The Equal Rights Trust Legal Brief For Kanalesingam

Introduction

1. This legal brief is provided by The Equal Rights Trust (ERT) to Kanesalingam & Co (Kanesalingam). It sets out international and comparative law and jurisprudence arguments in relation to the current case (the Judicial Review) before the High Court in Malaya at Seremban, in which Kanesalingam & Co currently represents (1) Muhamad Juzaili Bin Mohd Khamis, (2) Shukur Bin Jani, (3) Wan Fairol Bin Wan Ismail, and (4) Adam Shazrul Bin Mohd Yusoff in their judicial review claim against (1) the State Government of Negeri Sembilan, (2) the Islamic Affairs Department of ENgeri Sembilan, (3) the Director adn/or highest ranked officer within the Islamic Affairs Department of Negeri Sembilan, (4) the Chief Syariah Enforcement Officer of Negeri Sembilan, and (5) the Chief Syariah Prosecutor of Negeri Sembilan.

2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as a resource centre and a think tank, it focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice and balancing the principle of non-discrimination with other rights. The Board and staff of ERT are qualified experts in human rights law and non-discrimination. ERT has professional expertise on equality and non-discrimination law, and its core work focuses on legal research on issues of discrimination.

3. In this brief, ERT provides arguments on which Kanesalingam may wish to rely in their submissions to the High Court to argue that Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 (Section 66) violates Article 8 of the Federal Constitution of Malaysia (Article 8) by discriminating against the applicants, and others in a similar situation to the applicants, on the ground of their gender identity.

Federal Constitution of Malaysia

4. Article 8 of the Federal Constitution of Malaysia states as follows:

   8. (1) All persons are equal before the law and entitled to the equal protection of the law.

   (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

   (...)

   (5) This Article does not invalidate or prohibit—

   > *(a) any provision regulating personal law;*

(b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

Article 8(1) provides that persons are entitled to "equal protection of the law", which means that there should be no discrimination between different groups in the rights and duties set out in the law. Article 8(2) also provides that there shall be no discrimination in any law. ERT suggests that Kanesalingam should focus on showing that Section 66 violates both Article 8(1) and Article 8(2) by subjecting transgender persons in Negeri Sembilan to direct discrimination on the ground of their gender and gender identity.

Direct Discrimination

5. Article 8(1) does not specify what is meant by "equal protection" and Article 8(2) of the Constitution does not define "discrimination". ERT suggests that Kanesalingam should refer to the definitions provided in The Declaration of Principles on Equality in order to elaborate on the provision in Article 8(2) that "there shall be no discrimination", and to to demonstrate how Section 66 violates Article 8(1). The Declaration of Principles on Equality (the Declaration), published in October 2008 and signed by experts from over 40 jurisdictions, represents a moral and professional consensus among human rights and equality experts, which is based on concepts and jurisprudence developed in international, regional and national legal contexts. The Declaration is "intended to assist efforts of legislators, the judiciary, civil society organisations and anyone else involved in combating discrimination and promoting equality".[1]

6. Principle 5 of The Declaration of Principles on Equality explains "direct discrimination" as follows:

[1] The Equal Rights Trust, *The Declaration of Principles on Equality*, London, 2008, available at: http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

7. On the basis of this definition, in order to show that Section 66 is directly discriminatory against the applicants, Kanesalingam will need to demonstrate that:

   a. Gender identity is, or should be treated as, a "prohibited ground" of discrimination under the Constitution;

   b. Section 66 treats the applicants "less favourably" than others who do not have the same gender identity as the applicants;

   c. It does so "on the grounds of" or "for a reason related to" gender identity; and

   d. The "less favourable treatment" which they have received is not justifiable and does not fall within an exception in the Constitution.

Gender identity as a "prohibited ground"

8. Article 8(1) does not specify which groups are entitled to "equal protection". Article 8(2) does not specify "gender identity" as a prohibited ground of discrimination. Two arguments can be made to demonstrate that "gender identity" should be treated as a "prohibited ground" within Article 8 of the Constitution. Firstly, international, regional and national law is increasingly recognising "gender identity" as a personal characteristic which should be a "prohibited ground" in relation to which discrimination is prohibited. Secondly, as Kanesalingam has already submitted in its Leave Statement, "gender identity" should be treated as forming part of the prohibited ground of "gender", which was added to Article 8(2) in response to Malaysia's assumption of obligations as a State Party to the Convention on the Elimination of All Forms of Discrimination Against Women. We will now address each of these arguments in turn.

