Chapter 23
Same-Sex Couples Before *Quasi*-Jurisdictional Bodies: The Case of the UN Human Rights Committee*

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Abstract After giving an overview on the HRC and its competence to examine individual communications, the chapter analyses the case-law on LGBT and same-sex couples issues, in the latter case with regard to the right to marry and the right to the "widow pension", i.e. the aspects specifically considered in its case-law. Different interpretative methods in approaching same-sex couples issues arise; in the case of marriage the literal interpretation of the ICCPR (Art. 23) does not support the right to marry between same-sex partners, while a more teleological approach to the Covenant (Art. 26) allowed to recognize them some rights not expressly provided for in the same treaty. The future case-law will tell if the Covenant can constitute the basis for the recognition of new LGBT rights, also with regard to the recognition of the sentimental link between two same-sex partners independently of the marriage. The chapter ends with some brief considerations on the HRC as a "desirable forum" for the protection of LGBT rights for people living in countries both benefiting and not of a regional system of protection of human rights.

23.1 Preliminary Remarks

In addition to national and international courts, some international bodies, established and acting in the framework of the UN, can represent approachable *fora* for the protection of LGBT and same-sex couples' rights.

One first option is offered by the complaint procedure before the Human Rights Council, which can be initiated by individuals, groups of persons and NGOs in

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cases of violation of human rights and fundamental freedoms.[1] Nevertheless, that procedure seems more focused on getting States to respect human rights obligations than on affording individuals a remedy to guarantee their personal situations. In fact, the Council, which decides only on cases of gross and reliably demonstrable violations of human rights, adopts a non-binding act directed to involved States, providing, *inter alia*, for the monitoring of the situation, the request to give further information or the invitation to the UN High Commissioner of Human Rights to provide its technical cooperation.[2]

Another chance is represented by the expert bodies created by some human rights international treaties concluded in the framework of the UN. Those bodies (*rectius*, committees) are tasked with monitoring the respect of the rights protected by the relevant conventions and, under particular circumstances, they can receive and analyse communications coming from individuals and pronounce views on the merits of cases brought to their attention. Here the competence to ascertain a violation of human rights obligations implies the establishment of a remedy directly aimed to guarantee individual situations, thus the committees represent direct *fora* for the protection of individuals' rights.

This is the case of the CEDAW, i.e. the Committee established by the Convention on the Elimination of Discrimination against Women of 1979, or of the CAT, which is the Committee monitoring respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. Their practice on LGBT issues is quite limited: some (unsuccessful for the complainants) CAT views on cases of expulsion to another State entailing the risk of being tortured also because of sexual orientation[3] and a CEDAW General Comment on the interpretation of Art. 2 of the Convention of 1979, which underlines the States parties' legal duty to enact legislation against discrimination in all fields of women's lives and throughout their lifespan, also with regard to lesbians, considered as one of those women groups vulnerable to discrimination through laws and regulations.[4]

[1] Human Rights Council resolution 5/1 of 18th June 2007, para. 87.

[2] *Ibidem*, para. 109. As for the promotion of LGBT rights, see in general the Human Rights Council resolution 17/19 on human rights, sexual orientation and gender identity of 17th June 2011 and the subsequent High Commissioner's for Human Rights report on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity of 17th November 2011. The latter recommends to UN Member States, *inter alia*, to take measures to prevent torture and other forms of cruel treatment on grounds of sexual orientation and gender identity and to enact comprehensive anti-discrimination legislation that includes discrimination on grounds of sexual orientation and gender identity among prohibited grounds. In literature, see Maaldon (2009).

[3] Views in no. 31/1995 *Mr. X. and Mrs. Y v. The Netherlands* 20th November 1995 (unfounded), no. 190/2001 *K.S.Y. v. The Netherlands* 15th May 2003 (no violation) and no. 213/2002 *E.J.V.M. v. Sweden* 14th November 2003 (no violation).

[4] General Recommendation 28 on the Core Obligations of States Parties under Art. 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 31.

The practice on LGBT and same-sex couples issues is more interesting when considering the Human Rights Committee (HRC or Committee), the treaty-based body composed by 18 experts of human rights also with legal experience,[5] established to monitor respect of the rights and principles proclaimed in the International Covenant on Civil and Political Rights of 1966 (ICCPR or Covenant).[6] Since it started its works, in 1977, the Committee has analysed a remarkable number of cases on the violation of ICCPR rights and, with regard to our field of investigation, it has considered cases both on LGBT individual rights and on same-sex couples—the latter with specific regard to the legal recognition of the sentimental link between two same-sex partners and to the survivor pension for the same-sex partner, i.e. one of the so-called material consequences. To date, the HRC has not adopted views on same-sex couples and parental consequences, but the privacy policy on pending cases, which remain confidential until the final decision,[7] does not allow reporting about the next pronunciation of the Committee on this sensitive issue.

It can be argued that the HRC represents for individuals the most relevant *forum* for the protection of LGBT and same-sex couples' rights in the constellation of the UN treaty monitoring bodies, and this chapter will address its decisions in this field of law. Before starting the analysis, a terminological clarification is due: even if the Committee does not pronounce judgments, the terms "jurisprudence" and "case-law" will be used in referring to its decisions because, as the following pages will highlight, there are meaningful similarities between the HRC and a court, and between the former body's decisions and courts' judgments.

