

Proliferation of Non-Discrimination through Private Sector Policies and Practices. An Exploration of Problems and Possibilities

Lydia Malmedie*

Introduction

The Preamble of the Universal Declaration of Human Rights (UDHR) refers to the «barbarous acts which have outraged the conscience of mankind» and which took place in the decade leading up to 1948, the year of the document's ratification¹. And yet Article 2 of the Declaration does not explicitly mention one of the grounds on which some people were systematically targeted by the Nazi regime – namely sexual orientation². Although not formally binding, the Universal Declaration of Human Rights has been very important as a standard setting document. Some of its provisions are recognised as customary law and it has influenced binding documents such as the International Covenant on Civil and Political Rights (ICCPR) on an international level, but also legislation on regional as well as on national level³.

There is no doubt that especially in Europe the situation with regard to sexual orientation has been changing considerably over the past decade. A strong indicator for transformation in terms of legal protection is the 2000/78/EC Directive Establishing a Framework for Equal Treatment in Employment and Occupation⁴. This document, although limited in scope to the workplace, can be considered a legal «mile-stone» as it is binding on all member states of the European Union (EU) and explicitly includes sexual orientation in the list of prohibited grounds of discrimination.

Based on the theoretical framework of the social working of law theory, looking at the interplay between rules and their interpretation, this article explores the problems and possibilities of effective private sector policies and practices with regard to sexual orientation and how these can be proliferated nationally and internationally.

* Lydia Malmedie holds European Master's Degree in Human Rights and Democratisation. She currently works as Education Officer for a lesbian, gay and bisexual equality charity in London.

¹ Universal Declaration of Human Rights, United Nations General Assembly Resolution 217(A) (III), 10 December 1949.

² Many have commented on this fact. See V. Baird, *Sex, Love and Homophobia*, London, Amnesty International, 2004, p. 28; E. Kukura, *Sexual Orientation and Non-Discrimination*, in «Peace Review», vol. 17, no. 2-3, 2005. Only in 2003, the German Bundestag agreed to the construction of a «Homo Memorial» in Berlin, commemorating homosexuals prosecuted under Hitler which was finally inaugurated at the end of May 2008.

³ The ICCPR lists the same grounds as the UDHR. Similarly, the ECHR provides the same list of grounds with the addition of «association with a national minority» but omits specific mention of «sexual orientation».

⁴ Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation 2000/78/EC, 27 November 2000, European Council, OJ L303/16, 2000.

1. Setting the Scene

1.1. Non-Discrimination on Grounds of Sexual Orientation

The general principle of non-discrimination is fundamental to human rights. Originally established as protection of the individual against the state, the horizontal impact of human rights has become more important. This is especially true for an increasingly privatised world in which many functions traditionally carried out by states have been taken over by private companies. For this reason, the state's function to regulate horizontally has become more important and essentially, non-discrimination legislation is a form of horizontal redistribution⁵. Those most affected by discrimination on grounds of sexual orientation are people who «deviate» from what is generally accepted as the «norm» – i.e. lesbian, gay men or bisexual people (LGB)⁶. However, those thought to be lesbian, gay or bisexual and those associated with someone who does not define as heterosexual can experience discrimination on grounds of sexual orientation or perceived sexual orientation. Discrimination can affect access to work, training, promotion, etc. and impacts on the financial situation as well as social status and can lead to «stereotypical choices» of employment⁷. Fear of discrimination often leads to «hiding» ones' sexual orientation and for many this means social (self-) exclusion and alienation from colleagues which can lead to poorer performance outcomes, fewer career chances and wasted potential.

The UK is one of the countries which, during the last decade and as a reaction to the EU Framework Directive on Employment and Occupation, has adopted a much more progressive position concerning gay and lesbian rights and has been further expanding legal equality for lesbian, gay and bisexual people. It will therefore be interesting to examine international companies as case studies which are firmly rooted in the financial hub of the UK – such as Barclays and Goldman Sachs. Furthermore, there is good data available for companies based in London due to the UK charity Stonewall, the biggest and most influential national NGO working for equality of lesbian, gay and bisexual people in Europe which in 2004 launched the «Workplace Equality Index» for the most «gay-friendly» employers.

⁵ J. Gerards, *Discrimination Grounds*, in W. van Gerven (ed.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford, Hart, 2007, p. 30.

⁶ Therefore, although the term «sexual orientation» is neutral and includes heterosexuality, most policies and practices established under on this ground, are geared towards LGB people.

⁷ Stonewall's report *Serves You Right* shows that LGB people expect discrimination for example if they wanted to be selected to run for Parliament, in the health service and education. This makes it less likely LGB people will seek jobs in these fields. *Serves You Right*, Stonewall, 2007 (accessed 4 March 2012), at www.stonewall.org.uk/documents/servesyouright.pdf.

⁸ J. Flood, *Globalisation and Law*, in R. Bankar, M. Travers (eds.), *An Introduction to Law and Social Theory*, Portland, Hart Publishing, 2002, p. 313.

⁹ F. Francioni, *Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations*, in W. Benedek, K. de Feyter, F. Marrella (eds.), *Economic Globalisation and Human Rights*, Cambridge, Cambridge University Press, 2007.

¹⁰ J.E. Goldschmidt, *Back to the Future - An Agenda for a More Equal Future*, in T. Loenen, P.R. Rodrigues, *Non-discrimination Law: Comparative Perspectives*, The Hague-London-Boston, Kluwer Law International, 1999, pp. 437-449: p. 442.

¹¹ A. Christensen, *Structural Aspects of Anti-Discriminatory Legislation and Processes of Normative Change*, in A. Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, The Hague, Kluwer Law International, 2001, pp. 31-60: p. 39.

¹² Single EU Anti-Discrimination Directive Announced 16 June 2008 (International Lesbian Gay Association (ILGA-Europe), 2008 [accessed 4 March 2012]), at http://ilga-europe.org/home/news/latest_news/single_eu_anti_discrimination_directive_announced. Only after massive lobbying the Commission finally decided on proposing a Directive which would cover all remaining grounds and not just disability, a priority issue because of the United Nation Disability Convention from 2006 which entered into force in May 2008. It remains to be seen whether the Council will reach an agreement on this new Directive.

¹³ M.R. Bell, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, p. 146.

¹⁴ Mark Bell as cited in J.E. Goldschmidt, *Reasonable Accommodation in EU Equality Law in a Broader Perspective*, in «ERA Forum Scripta Iuris Europaei: Journal of the Academy of

1.2. The State and Positive Obligations

Human rights were originally designed to protect individuals against states abusing their power. Since then international governmental organisations have increased their influence⁸ as have international corporations. Based on the idea that greater power brings increased responsibility, the human rights discourse has acknowledged the shift in power and Corporate Social Responsibility (CSR) has become more important, indicated for example by the appointment of a Special Representative on Human Rights and Multi-National Companies (MNC) and an EU green paper on CSR in 2001, even if the questions of who should ensure enforcement and who is to penalise for violations have not yet been fully clarified⁹.

Because the «essence of equality is preventing the exclusion of people from enjoying their fundamental rights and freedoms»¹⁰, non-discrimination laws are usually directed against certain agents who are stakeholders in granting or denying those rights or who allocate resources¹¹. These agents are states in their function of redistribution but also as employers, private sector employers, but also individuals in the role of landlords and service providers. All these agents are in an influential position which would make the proposed European Horizontal Directive on goods and services a very important instrument¹².

It is the duty of the state to protect all their citizens through legislation and its enforcement against a horizontal violation of their rights. In order to fulfil this obligation, states have to legislate more specifically and more inclusively in and cannot simply rely on international human rights instruments or general non-discrimination clauses to ensure effectiveness¹³. Similarly, it is insufficient for EU states to rely only on EU directives as their sole response to discrimination¹⁴ and the ECJ confirmed that specific legislation for different grounds might be necessary¹⁵.

