



UN Standards of Conduct for Business on Tackling Discrimination against LGBTI+ People

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Abstract

This work will particularly focus on the discrimination against LGBTI+ community with respect to the right to equal employment opportunities, including employment application stage, recruitment process and work environment once a person is already employed. There are different practical and theoretical approaches and theories featuring in the academic and political discussions on the matter. Both academia and praxis provides us with evidence to conclude that the issue of discrimination at work for the LGBTI+ community continues to exist, even though there may be legal and institutional provisions in place that protect them. The aim of the study is to critically analyze the current situation in light of the recommendations that the United Nations' Office of the High Commissioner for Human Rights (OHCHR) published in 2017 in its report titled "Standards of Conduct for Business on Tackling Discrimination against LGBTI people". Among others, this paper seeks to identify the relevant legal aspects of the United Nations Standards of Conduct for Business, in particular identifying their innovative and original feature as well as engaging with the criticism that was directed at it. To achieve the aforementioned goals, we will provide conceptual background information with regard to sexual orientation and gender identity as well as employment discrimination based on sexual orientation and its various forms. Secondly, we will focus on the consequences associated with this form of discrimination that have been identified so far. Lastly, we will assess the specific United Nations tool, which constitutes a core theme of this work, aimed at addressing discrimination at workplace of LGBTI+ people. Although sexual orientation and gender identity should in principle have nothing to do with an employee's performance in the workplace, researchers has documented that almost half (46%) of LGBT employees in the United States feel secluded in the workplace. A key aspect for minimizing the phenomenon of discrimination in work based on sexual orientation and gender identity is a continuing awareness-raising effort with the help of the media, aiming to form all individuals in a belief that no one has the right to judge an employee's job performance based on his or her sexual preferences. Also, the demonstration of positive practices by the employer and the promotion of a positive environment within the staff are key to avoiding conflicts at work. In addition, an ever-increasing and close cooperation between the institutions that protect the rights of the LGBTI+ community, such as non-profit organizations that focus on protecting LGBTI+ people, and LGBTI+ people themselves could change the situation at work.

Keywords: LGBTI+ community, jurisdiction, discrimination, organization

1. Introduction

This work will focus on the discrimination against LGBTI+ community with respect to the right to equal employment opportunities, including employment application stage, recruitment process and work environment once a person is already employed.

The existence of a sexual preference different from existing social norms, or more precisely from what others

expect, often leads to different types of discriminatory behaviour from people who have heterosexual preferences against those who have homosexual or bisexual preferences. Nowadays, discrimination on the grounds of sexual preference is banned in various forms in different national, regional and international jurisdictions. Individuals who identify themselves within as members of the LGBTI+ community, oftentimes face a plethora of obstacles in their daily lives, as in many countries around the world some of their basic rights are yet to be recognized, both legal and socially. They are confronted with stigmatization, discrimination, social exclusion and a considerable degree of prejudice in society. This work will particularly focus on the discrimination against LGBTI+ community with respect to the right to equal employment opportunities.

Admittedly, there are also different practical and theoretical approaches and theories featuring in the academic and political discussions on the matter.

However, this work will particularly focus on the discrimination against LGBTI+ community with respect to the right to equal employment opportunities, including employment application stage, recruitment process and work environment once a person is already employed.

2. The Concept of Sexual Orientation

The acronym LGBTI+ is an abbreviation for lesbian, gay, bisexual, transgender and intersex community. This abbreviation may vary and include additional letters, such as I (intersex), Q (queer or questioning), or A (asexual). Someone who is attracted to a person of the same sex has a homosexual orientation and can be called gay (G) or lesbian (L). Individuals who are attracted to people of the opposite sex have heterosexual orientation (H). Sexual orientation is a process that continually develops over time, and individuals who are attracted to both men and women are called bisexual (B). There are some people whose gender identity does not match the biological sex they belong to. This means that they identify themselves different from their biological sex, so they may perform surgical interventions, hormonal changes so that their sex is in line with their identity. These persons are known as transgender (T).¹