23.2 The Human Rights Committee's Monitor Functions

According to the Covenant and its First Optional Protocol (the Protocol),[8] the HRC has four monitor functions. Under Art. 40 ICCPR it receives and examines reports from States parties on the measures they have adopted to give effect to the Covenant rights and, after a public dialog with the States involved, it publishes its concluding observation in response.[9] It also elaborates General Comments,

[5] On the Committee and the election of its members, see Arts. 28–39 ICCPR. In the literature, see the references at the end of this chapter, with specific regard to books and commentaries.

[6] This important human rights treaty was signed in New York on the 16th December 1966 and entered into force on the 23rd March 1976; currently there are 167 States parties.

[7] Rule 102 HRC Rules of Procedure (last version: 11th January 2012, available at: www.ohchr.org).

[8] The Covenant has also a Second Protocol on the abolition of the death penalty, signed in New York on the 15th December 1989. Currently there are 78 States parties.

[9] See Ando (2009), pp. 6ff. With regard to LGBT, recently the Committee invited, for instance, Japan to amend its legislation to include sexual orientation among the prohibited grounds of discrimination (HRC Annual Report A/64/40 (Vol. I), from 94th to 96th sessions, p. 34) and Jamaica to decriminalize sexual relations between consenting same-sex adults (HRC Annual Report A/67/40 (Vol. I), 103rd and 104th sessions, p. 23.

i.e. general statements of law interpreting articles or general issues of the Covenant.[10] Under Art. 41 ICCPR the Committee has jurisdiction on inter-State complaints on the alleged infringement of the Covenant,[11] while the Protocol confers on it the competence to receive and consider complaints lodged by individuals on the violation of their ICCPR rights and freedoms.

23.2.1 Focus on the Competence to Examine Individual Communications

The HRC competence to examine individual communications regards the States parties to the Protocol, thus only individuals subject to their jurisdiction can address a complaint to the Committee. At the end of 2012 there were 114 States parties to the Protocol (*versus* 167 ICCPR States parties), and this remarkable number is likely to increase in light of the growing attention for the respect of human rights at the international level.

23.2.1.1 Sending and Registration of Individual Communications

Individuals can send their communications to the HRC in Geneva, substantiating the violation of their ICCPR rights and including, in case of fear of irreparable damage or prejudice, a reasoned request for *interim* measures. The procedure before the Committee is informal and free and does not require legal representation. Anyway, the assistance of a lawyer could be useful, for instance in light of the several admissibility criteria provided for in the Protocol or considering that the procedure is entirely written.[12] Communications have to be registered prior to being brought before the HRC; communications that fail to be sufficiently substantiated cannot be registered, and in this case the UN offices open a provisional file and contact the complainant in order to obtain additional details and information.

[10] To date, the HRC has adopted 35 General Comments; the first one, on the reporting obligation under Art. 40 ICCPR, was adopted on the 27th July 1981, the last one, on Art. 9 ICCPR (Liberty and security of person) during the 107th session. General Comments can be found at: www.ohchr.org.

[11] To date this function has not been exercised.

[12] Potential complainants have to consider that there is no possibility to orally express their arguments during hearings. Guidance for potential complainants and their legal counsel can be found in the handbook by Joseph et al. (2006), also available on line, at http://www.omct.org/files/2006/11/3979/handbook4_full_eng.pdf.

Not always does a provisional file turn into a registered case. Pursuant to the principle of *audiatur et altera pars*, registered complaints are communicated to the State party concerned in order to obtain its comments.

23.2.1.2 The Admissibility Criteria Under the Protocol

The Protocol imposes several requirements in order to consider individual communications admissible. The practice shows that a considerable number of complaints are declared inadmissible and not brought to the attention of the HRC,[13] thus it is advisable to pay particular attention to the relevant criteria.

The Criteria Under Arts. 1, 2 and 3 of the Protocol

Arts. 1 and 2 provide that communications have to be submitted by individuals, who are allegedly victims of a violation of ICCPR rights, as a consequence of the conduct by a State party to the Covenant and the Protocol having jurisdiction on complainants.[14] The violation must have occurred after the entry into force of the Protocol for the State concerned. Before submitting a communication, all available judicial domestic remedies have to be exhausted by the victim.[15] Under Art. 3, communications which are anonymous, which consist in an abuse of the right of submission or which are incompatible with the ICCPR[16] are inadmissible.

Those criteria have been interpreted in the HRC case-law.[17] For instance, the Committee has clarified that only individuals (and not legal persons) can submit a communication and that an unexplained delay in submitting a complaint amounts to an abuse of right.[18] The Committee has also considered communications when domestic remedies had not been exhausted, if the application resulted unreasonably prolonged. Certainly those clarifications provide valuable guidance for future complainants.

[13] Forty-three percent, according to Hennebel (2007), p. 346.

[14] Being a resident is not a precondition for being under the jurisdiction of a State party, as the "passport cases" demonstrate (view in no. 57/1979 *S. Vidal v. Uruguay* 23rd March 1982 and view in no. 125/1982 *M.M.Q. v. Uruguay* 6th April 1984).