1.3. The Private Sector and Non-Discrimination

Much has been published on companies as violators of human rights, however in a globalised world with an ever increasing influence of multinational companies¹⁶, there is also potential for the promotion of human rights through private actors¹⁷. The civil rights movement in the 1960s and 1970s recognised

that some groups in the society have fewer chances on the job market. At that time the discussion of non-discrimination with regard to work and occupation was mainly about equal opportunity policies. It focused on combating direct discrimination in individual cases through affirmative action and assimilating people into existing workplace cultures, rather than trying to change organisational cultures to accommodate to and benefit from the diversity of individuals¹⁸. The aim was to increase the numbers of under-represented individuals. This policy was rejected by many, especially members of the groups meant to benefit from it¹⁹, because it could lead to greater stigmatisation when leading to the perception that individuals achieved positions due to quotas rather than qualification. These policies were mainly about access to employment while other aspects of like promotion and career development were not yet on the equality agenda.

Unsurprisingly, this selective approach – «assimilation as supposed to integration and inclusion» did not result in much change²⁰. The concept of affirmative action was pursued mainly as compliance to legislation but a failure to recognise the importance of communicating law, led to it being misunderstood and often discredited in public opinion²¹. «Creating a culture which values and appreciates differences requires major, systematic, planned change efforts, [...] which are typically not part of affirmative action plans»²². The affirmative action model, as implemented, seems closer to formal equality and lacks the «substantive» elements necessary to change the culture, or expressed differently, to shape supportive rules within a SASF. It can be categorised under the second generation non-discrimination model – the first referring to non-discrimination policies without any mechanisms²³.

Nowadays, the concept of diversity is based on the recognition that diverse identities are valuable for business. The companies examined in this study employ a more holistic approach and have mainstreamed their diversity policies, thus constituting third-generation of equality and diversity policies.

The question is where this trend derives from. A study published in 1987 in the United States could have been one decisive factor for why companies developed an interest in diversity policies. The «Workforce 2000» study, funded by the US Department of Labour, is about the demographic changes in the US

European Law», 8, 2007, pp. 39-48: p. 44.

¹⁵ Compare also M.R. Bell, *Anti-Discrimination Law and the European Union*, cit., p. 147.

¹⁶ Compare J. Donnelly, *Human Rights, Globalisation, and the State*, in M. Castermans-Holleman, F. van Hoof, J. Smith (eds.), *The Role of the Nation-State in the 21st Century*, The Hague, Kluwer Law International, 1998, p. 407.

¹⁷ Compare N. Jägers, *Corporate Human Rights Obligations: In Search of Accountability*, Antwerpen-Oxford-New York, Intersentia, 2002, p. 6. For human rights implemented through Corporate Social Responsibility from above and from below see F. Marrella, *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade*, in W. Benedek, K. de Feyter, F. Marrella (eds.), *Economic Globalisation and Human Rights*, cit.

¹⁸ Compare R. White, *Managing the Diverse Organisation: The Imperative for a New Multicultural Paradigm*, in «Public Administration and Management», vol. 4, no. 4, 1999, pp. 469-493.

¹⁹ J.A. Gilbert, B.A. Stead, J.M. Ivancevich, *Diversity Management: A New Organizational Paradigm*, in «Journal of Business Ethics», vol. 21, no. 1, 1999, pp. 61-76: p. 64.

²⁰ N.M. Pless, T. Maak, *Building an Inclusive Diversity Culture: Principles, Processes and Practice*, in «Journal of Business Ethics», vol. 54, 2004, p. 130.

²¹ See J.A. Gilbert, B.A. Stead, J.M. Ivancevich, *Diversity Management...*, cit., p. 62.

²² *Ibidem*, p. 64.

²³ *Ibidem*, p. 63.

workforce and predicted that the number of non-white male will have increased manifold by 2000, making it imperative for employers to develop models to accommodate for this change²⁴. The number of people who are lesbian, bisexual or gay has not increased but those who are have become much more visible and outspoken. They have made clear that they are not only neighbours and daughters but also employees, consumers, tax payers and voters.

With regard to the idea of cyclic change of law, this leads to the assumption that maybe the companies' practices influence legislation just as much, or even more, than the other way around.

2. Theoretical Framework: Social Working of Law and Non-Discrimination

In isolation, theories of law or sociology, seem inadequate disciplines for investigating how non-discrimination on grounds of sexual orientation is proliferated throughout and by the private sector, and how effective legislation complements this process. Because non-discrimination law and the principle of equality are linked so closely to societal structures, and basically are an attempt to remodel society, a theory will have to take law and its social context into account and has to be applicable not only to formal law but to rules in general²⁵.

John Griffiths' theory or the social working of law attempts to do just that. Griffiths' achievement is to have combined and presented pre-existing ideas, models and theories in a systematic, way and having applied this already to anti-discrimination law in general²⁶. His theory will serve as a framework to examine how law, rules and policies interact, what role rhetoric and discourse play and what kind of policies laws and rules are transformed into. Furthermore it will help understand the conditions under which laws and rules prohibiting discrimination will be followed and will help identify factors which make rules effective. His theory draws on a range of other scholars such as Sally Moore and her anthropological approach to «Law as Process»²⁷ as well as Sally Riggs Fuller and Lauren B. Edelman and Sharon F. Matusik whose «legal readings model» focuses on the way employees interpret organisational rules in the context of their own

²⁴ R. White, *Managing the Diverse Organisation...*, cit., p. 475.

²⁵ W. Van Gerven, *Introduction*, in Id. (ed.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford, Hart, 2007, p. 13.

²⁶ J. Griffiths, *The Social Working of Anti-Discrimination Law*, in T. Loenen, P.R. Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives*, The Hague, Kluwer Law International, 1999.

²⁷ S.F. Moore, *Law as Process: An Anthropological Approach*, London, Routledge & Kegan Paul, 1978.

experiences and the authors therefore acknowledge the symbolic value of laws²⁸. Emphasising the powers of discourse, Edelman and Fuller and Matusik also write about the influence of diversity rhetoric in the transformation of law into organisational rules²⁹. Griffiths accepts the concept of the symbolic function of law in general but regards it as tautological and therefore irrelevant because it covers any kind of behavioural change³⁰.

2.1. Semi-Autonomous Social Fields

In order to identify the conditions under which people follow a law or rule, the social-working of law approach directs the focus to where rules are implemented – the shop floor. What constitutes the shop floor depends on the level examined. The social working of law approach is based on the notion that society can be described as a patchwork or even network of interconnected and overlapping Semi-Autonomous Social Fields (SASFs), each following their own rules that determine how external rules are integrated and applied – or not. SASFs are therefore one way of conceptualising the organisation of social life.

Because SASFs influence people's lives more immediately than external law, the social rules regulating the SASF determine how and which external information is communicated, which external legal rules are implemented and which ones are disregarded. The influence of a SASF on the shop floor on moral beliefs and values should not be underestimated. «[They] are the primary locus of moral training and orientation»³¹.

Within EU politics for example, the member states' governments and their politics can be regarded as the shop floor because they respond to European legislation but are constrained by party politics as well as the national political and legal system. Within a country, organisations and companies form the shop floor and respond to national legislation by creating policies and practices. Similarly the employees in these companies respond to the organisation's rules but are also influenced by the rules of other SASFs they are members of. In this sense, «all the nation-states of the world, new and old, are complex societies» because there are different and often conflicting rules operating³².

SASFs differ in their autonomy from the surrounding rules, i.e. in their ability to resist or regulate the external SASF-

²⁸ S.R. Fuller, L.B. Edelman, S.F. Matusik, *Legal Readings: Employee Interpretation and Mobilization of Law*, in «The Academy of Management Review», vol. 25, no. 1, 2000.

²⁹ L.B. Edelman, S.R. Fuller, I. Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, in «The American Journal of Sociology», vol. 106, no. 6, 2001. See also L.B. Edelman, C. Uggen, H.S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, in «The American Journal of Sociology», vol. 105, no. 2, 1999, pp. 406-454.

³⁰ See J. Griffiths, *Do Laws Have Symbolic Effects?*, in N. Zeegers, W. Witteveen, B. van Klink (eds.), *Social and Symbolic Effects of Legislation under the Rule of Law*, Lewiston, Edwin Mellen Press, 2005.

³¹ J. Griffiths, *The Social Working of Legal Rules*, in «Journal of Legal Pluralism and Unofficial Law», vol. 48, 2003, p. 66.

