EQUALITY AND DISCRIMINATION - SEXUAL ORIENTATION

II. JURISPRUDENCE

ICCPR

· *S. E. T. A v. Finland* (R.14/61), ICCPR, A/37/40 (2 April 1982) 161 at paras. 2.1-2.5, 9.1-9.3, 10.1-10.4, 11 and Individual Opinion by Mr. Torkel Opsahl, Mr. Rajsoomer Lallah, and Mr. Walter Surma Tarnopolsky, 166.

...

2.1 The facts of the five cases are essentially undisputed. The parties only disagree as to their evaluation. According to the contentions of the authors of the communication, Finnish authorities, including organs of the State-controlled Finnish Broadcasting Company (FBC), have interfered with their right of freedom of expression and information, as laid down in article 19 of the Covenant, by imposing sanctions against participants in, or censuring, radio and TV programmes dealing with sanctions against participants in, or censuring, radio and TV programmes dealing with homosexuality. At the heart of the dispute is paragraph 9 of chapter 20 of the Finnish Penal Code which sets forth the following:

> "If someone publicly engages in an act violating sexual morality, thereby giving offense, he shall be sentenced for publicly violating sexual morality to imprisonment for at most six months or to a fine."
>
> "Anyone who publicly encourages indecent behaviour between persons of the same sex shall be sentenced for encouragement to indecent behaviour between members of the same sex as decreed in subsection 1."

2.2 In September 1976, Leo Rafael Hertzberg, a lawyer, was interviewed for the purposes of a radio programme entitled "*Arbetsmarknadens uteslutna*" ("The Outcasts of the Labour Market"). In the interview, he asserted on the strength of his knowledge as an expert that there exists job discrimination in Finland on the ground of sexual orientation, in particular, to the detriment of homosexuals. Because of this programme criminal charges were brought against the editor (not Mr. Hertzberg) before the Helsinki Municipal Court and, subsequently, before the Helsinki Court of Appeals. Although the editor was acquitted, Mr. Hertzberg claims that through those penal proceedings his right to seek, receive and impart information was curtailed. In his view, the Court of Appeals (decision No. 2825 of 27 February 1979) has exceeded the limits of reasonable interpretation by construing paragraph 9 (2) of chapter 20 of the Penal Code as implying that the mere "praising of homosexual relationships" constituted an offence under that provision.

2.3 Astrid Nikula prepared a radio programme conceived as part of a young listeners series in December 1978. This programme included a review of the book, "*Pojkar skall inte grata*" ("Boys must not cry") and an interview with a homosexual about the identity of a young homosexual and about life as a homosexual in Finland. When it was ready for broadcasting, it was censored by the responsible director of FBC against the opposition of the editorial team of the series. The author claims that no remedy against the censorship decision was available to her.

2.4 Uit Mansson participated in a discussion about the situation of the young homosexual depicted in Mrs. Nikula's production. The discussion was designed to form part of the broadcast. Like Mrs. Nikula, the author states that no remedy was available to him to challenge the censorship decision.

2.5 In 1978, Marko and Tuovi Putkonen, together with a third person, prepared a TV series on different marginal groups of society such as Jews, gypsies and homosexuals. Their main intention was to provide factual information and thereby to remove prejudices against those groups. The responsible programme director, however, ordered that all references to homosexuals be cut from the production, indicating that its transmission in full would entail legal action against FBC under paragraph 9 (2) of chapter 20 of the Penal Code.

...

9.1 In considering the merits of the communication, the Human Rights Committee starts from the premise that the State party is responsible for actions of the Finnish Broadcasting Company (FBC), in which the State holds a dominant stake (90 per cent) and which is placed under specific government control.

9.2 The Committee wishes further to point out that it is not called upon to review the interpretation of paragraph 9 (2) of chapter 20 of the Finnish Penal Code. The authors of the communication have advanced no valid argument which could indicate that the construction placed upon this provision by the Finnish tribunals was not made *bona fide*. Accordingly, the Committee's task is confined to clarifying whether the restrictions applied against the alleged victims, irrespective of the scope of penal prohibitions under Finnish penal law, disclose a breach of any of the rights under the Covenant.

9.3 In addition, the Committee wishes to stress that it has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant, although such legislation may, in particular circumstances, produce adverse effects which directly affect the individual, making him thus a victim in the sense contemplated by articles 1 and 2 of the Optional Protocol. The Committee refers in this connexion to its earlier views on communication No. R.9/35 (*S. Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*).