[15] Normally, it is not necessary to have exhausted also extraordinary remedies, e.g. administrative procedures or recourse to the Ombudsman (Hanski and Scheinin 2003, pp. 20–21).

[16] For instance, with regard to Art. 25 ICCPR and the non-elective nature of the Spanish monarchy, see view in no. 1745/2007 *Costa v. Spain* 1st April 2008.

[17] For an accurate analysis of the admissibility criteria under the Protocol, with references to the HRC case-law, see, *ex multis*, Bair (2005) and Möller and De Zayas (2009).

[18] For instance, see the view in no. 1591/2007 *Brown v. Namibia* 23rd July 2008.

The Coordination Clause Under Art. 5, Para. 2, of the Protocol

The admissibility of a communication also depends on compliance with the coordination clause *ex* Art. 5, para. 2: the HRC cannot examine communications if the same matter[19] is being handled via another procedure of international investigation or settlement.

The clause is aimed to avoid the simultaneous pendency of the same matter before the Committee and another *forum* for the protection of human rights, for instance another quasi-jurisdictional body or a regional court on human rights.[20] By staying the proceeding, Art. 5, para. 2 does not exclude that the HRC can examine the same matter after the other *forum* has decided the case, and this can happen when the latter decision is not favourable to the applicant.[21] *De facto*, the temporary suspension effect produced by Art. 5, para. 2 provides individuals with a further level of protection in case of unsuccessful complaint before a regional body.[22] Although this chain of complaints can give rise to conflicting decisions and enforcement problems, it should be also pointed out that the possibility to seek subsequent protection from different bodies also increases the chances to obtain justice, i.e. an outcome never to be taken for granted in judicial or quasi-judicial proceedings.

Declarations and Reservations on Art. 5, Para. 2

Individual communication regarding violations of ICCPR rights by some European Countries,[23] by El Salvador, by Sri Lanka and by Uganda cannot be considered by the Committee if another procedure of international investigation or settlement has already examined the same case, because those States entered a declaration of interpretation or a reservation on Art. 5, para. 2.[24] Also Austria made a reservation,

[19] More precisely, ". . . the concept of "the same matter" within the meaning of Art. 5 (2) (a) of the Optional Protocol had to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body" (view in no. 75/1980 *Fanali v. Italy* 31st March 1983).

[20] Möller and De Zayas (2009).

[21] Which happened, for instance, with regard to previous ECHR bodies decision in the view in no. 201/1985 *Hendriks v. The Netherlands* 27th July 1988 and in the view in no. 1463/2006 *Gratzinger v. The Czech Republic* 25th October 2007. In the former case after the declaration of inadmissibility *ratione personae* adopted by the European Commission of Human Rights. In the latter one, a similar claim has been submitted to the European Court of Human Rights, which declared it inadmissible *ratione materiae*.

[22] Hennebel (2007), p. 390.

[23] Croatia, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Malta, Norway, Poland, Moldova, Romania, Slovenia, Spain, Sweden, Turkey.

[24] The Russian Federation also made a declaration, reproducing the wording of Art. 5, para. 2, and thus leaving untouched the HRC competence on cases already decided by other international

but with regard to the competence of the Committee on cases already examined by the European Commission (now Court) of Human Rights.[25]

As to the European States, the spirit of declarations and reservations consists in the intention to avoid conflicts of decisions between the Strasbourg Court and the HRC, and can be traced back to the indication, adopted in 1970 by the ECHR Committee of Ministers, to normally utilize the ECHR procedures when both the Convention and the Covenant protect the invoked right.[26] Today, in light of the developments in the European Union and the entry into force of the Lisbon Treaty and of the Charter of Fundamental Rights, those declarations and reservations should produce their effects also with regard to the judgments by the EU Court of Justice, except for Austria. The same spirit underlies the reservations made by El Salvador with regard to the Inter-American Court of Human Rights and by Uganda in respect of the (newly operational) African Court on Human and Peoples' Rights.

The patchy picture emerging from the States parties' approach to the Protocol allows allocating the individuals under their jurisdictions to two separate groups: those who can benefit from an additional chance of obtaining justice, and those who have to decide in advance which *forum* to seize. For the latter the ultimate effect is a "forum closing" one along with the reduced chance to obtain justice following a violation of their ICCPR protected rights.

23.2.1.3 Pronunciation of Views and the Follow-Up Procedure

Normally the HRC decides on admissibility and on the merit in the same sitting, adopting a decision of inadmissibility or pronouncing a view. In case of violation of the Covenant, the view indicates which remedy or remedies the violator State has to implement in order to give satisfaction to the victim—for instance, a change of legislation, payment of compensation or the *restitutio in integrum*.

Since 1990 compliance of the States parties with the Committee's view has been monitored through the follow-up procedure.[27] A Special Rapporteur, appointed among the HRC members, keeps contacts with violator States in order to gather information on the enforcement of the measures taken to give effect to the views. Not always do States reply to the Rapporteur's requests. The procedure makes the level of compliance with the views visible and, since one of the Rapporteur's duties is to cooperate in preparing the Annual Report addressed to the UN General Assembly, it allows publicising all the cases of non-compliance. This "naming

settings bodies (accordingly, see view in no. 712/1996 *Smirnova v. Russian Federation* 5th July 2004, para. 9.2).