³² S.F. Moore, *Law as Process...*, cit., p. 56.

matrix «which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance»³³. Every person belongs to several of these SASFs at once, for example the family unit, the workplace, a sports club. SASFs can refer to a great variety of settings where people form a group in the sociological sense that is characterised by membership and some form of social regulation³⁴. These fields can form interdependent and «complex chains» which are one characteristic of complex societies³⁵.

As a locus of regulatory activity, a SASF is only *partially* autonomous. It can regulate its internal affairs to a certain extent – maintain its own rules and resist (more precisely, as we shall see: regulate) the penetration of competing external rules – but its members are also members of many other social fields and as such exposed to other sources of regulation³⁶.

³³ *Ibidem*.

³⁴ J. Griffiths, *The Social Working of Legal Rules*, cit., p. 21.

³⁵ S.F. Moore, *Law as Process...*, cit., p. 58.

³⁶ J. Griffiths, *The Social Working of Legal Rules*, cit., p. 24. See also L.B. Edelman, M.C. Suchman, *The Legal Environments of Organizations*, in «Annual Review of Sociology», vol. 23, 1997, p. 500: «Professions, of course, are not alone in their ability to filter (and thereby transform) the law. Individual organisations [...] participate in the social construction of the regulatory environment, primarily through their bureaucratic practices and internal legal rules».

³⁷ J. Griffiths, *The Social Working of Legal Rules*, cit., p. 28.

³⁸ A. Christensen, *Structural Aspects of Anti-Discriminatory Legislation...*, cit., p. 38.

³⁹ J. Griffiths, *The Social Working of Legal Rules*, cit., p. 35 (emphasis in the original).

⁴⁰ L.B. Edelman, M.C. Suchman, *The Legal Environments of Organizations*, cit., p. 505.

⁴¹ For example in *L. and V. v. Austria* the ECtHR states that one factor for determining whether a state acted within its margin of appreciation is the existence or non-existence of common grounds between the member states. See also Chapter 3.3.

The workplace generally constitutes a strong SASF because it forms an economic production unit and is characterised by a relatively high level of dependency amongst members who are at the same time also strongly dependent on their workplace and the income it generates³⁷. Furthermore, «employment and salary belong within the field of free contracts» and this, as a principle of a liberal society, grants the workplace a certain level of autonomy from too much state interference³⁸.

Griffiths calls the rules that control the extent to which external laws/rules can be enforced within the SASF, secondary rules. These secondary rules should not be seen as only obstructing external rules to have the desired effects. They can also be «enabling factors» because «in many cases legislation is ineffective not *because of local resistance* but simply from *lack of active local support*»³⁹.

Strong secondary rules can result in unintended legal contradictions in every day activities. «[O]rganizations often generate legal pluralism [...] [and] may skew the development of constitutive law by favoring some legal alternatives over others»⁴⁰. This phenomenon is very common, not only on organisational level, but also on regional level where the margin of appreciation that the member states of the Council of Europe enjoy, can ultimately set new precedents that the ECtHR bases its decisions on⁴¹.

2.2. Factors of Effectiveness

Griffiths identified different factors that have an influence on whether or not an external law will gain the local support of SASF rules. These social control mechanisms then influence the effectiveness of the law. They can be subsumed under three main categories: 1. information and communication, 2. clarification, and 3. mobilisation.

2.2.1. Information and Communication

For rules to be effective, knowledge on all levels (at the legislator's level, the intermediate level and on the shop floor) is indispensable. The legislator usually has limited knowledge about the field he/she is creating a rule for. Max Weber, for example, regarded the economic sphere as particularly difficult to legislate effectively because the legislator does not have great insider knowledge.

[It] is obvious [...] that those who continuously participate in the market intercourse with their own economic interests have a far greater rational knowledge of the market and interest situation than the legislator and enforcement officers whose interest is only ideal. [...] It is those private interest parties who are in a position to distort the intended meaning of a legal norm to the point of tuning it into its very opposite, as has often happened in the past⁴².

Lauren B. Edelman reinforces this notion by pointing out that laws which regulate organisations are usually open to social construction due to strong corporate lobbying which tends to achieve broad and vague regulations⁴³.

On the shop floor within an organisation, knowledge about the existence and content of a certain law is required. And yet, changes in law or new rules are rarely communicated to those affected by the government or law-making instance itself. Often laws need to be «translated» into the context which they are meant to regulate and also into possible practices. The dissemination and translation is often carried out by a number of agents like the media, labour organisations, consultancies or NGOs. These actors have their own agenda and interests and will communicate the information accordingly. According to Edelman this can even lead to the creation of «myths», for example of grievance

⁴² As cited in S.F. Moore, *Law as Process...*, cit., pp. 56-57.

⁴³ L.B. Edelman, C. Uggen, H.S. Erlanger, *The Endogeneity of Legal Regulation...*, cit., p. 407.

procedures best designed to avoid lawsuits. Once established and readily accepted as truth, these myths, based on one way of interpreting a vague legal rule, can influence jurisprudence⁴⁴. This is because Courts often get «inspired» by existing practices on the shop floor as possible remedies. Once sanctioned in court rulings, these practices then set a standard companies adopt to limit the possibility of losing a lawsuit of alleged discrimination for example. Good practices can therefore become established by jurisprudence as a legal requirement *post factum*.

The way in which information is disseminated internally can depend on the size of a SASF and the organisational and social structure of the shop floor. These different factors mean that «legal information available on the shop floor is often sparse, vague, and inaccurate»⁴⁵. SASFs control the flow of information. If correct information is accessible but the gap between rules' requirement and social reality is too wide – there is a high possibility that the information will be ignored.

2.2.2. Clarification

Another factor also linked to communication which enhances rule-following behaviour is where a rule clarifies an ambiguous, normative situation. Griffiths' example for this is the smoking ban in England which saw high rates of compliance although there were almost no official enforcement mechanisms in place⁴⁶.

Griffiths also mentions that the likelihood of a law being followed increases the more the law is adapted to the internal normative situation of a respective SASF. The closer the law to the actual situation on the shop floor, the more likely it will be followed but the smaller the change it can possibly achieve⁴⁷. Griffiths realises that this is particularly difficult to accept when rules are about important ideals like equality.

The choice between political correctness and effectiveness may sometimes be a painful one, especially when the ideal rule incorporates important ideals like equality, respect for life, and the rule of law⁴⁸.

Clarification can only really take place if an alternative normative model, to what is regarded the *status quo*, exists. Therefore, the two factors, law and social norms, are interdependent.

With regard to sexual orientation and the workplace this could

⁴⁴ *Ibidem*, p. 409.

⁴⁵ J. Griffiths, *The Social Working of Legal Rules*, cit., p. 48.

⁴⁶ Another example supports his hypothesis. In Germany the smoking ban is much less successful and this may well be due to the unclear legislation that differs from *Bundesland to Bundesland* and in some places depends on the type of restaurant or bar. The result is that in a city like Hamburg, where the ban is officially in place, people still smoke in various locations despite the prohibition. Following Griffiths argument, the social control mechanisms are probably not as strong because the rule is less clear.

⁴⁷ Christensen supports this notion in relation to employment legislation: «The legislator's approach to this problem has entailed the construction of certain norms which are presumed to be at least fairly close to those patterns of action which the employer adheres to [...]». A. Christensen, *Structural Aspects of Anti-Discriminatory Legislation...*, cit., p. 38.

⁴⁸ J. Griffiths, *The Social Working of Legal Rules*, cit., p. 37.

for example lead to greater clarification that homophobic banter or jokes are unacceptable at the workplace. A rule like that would clarify that the company's non-discrimination and equality policies not only apply to official settings but to the workplace as a whole.

2.2.3. Mobilisation

Any kind of rules, internal or external come into existence by being used or «mobilised» as Griffiths calls it, i.e. they are referred to or behaviour will be justified and based on them. Complex secondary mobilisation can be understood as the process by which an actor mobilises an external rule as a reason to intervene in an internal situation. This could take place for example by creating an internal rule to implement an external one, i.e. translate a rule from external to internal⁴⁹. It often also includes quite literal translation when legal vocabulary is adapted to the technical language. Another option is to specify an existing but more general social rule or to change an operational procedure which will ensure rule following⁵⁰.