9. <u>Gender identity as a prohibited ground in its own right</u>: Despite the fact that "gender identity" is not explicitly stated as a prohibited ground of discrimination in the core international human rights treaties, there is a growing trend amongst international human rights bodies to recognise that, although not expressly mentioned, "gender identity" is in fact a prohibited ground of discrimination under international human rights law. In its General Comment No. 20, the UN Committee on Economic, Social and Cultural Rights explains that "gender identity is recognised as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations".[2] In their

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[2] UN Committee on Economic, Social and Cultural Rights, General Comment No. 20 on Non-Discrimination in relation to Economic, Social and Cultural Rights, E/C.12/GC/20, July 2009, Para 32.

general comments and concluding observations the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, which oversee the implementation of treaties by which Malaysia is bound, have included recommendations on countering discrimination based on gender identity.[3] Although gender identity is not an express ground of discrimination in the European Convention on Human Rights, in the 2010 case of *P.V v Spain*,[4] the European Court of Human Rights explicitly found transsexuality to be a prohibited ground of discrimination under Article 14 (Non-Discrimination) of the European Convention on Human Rights. In 2012, the Inter-American Court of Human Rights in *Case of Atala Riffo and daughters v Chile*,[5] found that Article 1 of the Inter-American Convention on Human Rights, which prohibits discrimination, includes discrimination on grounds of gender identity, though this ground is not specifically mentioned.

10. Principle 5 of The Declaration of Principles on Equality reflects the growing consensus that "gender identity" should be included as a prohibited ground of discrimination. Further, Principle 2 of The Yogyakarta Principles, which explain how international human rights law applies to issues of gender identity, states as follows:

> *Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination (...) States shall (...) Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles".*[6]

11. Gender identity as within "gender": Discrimination on grounds of gender identity has been found to be unlawful under provisions which prohibit discrimination on grounds of gender and sex. In its General Comment 28, the Committee on the Elimination of Discrimination Against Women provides helpful definitions of both "sex" and "gender". It states "The term "sex" here refers to biological differences between men and women. The term "gender" refers

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[3] See, for example, Committee on the Elimination of Discrimination against Women, *General Comment No. 28 on Core Obligations of States Parties under Article 2*, UN Doc. No. CEDAW/C/GC/28, para. 18 and UN Committee on the Rights of the Child, *Concluding Observations on New Zealand*, CRC/C/NZL/CO/3-4, 11 April 2011, Para 25.

[4] *P.V. v Spain*, Appl. No. 35159/09, ECHR, 30 November 2010.

[5] *Atala v Chile*, Case no 12.502, Judgment of 24 February 24 2012.

[6] The Yogyakarta Principles, 2008, Principle 2, available at: http://www.yogyakartaprinciples.org/principles_en.htm.

to socially constructed identities, attributes and roles”.[7] Discrimination against a person because he or she has failed to act in accordance with the socially constructed identity associated with his or her biological sex, constitutes discrimination on grounds of gender and discrimination based on sex. In *Glenn v Brumby*, the US 9th Circuit Court of Appeals held “discrimination against a transgender individual because of her gender non-conformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”

12. A number of cases from the United States may be used to support an assertion that discrimination on the basis of a person’s failure to act in accordance with societal expectations for a person of his or her sex should treated as discrimination on the ground of gender and sex. *Glenn v Brumby* concerned the dismissal of Glenn, who had been born a biological male and had a female gender identity.[8] Glenn was dismissed when she started to come to work presenting as a woman. In this case, the court found that “instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination”.[9] In *Price Waterhouse v Hopkins*, the US Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination.[10] The Court found that the US Constitution barred not just discrimination because of biological sex, but also gender stereotyping, that is discrimination because a person fails to act and appear according to expectations defined by gender. In Pat Doe, by Her Next Friend, *Jane Doe, Plaintiff v. John YUNITS, et al*.,[11] the plaintiff was a school student who had been diagnosed with gender identity disorder. The plaintiff was biologically male, but had a female gender identity. The plaintiff sought a court injunction requiring the Defendants to allow her to attend school wearing clothing that either a male or female student could wear without being disciplined. The Trial Court held that the school’s attempt to prohibit the plaintiff from wearing clothing that expressed her female gender identity violated her right to free expression, and also created an impermissible sex-based classification contrary to the prohibition of sex discrimination in Massacheusetts law.

13. A similar treatment of the ground of “sex” has been found in the jurisprudence of the Human Rights Committee. In the case of *Nicholas Toonen v. Australia*, the Human Rights Committee found that the reference to “sex” as a prohibited ground in Article 26 of the International

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[7] UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 2010, Para 5, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement.