[25] For example, see the view in no. 998/2001 *Althammer v. Austria* 8th August 2003, para. 8.3.

[26] Some other ECHR parties (for instance, the UK) have not ratified the Protocol, removing *ex ante* the risk of conflict of decisions, but the majority of the ECHR States parties have not embraced that invitation and ratified the Protocol without reservations, in order to preserve the integrity of the universal system of human rights protection.

[27] On the follow-up of views procedure, see Ando (2002).

and shaming" policy should stimulate reluctant States parties to accomplish the Committee's decisions. The practice shows an encouraging level of compliance with views[28] and the progressive decrease of non-replying States parties.

Since *Kone v. Senegal* of 1994[29] the Committee has started coupling the indication of remedies with a formula aimed to underline the legal nature of obligations deriving from the Covenant and the Protocol—that is, in substance, the duty to comply with its views.[30]

23.2.1.4 Nature and Authoritativeness of the HRC and Its Views

The HRC is not a judicial institution and its members are not judges, and this is an unquestionable point, not only in the literature.[31] It is normally considered as a quasi-jurisdictional body, but this qualification is disputable as well since the Committee itself affirmed to be neither a court nor a body with a quasi-judicial mandate.[32] Certainly its views have no binding force in law and there is no enforcement mechanism aimed to guarantee compliance with them.

Nevertheless, it is fairly common to consider that the HRC behaves like a judicial body. In that regard, some indications come from the procedure on individual communications, which follows a judicial *iter*. For instance, communications have to respect precise admissibility requirements; the Committee acts as an arbitrator in an adversary proceeding; it decides on admissibility first and on the merits only afterwards for admitted cases; its views have a court-like design[33] and consist in conclusions of law; and finally, HRC members can submit individual opinions. Furthermore, the HRC function to elaborate interpretative General Comments on the ICCPR substantially mirrors the competence that some supra/international courts have to interpret authoritatively the relevant treaties—as it happens, for instance, with the Strasbourg Court in respect of the ECHR.

Certainly the strength of the HRC lies in its authoritativeness,[34] which results in turn from many factors such as its composition of independent experts, the judicial

[28] De Zayas (2009), p. 37.

[29] View in no. 386/1989 *Kone v. Senegal* 21st October 1994.

[30] The formula reads: "Bearing in mind that, by becoming a 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 Art. 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party".

[31] Case C-249/96 *Grant v South-West Trains Ltd.* [1998] ECR I-621, para. 46.

[32] Selected decisions of the HRC under the Optional Protocol, Vol. 3, 2002, para. 7.

[33] Nowak (2005), p. 892.

[34] Office of the United Nations High Commissioner for Human Rights 2005, p. 14.

spirit of its procedures, and the importance of its views[35] along with the independence and seriousness of its case-law.[36]

23.3 The HRC Case-Law on LGBT Rights

The case-law on LGBT rights does not directly regard same-sex couples issues, but a mention of the relevant views is due, in light of the delicate issues examined, i.e. the criminalization of homosexuality and freedom of expression.

In *Toonen v. Australia*,[37] "the first juridical recognition of gay rights on a universal level",[38] the Committee found that the provisions of the Tasmanian Criminal Code criminalizing homosexual intercourses were in contrast with Art. 17, which protects privacy and family, in connection with Art. 2, para. 1, ICCPR for the interferences they produced in the complainant's private life.[39] Australia's justifications on the need to maintain the contested provisions for moral reasons and to limit the spread of HIV/AIDS did not convince the Committee, since they did not appear reasonable in the circumstances of the case. In particular, the contested provisions had not been enforced for years, thus they were not so fundamental in protecting moral,[40] and there was no direct link with the effective control of HIV/AIDS spread. The Committee did not consider it necessary to verify the violation of the invoked Art. 26 ICCPR, disappointing those who expected an in-depth analysis of the discriminatory aspect of the contested provisions, e.g. the lack of prohibition of sexual intercourses between women.[41] It is worth underlining that here (and only in two more cases) the HRC found a violation of the prohibition of discrimination under Art. 2, para. 1, ICCPR, which affirms the general obligation of States parties to ensure the rights recognized in the Covenant, while normally those violations have been ascertained under Art. 26.[42]

[35] Tyagi (2011), p. 778, compares views to the teachings of the most highly qualified publicists of the various nations under Art. 38 of the International Court of Justice Statute.

[36] Independence has to be seen as lack of influence from other bodies' case-law (Conte and Burchill 2009, p. 16). Conversely, the HRC case-law has been applied and used in other contexts, both judicial—national and international—and not (Tyagi 2011, pp. 787ff).

[37] View in no. 488/1992 *Toonen v. Australia* 31st March 1994.

[38] Joseph (1994), p. 410. The case is important also for the notion of "victim" under Art. 1 of the Protocol, since the complainant had never been arrested or prosecuted because of his sexual orientation and the contested legislation had not been enforced for years. Nevertheless, the HRC found that future enforcement of the contested legislation could not be excluded and accepted the complainant's position on its impact on his and many people's life (paras 2.7 and 5.1), *de facto* extending the notion of victim to that of "potential victim".

[39] There are no details on the violation of Art. 2 ICCPR, but clearly the point is that all States parties have to guarantee the right recognized by the Covenant without discriminations.