Different styles of bureaucratic mobilisation can also impact on the rule's effectiveness. Griffiths distinguishes between compliance and sanctioning but declares that in most cases a mix of these two styles is employed. In either way, «bureaucratic mobilization of legal rules involves actors who are simultaneously mobilizing both primary (“legal”) and secondary (local) rules, and the behavioural effects of the latter can be absolutely crucial to the behavioural effects of the former»⁵¹. It also involves a number of different actors at different levels. This complex process is a sort of «sense-making exercise» that involves not only official agents of the legal system such as regulators, judges, litigators, but also members of the local social field like individual firms, professional groups, trade associations, media observers, and legal advisors⁵².

Whether or not rules get mobilised depends on the actors and their position in the social order of a SASF and the costs associated with mobilising the rule. In order for actors to mobilise rules, they «must consider doing so feasible and appropriate under the circumstances»⁵³. In a business, the position of the potential mobiliser within the hierarchy of the SASF is likely to make a difference.

The mobilisation of a rule concerning sexual orientation

⁴⁹ *Ibidem*, p. 62.

⁵⁰ *Ibidem*, p. 40.

⁵¹ *Ibidem*, p. 63.

⁵² L.B. Edelman, M.C. Suchman, *The Legal Environments of Organizations*, cit., p. 502.

⁵³ J. Griffiths, *The Social Working of Anti-Discrimination Law*, cit., p. 315.

probably requires greater motivation because of the concern that it might lead others to make assumptions about the mobiliser's sexual orientation. This means the motivation for heterosexual people fearing that other's assuming they could be gay, as well as lesbian, gay or bisexual people who fear to be «out», has to be considerably stronger.

2.3. Cyclic Change of Law and Proliferation

The previous paragraphs have demonstrated the importance of local rules with regard to the interpretation and mobilisation of legal rules. This leads to the conclusion that «[it] is society that determines when and to what extent it is regulated by law. And it does this in a highly self-regulated way»⁵⁴. This cyclic change can be conceptualised as a highly complex feedback loop «likely to involve not only the official agents of the legal system (regulators, judges, litigators, and the like), but also the members of the local organizational field (including individual firms, professional groups, trade associations, media observers, and legal advisors)»⁵⁵.

Griffiths' presentation of the social working of law approach is to a great extent based on Lauren Edelman's theory of the cycle of legal change. Edelman's theory describes the «top-down legislative input» and «bottom-up development» of rules and describes how normative change at lower levels usually precedes legal change⁵⁶.

The social working of law approach is mainly about analysing the factors which ensure laws have an *impact* on behaviour. It is not tackling the question of how laws or rules are *created*. However, as Griffiths admits «the theoretical distance between the social working of law and the social genesis of rules is thus far smaller than is generally assumed»⁵⁷. A strict distinction becomes impossible to uphold as soon as it is accepted that semi-autonomous fields not only co-exist and overlap but that they can also contain each other like concentric circles and that there are different levels (the international, national, local for example). It means that the shop floor of EU legislation is made up of national law-makers, organisations become the shop floor within national jurisdiction and the employees resemble the shop floor of a company. This presupposes that behaviour in response to law can include rule making and that

⁵⁴ J. Griffiths, *The Social Working of Legal Rules*, cit., p. 66.

⁵⁵ L.B. Edelman, M.C. Suchman, *The Legal Environments of Organizations*, cit., p. 502. Edelman makes clear, that this feedback loop differs from autopoietic theories of law which stress incommensurability of legal and economic discourses. Expressed in those theories, law is a self-referential system and external phenomena are merely representations but the boundaries between the systems are rather impermeable and cannot be overcome simply by communication.

⁵⁶ L.B. Edelman, C. Uggen, H.S. Erlanger, *The Endogeneity of Legal Regulation...*, cit., p. 68.

⁵⁷ J. Griffiths, *The Social Working of Legal Rules*, cit., p. 72.

the performative nature of rules or law is recognised⁵⁸. It also presupposes the understanding that words on paper are not enough to ensure they are followed but that «*people must use the rule*» for it to have social effects⁵⁹.

If rule-following and rule-making are accepted as forming part of a cyclic development, how then is legal change initiated? How is anything new injected into the circle? In Griffiths' example of euthanasia in The Netherlands, an old rule «clean up after yourself» was mobilised on the shop floor rather than a new rule created. It can be assumed, that «new» rules will usually be based upon «old» normative ideas that will be adapted to fit general social developments.

Similarly, Christensen states that «Anti-discriminatory legislation is connected with processes of normative change. Processes of normative change are, in their turn, connected with processes of material change»⁶⁰. She uses the example of industrialisation which restructured families and working patterns of men and women and lead to the normative notion of sex discrimination. The other side of this «bottom-up» approach is what she calls the symbolic or normative level of law that «may possess a further effect at the level of norm formation by demonstrating that the political level does not accept discrimination against homosexuals»⁶¹. Griffiths does not make a distinction between symbolic and other effects of law because as long as laws and rules have an effect on people's behaviour he subsumes their effect under the social working of legal rules⁶².

This phenomenon of mobilising old rules or norms becomes very apparent in the debate around sexual orientation and non-discrimination. The «old», normative rules that are mobilised are often those of equality and human rights for *all*.

3. Case Studies: Good-Practice on the Top Shop Floor

This section will examine the policies and practices of Barclays and Goldman Sachs with regard to non-discrimination on grounds of sexual orientation against the three factors of effectiveness outlined in the theoretical framework. The notion of cyclic change of law allows to further explore the possibility of proliferation of these policies and practices on an international level.

⁵⁸ John Austin's speech act theory formulated in the 1980s is based on the idea that speech, spoken or written, can constitute acts in itself. Laws and rules certainly qualify as speech acts in this sense. J.L.

Austin, *Zur Theorie der Sprechakte*, Stuttgart, Reclam, 1989. See also R. Macaulay, *The Social Art: Language and Its Uses*, Oxford, Oxford University Press, 1994.

⁵⁹ J. Griffiths, *The Social Working of Anti-Discrimination Law*, cit., p. 315 (emphasis in the original).

⁶⁰ A. Christensen, *Structural Aspects of Anti-Discriminatory Legislation...*, cit., p. 43.

⁶¹ *Ibidem*, p. 51.

⁶² J. Griffiths, *Do Laws Have Symbolic Effects?*, cit.

Barclays and Goldman Sachs, are globally operating financial institutions with 145,000 and 33,000 employees respectively. They both scored 100% in the Corporate Equality Index 2011 set up in 2002 by Human Rights Campaign, the largest US gay, lesbian, bisexual and transgender civil rights organisation. This indicates, amongst other things, that they have LGB inclusive policies in place, a benefit schemes inclusive of same sex partners and diversity training for staff⁶³. Both companies also scored very high on Stonewall's Workplace Equality Index 2011 (WEI). Launched in 2004, the WEI is based on a questionnaire which measures UK's leading organisations' dedication to LGB diversity in greater detail than the Corporate Equality Index and requires submission of extensive evidence. Out of the 378 participating organisations in 2011, Barclays came 10th and Goldman Sachs ranked 6th⁶⁴.

Both companies emphasise three main reasons for their diversity policies, the first two being related to human resources strategies. They state that a diverse workforce environment is crucial because it requires «the best people, and the best people are drawn from the broadest pool of applicants. The people we need can be found only by looking across the full spectrum of gender, ethnicity, national origin, sexual orientation, gender identity, age, religion, culture and level of physical ability». Secondly, that in order for successful business, «all members must feel that they are operating in an inclusive environment that welcomes and supports differences»⁶⁵. The third reason they present is that a company which displays diversity is more likely to reflect its customer base or also attract customers from different minorities who feel «represented»⁶⁶. On its website, Barclays makes the clear link between excellence, innovation and diversity by stating that

Organisations hoping to achieve global ambitions need to bring together different cultural and international perspectives, and draw on the ideas of the widest possible range of people⁶⁷.

Similarly, a statement by Lloyd C. Blankfein, Chairman and Chief Executive Officer of the Goldman Sachs Group on the company's website makes clear that «The diversity of our people is not just an enhancement of our problem-solving or our creativity or our ability to get on with our clients. It is a source of business opportunity»⁶⁸.