Sexual orientation is different from gender identity. The latter refers to the inner feelings that indicate if someone is male or female. However, the concept of sexual orientation cannot be restricted to sexual behavior only as it involves both feeling and identity. Some individuals may identify themselves as gay, lesbian, or bisexual without engaging in any sexual activity or actual sexual intercourse.²

3. A Brief Review of International Legal Acts Concerning Discrimination Based on Sexual Orientation and Gender Identity

In principle, international human rights instruments protect everyone from discrimination. The Universal Declaration of Human Rights has established the principle of equality and non-discrimination in a single provision (Article 7) which provides that: "All are equal before the law and are entitled without any discrimination to equal protection of the law."³ Although gender identity and sexual orientation are often not mentioned in international human rights treaties as grounds of discrimination, they are usually covered thanks to the open clause. For instance, with regard to the International Covenant on Economic, Social and Cultural Rights the UN Committee on Economic, Social and Cultural Rights stated that "Other status" as recognized in article 2, paragraph 2, includes sexual orientation [...] In addition, gender identity is recognized as among the prohibited grounds of discrimination".⁴

In the European Union the rights of LGBTI+ people became present firstly through the coming into force of the Treaty of Amsterdam in 1997, which added to the anti-discrimination clause as one of the grounds that of sexual orientation. Since then, sexual orientation is prohibited through positive law in the EU. The anti-discrimination clause is present also in the EU Charter of Fundamental Rights in Article 21 –mentioning explicitly sexual orientation as one of the grounds– which reads: "Any discrimination based on any ground such as [...] sexual orientation shall be prohibited."⁵

¹ <https://lgbtqia.ucdavis.edu/educated/glossary> [last accessed 03/04/2020].

² Spitzer, R. L. "Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation" 2003, 32, pp. 403-4017, p. 413.

³ UNGA Res. 217 A (III) *Universal Declaration of Human Rights of 10/12/1948*, UN Doc. A/RES/3/217A, article 7.

⁴ UNCESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) 02/072009*, UN Doc. E/C.12/GC/20, para 32.

⁵ *European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, article 21.*

Additionally, the Employment Equality Directive (Directive 2000/78)⁶, which is applicable mainly within the field of employment prohibits discrimination on grounds of sexual orientation among other grounds.

The International Labor Organization, on the other hand, has adopted The Employment Discrimination Convention (ILO Convention No.111), which requires states to introduce legislative measures in order to prohibit all forms of discrimination and exclusion on any grounds including race, color, religion, sexual orientation, and to withdraw any legislation which is not based on equal opportunities. In addition, there is the Employment Policy Convention (ILO Convention No. 122) which aims at guaranteeing equal treatment of individuals in the employment process, regardless of their sexual orientation and gender identity.

All these provisions have almost the same outcome although the wording may differ. However, it should be noted that some of them are not equipped with mechanisms to monitor the observance of these rights. As it will be elaborated in the next section, although the United Nations has introduced progressive tools to deal with discrimination at work on a regular basis, the issue of enforcement of the rights is an obstacle.

4. The Five Standards of Conduct for Business

In September 2017, the former High Commissioners in Human Rights Zeid Ra'ad Al Hussein launched the Standards of Conduct to tackle discrimination against LGBTI+ people in within the business and work environment.⁷ The document is composed of five standards and its innovative nature is in recognizing that they can be put into action in different spaces or spheres: all the time, in the workplace and the marketplace. In this section, I will present each standard and analyze it from a legal perspective.

1). Respect of Human Rights (At All Times)

The first standard establishes that all companies have the responsibility to respect human rights in their business relations and operations. Furthermore, it specifies that companies are expected to "develop policies, exercise due diligence, and, in cases where their decisions or activities have adversely affected the enjoyment of human rights, remediate such impacts". One of the key aspects that this standard introduces from a legal perspective is the erasure of the public/private dichotomy, which has been extensively criticized by the feminist scholars, activists and, in a way, the feminist movement too.⁸

While it is still recognized that the main responsibility of preventing human rights violations and complying with the International Human Rights Law is the responsibility of the States⁹, the document also establishes a complementary obligation of corporations of respecting human rights at every moment in their performance and conduction.