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10.1 Concerning Leo Rafael Hertzberg, the Committee observes that he cannot validly claim to be a victim or a breach by the State party of his right under article 19 (2) of the Covenant. The programme in which he took part was actually broadcast in 1976. No sanctions were imposed against him. Nor has the author claimed that the programme restrictions as applied by FBC would in any way personally affect him. The sole fact that the author takes a personal interest in the dissemination of information about homosexuality does not make him a victim in the sense required by the Optional Protocol.

10.2 With regard to the two censored programmes of Mrs. Nikula and of Marko and Tuovi Putkonen, the Committee accepts the contention of the authors that their rights under article 19 (2) of the Covenant have been restricted. While not every individual can be deemed to hold a right to express himself through a medium like TV, whose available time is limited, the situation may be different when a programme has been produced for transmission within the framework of a broadcasting organization with the general approval of the responsible authorities. On the other hand, article 19 (3) permits certain restrictions on the exercise of the rights protected by article 19 (2), as are provided by law and are necessary for the protection of public order or of public health or morals. In the context of the present communication, the Finnish Government has specifically invoked public morals as justifying the actions complained of. The Committee has considered whether, in order to assess the necessity of those actions, it should invite the parties to submit the full text of the censored programmes. In fact, only on the basis of these texts could it be possible to determine whether the censored programmes were mainly or exclusively made up of factual information about issues related to homosexuality.

10.3 The Committee feels, however, that the information before it is sufficient to formulate its views on the communication. It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.

10.4 The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. According to article 19 (3), the exercise of the rights provided for in article 19 (2) carries with it special duties and responsibilities for those organs. As far as radio and TV programmes are concerned, the audience cannot be controlled, In particular, harmful effects on minors cannot be excluded.

11. Accordingly, the Human Rights Committee is of the view that there has been no violation of the rights of the authors of the communication under article 19 (2) of the Covenant.

...

Individual Opinion by Mr. Torkel Opsahl, Mr. Rajsoomer Lallah and Mr. Walter Surma Tarnopolsky

Although I agree with the conclusion of the Committee, I wish to clarify certain points.

This conclusion prejudges neither the right to be different and live accordingly, protected by article 17 of the Covenant, nor the right to have general freedom of expression in this respect, protected by article 19. Under article 19 (2) and subject to article 19 (3), everyone must in principle have the right to impart information and ideas - positive or negative - about homosexuality and discuss any problem relating to it freely, through any media of his choice and on his own responsibility.

Moreover, in my view the conception and contents of "public morals" referred to in article 19 (3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority. Therefore, even if such laws as paragraph 9 (2) of chapter 20 of the Finnish Penal Code may reflect prevailing moral conceptions, this is in itself not sufficient to justify it under article 19 (3). It must also be shown that the application of the restriction is "necessary".

However, as the Committee has noted, this law has not been directly applied to any of the alleged victims. The question remains whether they have been more indirectly affected by it in a way which can be said to interfere with their freedom of expression, and if so, whether the grounds were justifiable.

It is clear that nobody - and in particular no State - has any duty under the Covenant to promote publicity for information and ideas of all kinds. Access to media operated by others is always and necessarily more limited than the general freedom of expression. It follows that such access may be controlled on grounds which do not have to be justified under article 19 (3).

It is true that self-imposed restrictions on publishing, or the internal programme policy of the media, may threaten the spirit of freedom of expression. Nevertheless, it is a matter of common sense that such decisions either entirely escape control by the Committee or must be accepted to a larger extent than externally imposed restrictions such as enforcement of criminal law or official censorship, neither of which took place in the present case. Not even media controlled by the State can under the Covenant be under an obligation to publish all that may be published. It is not possible to apply the criteria of article 19 (3) to self-imposed restrictions. Quite apart from the "public morals' issue, one cannot require

that they shall be only such as are "provided by law and are necessary" for the particular purpose. Therefore I prefer not to express any opinion on the possible reasons for the decisions complained of in the present case.

The role of mass media in public debate depends on the relationship between journalists and their superiors who decide what to publish. I agree with the authors of the communication that the freedom of journalists is important, but the issues arising here can only partly be examined under article 19 of the Covenant.