⁶³ For results search Employer Database, Human Rights Campaign, 2008 (accessed 26 July 2011), at http://www.hrc.org/issues/workplace/search_employers.htm.

⁶⁴ Stonewall Workplace Equality Index 2011 (accessed 5 May 2011), at http://www.stonewall.org.uk/at_work/stonewall_top_100_employers/default.asp.

⁶⁵ Goldman Sachs, *Who We Are/Diversity and Inclusion/Our Commitment* (accessed 4 March 2012), at <http://www.goldmansachs.com/who-we-are/diversity-and-inclusion/our-commitment/our-commitment-main-page.html>.

⁶⁶ Barclays Capital website, *Diversity and Inclusion*, 2010 (accessed 28 July 2011), at <http://graduate.barclayscapital.com/diversity-and-inclusion>, and Annual Report 2010 (accessed 28 July 2011), at <http://www.barclaysannualreport.com/ar2010/index.asp?pageid=140>.

⁶⁷ *An Inclusive Employer* (accessed 9 July 2011), at http://www.barclays.com/sustainabilityreport07/inclusive_employer.html.

⁶⁸ Goldman Sachs, *Who We Are/Diversity and Inclusion/Our Commitment*, cit.

3.1. Information and Communication

In line with the expressed reasons for promoting diversity, the banks adopt a very proactive approach with regard to access to employment. Barclays and Goldman Sachs are Diversity Champions in Stonewall's program which offers good practice sharing, training and benchmarking concerning LGB diversity to companies. As members of this program they can also choose to feature in Stonewall's LGB recruiting guide *Starting Out*, which is produced annually and distributed to every university in the UK. Barclays and Goldman Sachs also both have recruitment campaigns in which they make clear that they are searching for people from all sorts of backgrounds⁶⁹. Furthermore both firms support organisations and the LGB community through sponsorship. For example, Barclays has sponsored a football club for gay players since 2007 as well as the Stonewall Workplace Conference 2011. Goldman Sachs hosted a Stonewall Workplace Seminar on straight allies in May 2011⁷⁰. This has of course the effect of advertisement but also promotes their LGB friendly policies to potential recruits in the attempt to make their organisation an employer of choice.

Both banks have established LGB networks which are not only point of contact for LGB employees, provider of training, disseminator of information to all staff on LGB issues but are also claimed to be consulted by management and can develop initiatives to enhance compliance of the firm with its own set standards⁷¹. Institutions which take their diversity policies seriously see a well developed network group as an important asset and as a pool of expertise. Barclays' lesbian, gay, bisexual, trans (LGBT) Network group Spectrum contributes to the firm's equality and diversity work in many different ways. It works, for example, with the marketing and production team to explore ways in which the bank can attract the «Pink Pound»⁷². Its contribution to the company as a whole was recognised by awarding the Chair, Jo Fraser, with the Barclays' Woman of the Year Award 2011⁷³. Furthermore, Marge Connelly, Global Chief Operating Officer Barclaycard, gave a keynote speech at the Stonewall Workplace Conference 2011. As an openly gay woman and a very senior role model, she is also involved in Spectrum and has been on the board of the Human Rights Campaign Foundation⁷⁴. This public recognition and the

⁶⁹ See for example advertisement in Stonewall, *Starting Out: Lesbian & Gay Recruitment Guide*, 2011 (accessed 9 July 2011), at <http://www.startingoutguide.org.uk/employers/28?empid=20>.

⁷⁰ Stonewall, Seminar Program (accessed 28 July 2011), at http://www.stonewall.org.uk/at_work/seminar_programme/default.asp.

⁷¹ *Diversity and Inclusion: Affinity Networks*, Goldman Sachs Group, Inc., 2008 (accessed 26 July 2011), at <http://www2.goldmansachs.com/our-firm/about-us/diversity-and-inclusion/affinity-networks.html>.

⁷² C. Wheeler-Quinnell, *Marketing: How to Market to Gay Consumers*, London, Stonewall Workplace Guides, 2011.

⁷³ Stonewall, Top 100 Employers (accessed 10 July 2011), at http://www.stonewall.org.uk/at_work/stonewall_top_100_employers/4923.asp.

⁷⁴ Stonewall, Workplace Conference 2011 (accessed 10 July 2011), at http://www.stonewall.org.uk/at_work/workplace_conference_2011/4702.asp.

celebration of an employee's contribution to diversity send a strong signal to all employees and also encourage the compliance with and mobilisation of non-discrimination rules regarding all grounds including sexual orientation.

3.2. Clarification

The basic argument for the policies and practices both companies use is not a philanthropic one; it is the value of each individual in relation to the bottom line. This means a general «old» rule is evoked while at the same time linked to the specific «language» of the environment⁷⁵.

Goldman Sachs founded a formal Diversity Committee in 1990 and in 2001 established an Office of Global Leadership and Diversity «to translate the firm's diversity commitments into specific actions that promote diversity and inclusion»⁷⁶ and «with the mandate of determining how we could reinforce more rigor, accountability and global thinking in the firm's diversity practices»⁷⁷.

Barclays and Goldman Sachs have recognised that LGB employees might face specific challenges in their career development. This could be for example because they feel comfortable being «out» in one team and are reluctant to join a new team even though it would enhance their career or they find it difficult to network because this usually involves sharing some information about one's private life⁷⁸. Companies such as Barclays and Goldman Sachs therefore provide specific training courses to help employees with their career development. These programs include mentoring schemes but also networking opportunities and are often organised by the firms' diversity network on sexual orientation. For example, Goldman Sachs has its Gay and Lesbian Network (GALN) and is also part of the inter-bank network in «Out in the City». Barclays offers specific mentoring and networking opportunities through its LGBT group Spectrum and has sponsored employees to participate in Stonewall's Leadership Program⁷⁹. These initiatives go beyond equal treatment and demonstrate that difference on grounds of sexual orientation is valued.

The internal rules adopted by the two companies examined here are adapted to the specific situation by making a business case additional to highlighting the value and dignity of every employee and benefit to each employee⁸⁰.

⁷⁵ The fact that individualism is said to be a very «Western» concept, it would be interesting to discuss the implications this has on the work in other cultural settings. Unfortunately this question cannot be explored further at this point.

⁷⁶ *Our People*, Goldman Sachs website (accessed 11 July 2011), at <http://www2.goldmansachs.com/our-firm/our-people/diversity/programs-and-initiatives/index.html>.

⁷⁷ Letter from Chairman and CEO, Goldman Sachs Group, Inc., 2008 (accessed 11 July 2011), at <http://www2.goldmansachs.com/our-firm/our-people/diversity/letter-from-chairman-and-ceo.html>.

⁷⁸ See also S. Dick, *Workplace Guides: Career Development*, London, Stonewall, 2007, p. 4.

⁷⁹ Stonewall, *Starting Out: Lesbian & Gay Recruitment Guide* (accessed 5 July 2011), at <http://www.startingoutguide.org.uk/employers/28?empid=20>.

⁸⁰ In the spirit of Adam Smith: «By pursuing his [or her] own interest he [or she] frequently promotes that of the society more effectually than when he [or she] really intends to promote it». As cited in F. Marrella, *Human Rights, Arbitration, and Corporate Social Responsibility...*, cit., p. 298.

3.3. Mobilisation

As mentioned above, recognition of initiatives and success as well as support at a high level can contribute to the mobilisation of rules. Other good practices further demonstrate the awareness that the shop-floor rules have to be supportive of diversity in order for greater equality to be realised. Mere commitment however is not always enough. Goldman Sachs and Barclays have incorporated diversity into its annual performance review, thus ensuring that it is unmistakably embedded in everything the company does and is evaluated systematically⁸¹. The annual review at Goldman Sachs applies to all employees and information is taken into consideration in decisions about compensation and promotion. Barclays includes a section on diversity into its annual review and clearly states that its diversity agenda is overseen by the Executive Diversity Group which in turn is mandated by the Group Executive Committee⁸². Additionally, their staff satisfaction survey monitors for sexual orientation and while completely anonymous, the data can be correlated with questions around general equality and diversity to identify areas for concern or improvement. This survey goes out to all staff and again sends a strong signal that there is no hierarchy of equality grounds, and that sexual orientation is not a private matter when it comes to identifying staff experiences in the workplace⁸³. Employees have to trust that the information gathered will be truly anonymously and will be handled sensitively in order to feel able to answer monitoring questions truthfully. Barclays therefore employed an external consultancy to gather the data⁸⁴.