[40] Thus public morality is a relative value, as Joseph et al. (2005), Art. 17, wittily observe.

[41] See individual opinion of HRC member Wennergren and, in the literature, *inter alia*, Joseph (1994).

[42] Nowak (2005), p. 47.

In two more cases that were decided with a 30-year interval between them, the Committee took into consideration the freedom of expression *ex* Art. 19 ICCPR with regard to sexual orientation, changing its position on public moral as a valid ground for the limitation of human rights.

Initially, in *Hertzberg v. Finland* of 1982[43] the HRC did not find a violation of Art. 19 in a case concerning both some decisions adopted by the Finnish Television to censure radio and TV programmes dealing with homosexuality and the criminal charges brought against the editor of a radio programme about job discrimination on the ground of sexual orientation. The Committee accepted the State's justification that freedom of expression could be limited for moral reasons, in particular the dis-encouragement of indecent behaviour between persons of the same sex (at that time punished by the Finnish Penal Code) and specifically minors. The HRC recognized a certain "margin of discretion" to States in protecting public moral, because it differs widely in ICCPR States parties and there is no universally applicable common standard.[44]

In *Fedotova v. Russian Federation* of 2012[45] the Committee reached opposite conclusions and established the violation of Art. 19 read in conjunction with Art. 26 ICCPR. The case regarded an openly lesbian woman activist in the field of LGBT rights, who was ordered to pay a heavy fine because in 2009 she had held a picket to promote tolerance towards gays and lesbians near a secondary school building in violation of a domestic provision. The State party argued that the picket constituted a public action aimed at involving minors in sexual activities or at encouraging any particular sexual orientation, i.e. substantially the same arguments adduced by the State party in *Hertzberg v. Finland*. The HRC did not share those arguments, observing that

> (w)hile noting that the State party invokes the aim to protect the morals, health, rights and legitimate interests of minors, the Committee considers that the State party has not shown that a restriction on the right to freedom of expression in relation to "propaganda of homosexuality" – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria. Moreover, no evidence which would point to the existence of factors justifying such a distinction has been advanced[46]

and, with specific regard to the freedom of expression, it affirmed that

> by displaying posters that declared "Homosexuality is normal" and "I am proud of my homosexuality" near a secondary school building, the author has not made any public actions aimed at involving minors in any particular sexual activity or at advocating any particular sexual orientation. Instead, she was giving expression to her sexual identity and seeking understanding for it.[47]

[43] View in no. 61/1979 *Hertzberg v. Finland* 2nd April 1982.

[44] This the only case in which the Committee adopted that "margin approach". As noted, *inter alia*, by Joseph et al. 2005, the recognized margin seems to mirror the ECHR margin of appreciation.

[45] View in no. 1932/2010 *Fedotova v. Russian Federation* 31st October 2012.

[46] *Ibidem*, para. 10.6.

[47] *Ibidem*, para. 10.7.

This is an important case for two reasons. It is the first one ascertaining infringement of a ban on discrimination on grounds of sexual orientation with regard to LGBT individual rights also under Art. 26 ICCPR,[48] thus it represents a milestone for activists, advocates and commentators. Secondly, it testifies to the decreasing importance of public moral in limiting human rights: while in *Hertzberg v. Finland* moral reasons represented a valid justification in limiting the freedom of expression, in *Fedotova v. Russian Federation* the Committee, along the trail of the General Comments 22 and 34[49] (and perhaps *Toonen v. Australia*),[50] stated that

> "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.[51]

23.4 The HRC Case-Law on Same-Sex Couples Issues

Coming to same-sex couples issues, the relevant HRC case-law is confined to one case on same-sex marriages and two cases on the right to the deceased partner's pension. Even if reduced in number, those three views are interesting because of the conclusions reached by the HRC on the right to marry under Art. 23 and on the prohibition to discriminate under Art. 26 ICCPR.

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[48] In the past, the Committee could not consider the merits of some cases brought to its attention but declared inadmissible (views in no. 480/1991 *Fuenzalida v. Ecuador* 12nd July 1996 and no. 1512/2006 *Dean v. New Zealand* 17th March 2009).

[49] See General Comment 22 on Art. 18 ICCPR (para. 8) and General Comment 34 on Art. 19 ICCPR (para. 32).

[50] *Supra*, note 37, para. 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".

[51] *Supra*, note 45, para. 10.5. *Ante litteram*, Mr. Opsahl, Mr. Lallah and Mr. Tarnopolsky observed in their individual opinion in *Hertzberg v. Finland*: "... 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'".

23.4.1 The Right to Marry

Joslin v. New Zealand of 2002[52] regarded two lesbian couples living in *de facto* relationships involving a sentimental link, sexual intercourse and shared responsibilities for their children out of previous marriages, finances and common home. Both couples applied for a marriage license, rejected under the New Zealand Marriage Act 1955 because it confines marriage to the union between a man and a woman. The internal courts, seized by the complainants, confirmed such an interpretation of the domestic law.[53]

The complainants alleged the violation of several provisions of the Covenant, i.e. Art. 16 on the right to be recognized as persons before the law, Art. 17 on the right to privacy and family life and Art. 26 ICCPR on equality before the law and prohibition of discrimination. Moreover, Arts. 17 and 23, paras 1 and 2, on the right to found a family and to marry, were invoked in conjunction with Art. 2, para. 1, ICCPR. Considering that their relationships exhibited all the criteria of a heterosexual family, the same-sex couples affirmed that since the New Zealand Marriage Act denied same-sex marriages, they suffered several harmful effects deriving from discrimination, impossibility to exercise civil rights, social exclusion, impossibility to assert their dignity, interference in private life and in having access to some important parental and material consequences, such as adoption, succession, matrimonial property, family protection.

