Toonen v Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

1) Reference Details

Jurisdiction: UN Human Rights Committee
Date of Decision: 31 March 1994
Link to full case: http://www1.umn.edu/humanrts/undocs/html/vws488.htm

2) Facts

The author was an activist for the promotion of the rights of homosexuals in Tasmania, one of Australia's six constitutive states. He challenged two provisions of the Tasmanian Criminal Code, namely ss. 122(a) and (c) and s. 123, which criminalise various forms of sexual contact between men, including all forms of sexual contacts between consenting adult homosexual men in private.

3) Law

National Law

- Sections 122(a) and (c) and s. 123 of the Tasmanian Criminal Code

International Law

- Article 2, paragraph 1 of the International Covenant on Civil and Political Rights (Each State Party to the present Covenant 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, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status)
- Article 17 of the International Covenant on Civil and Political Rights (right to privacy)
- Article 26 of the International Covenant on Civil and Political Rights (right to non-discrimination)

4) Legal Arguments

The Author

The author affirmed that ss. 122 and 123 of the Tasmanian Criminal Code violated Articles 2, paragraphs 1, and Articles 17 and 26 of the Covenant due to:

a) The sections do not distinguish between sexual activity in private and sexual activity in public and bring private activity into the public domain. In their enforcement, these provisions resulted in a violation of the right to privacy, since they enable the police to enter a household on the mere suspicion that two consenting adult homosexual men may be committing a criminal offence. Given the stigma attached to homosexuality in Australian society (and especially in Tasmania), the violation of the right to privacy may lead to unlawful attacks on the honour and the reputation of the individuals concerned;
b) They distinguish between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity, and;
c) The Tasmanian Criminal Code did 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. The author contended the fact that the laws in question were not currently enforced by the judicial authorities of Tasmania should not be taken to mean that homosexual men in Tasmania enjoy effective equality under the law.

5) Decision

Merits

The Committee reject that for the purposes of Article 17 of the Covenant, moral issues are exclusively a matter of domestic concern. It opined that this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further noted that with the exception of Tasmania, all laws criminalising homosexuality were repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether ss. 122 and 123 should not also be repealed. Considering further that these provisions were not enforced, which implied that they are not deemed essential to the protection of morals in Tasmania, the Committee concluded that the provisions did not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfered with Mr Toonen's right under Article 17.

Since the Committee has found a violation of Mr Toonen's rights under Articles 17 and 2(1) of the Covenant and required the repeal of the offending law, the Committee did not consider it necessary to consider whether there had also been a violation of Article 26 of the Covenant.