Mandatory diversity training for all employees which includes sexual diversity is another way of communicating and explaining policies to all staff as well as empowering them to challenge it when it occurs and pointing out grievance procedures and consequences⁸⁵. Other ways include hosting events like the annual Diversity Awareness Week organised by Goldman Sachs providing employees with further exposure to diversity issues. These events also include heterosexual staff – an important element to secure the support of «straight allies»⁸⁶. It is a way of engaging heterosexual people to proactively support their LGB colleagues and it can prevent the impression of reverse discrimination and at Goldman Sachs it seems fruitful as Nicholas Crapp, Managing Director, Goldman Sachs describes:

⁸¹ Case study, Stonewall website (accessed 10 July 2011), at http://stonewall.org.uk/at_work/stonewall_top_100_employers/5268.asp.

⁸² Barclays, Annual Report 2010, pp. 24, 144 (accessed 7 March 2012), at http://www.barclaysannualreports.com/ar2010/files/Annual_Report_2010.pdf.

⁸³ C. Cowan, *Monitoring - How to Monitor Sexual Orientation in the Workplace*, London, Stonewall Workplace Guide, 2006, p. 21.

⁸⁴ *Ibidem*, p. 12.

⁸⁵ E. Abrams, *Out at Work - Interview with Arden Hoffman, GALN at Goldman Sachs*, Interview 8 March 2008, The Glass Hammer website (accessed 7 March 2012), at <http://www.theglasshammer.com/news/2008/03/11/out-at-work-%E2%80%93-interview-with-arden-hoffman-galn-at-goldman-sachs/>.

⁸⁶ Dave Morris from the South Wales Police highlighted the importance of allies. D. Morris, *Straight Allies*, presentation at the Stonewall Workplace Conference, London, 16 April 2008.

I don't think I've got special skills. But the fact that you try is received well, and as long as you do something with a good heart nobody's going to respond negatively. You've just got to want to make a difference and be willing to try⁸⁷.

Goldman Sachs' Diversity Dialogues and Master Classes are «small training sessions led by the firm's senior leaders to encourage frank and open discussion on the subject of diversity»⁸⁸. The fact that these events as well as policies are chaired by and communicated through senior leaders of the company seems a crucial element in shaping the rules of this SASF. A prominent example of this is an ally program which is about «getting the broadest, most representative group of senior people involved in LGBT issues, acting as informed advocates, sitting in senior positions in all the divisions»⁸⁹. The senior leadership of Goldman Sachs is also educated by GALN with regard to the appropriate language when speaking about sexual orientation.

It seems possible to argue, that the policies and practices of both companies move «beyond a human resource model based solely on legal compliance to one that suggests there is inherent value in diversity»⁹⁰. This distinguishes the shop floor fundamentally from the current legal sphere, in many countries. The companies value diversity and this means respecting and allowing individual differences to flourish, rather than repressing or simply tolerating difference. The intrinsic value of diversity and dignity of every human being has to be recognised in order for these diversity policies and practices to really be effective and this is reminiscent of the underlying principles of human rights. Corporations are primarily interested in their employees because they constitute an asset and the company needs to generate profit. However, it could be argued that when looking at their internal policies only, they follow a more substantial and holistic model and employ the latest generation of non-discrimination policy while for the most part in the EU politics and legislation only recently started to develop in this direction.

It can be expected that this approach of diversity considerably lowers the threshold for the mobilisation of rules because of the company's efforts to create an inclusive environment for everyone and to show that highest level management is supportive. Where the companies take their policies about valuing each employee

⁸⁷ N. Miles, *Straight Allies: How They Help Create Gay Friendly Workplaces*, London, Stonewall Workplace Guide, 2011, p. 7.

⁸⁸ *Diversity and Inclusion: Programs and Initiatives*, Goldman Sachs Group, Inc., 2008 (accessed 6 March 2012), at <http://www.goldmansachs.com/who-we-are/diversity-and-inclusion/training-main-page.html>.

⁸⁹ N. Miles, *Straight Allies...*, cit., p. 9.

⁹⁰ J.A. Gilbert, B.A. Stead, J.M. Ivancevich, *Diversity Management...*, cit., p. 65.

seriously and where they recognised the value of an employee who feels comfortable at the workplace, grievances will also be seen as a chance to improve situation and will be followed by genuine attempts of solve any issues which might arise.

3.4. Proliferation through Contracts

Proliferation is used to describe the snowballing effect by which policies of non-discrimination are being promoted and spread through the internationally operating private sector and whereby each offshoot triggers further promotion of rules of non-discrimination in an exponential way. This can be achieved by influencing employees who in turn promote diversity and equality in their social circles – however this is very much out of the control of the company.

Another way a company can demonstrate it stands by the values it preaches is through the adoption of supplier diversity policies. These policies can be more or less powerful but it generally entails obliging supplier companies to report on their equality and diversity standards and conducting audits to ensure the provided data is accurate and in line with equality legislation and the contracting company's own diversity policies. In 2008 this was still a relatively new practice with only 50% of entrants to the WEI monitoring for supplier policies, amongst them public sector organisations like Transport for London⁹¹. Barclays mentions this practice in its human rights statement that in addition to complying with international human rights standards,

we should promote human rights through our employment policies and practices, through our supply chain and through the responsible use of our products and services. The promotion of human rights through our business activities forms part of our broader objective to be a leader in sustainability⁹².

⁹¹ Stonewall, WEI 2008 (London 2008) (accessed 6 March 2012), at <http://www.stonewall.org.uk/other/startdownload.asp?openType=forced&documentID=1797>.

⁹² Barclays, Statement on Human Rights (accessed 6 March 2012), at http://www.personal.barclays.co.uk/PFS/A/Content/Files/barclays_group_statement_on_human_rights.pdf, p. 3.

The Stonewall data for the WEI 2011 shows those amongst the top ten mostly have very strong supplier policies in place, including Barclays and Goldman Sachs. Both companies ask tendering businesses to comply with their diversity policies and procedures and this part of the tender feeds into the decision making. Furthermore both require organisations to provide

LGB diversity training for their staff and a contract could be terminated for a breach in this area⁹³.

Whether insufficient equality policies of a supplier actually would lead to termination, however, is another question Fabrizio Marrella comments on. He calls this phenomenon of supplier policies the «contractualisation» of human rights in corporate social responsibility and recognises its limitations since «any contract may or may not be terminated for reasons of commercial convenience»⁹⁴. It is therefore difficult to estimate the actual benefits from this practice (similar to the contracts including human rights of the EU). And yet, this practice sends the message that the company does not discriminate on grounds like sexual orientation and even tries to reverse unfavourable structures. Greater confidence of employees in their organisation will only be established if they see the commitment as more than lip-service and when they feel supported when engaging with suppliers and clients⁹⁵. In 2009 Stonewall's WEI for the first time included an employee questionnaire. The results did not feed into the ranking but it became apparent that employees of the top 25 businesses were more likely to agree that their senior management supports LGB staff in their organisation as compared to organisations which did less well in the index⁹⁶.

This validates the findings and reemphasises the interest of the company in their effort to retain their best employees. This kind of proliferation through supplier diversity policy has great potential and its impact on proliferation of non-discrimination warrants a more in-depth study at some other point.

3.5. Proliferation through Global Diversity Policies

Apart from supplier policies, it is the global diversity policies and practices of these international companies which have pushed the boundaries. Goldman Sachs states that they deal with «different cultures in an informed and nuanced manner»⁹⁷. Barclays has a very strong statement of human rights which includes equality and diversity as the first item in a list of policies and practices it applies to. The statement acknowledges that Barclays has «clear responsibilities to support governments and civil society organisations in upholding human rights principles, wherever we operate»⁹⁸. The statement goes on to say that it is not enough

⁹³ Stonewall, WEI 2011 (London 2011) (accessed 6 March 2012), at <http://www.stonewall.org.uk/other/startdownload.asp?openType=forced&documentID=2495>. p. 15.