The State party opposed to those arguments, *inter alia*, that the recognition of same-sex marriage does not meet the ordinary meaning of Art. 23, para. 2, ICCPR, which clearly refers to marriage between man and woman, and for this reason marriage as a legal institution cannot regard same-sex partners. Moreover, New Zealand argued that its law and policy protected and recognized gay couples in various ways, and that the Marriage Act did not interfere with the complainants' privacy or family life, as their personal relationships demonstrated.

The Committee adopted its view considering that the core of the communication was the denial of the right to marry under Art. 23, para. 2, ICCPR from which, like a cascade, the infringement of the other invoked provisions derived, and thus it decided the case focusing on the specific provision on marriage. Since the wording of Art. 23, para. 2, ICCPR, which protects the right of men and women of marriageable age to marry and to found a family, is specific—and not generic, like in other ICCPR provisions that refer to "every human being", "everyone" and "all persons"—the Committee concluded that the legal duty imposed on States

[52] View in no. 902/1999 *Joslin v. New Zealand* 17th July 2002.

[53] Complainants did not exhaust all available domestic remedies because they considered them futile, but New Zealand declined to draw a conclusion as to the admissibility of the communication on this or any other grounds, underlining, at the same time, that the Privy Council (unapplied to) could interpret the Marriage Act differently (*ibidem*, para. 4.1).

parties is to recognize as marriage only that between a man and a woman wishing to marry each other.[54] Consequently, the denial of same-sex marriages did not give rise to a violation of Art. 23, paras 1 and 2, and 16, 17 and 26 of the Covenant.

The decision in *Joslin v. New Zealand* is a matter of interpretation of the Covenant, and clearly the hermeneutic approach adopted by the Committee is textual, focused on the ordinary meaning of the wording of Art. 23 ICCPR in the context of the treaty as a reflection of what the parties intended[55]—i.e., it relies on the first (and prior) among the methods indicated in Art. 31, para. 1, of the Vienna Convention of the Law of Treaties (VCLT). The adoption of such a method is not surprising, firstly because the ICCPR is an international treaty and secondly because ever since *J.B. et al. v. Canada* of 1982 the Committee stated it would apply Art. 31 and, if necessary, 32 VCLT in interpreting the Covenant.[56] Thus, it can be said that there is a certain emphasis on its literal interpretation.[57] In that regard, it is interesting to quote what the International Court of Justice affirmed in 1950, i.e. that

> (...) the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.[58]

because it seems to mirror the brief reasoning of the Committee in *Joslin v. New Zealand*. In other words, Art. 23 ICCPR does not allow same-sex marriages because at the time of drafting the Covenant the States parties intended the marriage as an heterosexual institution—which is surely true, since the first ICCPR State party who legalized same-sex marriages was The Netherlands in 2000, and in 2002 the latter still was the only country in the world giving this right to same-sex partners.

One of the effects of the textual approach is to crystallize the meaning of the interpreted provisions and this could also have happened with Art. 23 ICCPR, but this does not mean that the Covenant is not a living instrument. On the contrary, the HRC stated that

> (w)hile recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights - the right to life - and in particular if there have been notable factual and legal developments and changes

[54] The General Comment 19 on Art. 23 ICCPR, adopted by the HRC in 1990, did not provide any further interpretative elements to the complainants; in fact, it strengthened the State party's position on the possibility to accord different levels of protection to different kinds of families (*ibidem*, para. 4.8).

[55] Aust (2007), p. 235.

[56] See view in no. 118/1982 *J.B. et al. v. Canada* 18th July 1986, para. 6.3.

[57] Conte and Burchill (2009), pp. 14–15.

[58] ICJ, Advisory opinion on the competence of the General Assembly for the admission of a State to the United Nations, 3rd March 1950, p. 8.

> in international opinion in respect of the issue raised. . . . The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions[59]

and its jurisprudence confirms such a teleological approach, as some cases regarding death penalty demonstrate:

> (t)he provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (article 31 of the Vienna Convention on the Law of Treaties). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.[60]

This points to a variable interpretative method of the Committee in respect of the ICCPR,[61] unlike some regional human rights courts whose interpretative approach is, instead, mainly person-oriented. The effect of that variability is that the interpretation of the same legal instrument follows alternatively the textual and the teleological approach, and the choice probably depends on the kind and the importance of the issue at stake.[62]

Another effect produced by the textual approach is the de-contextualization of the Covenant from other human rights treaties of the UN system, to which it belongs.[63] The specific wording of Art. 23 allowed the Committee to deny the right to marry for same-sex couples, but the same outcome could not derive in cases similar to *Joslin v. New Zealand* brought before other treaty-based committees. For instance, the right to marry under Art. 5 of the Convention on the Elimination of All Forms of Racial Discrimination of 1965 or under Art. 16 of the Convention on the Elimination of Discrimination against Women of 1979 could not be denied when interpreting those provisions literally, since the former refers to the right of "everyone" to marry and the latter refers to the States Parties' duty to take all appropriate measures to eliminate discrimination against women in all matters related to marriage and family relations, the right to enter into marriage included.[64] In other words, the committees monitoring the respect of those treaties should adopt a more

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[59] View in no. 829/1998 *Judge v. Canada* 5th August 2003, para. 10.3.

