophobic attitudes and to recommend Member States to adopt legislation which makes provision for registered partnership¹³⁵. The text was adopted by the Assembly September 30th 2000. In 2.3 I have shown what happened as Protocol 12 of the ECHR was drafted and passed, and how discrimination based on sexual orientation was included there.

In following Heinze I would argue that there now is reason to convincingly argue that discrimination based on sexual orientation is to be discussed to consider if it can be seen as part of customary law, and that based on that assumption States that discriminate are in violation of international law and human rights legislation. In addition international human rights law, as with other international law, is a living organism. It should always be interpreted taking into account the time and context into which it is to be applied, and as Heinze and also Donnelly have discussed in their writings the wording "without distinction of any kind" was introduced as language to focus on categories that historically have been clear targets of human rights violations worldwide.¹³⁶. Adding on to this sexual orientation cannot in my opinion be seen as a new right, but the right to protection from discrimination and violations of rights have been included also for sexual orientation since the signing of the treaties and declarations.

¹³⁵ <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta00/EREC1474.htm> – Recommendation 1474 (2000)

¹³⁶ Heinze, p.121-125 and p.222-223 and Donnelly p.225-241

A large number of States worldwide have introduced anti-discrimination clauses into their legislation¹³⁷ and the number of States that uphold sodomy laws, morality laws or laws criminalizing homosexual relations is shrinking. As a consequence of this those States still upholding criminal or discriminatory laws will have an increasingly hard time having their arguments for upholding such laws validated by others. As for States upholding sexual orientation discrimination and other violations of human rights based on sexual orientation the developments of de facto inclusion will in my opinion lead to these States having fewer and fewer allies in support for their violations. The shaming from the international community is growing, both from States and international human rights NGOs.

2.5 Conclusion

When approaching the discussion on whether sexual orientation is to be seen as grounds for discrimination in terms of human rights violations, my discussions above should provide substance to the fact that when the treaty articles state that all human beings are entitled to the rights and that they are to be given without distinction of any kind, that also includes discrimination on the basis of sexual orientation. Through the last 15 years practice, in my opinion, shows that non-discrimination based on sexual orientation has been confirmed de jure and de facto as included in the international human rights regime, and as I have shown this has happened through visibility of actual discrimination and violations of basic human rights. I have shown that when looking at international case law and developing jurisprudence sexual orientation is interpreted into the non-discrimination framework, through HRC decisions, inclusion and visibility in State reports and observations from treaty body committees and General Comments, focus from Special Rapporteurs and lifted into visibility by government representatives at meetings and conferences. With the decisions made by the HRC sexual orientation discrimination has been brought from criminalization of same-sex activity to a clear view on broader based discrimination. The a number of UN bodies have taken on the issue through decision, legal interpretations of human rights treaties, reports, conference discussions and support from a growing number of States. At the same time the sexual orientation is still an issue that creates debate, as shown through the Vienna conference and comments from the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

¹³⁷ <http://www.sodomylaws.org/world/world.htm> – World Laws

Chapter 3

Freedom of religion and belief and the balance against non-discrimination based on sexual orientation: Religious actors, political agendas and the need for separation of religious text and doctrine and secular law.

“And equally, I could not myself keep quiet whilst people were being penalized for something about which they could do nothing, their sexuality. For it is so improbable that any sane, normal person would deliberately choose a lifestyle exposing him or her to so much vilification, opprobrium and physical abuse, even death. To discriminate against our sisters and brothers who are lesbian or gay on grounds of their sexual orientation for me is as totally unacceptable and unjust as Apartheid ever was.”¹³⁸

Former Archbishop Desmond Tutu – Sermon at Southwark Cathedral 2004

3.1 Introduction

As one of the main problem areas related to discrimination on the basis of sexual orientation are claims of immorality, sin, perversity, abomination and sexual deviance in the eyes of State actors and representatives of religious communities and organizations claiming religion as right to discriminate, I will look at freedom of religion¹³⁹ and how it is used and misused by religious actors with political agendas connected to non-discrimination based on sexual orientation. This will be viewed in relation to the second part of my problem statement in this thesis on the need for a balance between religious text and doctrine and international human rights law implemented in domestic law, as this is the main challenge in the relationship between religious groups their relationship to LGBT persons rights .

It seems clear that there are essential disagreements coming from some religious groups and communities concerning the intent and content of human rights where these groups act out of religious motives on a number of issues, such as sexual and reproductive rights, the fight against AIDS and same-sex marriage. There is to some extent a collision between human rights

¹³⁸ <http://www.anglicancommunion.org/acns/articles/37/50/acns3772.cfm>

¹³⁹ I will not go in depth in discussions on freedom of religion, but reference it to sexual orientation discrimination and discussions further on limits in discussions on equality. Freedom of religion has been discussed and interpreted in depth by Martin Scheinin in *The Universal Declaration of Human Rights: A Common Standard of Achievement*. Article 18 and by See Manfred Nowak – *UN Covenant on Civil and Political Rights. CCPR Commentary*. 2nd Revised edition 2005.

and a new return of religion with a strong force and new intensity. The French political scientist Gilles Keppel has called this “God’s Revenge” and points to a reassertion of more dogmatic and conservative forms of beliefs inside and outside of mainstream religious denominations¹⁴⁰. What makes this collision such a force is that the language of the human rights conventions and declarations is what Elie Wiesel has called protective writings of a “worldwide secular religion”¹⁴¹.

