UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/89/D/1361/2005
14 May 2007

ENGLISH
Original: SPANISH

HUMAN RIGHTS COMMITTEE
Eighty-ninth session
12-30 March 2007

VIEWS

Communication No. 1361/2005

Submitted by:	X[1] (represented by counsel)
Alleged victim:	The author
State party:	Colombia
Date of communication:	13 January 2001 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 9 February 2005 (not issued in document form)
Date of adoption of Views:	30 March 2007
Subject matter:	Discrimination in granting pension transfer in the case of homosexual couples
Procedural issues:	Failure to substantiate the alleged violations adequately

* Made public by decision of the Human Rights Committee.

[1] The name and surname of the author and his partner have been omitted in accordance with a request for confidentiality from one of the parties.

Substantive issues:	Equality before the courts; arbitrary or unlawful interference in privacy; equality before the law and right to equal protection of the law without discrimination
Articles of the Covenant:	2, paragraph 1, 3, 5, 14, paragraph 1, 17 and 26
Articles of the Optional Protocol:	2 and 3

On 30 March 2007 the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1361/2005.

[ANNEX]

Annex

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-ninth session

concerning

Communication No. 1361/2005**

Submitted by:	X (represented by counsel)
Alleged victim:	The author
State party:	Colombia
Date of communication:	13 January 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2007,

Having concluded its consideration of communication No. 1361/2005, submitted on behalf of X under the Optional Protocol to the International Covenant on Civil and Political Rights,

Bearing in mind all the information submitted to it in writing by the authors of the communication and the State party,

Adopts the following:

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Sir Nigel Rodley and Mr. Ivan Shearer.

An individual opinion co-signed by Committee members Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil, is appended to the present document.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Rafael Rivas Posada did not participate in the adoption of the present decision.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication dated 13 January 2001 is a Colombian citizen. He claims to be the victim of violations by Colombia of articles 2, paragraph 1, 3, 5, paragraphs 1 and 2, 14, paragraph 1, 17 and 26 of the Covenant. The Optional Protocol entered into force for Colombia on 23 March 1976. The author is represented by counsel.

The facts as presented by the author

2.1 On 27 July 1993, the author's life partner Mr. Y died after a relationship of 22 years, during which they lived together for 7 years. On 16 September 1994, the author, who was economically dependent on his late partner, lodged an application with the Social Welfare Fund of the Colombian Congress, Division of Economic Benefits (the Fund), seeking a pension transfer.

2.2 On 19 April 1995, the Fund rejected the author's request, on the grounds that the law did not permit the transfer of a pension to a person of the same sex.

2.3 The author indicates that according to regulatory decree No. 1160 of 1989, "for the purposes of pension transfers, the person who shared married life with the deceased during the year immediately preceding the death of the deceased or during the period stipulated in the special arrangements shall be recognized as the permanent partner of the deceased"; the decree does not specify that the two persons must be of different sexes. He adds that Act No. 113 of 1985 extended to the permanent partner the right to pension transfer on the death of a worker with pension or retirement rights, thus putting an end to discrimination in relation to benefits against members of a de facto marital union.

2.4 The author instituted an action for protection (*acción de tutela*) in Bogotá Municipal Criminal Court No. 65, seeking a response from the Benefits Fund of the Colombian Congress. On 14 April 1995, the Municipal Criminal Court dismissed the application on the grounds that there had been no violation of fundamental rights. The author appealed against this decision in Bogotá Circuit Criminal Court No. 50. On 12 May 1995, this court ordered the modification of the earlier ruling and called on the Procurator-General to conduct an investigation into errors committed by staff of the Fund.

2.5 In response to the refusal to grant him the pension, the author instituted an action for protection in Bogotá Circuit Criminal Court No. 18. This court rejected the application on 15 September 1995, finding that there were no grounds for protecting the rights in question. The author appealed against this decision to the Bogotá High Court, which upheld the lower court's decision on 27 October 1995.