[60] View in no. 588/1994 *Johnson v. Jamaica* 22nd March 1996, para. 8.2, mirrored in no. 554/1993 *LaVende v. Trinidad and Tobago* 29th October 1997, para. 5.3, and no. 555/1993 *Bickaroo v. Trinidad and Tobago* 29th October 1997, para. 5.3.

[61] See Joseph et al. (2005), para. 1.62, and Conte and Burchill (2009), p. 16.

[62] Conte and Burchill (2009), p. 237, had the impression that in *Joslin v. New Zealand* the Committee considered the marriage only an inconsequential status, which clashes with the importance that the marriage received in other circumstances in the HRC jurisprudence.

[63] See the interesting considerations by Sudre (2011), pp. 46–47 and pp. 131–133, on the universality of human rights, their collectivization as an international phenomenon and the UN system for the protection of human rights, i.e. the UN Charter, the Universal Declaration of Human Rights of 1948, the Covenants of 1966 and, finally, the sectorial treaties.

[64] Moreover, also Art. 23 of Convention on the Rights of Persons with Disabilities of 2006 does not include specific wording, and the same is true with Art. 9 of the EU Charter of Fundamental Rights, solemnly proclaimed in 2000 and confirmed in 2007 as having the same legal value as the EU treaties (see Art. 6 TEU).

teleological approach in interpreting the said provisions, because the denial of marriage for same-sex partners could not be founded on the specific wording of the treaty provisions.

Concluding, reference should be made to the individual opinion of the HRC members Lallah and Scheinin in *Joslin v. New Zealand*, because they gave some important indications on prohibition of discrimination under Art. 26 ICCPR and differential treatment between married couples and same-sex couples. The Committee members recalled that, according to the previous case-law, reasonable and objective criteria can justify difference in the treatment under Art. 26, and this also regarded married couples and unmarried heterosexual couples, because heterosexual couples enjoy the right to marry and their living *more uxorio* amounts to a personal choice.[65] But the same is not true with same-sex couples:

> (n)o 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" (para. 3.1), an issue decided by the Committee under article 23, or remained unsubstantiated as to if and how the authors were so personally affected (para. 3.5). Taking into account the assertion by the State party that it does recognize the authors, with and without their children, as families (para. 4.8), we are confident in joining the Committee's consensus that there was no violation of article 26.[66]

It seems that the complainants applied to the HRC in order to affirm a principle, to "fight a battle" relying on the international duties of New Zealand under the ICCPR, i.e. the right to marry like heterosexuals. Indeed, their failure to refer to the right to be legally recognized as a couple before the law independently of marriage, which was not available at the time, seems to confirm it.[67]

That being said, the individual opinion of Mr. Lallah and Mr. Scheinin highlights the possibility to invoke Art. 26 ICCPR in cases of discrimination between same-sex couples and married couples in relation to certain rights, and this is what happened with the cases brought before the Committee with regard to a material consequence deriving from living in a same-sex couple.

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[65] *Infra*, note 79.

[66] Individual opinion of Committee members Mr. Lallah and Mr. Scheinin (concurring), 3rd and 4th paras.

[67] New Zealand adopted the Civil Union Act in 2005, i.e. 3 years after *Joslin v. New Zealand*, affording same-sex and heterosexual couples the right to have a civil union. See the chapter by Rundle in this volume.

23.4.2 The Right to Benefit from the Deceased Partner's Pension

The HRC jurisprudence on material consequences consists in two cases on the same matter, i.e. the pension in favour of the same-sex survived partner, but nonetheless the adopted views are important because of the conclusions reached by the Committee with regard to the discriminations ascertained between same-sex couples and heterosexual couples.

Both cases are focused on Art. 26 ICCPR, which affirms equality before the law and the right of non-discrimination on any ground.[68] That provision enumerates some grounds of prohibited discrimination—e.g., race, colour, sex, language, religion, *et cetera*—but the list is merely indicative. Moreover, as the Committee affirmed in *Toonen v. Australia*,[69] the reference to "sex" includes the prohibition of discrimination on ground of sexual orientation. Prohibited forms of discrimination have to be intended as

> any distinction, exclusion, restriction or preference which is based on any ground . . ., and which has the purpose *or effect* (*italic* added) of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms[70]

thus also indirect ("or effect", in *italic*) discriminations are prohibited under Art. 26.[71]

Differently from Arts. 2 and 3 ICCPR, which also regard the prohibition to discriminate, Art. 26 stands as an autonomous right.[72] While the former provisions have an accessory character and can be invoked in connection with a substantial right protected by the Covenant,[73] Art. 26 can be invoked autonomously and its field of application is not confined to discrimination in the matters covered by the Covenant, as it covers national legislations adopted in any field of law. In fact, as the Committee affirmed in the so-called Dutch Social Security cases:

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[68] Hanski and Scheinin (2003), p. 329 define equality and non-discrimination as a "cross-cutting theme" in the Covenant, involving also Arts. 4 (derogation clause) 14, para. 1 (general clause of fair trial) and 20, para. 2 (advocacy of national, racial or religious), 23, para. 4 (equality of rights and responsibilities of spouses as to marriage), 24, para. 1 (discrimination of children on different grounds) and 25 (participation in public affairs) ICCPR.