Religious fundamentalists in many different parts of the world, whether it is the United States or Sudan or the Holy See, have gained additional power. Change in political leadership in the United States, active use of religion by the Holy See, who has observer status in the UN, and strengthening of Islam have all been parts of a puzzle that has made some rights discussions with reference to gender and sexual orientation difficult.

The aims of non-discrimination without distinctions of any kind, equal rights between men and women, and arguing for full human rights for LGBT persons comes in conflict with conservative and traditionalist interpretation of religious text and doctrine. There is no consensus among religions or within religions on discrimination based on sexual orientation. There are conservative and liberal fractions among Protestants, Catholics and Muslims. Religion is also used in a political context and Jürgen Habermas has said that the significance of religions used for political ends has grown the world over¹⁴².

3.2 Religious text and doctrine or secular law – religious and political agendas in conflicts with non-discrimination based on sexual orientation and human rights implementation.

It is important to look for the balance between religious text and doctrine and secular law and human rights. This is a tool needed to uphold both non-discrimination and freedom of religion and conscience. Abdullahi Ahmed An-Na'im argues interdependence between religion, secularism and human rights instead of incompatibility¹⁴³ as he says that the tension between them can be overcome. This is essential to the legitimization of human rights, the regulation of the role of religion in the public sphere and affirming the positive place of secularism. This is in my view an important aspect to keep in mind, as the three exist independent of the others and to move human rights forward there has to be dialogue. An-Na'im additionally says that human

¹⁴⁰ Religion and the Human Rights Movement. Article by Jean-Paul Marthoz and Joseph Saunders. Human Rights Watch 2005

¹⁴¹ Ibid.

¹⁴² Jürgen Habermas in Religion in the Public Sphere. Lecture at San Diego University 03.11.2005

¹⁴³ Abdullahi Ahmed An-Na'im: The Interdependence of Religion, Secularism, and Human Rights. Prospects for Islamic Societies in Common Knowledge. Duke University 2005

rights continue to be violated as some politicians manipulate them for their own purpose and we need a framework to minimize this¹⁴⁴. The same framework is in my opinion needed to end human rights manipulations by some religious actor in both the public and private spheres.

Michael Ignatieff argues that human rights cannot be a global tool unless it has a deep local anchoring. In doing so it has to address views, cultural arguments and beliefs that sometimes collide with or resist the need for universal norms¹⁴⁵. Ignatieff has said that secularism is not chosen to crush religion, but to create a neutral space where arguments between religious and secular people are settled by evidence and not by dogma¹⁴⁶. This also in my opinion goes to strengthen the argument that there has to be a dialogue and that the neutral space is central to making this happen. The State should not favor nor disfavor one religion or religious tradition over another as this will result in discrimination and human rights violations. My point with arguing secularism in the context of this thesis is that it has the ability to unite various views and various groups into a political community, and by that also furthering the possibility of inclusion of protection from discrimination based on sexual orientation in domestic laws. An-Na'im argues that secularism can unite because the moral claims made are minimal¹⁴⁷.

Religions and religious values have a firm foundation in the consciences of peoples and States, both consciously and subconsciously. The European Court of Human Rights in 2001 deliberated on the *Refah Partisi v. Turkey*¹⁴⁸, and rendered a verdict that shows the balance between a secular State and freedom of religion. The judgement was appealed to the Grand Chamber, where the judgment from 2001 was upheld. In this case Turkey's authorities banned a political party because its activities were contrary to the principle of secularism embodied in the Turkish Constitution Article 2. The Refah Partisi had in its goals three principles that the European Court looked at to determine if it undermined the democratic imperative of Turkey to be a secular State. The three principles were: 1. to establish a plurality of legal systems in Turkey based on differences in religious belief, 2. to establish Sha'riah law in Turkey; and 3. to develop jihad or holy war as a political method. These principles were not found in the party's documents, but had been stated by the party leaders and members. The court decision was 4 to 3 votes, and the majority said that there can be no democracy where the people or the State, even by a majority decision, waive their legislative and judicial powers in favor of an entity which is

¹⁴⁴ Ibid.

¹⁴⁵ Michael Ignatieff. *Human Rights as Politics and Idolatry*. Princeton University Press 2001 .p.53

¹⁴⁶ Michael Ignatieff: Iranian lessons. *New York Times Magazine* July 17, 2005.

http://www.ksg.harvard.edu/ksgnews/Features/opeds/071705_ignatieff.htm

¹⁴⁷ See Abdullahi Ahmed An-Na'im: *The Interdependence of Religion, Secularism, and Human Rights*.

¹⁴⁸ *Case of Refah Partisi (the Welfare Party) and Others v. Turkey*, Judgment 31 July 2001 (41340/98, 41342/98, 41343/98 and 41344/98) and Judgment of 13 February 2003

not responsible to the people it governs, whether it is secular or religious¹⁴⁹. The majority upholds freedom of thought, conscience and religion as one of the foundations of a democratic society, but point out that this freedom also entails the right to hold or not hold and the right to practice or not practice religion. The majority goes on to state that the State has a role as a neutral and impartial organizer of the practising of various religions¹⁵⁰. The Court's majority draws lines and sets limitations to how wide a reach freedom of religion can have and at the same time clearly gives reference to the importance of upholding the total content of what is implied by freedom of thought, conscience and religion, namely the right to choose not to have a religion or practice one. By this interpretation of freedom of religion the Court says that it's difficult to have respect for democracy and human rights and at the same time giving support to a regime based on shari'a which clearly diverges from human rights values and the way it intervenes into all spheres of public and private life in accordance with religious concepts¹⁵¹. This judgment, in my opinion, underlines the importance of the interdependence of the individual human rights and the limitation set that rights given in one aspect of the human rights regime cannot be used to discriminate against others. My reason for including this case here is to draw lines to arguments on freedom of religion not being used to lessen the value of non-discrimination on the basis of sexual orientation. Human rights need to be "owned" by different groups not to be perceived as only the rights of some.