· *Toonen v. Australia* (488/1992), ICCPR, A/49/40 vol. II (31 March 1994) 226 (CCPR/C/50/D/488/1992) at paras. 8.1-8.7, 9-11 and Individual Opinion by Mr. Bertil Wennergren, 236.

...
8.1 The Committee is called upon to determine whether Mr. Toonen has been the victim of an unlawful or arbitrary interference with his privacy, contrary to article 17, paragraph 1...

8.2 Inasmuch as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that Sections 122(a), (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.

8.3 The prohibition against private homosexual behaviour is provided for by law, namely, Sections 122 and 123 of the Tasmanian Criminal Code. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its General Comment 16[32] on article 17, the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances". a/ The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

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8.4 While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds, as they are intended in part to prevent the spread of HIV/AIDS in Tasmania, and because, in the absence of specific limitation clauses in article 17, moral issues must be deemed a matter for domestic decision.

8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection". Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

8.6 The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether Sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.

8.7 The State party has sought the Committee’s guidance as to whether sexual orientation may be considered an “other status” for the purpose of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting , however, that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

9. The Human Rights Committee...is of the view that the facts before it reveal a violation of articles 17, paragraph 1, *juncto* 2, paragraph 1, of the Covenant.

10. Under article 2(3)(a) of the Covenant, the author, victim of a violation of articles 17,

paragraph 1, *juncto* 2, paragraph 1, of the Covenant, is entitled to a remedy. In the opinion of the Committee, an effective remedy would be the repeal of Sections 122(a), (c) and 123 of the Tasmanian Criminal Code.

11. Since the Committee has found a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant requiring the repeal of the offending law, the Committee does not consider it necessary to consider whether there has also been a violation of article 26 of the Covenant.

Notes

a/ Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VI, general comment 16 (32), para. 4.

Individual Opinion by Mr. Bertil Wennergren

I do not share the Committee's view in paragraph 11 that it is unnecessary to consider whether there has also been a violation of article 26 of the Covenant, as the Committee concluded that there had been a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant. In my opinion, a finding of a violation of article 17, paragraph 1, should rather be deduced from a finding of violation of article 26. My reasoning is the following:

Section 122 of the Tasmanian Criminal Code outlaws sexual intercourse between men and between women. While Section 123 also outlaws indecent sexual contacts between consenting men in open or in private, it does not outlaw similar contacts between consenting women. In paragraph 8.7, the Committee found that in its view, the reference to the term "sex" in article 2, paragraph 1, and in article 26 is to be taken as including sexual orientation. I concur with this view, as the common denominator for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under Sections 122(a), (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.

Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time: the designated

behaviour none the less remains a criminal offence.

Unlike the majority of the articles in the Covenant, article 17 does not establish any true right or freedom. There is no right to freedom or liberty of privacy, comparable to the right of liberty of the person, although article 18 guarantees a right to freedom of thought, conscience and religion as well as a right to manifest one's religion or belief in private. Article 17, paragraph 1, merely mandates that no one shall be subjected to arbitrary or unlawful interference with his privacy, family etc. Furthermore, the provision does not, as do other articles of the Covenant, specify on what grounds a State party may interfere by way of legislation.

A State party is therefore in principle free to interfere by law with the privacy of individuals on any discretionary grounds, not just on grounds related to public safety, order, health, morals, or the fundamental rights and freedoms of others, as spelled out in other provisions of the Covenant. However, under article 5, paragraph 1, nothing in the Covenant may be interpreted as implying for a State a right to perform any act aimed at the limitation of any of the rights and freedoms recognized therein to a greater extent than is provided for in the Covenant.

The discriminatory criminal legislation at issue here is not strictly speaking "unlawful" but it is incompatible with the Covenant, as it limits the right to equality before the law. In my view, the criminalization operating under Sections 122 and 123 of the Tasmanian Criminal Code interferes with privacy to an unjustifiable extent and, therefore, also constitutes a violation of article 17, paragraph 1.

A similar conclusion cannot, in my opinion, be reached on article 2, paragraph 1, of the Covenant, as article 17, paragraph 1 protects merely against arbitrary and unlawful interferences. It is not possible to find legislation unlawful merely by reference to article 2, paragraph 1, unless one were to reason in a circuitous way. What makes the interference in this case "unlawful" follows from articles 5, paragraph 1, and 26, and not from article 2, paragraph 1. I therefore conclude that the challenged provisions of the Tasmanian Criminal Code and their impact on the author's situation are in violation of article 26, in conjunction with articles 17, paragraph 1, and 5, paragraph 1, of the Covenant.