2.6 The author indicates that all the actions for protection in the country are referred to the Constitutional Court for possible review, but that the present action was not considered by the Court. Since Decree No. 2591 provides that the Ombudsman can insist that the matter be considered, the author requested the Ombudsman to apply for review by the Constitutional Court. The Ombudsman replied on 26 February 1996 that, owing to the absence of express legal provisions, homosexuals were not allowed to exercise rights recognized to heterosexuals such as the right to marry or to apply for a pension transfer on a partner's death.

2.7 The author instituted proceedings in the Cundinamarca Administrative Court, which rejected the application on 12 June 2000, on the grounds of the lack of constitutional or legal recognition of homosexual unions as family units. The author appealed to the Council of State, which on 19 July 2000 upheld the ruling of the Administrative Court, arguing that under the Constitution, "the family is formed through natural or legal ties … between a man and a woman". This decision was notified by edict only on 17 October 2000, and became final on 24 October 2000.

2.8 The author considers that he has exhausted domestic remedies. He emphasizes that all the actions for protection in the country are referred to the Constitutional Court for possible review, but that the present action was not considered by the Court.

2.9 The author asks for his personal data and those of his partner to be kept confidential.

The complaint

3.1 Regarding the alleged violation of article 2, paragraph 1, the author states that he has suffered discrimination owing to his sexual orientation and his sex. He states that Colombia has failed to respect its commitment to guarantee policies of non-discrimination to all the inhabitants of its territory.

3.2 The author alleges a violation of article 3, since a partner of the same sex is being denied the rights granted to different-sex couples, without any justification. He states that he fulfilled the legal requirements for receiving the monthly pension payment to which he is entitled and that this payment was refused on the basis of arguments excluding him because of his sexual preference. He points out that if the pension request had been presented by a woman following the death of her male partner, it would have been granted, so that the situation is one of discrimination. The author considers that the State party violated article 3 by denying a partner of the same sex the rights which are granted to partners of different sexes.

3.3 The author also claims a violation of article 5, paragraphs 1 and 2, of the Covenant, because the actions of the State party displayed a failure to respect the principles of equality and non-discrimination. According to the author, the State party ignored the Committee's decisions regarding the prohibition of discrimination on grounds of sexual orientation,[2] and Colombian law was applied restrictively, preventing the author from obtaining the transfer of his partner's pension, thus putting his means of subsistence and his quality of life at risk.

3.4 Regarding the alleged violation of article 14, paragraph 1, the author maintains that his right to equality before the courts was not respected, since the Colombian courts rejected his request on several occasions because of his sex. He refers to the dissenting opinion of Judge Olaya Forero of the Administrative Court in the case, in which she stated that the Court was subjecting homosexuals to unequal treatment.

[2] The author seems to be referring to the Committee's decisions in communications Nos. 488/1992, *Toonen v. Australia*, and 941/2000, *Young v. Australia*.

3.5 The author claims a violation of article 17, paragraph 1, alleging negative interference by the State party, which failed to recognize his sexual preference so that he was denied the fundamental right to a pension which would assure his subsistence. Regarding the alleged violation of article 17, paragraph 2, he maintains that his private life weighed more heavily in the decisions of the judicial authorities than the legal requirements for receipt of a pension. The judges had refused to grant protection or *amparo* on the sole grounds that he was a homosexual.

3.6 Regarding the violation of article 26, the author states that the State party, through the decision of the Benefits Fund and subsequently in the many court actions, had an opportunity to avoid discrimination based on sex and sexual orientation, but failed to do so. He claims that it is the duty of the State to resolve situations which are unfavourable to its inhabitants, whereas in his case the State had in fact worsened them by increasing his vulnerability in the difficult social circumstances prevailing in the country.

State party's observations on the admissibility and merits of the communication

4.1 In a note verbale dated 25 November 2005, the State party submitted its observations on the admissibility and merits of the communication.

4.2 Regarding the admissibility of the communication, the State party reviews in detail the remedies of which the author made use, concluding that these have been exhausted, with the exception of the special remedies of review or reconsideration, which he did not use in good time. The State party maintains that it is not for the Committee to examine the findings of fact or law reached by national courts, or to annul judicial decisions in the manner of a higher court. The State party considers that the author is seeking to use the Committee as a court of fourth instance.