[8] *Glenn v Brumby*, 11th Circuit Court of Appeals, No. 10-14833, 5 December 2011.

[9] *Glenn v Brumby*, 11th Circuit Court of Appeals, No. 10-14833, 5 December 2011, p. 9.

[10] *Price Waterhouse v Hopkins*, Supreme Court of the Unites States, 490 U.S. 228 (1989).

[11] 15 Mass. L. Rptr. 279, No. 00-1060A, 26 February 2001.

Covenant on Civil and Political Rights includes discrimination on the ground of sexual orientation.[12] Though this case concerned sexual orientation, rather than gender identity, the prohibition of "sex discrimination" was interpreted to cover discrimination against people because they fail to behave in accordance with the behaviours thought to be suitable for persons of their sex.

14. In the case of *P. v S. and Cornwall County Council*, the European Court of Justice held that discrimination arising from gender reassignment constituted discrimination on the grounds of sex, and prevented the dismissal of a transsexual for a reason related to a gender reassignment. The court stated as follows:

> *[W]here a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard.*[13]

15. Similarly, in the case of *Sarah Margaret Richards v. Secretary of State for Work and Pensions,* the European Court of Justice noted that the right not to be discriminated against on grounds of sex is one of the most fundamental human rights that the Court had to ensure, and that it could not be confined to discrimination based on the fact that person is of one or other sex.[14]

Less favourable treatment

16. The definition of direct discrimination in Principle 5 of The Declaration of Principles on Equality states that in order to establish that direct discrimination has occurred, it is necessary to show that the act complained of amounts to "less favourable treatment", meaning that a person was treated worse than someone else. In this case, there appear to be two types of "less favourable treatment". The very existence of section 66, which effectively criminalises those who have a gender identity according to which they wear clothes which are not thought to be appropriate for persons of their sex, subjects transgender persons to less favourable treatment than those who are not transgender. Furthermore, the arrest, investigation and charging of the applicants, and other transgender persons in Negeri Sembilan, in enforcement of the offence established in Section 66, represents less favourable treatment of them in comparison to men and women without their gender identity who are not so arrested and charged. The UK House of Lords has suggested that "less favourable treatment" should require a "test of materiality", stating that "[a]n unjustified sense of

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[12] *Nicholas Toonen v. Australia*, Communication No. 488/1992, Paras 8.2-8.7.

[13] Judgment of 30 April 1996, *P. v. S. and Cornwall County Council,* Case C-13/94.

[14] Judgment of 27 April 2006, *Sarah Margaret Richards v. Secretary of State for Work and Pensions, Case C-423/04.*

grievance cannot amount to 'detriment'" but that "it is not necessary to demonstrate some physical or economic consequence".[15]

17. It is possible to argue that the very existence of section 66, whether enforced or not, constitutes less favourable treatment, in breach of Article 8(1) and Article 8(2) of the Constitution. In *Dudgeon v United Kingdom*, a case challenging the law applicable in Northern Ireland which criminalised sex between consenting males, the European Court of Human Rights found that "the very existence of this legislation continuously and directly affects" the private life of the victim.[16] In *Goodwin v United Kingdom*, a case challenging the failure of the United Kingdom's legislation to recognise the gender identity of transsexual people, the European Court of Human Rights reasoned that "serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (...) A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety".[17] Thus the disadvantaged position in which people with the applicants' gender identity are placed by section 66 constitutes "less favourable treatment". Articles 8(1) and 8(2) also envisage that the very existence of a law which discriminates, will fall foul of the Constitution.

18. In addition, the applicants have been subjected to the very serious "less favourable treatment" of arrest and charge, to which those who have a different gender identity were not subject. The act of enforcement of Section 66 therefore amounted to treatment of the applicants, which was less favourable that that accorded to persons without their gender identity.

"On grounds of""

19. In order to show direct discrimination, it is also necessary to show that the victim was treated less favourably "on grounds of" gender identity. This is not a matter of showing the motivation of the person who is alleged to have discriminated, but is rather about the causation behind the treatment. In other words, it must be shown that the causal factor, or factual criterion, behind the treatment was gender identity. One way of thinking of this is for the court to ask itself "but for the person's gender identity, would he or she have been treated in this way?". In the case under consideration, if the applicants had had a different gender identity, if they had had the gender identity associated with their biological sex, then they would not have been criminalised. This test is therefore satisfied in relation to section 66.

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[15] *Shamoon v Chief Constable of the Royal Ulster Constabulary,* [2003] 2 All ER, HL, Para 35.