· *Joslin v. New Zealand* (902/1999), ICCPR, A/57/40 vol. II (17 July 2002) 214 (CCPR/C/75/D/902/1999) at paras. 2.1-2.4, 8.2, 8.3, 9 and Individual Opinion by Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring).

...
2.1 Ms. Joslin and Ms. Rowan commenced a lesbian relationship in January 1988. Since

that point, they have jointly assumed responsibility for their children out of previous marriages. In living together, they have pooled finances and jointly own their common home. They maintain sexual relations. On 4 December 1995, they applied under the Marriage Act 1955 to the local Registrar of Births, Deaths and Marriages for a marriage licence, by lodging a notice of intended marriage at the local Registry Office. On 14 December 1995, the Deputy Registrar-General rejected the application.

2.2 Similarly, Ms. Zelf and Ms. Pearl commenced a lesbian relationship in April 1993. They also share responsibility for the children of a previous marriage, pool financial resources and maintain sexual relations. On 22 January 1996, the local Registry Office refused to accept a notice of intended marriage. On 2 February 1996, Ms Zelf and Ms Pearl lodged a notice of intended marriage at another Registry Office. On 12 February 1996, the Registrar-General informed them that the notice could not be processed. The Registrar-General indicated that the Registrar was acting lawfully in interpreting the Marriage Act as confined to marriage between a man and a woman.

2.3 All four authors thereupon applied to the High Court for a declaration that, as lesbian couples, they were lawfully entitled to obtain a marriage licence and to marry pursuant to the Marriage Act 1955. On 28 May 1996, the High Court declined the application. Observing inter alia that the text of article 23, paragraph 2, of the Covenant "does not point to same-sex marriages", the Court held that the statutory language of the Marriage Act was clear in applying to marriage between a man and a woman only.

2.4 On 17 December 1997, a Full Bench of the Court of Appeal rejected the authors' appeal. The Court held unanimously that the Marriage Act, in its terms, clearly applied to marriage between a man and a woman only. A majority of the Court further went on to hold that the restriction in the Marriage Act of marriage to a man and a woman did not constitute discrimination. Justice Keith, expressing the majority's views at length, found no support in the scheme and text of the Covenant, the Committee's prior jurisprudence, the *travaux préparatoires* nor scholarly writing1/ for the proposition that a limitation of marriage to a man and a woman violated the Covenant.

...

8.2 The authors' essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry.

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant

which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.

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Notes

1/ Harris, D., Joseph, S.: *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford, Oxford University Press, 1995, p. 507 ("It seems clear that the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2).")

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Individual Opinion by Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring)

We found no difficulty in joining the Committee's consensus on the interpretation of the right to marry under article 23, paragraph 2. This provision entails an obligation for States to recognize as marriage the union of one adult man and one adult woman who wish to marry each other. The provision in no way limits the liberty of States, pursuant to article 5, paragraph 2, to recognize, in the form of marriage or in some other comparable form, the companionship between two men or between two women. However, no support can be drawn from this provision for practices that violate the human rights or dignity of individuals, such as child marriages or forced marriages.

As to the Committee's unanimous view that it cannot find a violation of article 26, either, in the non-recognition as marriage of the same-sex relationships between the authors, we wish to add a few observations. This conclusion should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.

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Contrary to what was asserted by the State party...it is the established view of the Committee that the prohibition against discrimination on grounds of "sex" in article 26 comprises also discrimination based on sexual orientation.a/ And when the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences.b/ No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria.

However, in the current case we find that the authors failed, perhaps intentionally, to demonstrate that they were personally affected in relation to certain rights not necessarily related to the institution of marriage, by any such distinction between married and unmarried persons that would amount to discrimination under article 26. Their references to differences in treatment between married couples and same-sex unions were either repetitious of the refusal of the State party to recognize same-sex unions in the specific form of "marriage" ... an issue decided by the Committee under article 23, or remained unsubstantiated as to if and how the authors were so personally affected...Taking into account the assertion by the State party that it does recognize the authors, with and without their children, as families...we are confident in joining the Committee's consensus that there was no violation of article 26.

Notes

a/ *Toonen v. Australia*, Communication No. 488/1992.

b/ *Danning v. the Netherlands*, Communication No. 180/1984.