⁹⁴ F. Marrella, *Human Rights, Arbitration, and Corporate Social Responsibility...*, cit., p. 305.

⁹⁵ See *Peak Performance: Gay People and Productivity* (accessed 5 March 2012), at http://www.stonewall.org.uk/documents/peak_performance.pdf, p. 20.

⁹⁶ Stonewall, WEI 2010 (London 2010) (accessed 6 March 2012), at <http://www.stonewall.org.uk/other/startdownload.asp?openType=forced&documentID=2212>, p. 19.

⁹⁷ Goldman Sachs, *Who We Are/Diversity and Inclusion/Our Commitment*, cit.

⁹⁸ Barclays, *Statement on Human Rights*, cit., p. 3.

to comply with human rights but that Barclays seeks to promote these through policies and practices.

[...] we should promote human rights through our employment policies and practices, through our supply chain and through the responsible use of our products and services. The promotion of human rights through our business activities forms part of our broader objective to be a leader in sustainability⁹⁹.

The statement also comments on a situation where local legislation may be in conflict with human rights. In this case, Barclays will comply with the law but seek to use its sphere of influence to raise awareness and set an example of good practice.

3.6. Proliferation through Practice

Barclays and Goldman Sachs each operate in over 50 countries¹⁰⁰. The inter-bank networking opportunity for everyone interested in LGBT topics «Out in the City», that Goldman Sachs is part of and sponsors regularly, has been held in London and New York, but also in Hong Kong and Tokyo¹⁰¹. Many staff members are of course regularly dispatched to other offices abroad including of course LGB employees, however LGB staff members might still be less likely to be offered and to accept such postings for fear of being in a less safe country and a more hostile office environment. At the monthly inter-bank drinks, Stephen Golden, Diversity Manager at Goldman Sachs, was asked «Why in the world would anyone who is gay want to leave London?». In his response, Mr. Golden pointed out that overseas postings are often important for one's career and that the issue is similar to the problems even «straight» women can face in many companies where they are less likely to take and to be offered overseas assignments (something which is probably self-perpetuating) because employers think it is «easier» to send a male colleague who is regarded as more independent from family responsibilities and might not challenge the cultural norms as much¹⁰².

While EU legislation is usually based around the greatest common denominator, companies with global diversity policies have to comply at least with the highest national standard if their aim is to avoid lawsuits. The two companies examined

⁹⁹ *Ibidem*.

¹⁰⁰ Stonewall, *Starting Out: Lesbian & Gay Recruitment Guide*, 2010 (accessed 15 July 2011), at <http://startingoutguide.org.uk>.

¹⁰¹ *Out in the City*, Goldman Sachs Group, Inc., 2008 (accessed 26 June 2008), at <http://www2.goldmansachs.com/our-firm/about-us/diversity-and-inclusion/programs-and-initiatives/out-in-the-city.html>.

¹⁰² S. Golden, *International Implications*, paper presented at the Stonewall Workplace Conference, London, 16 April 2008.

here easily outbid every national standard in terms of their equality and diversity policies with regard to sexual orientation. While the EU aims at creating a level playing field for free movement of labour in a common market, MNCs demonstrate in practice how to accommodate for relocating employees to be accompanied by their partner regardless whether it is a same-sex or opposite-sex relationship.

Japan¹⁰³ was actually our [Goldman Sachs] last office where we didn't offer full domestic partner benefits. Because our health insurance company wouldn't give us same-sex partner coverage, we [Mr. Golden and his same-sex partner] being out there were motivational force for change. We threatened to drop our insurance company. We said sorry, if you are not going to offer this, we'll find someone else [...] and they quickly changed their mind. So finally we managed to achieve that, and the good thing about it is that and there are a lot of investment banks that well fare in the same situation because a lot of us use the same insurance provider. They will say well, you give it to Goldman Sachs, you can give it to us, too. One company can only go so far, but a lot of these things can be accomplished by lobbying together¹⁰⁴.

This anecdotal evidence is just an example for how sending openly LGB employees abroad, can push several boundaries with regard to sexual orientation discrimination at local level. The reactions by local colleagues in Japan were also very positive and instead of being faced with intolerance, Mr. Golden recalls that everyone was very eager to speak about the fact that he arrived with his same-sex partner and enjoyed the opportunity to talk openly about the topic of sexual orientation.

Goldman Sachs used to say: we better do not talk about these things because we don't know how people will react. People absolutely loved the fact that the book was open and that they could ask questions¹⁰⁵.

Of course, for such a posting abroad to be this positive, a high level of confidence by the employee in the company is required as the employee has to be able to rely on backing from her or his employer in case of difficulties. Similarly, flexibility on side of the employer is required since most countries do not issue «spouse» visa for same-sex partners. The alternative is for a partner to enter on a tourist visa which requires leaving the country for renewal. This kind of visa furthermore bars partners from

¹⁰³ Homosexual conduct has never been outlawed in Japan but legislation has simply ignored the issue all together and this is also reflected in the society. The topic is not discussed openly but constitutes a taboo. S. Golden, *International Implications*, cit. See also T. Hiroyuki, *The Legal Situation Facing Sexual Minorities in Japan*, in «Intersections: Gender and Sexuality in Asia and the Pacific», no. 12, 2006.

¹⁰⁴ S. Golden, *International Implications*, cit.

¹⁰⁵ *Ibidem*.

working. Goldman Sachs provides couples in that situation with a travel grant for this purpose. Where there is a problem with co-habitation, for example in some Middle-Eastern countries, the bank provides employees with extra financial support for a second accommodation¹⁰⁶.

Golden also recalled an example of one of his company's competitors, what was then Merrill Lynch. The investment bank offered «diversity training on sexual orientation» for their staff in Singapore – a country where sexual acts between consenting male adults still falls under «gross indecency» and can be penalised with up to two years in jail¹⁰⁷. According to Golden, the event was not only «very well attended but also no one kicked up a fuss and no one cared». His explanation for why this was the case is that with

[...] global companies or [...] companies from outside of the region, people's expectations are always different. They don't expect you to do politics exactly the same way everyone else does and so as a global organisation, people expect you to be pushing those boundaries and that's positive, too. And your employees don't complain as much because they know it's a global company and that's what they signed up for. So I think there is a lot more acceptance from employees perspective¹⁰⁸.

This acceptance is of course a first step to changing attitudes and behaviour with regard to sexual orientation and LGB people. Mr. Golden also recognises the wider implications and the role international companies can play in the wider proliferation of the non-discrimination principle through policies and practices.

Now, that's a single isolated event. It's internal and not open to external participants but companies push those boundaries. Which isn't necessarily going to change the legislation right away but it will change the culture of acceptance¹⁰⁹.

Another reason for why it may be easier for international banks to push boundaries is of course because they mainly operate in the biggest urban centres where «the population is usually most diverse and conservative attitudes are less entrenched»¹¹⁰. Furthermore, these international finance companies play a major role in the economy of every country and can therefore get away with policies that are inconsistent with local laws and culture.

¹⁰⁶ *Ibidem*.

¹⁰⁷ Human Rights Watch, *Human Rights Watch World Report 2007: Country Summary Singapore*, 2008. See also International Lesbian and Gay Association, ILGA Asia website Home/Asia/Singapore/Law (accessed 5 March 2012), at <http://ilga.org/ilga/en/countries/SINGAPORE/Law>.

¹⁰⁸ S. Golden, *International Implications*, cit.

¹⁰⁹ *Ibidem*.

¹¹⁰ R. Minder, *Cool Reception for Asia's Gay Workers*, in «Financial Times Deutschland», 2008 (accessed 5 March 2012), at <http://www.ft.com/cms/s/0/6c43b6fo-c30c-11dc-b617-0000779fd2ac.html#axzz10T3mZteoc>.

In this part good practices have been presented and indicated some ways in which private enterprises, such as international financial companies, can proliferate their non-discrimination policies and practices. Barclays and Goldman Sachs have rules in place which fulfil most of the identified factors for being effective, according to the social working of law approach. They can be categorised under the third generation of non-discrimination rules because they demonstrate a proactive approach which is already expressed in the terminology of «diversity».

