HUMAN RIGHTS MEMORIAL
Communication to the Human Rights Committee under the Optional Protocol to the ICCPR in relation to Homosexual Rights in the United States

Instructions

Set out below is a factual situation that gives rise to a number of human rights considerations. The situation envisaged is of an individual in the United States of America who claims to have been the victim of specified human rights violations. The individual concerned has decided to initiate a communication to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (the “ICCPR”). You are required to prepare either the written individual communication to the Committee, or to draft a response to the communication for the State party (depending on which side you have been assigned) (in both cases, a “Memorial”).

Please read the factual scenario below, meet with your team-mates, and consider the ways in which you intend to approach the problem. Then, schedule a meeting with your Teaching Assistant (Mikiko) as soon as possible to discuss the problem, and to raise any queries or concerns that you may have. You are required to research both the issues raised by the problem (including factual issues, questions of domestic and international law, and any other relevant points) and the general work of the Human Rights Committee to the extent required to write your Memorial in a persuasive and comprehensive manner. This is a “team exercise” (and you should endeavour to work on it together), although each of you is solely responsible, and will be graded for, your section of the Memorial that you finally submit.

In framing the problem we have taken certain liberties (such as assuming that the United States is a party to the Optional Protocol when in reality it is not) in order to create a good hypothetical problem for the purposes of this exercise. While you are not required to follow all the rules of procedure of the Human Rights Committee, you should approach this problem as if it were as realistic as possible. Your focus, however, should be on the substantive human rights issues raised in the problem rather than on more technical issues of procedure. You are encouraged to consult international human rights experts, NGOs, or any other resources.

The aim of the exercise to familiarize you with how human rights complaints mechanisms actually work, and for you to gain some experience in preparing the kinds of arguments that arise for adjudication before treaty bodies. While we have provided detailed guidelines as to how we suggest that you approach the problem, you should see this as only the required minimum (ie, feel free to include your own creative ideas or arguments and to move beyond the points we have set out—particularly by researching new cases or decisions that support your arguments). If you have any concerns, please email either your TA or Peter Danchin.
Your Memorial should be approximately 10-15 pages in length per student (that is, approximately 35-45 pages in total) including any footnotes. This assumes that you will use 11 or 12 point font (smaller for footnotes), and space-and-a-half in the main text. Do not exceed this word limit.

FACT SCENARIO

The Atlanta Police arrested Kenneth Miller, a 35-year-old native-American male, in August 1996, on the grounds that he had homosexual activities with a consenting 30-year-old male in the bedroom of his home. Miller’s activities violated the Georgia Criminal Code, which criminalizes various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private. Miller has exhausted all domestic remedies in challenging the constitutionality of the Georgia Criminal Code. The United States Supreme Court, in May 1998, rejected Miller’s claim on the ground that the Constitution does not confer a fundamental right upon homosexuals to engage in homosexual activities.

Assume that the United States is a party to the Optional Protocol to the International Covenant on Civil and Political Rights. Miller filed a communication to the Human Rights Committee on August 5, 1998 alleging the violation of Articles 2, 17, 18 and 26 of the Covenant.

ARGUMENTS

In the communication, Miller makes a number of claims on the merits. The main claims of Miller, and possible responses by the United States, that you are suggested to consider are as follows:

(1) VIOLATION OF ARTICLE 17—RIGHT TO PRIVACY

Miller claims that:

1) The Georgia Criminal Code interferes with and thus violates his right to privacy under Article 17. (See, Human Rights Committee, Toonen v. Australia; European Human Rights Court, Dudgeon v. United Kingdom.)

2) This interference is “arbitrary,” as it does not meet the “reasonable test” established under the Committee’s jurisprudence as a criterion to distinguish between permissible and impermissible interferences. (See, Human Rights Committee, General Comment No. 16; Toonen v. Australia; and Bowers v. Hardwick (U.S.S.C.).) The aim of the law is not legitimate, as it is intended to protect only Christian moral concerns and not the morality of all people in the U.S. The prohibition of sexual activities under the Georgia Criminal Code is not proportional in that it even criminalizes such activities in private places.

The United States responds on the two grounds:
1) **Nature and scope of Article 17.**

Article 17 of the Covenant does not create a “right to privacy” but only a right to freedom from arbitrary or unlawful interference with privacy. The Georgia Criminal Code was enacted by valid democratic processes, and it is not an unlawful interference with privacy. *(See, Toonen v. Australia, Tasmanian Government’s claim; Wennergren Dissenting Opinion).* Even if Article 17 of the Covenant recognizes the right to privacy, it does not encompass homosexual activities. The scope and effect of the right to privacy, if established by Article 17, is not to immunize otherwise illegal conduct whenever it occurs in the home. *(See, the U.S. Supreme Court in Bowers v. Hardwick: “Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home.”)*

2) **Moral argument**

Article 17(1) does not prohibit all interference with privacy, but only arbitrary or unlawful interference. Sodomy was a criminal offense at common law and has been forbidden since the establishment of the United States. The purpose of criminalizing homosexual activities by the Georgia Criminal Code is to protect the moral concerns of people and it is a criminal measure that is proportional and necessary for this purpose. Thus, the Georgia Criminal Code is reasonable in the particular circumstances of the U.S. as a State Party and is neither an arbitrary nor unlawful interference.