· *Young v. Australia* (941/2000), ICCPR, A/58/40 vol. II (6 August 2003) 231 (CCPR/C/78/D/941/2000) at paras. 2.1, 2.2, 9.3, 10.2-10.4, 12 and Individual Opinion of Mrs. Ruth Wedgwood and Mr. Franco DePasquale (concurring), 245.

...

2.1 The author was in a same-sex relationship with a Mr. C for 38 years. Mr. C was a war

veteran, for whom the author cared in the last years of his life. He died on 20 December 1998, at the age of 73. On 1 March 1999, the author applied for a pension under section 13 of the Veteran's Entitlement Act ("VEA") as a veteran's dependant. On 12 March 1999, the Repatriation Commission denied the author's application in that he was not a dependant as defined by the Act. In its decision the Commission sets out the relevant legislation as follows:

Section 11 of the Act states:

> "dependant, in relation to a veteran (including a veteran who has died), means
>
> (a) the partner;"

Section 5E of the Act defines a "partner, in relation to a person who is a "member of a couple", [as] the other member of the couple."

The notion of couple is defined in section 5E(2):

> "a person is a "member of a couple" for the purposes of this Act if:
>
> > (a) the person is legally married to another person and is not living separately and apart from the other person on a permanent basis; or
> >
> > (b) all of the following conditions are met:
> >
> > > (i) the person is living with a person of the opposite sex (in this paragraph called the partner);
> > >
> > > (ii) the person is not legally married to the partner;
> > >
> > > (iii) the person and the partner are, in the Commission's opinion (...), in a marriage-like relationship;
> > >
> > > (iv) the person and the partner are not within a prohibited relationship for the purposes of Section 23 B of the Marriage Act 1961."

The decision reads "The wording of Section 5E (2) (b) (i) - the text that I have highlighted - is unambiguous. I regret that I am therefore unable to exercise any discretion in this matter. This means that under legislation, you are not regarded as the late veteran's dependant. Because of this you are not entitled to claim a pension under the Act."

The author was also denied a bereavement benefit under the Act, as he was not considered to be a "member of a couple".1/

2.2 On 16 March 1999, the author applied to the Veterans Review Board ("VRB") for a review of the Commission's decision. On 27 October 1999, the Board affirmed the Commission's decision, finding that the author was not a dependant as defined by the Act. In its decision the Board outlines the legislation as above and considers that it "has no discretion in its application of the Act and in this case it is bound to have regard to Section 11 of the Act. Hence, under the current legislation, the Board is required to affirm the decision under review in relation to the status of the applicant".

...

9.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that the author is not a victim as, regardless of the decisions of the domestic authorities, he has not established that he had a *prima facie* entitlement to a pension and therefore his sexual orientation is not determinative of the issue. The Committee recalls that an author of a communication is a victim within the meaning of article 1 of the Optional Protocol, if he/she is personally adversely affected by an act or omission of the State party. The Committee observes that the domestic authorities refused the author a pension on the basis that he did not meet the definition of being a "member of a couple" by not having lived with a "person of the opposite sex". In the Committee's view it is clear that at least those domestic bodies seized of the case, found the author's sexual orientation to be determinative of lack of entitlement. In that respect, the author has established that he is a victim of an alleged violation of the Covenant for purposes of the Optional Protocol.

...

10.2 The author's claim is that the State party's refusal to grant him a pension on the ground that he does not meet with the definition of "dependant", for having been in a same-sex relationship with Mr. C, violates his rights under article 26 of the Covenant, on the basis of his sexual orientation. The Committee notes the State party's argument that had the domestic authorities applied all the facts of the author's case to the VEA it would have found other reasons to dispose of the author's claim, reasons that apply to every applicant regardless of sexual orientation. The Committee also notes that the author contests this view that he did not have a *prima facie* right to a pension. On the arguments provided, the Committee observes that it is not clear whether the author would in fact have fulfilled the other criteria under the VEA, and it recalls that it is not for the Committee to examine the facts and evidence in this regard. However, the Committee notes that the only reason provided by the domestic authorities in disposing of the author's case was based on the finding that the author did not satisfy the condition of "living with a person of the opposite sex". For the purposes of deciding on the author's claim, this is the only aspect of the VEA at issue before the Committee.