Focus on discrimination through secular law and needs for change also affects views on religious doctrine and marginalize conservative views. Robert Wintemute has written on religion and sexual orientation and questions whether it is a collision of human rights. He writes about religious hostility towards LGBT individuals and same-sex couples and says that:

"Even if every religion in the world agrees that LGBT individuals should be boiled in oil and cites ancient texts requiring this, religious doctrines must be deemed absolutely irrelevant in determining the content of secular laws and human rights. Although it may be observed with varying degrees of strictness, a separation between law and religion is a defining principle of every liberal democracy."¹⁵²

In my opinion this gives the essence of the problem seen from and LGBT angle. As human rights are inclusive of all human beings, irrespective of membership in any social group all have to be treated equal and not connected to content in religious doctrine. At the same time it is important to keep in mind the thoughts of An-Na'im and Ignatieff that argue dialogue. In a perspective of

¹⁴⁹ Judgment 2001 para.43

¹⁵⁰ Ibid. paras. 47, 49, 51, 72

¹⁵¹ Ibid. para.72

¹⁵² Robert Wintemute in *The Times Higher Education Supplement*, 8th. March, 2002

sexual orientation LGBT persons meet de facto human rights discrimination in many parts of the world, and by States that are both signatories to the international human rights conventions and have ratified them for implementation into their own domestic laws. Where religion and morality has a clear political influence religious texts and doctrine are woven into different laws, and parliamentarians are at times strongly influenced by religious leaders or lobby groups to uphold such laws and contrary to international human rights standards. Dag Øystein Endsjø has written on religious relativism in human rights¹⁵³ pointing out the seriousness of the religious effort to redefine the understanding of human rights to exclude anything that has to do with LGBT rights. If this is accepted and selected groups can be excluded from protection due to specific religious and cultural prejudices then other groups can risk the same due to other religious doctrine or cultural prejudices. As human rights are universal and are given to all humans without distinction there can in my opinion be no such relativism as it is in conflict with the core of human rights.

There are a number of examples that can be used to demonstrate how religious and culturally prejudiced discrimination on the basis of sexual orientation is upheld in legal areas such as sodomy laws, age of consent laws, laws prohibiting acts “which offend public morals” or “cause public scandal”, laws penalizing those wearing clothing of the opposite sex, dress codes (especially for women), restrictive laws on registration of NGOs, restrictive laws on freedom of association or assembly, internet regulation codes, laws permitting discrimination in the labor market and housing¹⁵⁴. The modern day criminalization on homosexual conduct can in many cases be traced back to be legacies of the laws of England left from the British colonial period, when colonizers introduced penal codes copying those in England, and in most places where such laws didn’t exist before the colonizers came¹⁵⁵. As these laws still exist in a number of States, or where sodomy offences have been reintroduced to be utilized against political enemies¹⁵⁶, it is of interest that States that argue that homosexuality is a “Western decadence” or and influence from the West, would not have laws criminalizing homosexuality if it were not for colonial rule¹⁵⁷. James Wilets has noted that if there is a specific Western contribution to sexual

¹⁵³ Dag Øystein Endsjø in Lesbian, Gay, Bisexual and Transgender Rights and the Religious Relativism of Human Rights. *Human Rights Review*, 6:2, 2005: 102-110

¹⁵⁴ Human Rights and Sexual Orientation. International and Regional Standards. Background material presented by International Gay and Lesbian Human Rights Commission in connection with workshop at the Amnesty International Global Rights conference. Sidney Gay Games October 2002.

¹⁵⁵ See *Sexuality and Australian Law* by The Hon. Justice Michael Kirby in *Sexuality and Human Rights. A Global Overview*. Graupner and Tahmindjis (editors)

¹⁵⁶ *Ibid.*

¹⁵⁷ Some of the States that still have remnants of British law are India, Pakistan, Hong Kong, Malaysia, Kenya, and a number of other former British colonies. This is described more in detail in the book “The Third Pink Book”, edited by Art Hendriks and published by Prometheus Books, Buffalo in 1993. In June 2000 the Malaysian Foreign Minister stated that homosexuality was “against nature” and reacted to calls from Human Rights Watch to ban

minorities and the fact that they have existed across cultures and through times it is not homosexuality but homophobia that is the contribution¹⁵⁸. An-Na'im has said that "if we see culture in terms of static, rigid, watertight compartments, we can imagine irreconcilable differences and confrontation¹⁵⁹". No culture is unanimous or uniform and it articulates the values upheld by people. If people are willing to change it is possible to promote universal human rights and human dignity, both within and across cultures. An-Na'im points to it as a question of process and constitutional framework. I will not go in depth here on the discussion that has been ongoing for a number of years in relation to human rights seen as universal as opposed to views that they cannot be due to cultural relativism¹⁶⁰, but merely say that non-acceptance of rights based on sexual orientation also exists in Western States. Due to this fact, cultural relativism should not be used by non-Western States to argue discrimination on the basis of sexual orientation due to culture¹⁶¹.