[16] *Dudgeon v United Kingdom,* Application No. 7525/76, ECHR, 22 October 1981, Para 41.

[17] *Goodwin v United Kingdom*, Application No. 28957/95, 11 July 2002, Para 77.

20. In cases concerning the prohibition of certain conduct by gay people, such as sex and marriage, governments have sometimes tried to argue that the law does not target gay people themselves, but simply the conduct in which they engage. However, courts have rejected these arguments. In *Lawrence v Texas*, O'Connor's concurring opinion contained the following passage:

> *Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." Id., at 641 (Scalia, J., dissenting) (internal quotation marks omitted).*[18]

21. Similarly, in *Perry v Brown*, the Ninth Circuit Court of Appeals has noted that "because laws affecting gays and lesbians' rights often regulate individual conduct (...) as much as they regulate status, the Supreme Court has 'declined to distinguish between status and conduct in [the] context' of sexual orientation".[19]

22. Similar reasoning is applicable in relation to laws which regulate conduct, where the conduct is intimately connected with their status as a transgender person. To hold otherwise would seriously undermine protection against discrimination on grounds of gender identity, since "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender appropriate appearance and behavior."[20] If a law targets those acts which define a transgender person as transgender, the law is, in effect, targeting transgender people.

Lack of Exception and Lack of Justification

23. Once treatment is found to constitute less favourable treatment based on gender, it will constitute discrimination, and thus fall foul of Article 8 unless it falls within an exception to Article 8, or is otherwise justified. We would recommend that it would be appropriate to anticipate and counter any potential arguments that the state might choose to put forward in relation to exceptions or justifications for section 66. Below, we have identified arguments which may be raised to justify the Section 66, but which Kanesalingam should be prepared to refute.

a. No Exception in the Constitution

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[18] Lawrence v Texas, No. 02-102, United States Supreme Court, 26 June 2003.

[19] *Perry v Brown,* No. 10-16696, Ninth Circuit Court of Appeals, 7 February 2012.

[20] *Glenn v Brumby*, 11th Circuit Court of Appeals, No. 10-14833, 5 December 2011.

24. Article 8(2) of the Constitution states that there may be exceptions to the prohibition of non-discrimination where "expressly authorized by this Constitution". Kanalesingam may, therefore, wish to argue that nothing in the Constitution authorises the state of Negeri Sembilan to enact or enforce Section 66. In other words, Section 66 does not fall within any exception created by any other provision of the Constitution to the prohibition of discrimination in Article 8(2).

25. Article 74(2) of the Constitution provides that in relation to certain matters, "the Legislature of a State may make laws". These matters are listed in the Second List set out in the Ninth Schedule of the Constitution. The Second List includes the "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion". Section 66 falls within this category, so far as it relates to those professing the religion of Islam. However, Article 74(3) states that "[t]he power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution". Further, Article 4(1) of the Constitution provides that "any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". Therefore, any offence against precepts of Islam which is established by a State legislature under Article 74(2) must still comply with the prohibition of discrimination set out in Article 8(2).

26. Article 8(5) sets out a list of exceptions to the prohibition of discrimination which includes "any provision regulating personal law" and "any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion" but otherwise makes no reference to religious matters. Section 66 clearly does not relate to restrictions of "office or employment", and although it may be argued otherwise, it does not regulate "personal law". The Constitution elaborates on its interpretation of "personal law" in Paragraph 4(e)(ii) of the First List in the Ninth Schedule, where it describes "Islamic personal law" as "relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate". Further, it describes "personal and family law" as "the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts".

27. The AG has suggested that Article 11(3)(a) of the Constitution, which provides the right of every religious group to manage its own religious affairs, permits a State Territory such as Negeri Sembilan to enact Syariah laws pertaining to cross-dressing Muslim males. However, Article 11(3)(a) is intended to protect the right of religious groups to regulate their internal affairs, such as the way in which the religion is organised and practiced. Section 66 does not fall within this exception. It is not enacted by a religious group, nor does it regulate religious affairs. Article 11(3)(a) does not appear to create an exception for laws enacted by a state, such as Section 66, rather it directed at religious groups. Nor does it create an exception for rules of general application.

b) No justification based on the right to religious freedom

28. As stated above, Principle 5 of The Declaration of Principles on Equality states that direct discrimination "may be permitted only very exceptionally". In order to justify discrimination, the state would need to show that Section 66 has a legitimate aim, and that the provision is a proportionate means of achieving that aim. ERT suggests that Kanesalingam should argue strongly against any arguments seeking to justify the discriminatory nature of Section 66.