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10.3 The Committee notes that the State party fails specifically to refer to the impugned sections of the Act (sections 5(E), 5(E) 2 and 11) on the basis of which the author was refused a pension because he did not meet with the definition of a "member of a couple" by not "living with a member of the opposite sex". The Committee observes that the State party does not deny that the refusal of a pension on this basis is a correct interpretation of the VEA but merely refers to other grounds in the Act on which the author's application could have been rejected. The Committee considers, that a plain reading of the definition "member of a couple" under the Act suggests that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The State party does not contest this. Consequently, it remains for the Committee to decide whether, by denying a pension under the VEA to the author, on the ground that he was of the same sex as the deceased Mr. C, the State party has violated article 26 of the Covenant.

10.4 The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.20/ It recalls that in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences.21/ It transpires from the contested sections of the VEA that individuals who are part of a married couple or of a heterosexual cohabiting couple (who can prove that they are in a "marriage-like" relationship) fulfill the definition of "member of a couple" and therefore of a "dependant", for the purpose of receiving pension benefits. In the instant case, it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr. C, for the purpose of receiving pension benefits, because of his sex or sexual orientation. The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.

...

12. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee concludes that the author, as a victim of a violation of article 26 is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law. The State

party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

Notes

1/ The author does not make any specific claim on this fact.

...

20/ *Toonen v. Australia* [Case No. 488/1992, Views adopted on 31 March 1994].

21/ *Danning v. the Netherlands* [Case No. 180/1984, Views adopted on 9 April 1987].

Individual Opinion of Mrs. Ruth Wedgwood and Mr. Franco DePasquale (concurring)

Many countries recognize a right of privacy in intimate relationships, enjoyed by all citizens regardless of sexual orientation. In 1994, this Committee grounded a similar right on Article 17 of the Covenant on Civil and Political Rights - finding, in its views on *Toonen v. Australia*,1/ that Tasmanian penal statutes purporting to criminalize "unnatural sexual practices" amounted to an "arbitrary or unlawful interference with...privacy." In Toonen, the federal Government of Australia represented to the Committee that the Tasmanian criminal law indeed amounted to "arbitrary interference with [Mr. Toonen's] privacy" and "cannot be justified" on policy grounds.2/ Laws penalizing homosexual activity had already been repealed in other Australian states, with the exception of Tasmania, and this Committee's decision seems to have served as a means for Australia to overcome barriers of federalism.

In Toonen, the author had complained that the Tasmanian criminal code did "not distinguish between sexual activity *in private* and sexual activity *in public* and bring[s] private activity *into the public domain*."3/ (Emphasis added.) The Committee's ruling was founded on the right to be left alone, where there are no reasonable safety, public order, health or moral grounds offered by the state party to justify the interference with privacy.

The current case of *Edward Young v. Australia* poses a broader question, where various states parties may have decided views - namely, whether a state is obliged by the Covenant on Civil and Political Rights to treat long-term same-sex relationships identically to formal marriages and "marriage-like" heterosexual unions - here, for the purpose of awarding pension benefits to the surviving dependents of military service personnel. Writ large, the case opens the general question of positive rights to equal treatment - whether a state must accommodate same-sex relationships on a par with more traditional forms of civil union.

On the facts and in the particular posture of this case, the Committee has concluded that the differentiation made by Australia between same-sex and heterosexual civil partners has not

been sustained against Mr. Young's challenge. The trespass is not based on a right of privacy under Article 17, but rather on the claimed right to equality before the law under Article 26 of the Covenant.

...

In a case of this moment, it is perhaps surprising that Australia has not chosen to enter into any discussion, pro or con, on the merits of the claim made under Article 26 of the Covenant. Australia has offered no views concerning Mr. Young's argument that the distinction made by statute between same sex and heterosexual civil partners is unfounded, and the Committee has essentially entered a default judgment. Under Covenant jurisprudence, a State party must offer "reasonable and objective criteria" for making any distinction on grounds of sex or (according to our "guidance" to the state party in paragraph 8.7 of the Toonen case) on grounds of sexual orientation. Yet, as the Committee notes in paragraph 10.4 of the instant case of Mr. Young, "The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced." In every real sense, this is not a contested case.

Many governments and many people of good will share an interest in finding an appropriate moral and legal answer to the issues and controversies of equalizing various government entitlements between same-sex and heterosexual couples, including the disputed claim that there is a trans-jurisdictional right to recognition of gay marriage. There is an equally engaged debate within many democracies on whether military service should continue to be limited to heterosexual persons.