4. Problems and Possibilities of the Proliferation of Non-Discrimination

The examples of two international banks show that some areas of the private sector have developed and adopted policies and practices which include non-discrimination on grounds of sexual orientation and in many cases are ahead of those prescribed by law. These companies are strong SASFs and have adopted these more holistic approaches out of their own interest, reacting more to changes on the shop floor than changes in legislation. In fact, it seems like they might have influenced politics and legislation in the EU, its member states and beyond. It is not just organisations that mimic legal models in their attempt of compliance with the law, but «legal institutions often mimic organizational models of efficiency»¹¹¹. In a process of public-private learning the companies' policies and practices are now taken up and prescribed by NGOs and lobby groups like Stonewall in best-practice guides, exchange forums and through trainings. These companies promote and even export their policies and practices of inclusion and diversity to a region like Asia where no regional human rights system that would deserve this name exists.

Of course there are limitations and it could be argued that the two case studies are quite specific and do not allow for generalisation as the international banking sector is a highly competitive environment, in need of highly skilled employees, reliant on effective team work, creativity, innovation, and a great interest in retention because employees handle confidential insider knowledge, thus staff have to feel welcome and valued at their workplace¹¹². Businesses will not pursue an activity

¹¹¹ L.B. Edelman, M.C. Suchman, *The Legal Environments of Organizations*, cit., p. 506.

¹¹² N.M. Pless, T. Maak, *Building an Inclusive Diversity Culture...*, cit., p. 130.

unless it can be translated into a business value and if the costs outweigh the perceived benefits, it is very unlikely that a company will adopt a policy. And even then it could be argued that only a small minority of those working for international companies benefit from training around sexual orientation and are «governed» by inclusive policies. However, those working for international companies are often the economic and intellectual elite of a country and enjoy strong close ties with politics, influence political discourse and ultimately legislation¹¹³. This is the case for most countries but probably even more so for «Developing Countries» and also East Asia, where «the state and the private sector have traditionally worked in non-transparent fashion to advance the interests of the upper classes and foreign capital»¹¹⁴. Therefore, even though only a comparatively small number of people are directly affected by these policies and practices, the potential impact is much greater. Especially in this era of globalisation, where private companies are often the main actors¹¹⁵, as well as influencing at the top, they can also create forums in more restrictive societies which could be the starting point for a stronger civil society movement and societal change which, in democratic societies, will ultimately lead to legislative change.

The creation and interpretation of law is a reciprocal process and as crucial as the bottom-up influence is, the power of top-down orders is essential as well because they create the platforms for further development¹¹⁶. This build-up through mutual influence is currently the motor for development in the field of non-discrimination on grounds of sexual orientation¹¹⁷.

It is important to note that the criteria associated with greater effectiveness according to the social working of law approach seem closely linked to a more qualitative aspect – the concept of non-discrimination employed by the companies examined. Accordingly, in organisation literature it is argued

[...] that in order to unleash the potential of workforce diversity, a culture of inclusion needs to be established; a culture that fosters enhanced workforce integration and brings to life latent diversity potentials; a culture that is build on clarified normative grounds and honours the differences as well as the similarities of the individual self and others. Every self is a human being but as a unique person is always also different from others¹¹⁸.

¹¹³ While globalised media also transmits different lifestyles and values across borders, it does so in an impersonal and detached way. Trainings, like the one Merrill Lynch offered, allow for personal dialogue rather than a monologue.

¹¹⁴ W. Bello, *The End of the Asian Miracle*, in «Insight Asia», vol. 54, 1998 (accessed 1 July 2008), at <http://www.insideindonesia.org/edition-54-apr-jun-1998/the-end-of-the-asian-miracle-2909791>.

¹¹⁵ F. Marrella, *Human Rights, Arbitration, and Corporate Social Responsibility...*, cit., p. 289.

¹¹⁶ It needed social change to lead to decriminalisation of homosexual acts which then allowed people to come out and raise human rights-oriented demands. Before, fear of degradation and punishment prevented any kind of collective protest. See E. Kallen, *Social Inequality and Social Justice: A Human Rights Perspective*, Hampshire-New York, Palgrave Macmillan, 2004, p. 121.

¹¹⁷ Compare also Rishworth's study of legal developments concerning sexual orientation in New Zealand which suggests that further legal changes were possible because «decriminalisation and especially anti-discrimination legislation served [...] as a platform for further and more detailed reforms in the sphere of relationship recognition». P. Rishworth, *Changing Times, Changing Minds, Changing Laws - Sexual Orientation and New Zealand Law, 1960 to 2005*, in «International Journal of Human Rights», vol. 11, no. 1, 2007, pp. 85-107.

¹¹⁸ N.M. Pless, T. Maak, *Building an Inclusive Diversity Culture...*, cit., p. 130.

The above quote not only emphasises the importance for internal rules to clarify normative grounds as was discussed above. The paradigm of non-discrimination described here also moves beyond a human resource model based solely on legal compliance to one that suggests there is inherent value in diversity¹¹⁹. With this, it can be argued, it approximates the «inherent dignity» and «equal and inalienable rights» of every member of the human family as stipulated in the Preamble of the UDHR¹²⁰. Of course, companies' ultimate goal remains maximising profit and while for some companies the avoidance of lawsuits might have been the main reason for introducing new policies, changed demographics of the workforce had also turned other companies into trendsetters for legislation¹²¹.

With the proposed Horizontal Directive, there is the chance that the EU will codify, legislate and harmonise in a more effective manner what is already happening on the ground and what is furthermore requested by citizens¹²². This would work towards substantive implementation of one of the EU's fundamental values – the principle of non-discrimination.

The proposed Directive comprises the recognition of multiple discrimination and the importance of further awareness raising. It suggests a further commitment to non-discrimination mainstreaming, positive action and data collection. It also announces a governmental expert group to facilitate dialogue between member states on non-discrimination¹²³. All these measures would send a clear message demonstrating that the EU recognises and embraces the values and norms that its member states have already signed up to in the form of international and regional human rights documents. These human rights documents have been referred to in Community law and furthermore have been reiterated through the EU Charter of Fundamental Rights proclaimed in December 2000 and entering into force in 2009 with the Treaty of Lisbon. The Charter is the first international document of its kind to explicitly include sexual orientation as a protected ground in its non-discrimination provision in Article 21.

For the message of non-discrimination to be credible it has to consist of effective legislation that ensures the principle of equal treatment and explicitly cover all remaining grounds including sexual orientation. The EU already transforms its member states but only a holistic approach, similar to the

¹¹⁹ J.A. Gilbert, B.A. Stead, J.M. Ivancevich, *Diversity Management...*, cit., p. 65.

¹²⁰ Universal Declaration of Human Rights, cit.

¹²¹ J.A. Gilbert, B.A. Stead, J.M. Ivancevich, *Diversity Management...*, cit., p. 72; N.M. Pless, T. Maak, *Building an Inclusive Diversity Culture...*, cit., p. 129.

¹²² According to a EU survey, Europeans are of the opinion that discrimination is common, especially with regard to sexual orientation, and a majority of EU citizens see a need for specific legislation to protect people from discrimination in areas beyond the labour market. See *EU Proposes Protection from Discrimination Beyond the Workplace*, European Commission, 2 July 2008 (accessed 5 March 2012), at <http://ec.europa.eu/social/main.jsp?catId=89&langId=en&nwsl=373>.

¹²³ *EU Proposes Protection from Discrimination Beyond the Workplace*, cit.

example set by private sector enterprises, will place the EU in a position where it can also credibly challenge third countries on values, norms, and the principles of human rights based on the «inherent dignity» of each and every person. Already in 2001, the EU recognised its capability and responsibility in promoting human rights and democratisation *vis-à-vis* third countries as well as the importance of MNCs in this field. As «an economic and political player with global diplomatic reach, and with a substantial budget for external assistance, the EU has both influence and leverage, which it can deploy on behalf of democratisation and human rights»¹²⁴. With the legal back-up of international human rights and in combination with MNCs' practices and policies, non-discrimination on grounds of sexual orientation can be proliferated.

¹²⁴ European Commission, *Communication on the European Union's Role in Promoting Human Rights and Democratisation in Third Countries*, COM(2001) 252 final, 8 May 2001, pp. 3-4, 8.