Another innovative aspect of it is the inclusion of the "due diligence standard", a tool that has been extensively used by International Courts to assess the international responsibility of States for their actions, but also the violations committed by private parties. It is worth noting that in that way, the UN has committed to consider companies as actors that should carry on those responsibilities. The Inter-American human rights regime and the court are a prime example of a regional system that has been attempting to extend the due diligence duty to companies.¹⁰

Moreover, the standard recognizes that the economic power of business should also be used as a positive catalyst of change in this regard.¹¹ It is also important to stress the spatial- temporal distinction the document establishes. In this regard, the obligation to comply with human rights persists "at all times".

2). Eliminate Discrimination (In the Workplace)

The formulation of this standard is two-folded. On the one hand, it recognizes a life free of discrimination to business workers and, on the other hand, it puts the responsibility of guaranteeing an environment free of discrimination within the companies. The standard is also comprehensive in terms of establishing that discrimination can take place in different stages: at the recruitment, once individuals are employed, as concerns the working conditions, benefits, privacy issues and harassment.

3). Provide Support (In the Workplace)

⁶ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, article 21.

⁷ OHCHR, "Tackling Discrimination against Lesbian, Gay, Bi, Trans & Intersex People: Standards of Conduct for Business", 2017, p. 1.

⁸ Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy" *Public and Private Social Life* 281, 1992, 281.

⁹ *Supra* note 27, p. 15 "While governments have the primary obligation to respect, protect and fulfil human rights, companies also have an independent and complementary to respect human rights in their operations and business relations".

¹⁰ IACHR Thematic Report on "Business and Human Rights: Inter-American Standards", 2020, available at: https://www.oas.org/en/iachr/media_center/PReleases/2020/014.asp [last accessed 23/04/2020]

¹¹ *Ibid*

With respect to the ‘provide support’ standard, the UN relies on the positive reinforcement of good practices in the workplace. It requires businesses to ensure inclusion and to address the special needs of LGBTI+ people. This is an important aspect, since the “equal benefits” for all employees philosophy may in fact mask or reinforce inequalities. For instance, LGBTI+ workers may need therapies or special medical needs that are not covered in basic health insurances and this should be taken into account by companies.

4). Prevent other Human Rights Violations (In the Marketplace)

The holistic requirement to prevent other human rights violations is, in my opinion, one of the strongest aspects of the document. Through this standard, the UN recognizes the power and “domino effect” which companies’ practices can create across a whole spectrum of potential human rights issues. To exemplify, if a company refuses to negotiate or to buy goods from suppliers which do not have an inclusive policy, it can generate incentives for those suppliers to generate them. This is a key aspect because we move from a paradigm of legal obligations to one of incentives or even that of ethical responsibilities. This standard is closely related to “advocacy”, an activity that many companies promote among their employees. For instance, Google has a specific budget for activities related to inclusivity and its employees tend to participate on Mardigras and Pride Parades.

5). Act in the Public Sphere (In the Community)

This responsibility to act in the public sphere further extends the applicability and potential effect of the document to community or even country-level as “Business are encouraged to use their leverage to contribute to stopping rights abuses in the countries in which they operate”. Many multi-nationals and international companies have offices or factories in countries that are not open to same-sex practices, such as India, Sri Lanka, the Philippines, to name just a few. Therefore, companies can act in ways that encourage better practices in those countries by consultations and exchange with local communities. However, to fully comply with this standard, it is also necessary to keep in mind the indivisibility of human rights and attempt to tackle it together other issues — such as those touching on fair wages.