In the instant case, the Committee has not purported to canvas the full array of "reasonable and objective" arguments that other States and other complainants may offer in the future on these questions in the same or other contexts as those of Mr. Young. In considering individual communications under the Optional Protocol, the Committee must continue to be mindful of the scope of what it has, and has not, decided in each case.

Notes

1/ *Toonen v. Australia*, Communication No. 488/1992, Views adopted on 4 April 1994.

2/ *Id.*, paragraph 6.2.

3/ *Id.*, paragraph 3.1(a).

EQUALITY AND DISCRIMINATION - SEXUAL ORIENTATION

CAT

· *K. S. Y. v. The Netherlands* (190/2001), CAT, A/58/44 (15 May 2003) 107 (CAT/C/30/D/190/2001) at paras. 2.1, 2.4, 2.5, 7.1 and 7.3-7.5.

...

2.1 The complainant states that he has encountered problems in Iran on account of his homosexuality and because of the political activities of his brother, A.A.

...

2.4 In Iran, the complainant had a homosexual relationship with one K.H., whose homosexuality allegedly was evident due to his "female" behaviour. Because of his homosexuality, he separated from his wife, with whom he had three children.

2.5 On 10 August 1992, the complainant was arrested in Shiraz by the Monkerat on account of complaints by neighbours about his homosexual activities. His partner was not arrested as he went into hiding. The complainant was taken to a prison in the Lout desert and interrogated about his homosexuality and his brother's activities. During his detention, he allegedly was tortured, beaten with cables on the soles of his feet, on his legs and in the face, and hung from the ceiling by one arm for half a day over three weeks. The complainant was later sentenced to death a/ but never received a written copy of the verdict. After five months of detention, he succeeded in escaping with the help of the prison cleaning services who hid him in the garbage truck. The escape was facilitated by the absence of guards in the evening, the prisoners all being confined in their cell.

...

7.1 The Committee must decide whether the forced return of the complainant to the Islamic Republic of Iran would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (refouler) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture...

...

7.3 Concerning the alleged difficulties faced by the complainant because of his sexual orientation, the Committee notes a number of contradictions and inconsistencies in his account of past abuses at the hands of the Iranian authorities, as well as the fact that part of his account has not been adequately substantiated or lacks credibility.

7.4 The Committee also notes from different and reliable sources that there currently is no active policy of prosecution of charges of homosexuality in Iran.

7.5 In the light of the arguments presented by the complainant and the State party, the Committee finds that it has not been given enough evidence by the complainant to conclude

that the latter would run a personal, present and foreseeable risk of being tortured if returned to his country of origin.

Notes

a/ The complainant explains that he has never received a copy of the judgment and that he was only informed of his death sentence through a document that was pushed under his cell door and then immediately pulled back. He is therefore not in a position to give the date of the judgment.

· *E. J. V. M. v. Sweden* (213/2002), CAT, A/59/44 (14 November 2003) 267 (CAT/C/31/D/213/2002) at paras. 1.1, 2.5, 2.10 and 8.7.

...

1.1 The complainant is E.J.V.M., a Costa Rican citizen, born in 1956, currently residing clandestinely in Sweden, following the rejection by Sweden on 19 February 2002 of his application for asylum. He claims that his deportation to Costa Rica would constitute a violation by Sweden of article 3 of the Convention...

...

2.5 The complainant claims that, because of his Communist affiliations, he was prevented from working in the National Theatre Company and suspended from his acting classes. He also alleges that he was publicly attacked because he was bisexual.

...

2.10 He also says that his life and that of his partner, P. A. M., a female to male transsexual, with whom he shared his political activities, was in danger. He says that their house was shot at on several occasions and that although they asked for police protection their requests were ignored. He asserts that they had to install a metal stockade in the living room of their house for protection.

...

8.7 On the issue of the complainant's alleged difficulties in Costa Rica on account of his bisexuality, the Committee observes that the danger of being subjected to torture in Costa Rica in future is not based on grounds that go beyond mere theory or suspicion. In the Committee's opinion, the reports submitted by the complainant do not demonstrate substantial grounds for believing that he is personally and currently in danger of being tortured if returned to Costa Rica. In the light of the foregoing, the Committee considers that the information furnished by the complainant does not provide substantial grounds for believing that he would personally be in danger of being tortured if returned to Costa Rica.