29. In terms of its legitimate aim, the state may argue that the reason for or aim behind the provision was the preservation of religious culture or preservation of morals in society. Recently, courts in other jurisdictions have rejected the idea that "public morality" can constitute a legitimate state interest. In *Lawrence v Texas,* a case before the US Supreme Court, O'Connor rejected the idea that the state has a legitimate interest in preserving public morality: "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause".[21] The Delhi High Court reached a similar conclusion in *National Coalition, Naz Foundation, Nadan McCoskar v State*: "Moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy".[22] In 1978, the Supreme Court of Illinois, in *City of Chicago v Wilson*,[23] struck down the municipal cross-dressing statute which stated:

> *Any person who shall appear in a public place (...) in a dress not belonging to his or her sex, with intent to conceal his or her sex, (...) shall be fined note less than twenty dollars nor more than five hundred dollars for each offense.*[24]

Cook County sought to justify the prohibition of cross-dressing as "protecting the public morals". The Supreme Court of Illinois found that there was no evidence that cross-dressing when done as part of a preoperative therapy program or otherwise is, in and of itself, harmful to society, and stated that "the aesthetic preference of society must be balanced against the individual's well-being". In *Perry v Brown*, the Ninth Circuit Court of Appeals held that "Tradition is a legitimate consideration in policy making, of course, but it cannot be an end in itself"". Notwithstanding its recognition that "[d]isapproval may also be the product of longstanding, sincerely held private beliefs", the Court held categorically that "disapproval of a class of people" cannot constitute a legitimate government interest.[25] In 2010, the Council of Europe Committee of Ministers adopted a Recommendation on measures to combat

[21] Lawrence v Texas, No. 02-102, United States Supreme Court, 26 June 2003.

[22] *National Coalition, Naz Foundation, Nadan McCoskar v State*, High Court of Delhi at New Delhi, 2 July 2009.

[23] Supreme Court of Illinois, May 1978.

[24] Section 192-8 of the Municipal Code of the City of Chicago.

[25] *Perry v Brown,* No. 10-16696, Ninth Circuit Court of Appeals, 7 February 2012, pp. 72-73.

discrimination on grounds of sexual orientation or gender identity.[26] This Recommendation affirms "the principle that neither cultural, traditional nor religious values, nor the rules of a 'dominant culture' can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity".[27] In *Jane Doe, Plaintiff v. John YUNITS, et al*.,[28] the Trial also noted that the "community standards" exception to sex discrimination in schools has never been recognised by the Supreme Judicial Court or any court whose opinions are binding on the courts of the Commonwealth. In *Lawrence v Texas*, O'Connor in her concurring opinion said "Moral disapproval … is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. … Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons".

30. Even should the court find that the maintenance or morals of religious culture to be a legitimate interest of the state, Kanesalingam can argue that the provisions in question are not a proportionate, or reasonable, means of achieving that aim, given the hugely negative impact that they have on the lives of those criminalised by the provisions and the extent to which they undermine their right to be free from discrimination. In *Dudgeon,* the United Kingdom argued that it maintained legislation in Northern Ireland to criminalise sex between gay men because of "the strength of feeling in Northern Ireland against the proposed change, and in particular the strength of the view that it would be seriously damaging to the moral fabric of Northern Irish society".[29] The Court also took into account the fact that "Northern Irish society was said to be more conservative and to place greater emphasis on religious factors". However, in the light of the serious impact of the legislation on the victim, the European Court of Human Rights found that "there must be particularly serious reasons" to justify the legislation. The Court held that public opinion in Northern Ireland "cannot of itself be decisive as to the necessity for the interference". Ultimately, it found that

> *such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant (…) the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral*

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[26] Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity – Explanatory Memorandum to the Recommendation, CM(2010)4 add3 rev2E, 29 March 2010.

[27] *Ibid.*, Preamble.

[28] 15 Mass. L. Rptr. 279, No. 00-1060A, 26 February 2001.

[29] *Dudgeon v United Kingdom,* Application No. 7525/76, ECHR, 22 October 1981, Para 46.

> *standards cannot, without more, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.*[30]

The preservation of religious culture should not result in such severe consequences as the discriminatory arrest, ill-treatment and deprivation of liberty of individuals on the ground of gender identity, and the effective prohibition of individuals from living according to their true gender identity, thus undermining the autonomy, self-identity and personal integrity.

[30] *Dudgeon v United Kingdom,* Application No. 7525/76, ECHR, 22 October 1981, Paras 60-61.