4.3 Regarding domestic remedies, the State party notes that the Fund applied article 1 of Act No. 54 of 1990, which provides that "… for all civil law purposes, the man and the woman who form part of the de facto marital union shall be termed permanent partners". It concludes that Colombian legislation has not conferred recognition in civil law on unions between persons of the same sex. It also notes that the Cundinamarca Administrative Court considered that the systematic and consistent application of the 1991 Constitution together with other rules did not provide the administration with any grounds for granting the author's request. The State party points out that the system of administrative justice offers special remedies such as review and reconsideration, which the author could have sought, but which were not used in good time, as the deadlines laid down for doing so had passed.

4.4 Regarding the actions for protection instituted by the author, the State party considers that the purpose of the application lodged in Municipal Criminal Court No. 65 was not to protect the right to transfer of the pension but to protect the right of petition. Consequently, it considers that that remedy should not be viewed as one of those which offered the State an opportunity to try the alleged violation. The second action for protection did have the purpose of protecting some of the allegedly violated rights, and was denied by the judge on the grounds that the author was not in imminent danger and had another appropriate means of judicial protection.

4.5 Regarding the review of the rulings on protection by the Constitutional Court, the State party confirms that the rulings were submitted to the Court but not selected. It confirms that review by the Court is not mandatory, since the Court is not a third level in the protection procedure. It also forwards the comments made by the Ombudsman, who did not insist that the Constitutional Court should review the rulings in question. The State party refers to the Constitutional Court's ruling on a constitutional challenge to articles 1 and 2 (a) of Act No. 54 of 1990, "defining de facto marital unions and the property regime between permanent partners", and attaches part of the ruling.[3]

4.6 The State party concludes that the author has exhausted domestic remedies and that his disagreement with the decisions handed down prompted him to turn to the Committee as a court of fourth instance. The State party seeks to show that the decisions taken at the domestic level were based on the law and that the judicial guarantees set out in the Covenant were not ignored.

4.7 On the merits, the State party presented the following observations. Regarding the alleged violation of article 2, paragraph 1, of the Covenant, the State party maintains that the Committee is not competent to make comments on the violation of this article, since this refers to a general commitment to respect and provide guarantees to all individuals. It refers to the Committee's jurisprudence in communication No. 268/1987, *M.B.G. and S.P. v. Trinidad and Tobago*, and concludes that the author cannot claim a violation of this article in isolation if there is no violation of article 14, paragraph 1.

4.8 Regarding the alleged violation of article 3, the State party holds that this article does not have the scope claimed by the author, since this provision is designed to guarantee equal rights between men and women, in the context of the historical factors of discrimination to which women have been subjected. The State party refers to the ruling of the Constitutional Court in the case, and endorses the Court's observations, in particular the following. De facto marital unions of a heterosexual nature, insofar as they form a family, are recognized in law in order to guarantee them "comprehensive protection" and, in particular, ensure that "the man and the woman" have equal rights and duties (Constitution, arts. 42 and 43). A variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, particularly as living together may be a feature of couples and social groups of many different kinds or with several members, who may or may not be bound by sexual or emotional ties, and would not in itself oblige the drafters of the law to establish a property regime similar to that established under Act No. 54 of 1990. The legal definition of de facto marital union is sufficient to recognize and protect a group that formerly suffered from discrimination but does not create a privilege which would be unacceptable from the constitutional point of view. The State party also refers to the views of the Ombudsman along the same lines, and concludes that there has been no violation of article 3 of the Covenant.

4.9 Regarding the alleged violation of article 5, paragraphs 1 and 2, the State party maintains that it has not been expressly substantiated, as the author has not specified in what way a State, a group or person was granted the right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms recognized in the Covenant.

---

[3] Constitutional Court, C-098 of 1996.

4.10 The State party reiterates the statement of the Constitutional Court to the effect that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm, since no intent to harm homosexuals may be found in the rules. Regarding article 5, paragraph 2, the State party points out that none of the country's laws restricts or diminishes the human rights set out in the Covenant. On the contrary, there are provisions which, like Act No. 54 of 1990, extend rights in respect of social benefits and property to the permanent partners in de facto marital unions, though this is not provided for in article 23 of the Covenant, which refers to the rights of the couple within marriage.