Sexuality has been used by religion to install normative values to certain actions and religion has been used to control sexuality and define it as being contained within a marriage and to procreate. This still exists today and is being used to defend institutions of traditional male authority. The world's greatest religions were and are usually determined by males with a heterosexual agenda¹⁶², and sexuality has been used to control women denying equality, and also in a larger perspective gender. Religion connected to sexuality has been used by fundamentalists in recent years to argue against sexual and reproductive rights, targeting both women in general and sexual orientation specifically. Brought into a human rights context any discussion of gender or sexual rights is taken to refer to promoting homosexuality or speaking about deviant sexualities. This is used by alliances of religious fundamentalists and conservative governments

Malaysia's sodomy laws that "We can't amend the country's laws merely due to calls from outsiders." (See Holy hatred? Penalties for homosexuality in Muslim Countries. Article by Anissa Hélie

http://www.lolapress.org/elec2/artenglish/heli_e.htm

¹⁵⁸ See James Wilets in *International Human Rights Law and Sexual Orientation*, 18 *Hastings Int'l & Comp.L.Rev.* 1, 1995.

¹⁵⁹ Abdullahi Ahmed An-Na'im. Speech to World Humanist Congress 2002 - <http://www.ihcu.org/node/196>

¹⁶⁰ See broad discussions on this Jack Donnelly. *Universal Human Rights in Theory and Practice*. Second edition. Cornell University Press 2003. As this is a lengthy discussion that merits a different angle of this thesis and more space than there is room for here, I merely reference the discussion as it is relevant of such mention. Donnelly also discusses universalism vs. cultural relativism with reference to sexual minorities. See also Martha Nussbaum. *Sex and Social Justice*, which also discusses in detail lesbian and gay rights in a context of discrimination, culture and religion.

¹⁶¹ As an example same-sex marriage and relationships is not new historical phenomenon, but have existed since the Ancient Egypt, Mesopotamia, Greece, Christian Rome and in Europe during the Middle Ages. It has also existed in African, Indian, Chinese, Japanese and Milanese culture, as described in William N. Eskridge's book "Case for Same-Sex Marriage". That homosexuality historically dates back to such ancient cultures should in my opinion put aside the argument used of homosexuality as a part of "Western culture" and brought to other parts of the world that way.

¹⁶² See Wintemute, Religion vs. Sexual orientation. A Clash of Human Rights? *Journal of Law and Equality* Fall 2002 Vol. 1, No.2. (p.132)

in international and domestic settings¹⁶³. Jimmy Carter has characterized religious fundamentalism as symbolized by rigidity, domination and exclusion¹⁶⁴. In a human rights perspective it is a paradox to see how fundamentalists can disagree on religion, but agree on the need to have political agendas to control sexuality and condemn sexual orientation that deviates from the cultural and religious “norm”.

Given the fact that there seems to be a conflict in a number of UN member States between the right to equality for LGBT persons and the right to freedom of religion, both entrenched in customs and practices, as well as in formal legislation I will argue that secular law should be used to combat sexual orientation based discrimination on a domestic level in order to fulfil international human rights obligations¹⁶⁵. One of the questions that then need to be discussed is if such use has any limitations. All human rights treaties referred to in this thesis include articles that oblige the signatories to take necessary legislative or other measures to implement the rights of the treaties into domestic law. The issue I will look at here is how far a State can argue freedom of religion, where the balance is connected to non-discrimination based on sexual orientation and implementation can take place. I will use Wintemute’s division of spheres as he writes about public sphere, secular private sphere and religious private sphere¹⁶⁶

3.3 The public sphere

In a democratic society the public sphere has to reflect reciprocity in the respect between freedom of religion and the religious freedom of others. It has to reflect a religious pluralism where there is room for believers of all denominations and non-believers, and in this there may be a need to place restrictions on freedom to manifest one’s religion or belief in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected, as I have shown earlier through *Refah v. Turkey*. The various groups living in a democratic society have to tolerate each other and the secular State has to ensure that this happens.

Jürgen Habermas have written and lectured on religion in the public sphere and has said that it is not enough to rely on a secularized society’s good will because it now tolerates minorities that have previously been discriminated against. There must be agreements on “the precarious delimitations between a positive liberty to practice one’s own religion and the

¹⁶³ Written Out. How Sexuality is used to Attack Women’s Organizing. Report by International Gay and Lesbian Human Rights Commission and Center for Women’s Global Leadership 2005

¹⁶⁴ See Jimmy Carter. *Our Endangered Values: America’s Moral Crisis*. Simon & Schuster 2005, pp.224. ISBN: 0743284577

¹⁶⁵ This is also analyzed and discussed in depth in the book *Sexual Orientation and Human Rights in American Religious Discourse*, edited by Martha Nussbaum and Saul M. Olyan

¹⁶⁶ See Wintemute, *Religion vs. Sexual orientation. A Clash of Human Rights?*

negative liberty to remain spared of the religious practices of the others”¹⁶⁷. He adds that tolerance has to be raised above any suspicion of oppression and that those involved have to agree on a definition of what can be tolerated and what can not be tolerated.

In a discussion on human rights this, in my view, creates a legal conflict if a secular society and international human rights law has to take into account religious text and doctrine as part of the human rights perspective in relation to sexuality and sexual orientation. In my view the important task for those defending human rights has to be not to sacrifice important principles and objectives, but to speak out and defend them against private religious morality. Secular law and international human rights is not to be used to discriminate or alienate alliances, but to make a stronger force on issues of shared interest and importance¹⁶⁸. Religion must be practiced and expressed so as not to come into conflict with democracy, pluralism and equality, as the fundamental ideas of human rights or the rights and freedoms of others, as expressed through international human rights law¹⁶⁹.