To briefly summarize this section, the UN Standards of Conduct for Business seek to provide a set of guides and milestones for assessing the role of companies in acting against LGBTI+ discrimination and related human rights abuses. The UN has encouraged businesses to adopt these standards as best practices and incentive other stakeholders into using them to monitor the operations of businesses in the context of human rights protection. It is important to note that in the almost three years since the release of these standards, several companies have accompanied and endorsed them, such as Hogan Lovells¹², Societe Generale, Baker and Makenzie, IBM, among others.¹³

One of the main strengths of the document lies in its arguably successful attempt at generating synergies with private actors. This is especially important as it reflects the understanding that, while States are the main responsible actors for protecting human rights and preventing their violations, a most robust conception of the State and the society should make companies — especially in a capitalistic system — subject to this duty. A prime example of this is the extended application of the due diligence standard to companies.

The standards also show the potential which companies have to change the society and the communities in which they operate by either exercising pressure on the government or by generating incentives.

Finally, while the UN Standards of Conduct for Business have a universal vocation in principle, much like all human rights, these also recognize that each country and community may face specific challenges and come across situations that require different efforts, strategies and resources.

According to the Standards of Conduct, the companies should raise their voices in an attempt to bring social change to the areas they operate. However, in cases of tensions between the government and the company, the latter has to weigh its economic benefits against LBGTI+ awareness-raising. Challenging the government may cause harm to the company and its employees and the better solution might be to confine their active role in progressing LGBTI+ rights within the work environment, and, beyond that, act within the limits it is “permitted” by the ideology of the hosting State.¹⁴

Having regarded to the above-described positive aspects of the document it must be stated that the UN Standards of Conduct for Business nonetheless remain so-called “soft law”. It is not a treaty or ratification and as such it has no binding force. This means that States are not forced to apply them. However, most of the rights recognized in this document can still be enforced recurring to the “International Covenant on Civil and Political Rights” and the “Convention

¹² <https://www.hoganlovells.com/en/news/hogan-lovells-expresses-support-for-un-standards-of-conduct-addressing-discrimination-against-lgbti-people> , [last accessed 24/04/2020].

¹³ A list of the companies that have already expressed support can be found at <https://www.global-lgbti.org/the-supporters>. [last accessed 24/04/2020]

¹⁴ Dan Bross, et al. “None of their Business? How the United Nations is Calling on Global Companies to Lead the Way on Human Rights of LGBTI people”, *Business and Human Rights Journal*, 3, 2018, pp. 271–276.

on the Elimination of all Forms of Discrimination against Women". Additionally, and for more specificity, the International Labor Organization has drafted in 2019 the Convention No.190 "Eliminating Violence and Harassment in the World of Work"¹⁵. Although it did not enter into force yet, this Convention addresses as well many of the issues that the standards seek to tackle, especially in terms of harassment and awareness rising.

5. Recommendation

Recent developments support the idea that companies are introducing a more LGBTI-inclusive culture in the workplace because of the many benefits it brings about. Nonetheless, this is not the case for all companies yet, since (as it was shown in this work) recent reports have provided evidence that the LGBTI+ community still suffers from the signs of homophobia, social exclusion, stigmatization, prejudice and discrimination in the work environment. Therefore, the fight for equality will continue until it is fully achieved. As these standards suggest, apart from the State, the companies themselves are an important key factor in eliminating discrimination in the work environment, as well as putting pressure on the government authorities to develop progressive policies in this regard. It was proven in this part of the work that the standards are a good manner to generate synergies with the private sector to enhance the respect of LGBTI+ rights. Companies are exceptional catalysts of change and in many aspects, they tend to respond to the necessities of societies prior than the States.

Nonetheless, it is important to remark again that they do not have a binding character. The Standards of Conduct fall under "Soft law" and cannot be enforced; it is up to the companies to support and put them into force.

It is relevant to include as many stakeholders as possible (not just companies), but also NGOs and other organizations working with certification schemes on LGBTI+ issues, for instance.

When taking action in countries with less developed frameworks on gender equality and LGBTI+ issues, to bear in mind the indivisibility of human rights is of paramount importance.

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