4.11 Regarding the alleged violation of article 14, paragraph 1, the State party points out that court orders handed down in the course of proceedings or an action for protection are valid only *inter partes*. It considers that these allegations lack substance because all the court decisions adopted in relation to the applications made by the author display equality not only before the law but also vis-à-vis the judicial system. At no time were restrictions placed on his ability to go to law and make use of all the machinery available to him to invoke the rights he claimed had been violated. What the author calls violations do not represent some whim of the courts but the strict discharge of their judicial role under social security legislation, in which the duty of protection focuses on the family, viewed as a unit composed of a heterosexual couple, as the Covenant itself understands it in article 23.

4.12 Regarding the alleged violation of article 17, the State party maintains that the author has not explained the grounds on which he considers that this article was violated, or cited any evidence that he was the victim of arbitrary or unlawful interference with his privacy. Consequently, it considers that the author has not substantiated this part of his communication.

4.13 Regarding the alleged violation of article 26, the State party points out that it has already discussed the relevant points in relation to articles 3 and 14, since the same matters of fact and of law are involved. The State party concludes that no violation of the Covenant has taken place, and that the communication should be declared inadmissible under article 2 of the Optional Protocol.

4.14 The State party does not oppose the author's request for his identity and that of his late partner to be kept confidential, although it does not agree with the author that such action is necessary.

Comments by the author

5.1 In his comments dated 26 January 2006, the author states that it can be seen from the State party's observations that Colombian legislation does not recognize that a person who has cohabited with another person of the same sex has any rights in relation to social benefits. He refers to the rulings of the Administrative Court and the Council of State. Regarding the State party's observation that he should have sought the remedies of review and reconsideration, he indicates that the jurisdiction for such remedies is the Council of State itself, which had already examined the issue and clearly and categorically concluded that there were no grounds for a claim under Colombian law. However, the judicial remedies relating to fundamental rights or human rights had also been exhausted through the action for protection. The author points out that the Ombudsman had declined to request the Constitutional Court to review the application

for protection on the grounds that the application was inadmissible. He maintains that the State party's reply shows that there is no possibility of protection in this case under the country's Constitution, laws, regulations or procedures.

5.2 The author states that article 93 of the Constitution acknowledges that the views and decisions of international human rights bodies constitute guides to interpretation which are binding on the Constitutional Court. He maintains that under this provision the State party should have taken the Human Rights Committee into account as such a body, and in particular the Committee's decisions in case No. 488/1992, *Toonen v. Australia,* and case No. 941/2000, *Young v. Australia*.

5.3 The author concludes that domestic remedies have been exhausted and that Colombian legislation contains no remedy which would protect the rights of homosexual couples and halt the violation of their fundamental rights.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 The Committee notes that the State party considers that the author has exhausted domestic remedies.

6.2 Regarding the allegations relating to article 3, the Committee notes the author's arguments that a same-sex couple is denied the rights granted to different-sex couples, and that if the pension request had been submitted by a woman following the death of her male partner, the pension would have been granted - a discriminatory situation. However, the Committee points out that the author does not allege that discrimination is exercised in the treatment of female homosexuals in situations similar to his own. The Committee considers that the author has not sufficiently substantiated this complaint for the purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 Regarding the claims under article 5 of the Covenant, the Committee finds that this provision does not give rise to any separate individual right.[4] Thus, the claim is incompatible with the Covenant and inadmissible under article 3 of the Optional Protocol.

6.4 As to the claim under article 14, the Committee finds that it is not sufficiently substantiated for the purposes of article 2 of the Optional Protocol and this part of the complaint must therefore be declared inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the remainder of the author's complaint raises important issues in relation to articles 2, paragraph 1, 17 and 26 of the Covenant, declares it admissible and proceeds to examine the merits of the communication.

---

[4] See communications Nos. 1167/2003, *Rayos v. Philippines*, Views of 27 July 2004, para. 6.8, and 1011/2001, *Madafferi and Madafferi v. Australia*, Views of 26 July 2004, para. 8.6.