As for human rights and sexual orientation discrimination today and conflicts with religious text and doctrine, it takes on many faces. I’m using examples on a domestic level as these States are party to international human rights treaties that obligate them to uphold the principles of non-discrimination and equality. In Poland conservative politicians with strong connections to the Catholic Church, including the new Prime Minister and his government and the President, have made calls to prohibit gays from teaching and call homosexuality “unnatural”. Gay parades both in Krakow and Warsaw have been blocked, and when allowed in Warsaw a “normality” parade was given permission to march the same day. Those marching in the “normality” parade were members of the far-right League of Polish Families and their violent All Polish Youth¹⁷⁰. This is an example of the mix of religion and law where sexuality was put on trial as being in violation of religion and culture. The role of the authorities in such circumstances is in my opinion not to remove the cause of the tensions by eliminating pluralism, but, to ensure that the competing groups tolerate each other. In addition religious individuals have the same right as all others to take part in public decision making, but law and legal changes have to be argued on merits and content, not based on religious argument and rhetoric.

¹⁶⁷ See Jürgen Habermas in Religion in the Public Sphere. Lecture at San Diego University 03.11.2005

¹⁶⁸ There have been active voices within religious communities on a number of human rights issues like for example to fight poverty and to prevent hate crimes.

¹⁶⁹ See Leyla Şahin v. Turkey, Grand Chamber decision 2005. (107-108)

¹⁷⁰ The Gully online magazine article: Anti-Gay Panic Sweeps Poland.

http://www.thegully.com/essays/gaymundo/040827_gay_lesbian_poland.html. And information from ILGAs website on the situation in Poland with articles from their online archive. See also Human Rights Watch June 5, 2006 Poland: Official Homophobia Threatens Basic Freedoms. <http://hrw.org/english/docs/2006/06/05/poland13512.htm>

Habermas writes about religion being used for political ends and that in a secular state the government has to be placed on a non-religious footing. In my view in the case of Poland there was a political use of religion that also consequently narrowed the scope of freedom of religion as the State actors took it upon themselves to argue morals, culture and religion giving it only their context as the proper one.

The Organization of Islamic Conference (OIC) is an international organization of 57 member States and 3 observer States that have decided to pool their resources, and according to their web site to “combine their efforts and speak with one voice to safeguard the interests and secure the progress and well-being of their peoples and of all Muslims in the world”¹⁷¹. The OIC also claimed that in forcing countries to adhere to a UN order acknowledging the rights of gay men and lesbians, the UN would threaten their religious freedom and end public discourse about the morality of same-sex relationships. The organization is using arguments saying that the Conference “has among its consecrated traditions the respect of the cultural specificities of every human community, and it feels in return that the cultural and faith-related specificities of the Islamic communities should also meet with due respect”¹⁷². This was stated by the secretary-general of The OIC in a speech before the UN Commission on Human Rights¹⁷³. An-Na’im has written on international human rights law about State responsibility to change religious and customary laws. He says that the state responsibility to bring domestic law and practice into conformity with their international human rights law obligations also applies to religious and customary laws¹⁷⁴. The responsibility is not in conflict with the principle of state sovereignty since the state is not forced to take on legal obligations against its will. The responsibility comes due to obligations accepted as a consequence of signing international human rights treaties. The OIC cannot in my view construct themselves as a force within the UN that violate the object and purpose of human rights treaties that the individual States, who are part of their organization, are signatories to and thereby have accepted obligations domestically to provide protection against discrimination and other violations of human rights without distinctions of any kind.

Through secular law in a number of States limits have been set as to what lengths religious groups can be protected under cover of religious text and doctrine. Hate crime

¹⁷¹ The Washington Blade, Adrian Brune, April 9th 2004

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ See State Responsibility Under International Law to Change Religious and Customary Laws by Abdullahi Ahmed An-Na’im, in Human Rights of Women. National and International Perspectives. Edited by Rebecca J. Cook. University of Pennsylvania Press 1994

legislation protects discrimination based on sexual orientation. It also gives protection from racial, ethnic, religious and gender discrimination. Such legislation, in my view, has to be considered as an implementation of ICCPR Article 26. Conservative religious groups along with conservative politicians try to argue that inclusion of sexual orientation in hate crime law is not giving equal rights and equal protection, but giving “special rights”, trying that way to make the impression that discrimination based on sexual orientation is not defined along the same line as other basic human rights in general and freedom of religion specifically¹⁷⁵. They also argue that it violate the free speech rights of Christians and others who oppose homosexuality on moral grounds¹⁷⁶. Part of the rhetoric used is to compare totalitarian regimes with “thought crime” laws criminalizing the conscience and States that have introduced hate crime legislation and laws protecting sexual orientation as part of non-discrimination legislation, and that LGBT activists have a strategy to use such legislation to criminalize Biblical morality¹⁷⁷. In a secular state the government in my view should pass laws that give a balance between the positive liberty to practice one’s religion and for others to be spared from the religious practice of others. Implementing human rights in a domestic legal context should give protection from sexual orientation based discrimination, and in a public sphere the right to freedom of religion and freedom of speech has to balance protection from discrimination. Hate crime legislation give governments the possibility to promote tolerance and inclusion while promoting equality and human rights. An-Na’im has said that a conflict between right and wrong becomes a conflict between competing rights¹⁷⁸. In arguing violation of freedom of religion and freedom of speech related to hate crime legislation the balancing of rights by the secular state is in my view attempted made into a conflict by opponents.