*Note : The United States Supreme Court, in Bowers v. Hardwick, denied the petitioner’s challenge to the constitutionality of the Georgia sodomy law on the grounds of a right to privacy. Why did the Court reject the protection of homosexual activities under the right to privacy?*

**Note: Please think further about the comment: “In the field of sexual orientation law, the European Convention on Human Rights has provided greater legal protection to individuals than most domestic legal traditions, including U.S. law …. However, the European Court and Commission of Human Rights so far has limited the recognition of gay and lesbian rights to only private and consensual adult homosexual conduct.” Does the claim of homosexual activities based on the right to privacy necessarily result in circumscribing homosexuals into private places and thus exclude their lives from the public sphere?*

(2) **VIOLATION OF ARTICLES 2 AND 26—SEXUAL DISCRIMINATION**

Miller claims that the Georgia Criminal Code violates Article 2(1) and 26 of the Covenant because:
1) The Georgia Criminal Code distinguishes between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity. Sexual orientation falls within “sex” or “other status” of Articles 2(1) and 26. (See, Toonen v. Australia; Dudgeon v. United Kingdom; Modinos v. Cyprus; Norris v. Ireland).

2) The Georgia Criminal Code does not outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private. This is discrimination on the basis of sex or sexual orientation, which is covered by “sex” or “other status” in Articles 2(1) and 26.

3) Although not every differentiation of treatment will constitute discrimination, for such differentiation to be allowable under Articles 2 and 26, it has to meet certain criteria, i.e., that it is reasonable and objective and its aim is to achieve a purpose which is legitimate under the Covenant. (See, Human Rights Committee, General Comment No. 18, “Non-discrimination”). The objective of criminalizing homosexual activities is to preserve a Christian moral view or a gendered view of imposing sexual roles on men and women, neither of which can be a legitimate aim under the Covenant. In addition, the distinction imposed by the Georgia Criminal Code on Miller is not “reasonable”, as there is no legitimate reason as to why homosexual activities between men should be singled out and criminalized to meet such a moral concern, while homosexual activity between women is not outlawed.

The United States responds to Miller's claims on the basis of its reservations, understandings and declarations to the ICCPR:

The United States ratified the Covenant, subject to a number of reservations, understandings, and declarations including understandings for Articles 2(1) and 26. This reads that “[t]he United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.” The distinction attacked by Miller as being based on sexual orientation is rationally related to a legitimate governmental objective, that is, to protect the morality of the community, which is supported by many states in the country.

*Note: Please try to understand how reservations, declarations, and understandings play a role in implementation mechanisms for international human rights instruments. Is the U.S. “understanding” of Article 2 legitimate? When are distinctions permitted under the Covenant in spite of Articles 2 and 26?
(3) Violation of Article 18—Right to Freedom of Thought, Conscience and Religion; and Articles 2, and 26—Religious Discrimination

Miller claims that:

1) How individuals identify their own personality and morality, and how they pursue friendship and love with other people, are part of that area of liberty protected by the right to freedom of thought, conscience and religion under Article 18 of the Covenant. It is clear that the Georgia Criminal Code criminalizes homosexual activities based on a Western Christian moral view that such activities are a “sin”. The imposition of sectarian religious views by states through secular public law violates the right to freedom of thought, conscience and religion of homosexual people, as it forces them to refrain from acting according to their own moral views and (in many cases) non-Christian religious beliefs.

2) The Georgia Criminal Code constitutes religious discrimination, which is prohibited under Article 2 and Article 26 of the Covenant, because by penalizing homosexual activities, it condemns and marginalizes homosexual people who do not accept Western Christian views.

3) The U.S. claim based on the limitation clause (see Article 18(2)) cannot be accepted. “The concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.” “Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.” (See, Human Rights Committee, General Comment No. 22). Opposition to homosexual activities is not representative of a common morality of the people of the United States as a whole, but rather a moral position taken only among certain Christian religious communities or is representative of a stereo-typed gender view. Even if it is legitimate to protect such a “morality”, to criminalize homosexual activities in private places is not necessary or proportional to the achievement of that aim.

The United States responds that:

1) Prohibiting homosexual activities, originally rooted in Christian belief, has been raised to the traditional moral view of the United States through its long history and practice throughout the country. The Georgia Criminal Code is not aimed to protect one religious value but to protect the moral values of the people of the United States. Thus it is allowed as a necessary limitation to protect morals under Article 18(3) of the Covenant.
2) The Georgia Criminal Code itself, and its means of implementation, are not discriminatory. This is a religiously neutral law and it is not enforced in a discriminatory way against any religious or other minority.

*Note: Advocates of the rights of homosexual people have most often based their arguments on the right to privacy. Recently, however, an alternative path has been proposed, particularly in the United States: to claim their rights based on the right to freedom of thought, conscience and religion, and non-religious discrimination/intolerance. How can you make an effective argument based on the right to freedom of thought and conscience, and non-religious discrimination? Do homosexual activities fall within the scope of the right to freedom of thought, conscience or religion? What are the merits and/or significance of claiming violations of the rights enshrined in Article 18 (and Articles 2 and 26)?

**Note: The right to freedom of thought, conscience and religion under Article 18 of the Covenant, while non-derogable (Article 4), is still subject to certain limitations. Under what circumstances are limitations allowable under the Covenant? In particular, what does the permissible limitation allowed by the word “moral” allow? Who decides what “moral” means?

SOURCE MATERIALS

(1) For Individual Communication Procedures:


(2) For cases under International or Regional Human Rights Mechanisms:


(3) For US Court Cases:

- Bowers v. Hardwick, 487 U.S. 186

(4) For Human Rights Committee, General Comments:

- No. 16, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honor and Reputation (Article 17)

- No. 22, The right to freedom of thought, conscience and religion (Article 18)

- No. 18, Non-discrimination (Articles 2 and 26).

(5) For Books/Articles:


Good luck!!