Consideration of the merits

7.1 The author claims that the refusal of the Colombian courts to grant him a pension on the grounds of his sexual orientation violates his rights under article 26 of the Covenant. The Committee takes note of the State party's argument that a variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, and that the State party has no obligation to establish a property regime similar to that established in Act No. 54 of 1990 for all the different kinds of couples and social groups, who may or may not be bound by sexual or emotional ties. It also takes note of the State party's claim that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm.

7.2 The Committee notes that the author was not recognized as the permanent partner of Mr. Y for pension purposes because court rulings based on Act No. 54 of 1990 found that the right to receive pension benefits was limited to members of a heterosexual de facto marital union. The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.[5] It also recalls that in previous communications the Committee found that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences.[6] The Committee also notes that, while it was not open to the author to enter into marriage with his same-sex permanent partner, the Act does not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. The Committee finds that the State party has put forward no argument that might demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective. Nor has the State party adduced any evidence of the existence of factors that might justify making such a distinction. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author's right to his life partner's pension on the basis of his sexual orientation.

7.3 In the light of this conclusion, the Committee is of the view that it is not necessary to consider the claims made under articles 2, paragraph 1, and 17.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts before it disclose a violation by Colombia of article 26 of the Covenant.

---

[5] See communication No. 941/2000, *Young v. Australia*, Views of 6 August 2003, para. 10.4.

[6] See communications Nos. 180/1984, *Danning v. Netherlands*, Views of 9 April 1987, para. 14, and 976/2001, *Derksen and Bakker v. Netherlands*, Views of 1 April 2004, para. 9.2.

9. In accordance with the provisions of article 2, paragraph 3 (a), of the Covenant, the Committee finds that the author, as the victim of a violation of article 26, is entitled to an effective remedy, including reconsideration of his request for a pension without discrimination on grounds of sex or sexual orientation. The State party has an obligation to take steps to prevent similar violations of the Covenant in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Annex

Separate opinion by Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil (dissenting)

The author, X, lost his partner, who was of the same sex as him, after a 22-year relationship and having lived together for seven years. He considers that, like the surviving partners of heterosexual married or de facto couples, he is entitled to a survivor's pension, but the law of the State party does not allow this.

The Committee has upheld the author's claim, finding that he has suffered discrimination within the meaning of article 26 of the Covenant on grounds of sex or sexual orientation, inasmuch as the State party has failed to explain how "a distinction between same-sex partners and unmarried heterosexual partners is reasonable and objective" and has not "adduced any evidence of the existence of factors that might justify making such a distinction".

On the basis of the Committee's conclusion, there is apparently no distinction or difference between same-sex couples and unmarried mixed-sex couples in respect of survivor's pensions, and for the State party to make such a distinction, unless it can be explained and substantiated, constitutes discrimination on grounds of sex or sexual orientation and amounts to a violation of article 26. Not surprisingly, then, the Committee calls on the State party to reconsider the author's request for a pension "without discrimination on grounds of sex or sexual orientation". The State party is further required, in the standard wording, "to take steps to prevent similar violations of the Covenant in the future".

The Committee's decision in fact repeats the conclusion reached in 2003 in *Young v. Australia* (communication No. 941/2000), in what is clearly a perspective of establishment and consolidation of consistent case law in this area, binding on all States parties to the Covenant.

We cannot subscribe either to this approach or to the Committee's conclusion, for several legal reasons.

In the first place article 26 does not explicitly cover discrimination on grounds of sexual orientation. Such discrimination might - conceivably - be covered, but only by the phrase "other status" at the end of article 26. Hence matters involving sexual orientation can be addressed under the Covenant only on an interpretative basis. Clearly any interpretation within reasonable limits, and to the extent that it does not distort the text or attribute to the text an intent other than that of its authors, can be derived from the text itself. There is reason to fear, as will be seen below, that the Committee has gone beyond mere interpretation.

Secondly, and still by way of introductory remarks, no interpretation, even one grounded in legal experience at the national level, can ignore current enforceable international law, which does not recognize any human right to sexual orientation. That is to say, the scope of the Committee's pioneering and standard-setting role should be circumscribed by legal reality.

The main point is that, whatever interpretation is given to article 26, it must relate to non-discrimination and not to the creation of new rights which are by no means clearly implied by the Covenant, not to say precluded given the context in which the instrument was conceived.