3.4 The secular private sphere

In the private sphere the rights balance has to be almost the same as in the public sphere, but there has to be a division between the secular private sphere and the religious private sphere. Freedom of religion and non-discrimination based on sexual orientation can create conflict in a secular private sphere in areas such as that of private sector employment, housing related to rentals and landlords, membership in organizations and visitation rights and custody of

¹⁷⁵ See article “Hate Crime” Laws Threaten Religious Freedom”, by Robert Knight and Lindsey Douthit. – Concerned Women of America we page

¹⁷⁶ Hate Crime Laws and Sexual Orientation. Web article on about.com owned by New York Times. http://crime.about.com/od/hate/i/hate_sexual.htm

¹⁷⁷ Ibid.

¹⁷⁸ See An-Na’im in Interdependence of Religion, Secularism, and Human Rights.

children¹⁷⁹. In general most private sector employers, landlords and organizations cannot use freedom of religion to deny employment, rentals of apartments or organization membership. These operators have a right to regulate within reasonable limits. The High Commissioner for Human Rights Louise Arbour held the opening speech at an international conference on LGBT human rights in July 2006 and said that:

“Striking a balanced approach to the right to privacy is made even more complicated by the fact that attitudes to privacy are often shaped by culture or religion, and thus by deeply held beliefs. It is therefore important to stress that freedom of religion is a right that also protects the freedom not to share in religious beliefs or be required to live by them. ”

In the case of *Toonen v. Australia*, cited in chapter 2.1.2.1, the right to privacy and protection from sexual orientation based discrimination was considered by the UN Human Rights Committee. Morality was connected to homosexuality, and as I have shown above such laws have a historical connection to religious and cultural prejudices. When such laws are upheld in domestic courts, in conflict with international human rights and developed jurisprudence, the Court refers to Christian religious tradition to support its position¹⁸⁰. The judiciary in a secular state, in my view, has to have interpretations of the law that are not based upon religious doctrine but on secular legal rationality. The legal and other obligations a state has accepted through signing human rights treaties, as referred to previously, in my view has to be applied throughout society and protection from discrimination has to balance freedom of religion also in a private sphere.

In Egypt the government manipulated moral panics and in 2001 they visibly started cracking down on gatherings of homosexual men as part of a moral clean-up operation. It led to the arrest of at least 179 men, who were put on trial and the prosecutors charged them with “debauchery”, which is the language for sex between men in Egyptian law. They were said to belong to a blasphemous “Satanist” cult that assaulted culture and religion. The case received international attention because of its human rights violations, and Human Rights Watch reported that the raids included entrapment, police harassment and torture, and that hundreds more were probably harassed, arrested and tortured but not charged¹⁸¹. I’m using this as an example to show a violation of protection from sexual orientation based discrimination in a secular private sphere.

¹⁷⁹ See also European Court of Human Rights decisions *Salgueiro da Silva Mouta v Portugal*, 1999 and *Karner v Austria*, 2003

¹⁸⁰ Jakobsen and Pellegrini in *Love the Sin. Sexual Relations and the Limits of Religious Tolerance*. Beacon Press Books 2004

¹⁸¹ In a Time of Torture. The Assault on Justice In Egypt’s Crackdown on Homosexual Conduct. Report by Human Rights Watch March 2004

Ignatieff has said that human rights language is there to remind us that some abuses are intolerable and some excuses for such abuses are insupportable¹⁸². The Egyptian authorities in my view violated their obligations connected to having ratified ICCPR, including the right to privacy and the protection from discrimination. Where politicians or State authorities have a religious agenda they impose their interpretation of freedom of religion on others and thereby also violating that freedom.

The Vatican's Congregation for the Doctrine of the Faith in 2003 launched a global attack on same-sex marriages in a document titled "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons", signed by Cardinal Joseph Ratzinger¹⁸³. The document is interesting in this context because it in its introduction stated the following:

"The present Considerations are also intended to give direction to Catholic politicians by indicating the approaches to proposed legislation in this area which would be consistent with Christian conscience. Since this question relates to the natural moral law, the arguments that follow are addressed not only to those who believe in Christ, but to all persons committed to promoting and defending the common good of society."¹⁸⁴

This also refers to another document from the Congregation for the Doctrine of the Faith, namely Doctrinal Note on some questions regarding the participation of Catholics in political life (November 24, 2002)¹⁸⁵. The Vatican insists that politicians put their religion first when determining public policy. I argue that any politician has the right to their religious view and to their belief, but as politicians in a secular state they have to balance their own belief up against respect for other's views. Their political decisions and legislative proposals both in the public and private sphere has to be justifiable to all citizens irrespective of their belief. According to Habermas parliaments that open themselves to battles on religious beliefs risk becoming spokespersons for the religious majority and by that violating democratic procedure¹⁸⁶. In my view this is relevant both for public and private sphere, and the Vatican is this example trying to define certain issues as belonging to the definition moral law and by that excluding groups from being covered by law in clear violation of protection from discrimination. To instruct politicians

¹⁸² See Ignatieff in Human Rights as Politics and Idolatry (p.22)

¹⁸³ Congregation for the Doctrine of the Faith. Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons.
http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html

¹⁸⁴ Ibid.

¹⁸⁵ Congregation for the Doctrine of Faith. Doctrinal Note on some questions regarding the participation of Catholics in political life (November 24, 2002)

http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html

¹⁸⁶ See Habermas in Religion in the Public Sphere. Lecture at San Diego University 03.11.2005

to abide by Catholic doctrine they also themselves violate freedom of religion by trying to imposing Catholicism on people who are not Catholic.

3.5 The religious private sphere

Urvashi Vaid, a long-time lesbian human rights activist, has written that lesbians and gay men have to be clear on the point that the LGBT movement does not oppose religion or people's right to practice their religion and live by their faith. It is necessary to make clear that in a civil society there is room for both religious worship and secular practice. What has to be opposed is the persecution of any religious majority or minority group. The societies in which we live have to see that LGBT people are themselves moral people, and belong to a wide variety of religious faiths. The faiths are anchored by deeply bound values like equality, freedom, inclusion and justice¹⁸⁷.

When it comes to the religious private sphere there is a lack of international human rights cases connected to the balance that I'm trying to show to substantiate my argument and research question. There have been regional references through the European Union, where the EU has given formal recognition to human rights through the Amsterdam Treaty¹⁸⁸ and there are national cases with human rights reference. I will briefly try to draw on some of this.

Member States of the European Union have implemented EU Employment Framework Directive 2000/78¹⁸⁹ that required member States of the European Union to ban sexual orientation discrimination in employment by the end of 2003. The legislation bans both direct and indirect discrimination, harassment and victimisation based on sexual orientation¹⁹⁰. This was a result of the revised Amsterdam Treaty from 1997, where all member States agreed to combat sexual orientation discrimination¹⁹¹. The implemented EU Directive also protects from discrimination based on religion or belief, disability and age. It has direct referrals to international human rights conventions and obligations that lie with such implementation¹⁹².

The different grounds protected from discrimination are all equal. The only exception the Directive allows for is in paragraph 23:

“In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and

¹⁸⁷ Urvashi Vaid in *Virtual Equality*. The mainstreaming of gay and lesbian liberation

¹⁸⁸ The Amsterdam Treaty: a Comprehensive Guide - <http://europa.eu/scadplus/leg/en/lvb/a10000.htm>

¹⁸⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

¹⁹⁰ Ibid.

¹⁹¹ Amsterdam Treaty on fundamental rights and non-discrimination, 1997 – Article 13

¹⁹² Council Directive 2000/78/EC para.1, 4 and 5

the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.”

I will not go into any interpretation of EU law, but use it here to exemplify possible limits on a religious private sphere. The right to protection from sexual orientation discrimination is not an absolute right as the balance between rights and interests has to be considered. There has to be given consideration to employment within religious organizations and what has relevance in a human rights context. In my view freedom of religion has to be given more room within a religious private sphere than in the two other spheres discussed previously. This is the sphere where religious text and doctrine is used in the inner life of the religious community or organization. If such organizations or communities also have a role as employers discussions have to be made on the balance between positions that exist to promote and represent religion, such as ministers of religion, posts outside the clergy, and other employees. As this has not been discussed my opinion here is limited to just that while all the time keeping human rights in mind. If a religious institution hires a janitor, personnel to clean floors, someone to serve food in a cafeteria or a nurse in a nursing home this can, in my opinion, not be interpreted as justified because no specific characteristic related to religion is needed to do repairs, clean or do general employment. Restrictions on such positions due to religion have to be balanced up against non-discrimination and the right to privacy.

According to An-Na'im it is important to allow internal transformations in religions to allow for development that will be positive both for human rights and secularism¹⁹³. Without human rights such as freedom of religion development within religion and religious organizations will be difficult. As for the secular state it provides room for religious pluralism. An-Na'im also argues that freedom of religion gives religions and religious communities more room for believers with different views and interpretations of religion, and by that increasing the possibility for discussion and internal transformation. It gives room to minority voices that will have a better chance of not being suppressed. Examples of churches and religion having played important roles in regard to human rights in general are many. Martin Luther King's role in the civil rights movement in the United States is such an example. Protection for discrimination based on sexual orientation was given by churches in former East Germany during its Communist rule, when the Protestant church throughout the 1980s gave lesbians and gay men

¹⁹³ See An-Na'im in *Interdependence of Religion, Secularism, and Human Rights*.

and sexual orientation organizations space to meet in churches and printing facilities to provide for distribution of materials¹⁹⁴.

An-Na'im additionally argues that there are possibilities of religious transformation in Islam as views within Islam always have been diverse. The States in the world that are Muslim also need protection for religious plurality as they are not religiously uniform. This can be achieved with human rights giving protection from various abuses and secularism to protect religious plurality. This in my view gives added force to an argument that implementation of human rights on a domestic level through secular law is possible across religious and cultural traditions as long as it can be made visible that there is a need for interdependence between human rights, secularism and religion.

The elimination of religious discrimination against LGBT persons has to be left to internal reform. Interpretation of religious text and doctrine has to take place in this sphere, and kept here it should not affect anyone in the secular public or private sphere except views and discussions that are being brought into a public sphere as part of freedom of speech and freedom of expression.