The Committee has always taken a very rigorous line in its efforts to interpret the concept of non-discrimination. Thus it finds that "not every differentiation based on the grounds listed in article 26 of the Covenant amounts to discrimination, as long as it is based on reasonable and objective grounds" (*Jongenburger-Veerman v. Netherlands*, communication No. 1238/2004). In *O'Neill and Quinn v. Ireland* (communication No. 1314/2004) the Committee recalled its settled case law (see communications Nos. 218/1986 *Vos v. Netherlands*; 425/1990 *Doesburg Lannooij Neefs v. Netherlands*; 651/1995 *Snijders v. Netherlands*; and 1164/2003 *Abad Castell-Ruiz et al. v. Spain*), "that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant".

It is not always easy to assess whether the grounds for distinction or differentiation are reasonable and objective or whether the aim is legitimate under the Covenant, and the difficulties involved are naturally of varying magnitude. This is an area where interpretation is dogged by the risk of subjectivity, particularly when - consciously or not - it is locked into a teleological approach, for the issues that arise may then be only marginal to the Covenant or even, in some cases, lie outside it, which may mean that legal discourse gives way to other types of discourse that legitimately belong in non-legal domains or at best on the boundaries of the legal domain. Thus the establishing of similarities, analogies or equivalences between the situation of heterosexual married or de facto couples and homosexual couples may well entail not only observation of facts but also interpretation, and can therefore be of no help in construing the law in a reasonable and objective manner.

Provisions of the Covenant cannot be interpreted in isolation from one another, especially when the link between them is one that cannot reasonably be ignored, let alone denied. Thus the question of "discrimination on grounds of sex or sexual orientation" cannot be raised under article 26 in the context of positive benefits without taking account of article 23 of the Covenant, which stipulates that "the family is the natural and fundamental group unit of society" and that "the right of men and women of marriageable age to marry and found a family shall be recognized". That is to say, a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes.

What additional explanations must the State provide? What other evidence must it submit in order to demonstrate that the distinction drawn between a same-sex couple and a mixed-sex couple is reasonable and objective? The line of argument adopted by the Committee is in fact highly contentious. It starts from the premise that all couples, regardless of sex, are the same and are entitled to the same protection in respect of positive benefits. The consequence of this is that it falls to the State, and not to the author, to explain, justify and present evidence, as if this was some established and undisputed rule, which is far from being the case. We take the view that in this area, where positive benefits are concerned, situations that are widespread can be presumed to be lawful - absent arbitrary decisions or manifest errors of assessment - and situations that depart from the norm must be shown to be lawful by those who so claim.

Similarly, and still in the context of interpreting Covenant provisions in the light of other Covenant provisions, we would point out that article 3, on equality between men and women, must be interpreted in the light of article 26, but cannot be applied to equality between heterosexual couples and homosexual couples.

On the other hand, there is no doubt that article 17, which prohibits interference with privacy, is violated by discrimination on grounds of sexual orientation. The Committee, both in its final comments on States parties' reports and in its Views on individual communications, has rightly and repeatedly found that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults. Article 26, in conjunction with article 17, is fully applicable here because the aim in this case is precisely to combat discrimination, not to create new rights; but the same article cannot normally be applied in matters relating to benefits such as a survivor's pension for someone who has lost their same-sex partner. The situation of a homosexual couple in respect of survivor's pension, unless the problem is viewed from a cultural standpoint - and cultures are diverse and even, as regards certain social issues, opposed - is neither the same as nor similar to the situation of a heterosexual couple.

In sum, the law's flexibility yields many good things, but it can at times lead to extremes that strip an instrument of its substance and substitute something other, a content different from that intended by the author and different from that reflected in the spirit and letter of the text. The choices made in the process of interpretation are valid only in the context and within the limits of the provision being interpreted. Of course States still have the right and the capacity to establish new rights for the benefit of those under their jurisdiction. It is not for the Committee, in this regard, to substitute itself for States and make choices it is not entitled to make.

(*Signed*): Abdelfattah Amor

(*Signed*): Ahmed Tawfik Khalil

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

- - - - -