3.6 Conclusion

The balance between religion, secular law and human rights is a tool needed to uphold both non-discrimination and freedom of religion, and this seems like a better entry point than treating the three individually. There is an effort to redefine human rights to exclude sexual orientation from protection from discrimination, but this is relativism that comes into conflict with the core of human rights and the right to protection from discrimination without distinction of any kind. The future for achieving a balance between principles of non-discrimination based on sexual orientation, freedom of religion and the balance of secular and religious spheres still needs internal transformation in religious communities and inclusion of non-discrimination based on sexual orientation in secular domestic law. There will most likely always be opposition to inclusion of non-discrimination based on sexual orientation on domestic legislation, as there will always be religious groups and organizations who interpret their religious texts and doctrines conservatively and to the letter of the text. In a secular society all individuals have the opportunity to voice their own opinion and take part in political discussions regarding proposed new and amended legislation. As for religious text and doctrine it belongs in a religious sphere but discussion can also take place in the secular public sphere. Disagreement as to legislation

¹⁹⁴ Gay rights in Germany - http://en.wikipedia.org/wiki/Gay_rights_in_Germany

should be argued on merits and content and not based on religion and States have a responsibility to change religious and customary laws to achieve conformity with human rights obligations.

Chapter 4

Conclusions

“What is straight? A line can be straight, or a street, but the human heart, oh, no, it’s curved like a road through mountains”

Tennessee Williams, A streetcar Named Desire, 1947

“Who would give laws to lovers? Love is unto itself a higher law.”

Boethius, The Consolation of Philosophy, A.D. 524

Reviewing the first part of my research question on inclusion of non-discrimination and the right to equality based on sexual orientation de jure and de facto in international human rights I have viewed the most important human rights treaties relevant to my research question, having looked at UDHR, ICCPR, ICESCR, CEDAW and CRC. The treaties have not been amended since their origin, but have been interpreted by UN treaty bodies that have done so both by handling complaints from individual against signatory States and by writing General Comments that look at specific articles that merit further interpretation. Through this the treaty bodies have created extensive soft law that should be included by States in their domestic implementation of the human rights treaties. The treaty bodies have during the past 25 years dealt with cases, reports and discussions related to protection from discrimination based on sexual orientation, and they have shown inclusiveness in their work. They have not as far as I have been able to show had any discussions as to whether sexual orientation should not be included in the framework of non-discrimination. The times they have mentioned sexual orientation in their work it has been as a natural part of other issues concerning non-discrimination or it has been given specific focus due to State reports and comments by treaty bodies of human rights violations based on sexual orientation. The work that has been done by the UN Special Rapporteurs has also showed inclusion of reporting on violation of rights linked to sexual orientation. The Rapporteurs, such as Mr.Hunt, have additionally interpreted their mandates to include reporting on sexual orientation. At the same time a number of States don’t agree that protection should be given to sexual orientation discrimination, but I have shown how this has been addressed by the above mentioned bodies and actors. I have additionally taken a brief look at the European human rights system and have shown how protection from

discrimination based on sexual orientation has been given protection there and how the European Court of Human Rights has had a growing jurisprudence connected to various articles of the treaty. I have also shown how this has been used by courts in other States arguing for change in legislation. I have argued that protection based on sexual orientation is not a new right but part of the existing non-discrimination articles in the treaties.

As for the second part of my research question on whether the non-discrimination related to sexual orientation comes into conflict with freedom of religion and how the balance between religious text and doctrine and human rights can be achieved through secular law, I have attempted to show how an interdependence between religion, secularism and human rights can be good for all three. I have shown how there is a conflict where religious actor with political motives use sexual orientation to argue exclusion instead of inclusion and how there historically have been links between morality and religious and cultural prejudice that still exist today in different parts of the world. In using the division of the three spheres I have tried to show how a democratic society can function with room for believers of all denominations and non-believers reflecting religious pluralism and the balance of the secular private and religious private spheres. I have argued more room for religious doctrine in the latter, but also there with possible balances to other rights and at the same time pointing to the importance of internal religious transformation.

In conclusion, I would say that in reviewing and discussing the first part of my research question on inclusion of non-discrimination and the right to equality based on sexual orientation in international human rights law I have been able to show inclusion. There is no documentation in the drafting or intent of the non-discrimination principles of the UN Charter, UDHR or human rights treaties such as ICCPR, ICESCR, CEDAW or CRC that would indicate any exclusion of protection from discrimination based on sexual orientation. The principle of non-discrimination is seen as one of the cornerstones of international human rights law and applies to all rights. The treaties have non-discrimination articles that have language saying that everyone, without distinction of any kind, is entitled to protection and the non-discrimination categories are open ended and by that not exhaustive. I have found no argument that would validate exclusion. In addition the de facto inclusion given by the treaty bodies and Special Rapporteurs indicate both de jure and de facto inclusion.

Sexual orientation is still culturally and religiously claimed as immoral, “a troubling moral and social phenomenon¹⁹⁵” and against the culture of States and religions. The use of a system as argued by An-Na’im in secular society indicate that freedom of thought, conscience

¹⁹⁵ Congregation For The Doctrine Of The Faith. Considerations Regarding Proposals To Give Legal Recognition To Unions Between Homosexual Persons. June 3, 2003

and religion can exist alongside freedom from discrimination based on sexual orientation, and signal the need for balance and the interdependency that the basic human rights have. With the exemptions given to the religious private sphere there should be room for a coexistence between religion and sexual orientation, where religious individuals must accept and respect the right to freedom from discrimination based on sexual orientation as it is determined by domestic secular law. The same respect must also be given the other way for views upheld in a religious private sphere. As both freedom of religion and non-discrimination depends on implementation of human rights can be upheld by secularism the second part of my research question should have a chance to achieve that balance if there are neutral spaces with moral claims are minimal, as secularism can provide. In a human rights context this is still an area that deserves more discussion and my attempts have built on ongoing debates that I have tried to pull further in the context of this thesis and it's angle.

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