[69] *Supra*, note 37, para. 8.7. This interpretation has been criticized in the literature as well as by some HRC members (Separate dissenting opinion by Mr. Amor and Mr. Khalil in the case *X v. Colombia*, examined at Sect. 23.4.2.2). Those criticisms have not prevented, for instance, the EU Advocate General Ruiz-Jarabo Colomer from taking up that approach as a point of reference in his opinion of 6th September 2007 on the Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, para. 86.

[70] General Comment 18 on non-discrimination, para. 7, and, as to the HRC jurisprudence, view in no. 976/2001 *Derksen v. The Netherlands* 1st April 2004, para 9.3.

[71] For instance, see view in no. 516/1992 *Simunek v. The Czech Republic* 19th July 1995, para. 11.7.

[72] See Sect. 23.4.2.4.

[73] *Ex multis*, Nowak (2005), pp. 34 and 78.

> ... article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof. Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.[74]

In accordance with the HRC jurisprudence, the prohibition of discrimination is not absolute, since reasonable and objective criteria can justify differences in treatment.[75]

23.4.2.1 The Case of *Young v. Australia*

In *Young v. Australia* of 2003[76] a man who was in a long same-sex relationship with a war veteran was denied the pension after the death of his partner by the Repatriation Commission, because under the Veteran's Entitlement Act, which considers "couples" to be only married couples and *more uxorio* couples, he could not be considered as a member of a couple, thus a veteran dependant entitled to benefit from the bereavement payment. The internal authorities asked to review the Repatriation Commission's decision confirmed that interpretation, but Mr. Young did not exhaust all the available domestic remedies, because in his opinion a further appeal would have had no real prospect of success.

In his communication, Mr. Young argued the violation of his right to equal treatment before the law as an effect of the discrimination determined by VEA in relation with his sexual orientation; while widows and unmarried heterosexual survived partners could benefit from the pension, same-sex survived partners could not. In his opinion, that violation amounted to an infringement of Art. 26 ICCPR, because even if that provision does not oblige States parties to enact any particular legislation, social security included, according to the HRC jurisprudence on the invoked provision, when a legislation has been adopted, it has to comply with that provision. The State party, *inter alia*, opposed the lack of any form of discrimination: the former veteran did not meet the primary requirement under the VEA, in particular the serious disability or death caused as a result of war service, thus no survived partner, whether homosexual or heterosexual, would have been entitled to the pension under VEA.

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[74] View in no. 182/1984 *Zwaan-de Vries v. The Netherlands* 9th April 1987, paras 12.3–12.4. Specularly, see views in no. 172/1984 *Broeks v. the Netherlands* 9th April 1987 and no. 180/1984 *Danning v. the Netherlands* 9th April 1987, same paras.

[75] *Infra*, note 79.

[76] View in no. 941/2000 *Young v. Australia* 6th August 2003.

The HRC considered the communication admissible[77] and ascertained that Australia, by denying Mr. Young a pension on the basis of his sex or sexual orientation, violated Art. 26 of the Covenant. It did not examine the State party's argument on the impossibility of Mr. Young's being entitled to the pension independently of his sexual orientation, as it was not in his competence, and concentrated on the domestic provisions applied by the internal authorities to deny the pension to the applicant, i.e. on the circumstance of being of the same sex as the deceased partner. The Committee considered that, independently of the other criteria provided for in the VEA, the applicant would never have been entitled to a pension because he was the same-sex survived partner of a former soldier, and added substantially the same considerations made by Mr. Lallah and Mr. Scheinin in their individual opinion in *Joslin v. New Zealand*, i.e. 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. 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.[78]

Certainly, distinctions can be admitted under Art. 26 if based on reasonable and objective criteria, for instance as in *Danning v. The Netherlands* with regard to differences in the insurance benefits for married beneficiaries and *more uxorio* beneficiaries:

> In the light of the explanations given by the State party with respect to the differences made by Netherlands legislation between married and unmarried couples (. . .), the Committee is persuaded that the differentiation complained of by Mr. Danning is based on objective and reasonable criteria. The Committee observes, in this connection, that the decision to enter into a legal status by marriage, which provides, in Netherlands law, both for certain benefits and for certain duties and responsibilities, lies entirely with the cohabiting persons. By choosing not to enter into marriage, Mr. Danning and his cohabitant have not, in law, assumed the full extent of the duties and responsibilities incumbent on married couples. Consequently, Mr. Danning does not receive the full benefits provided for in Netherlands law for married couples. The Committee concludes that the differentiation complained of by Mr. Danning does not constitute discrimination, in the sense of article 26 of the Covenant.[79]

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[77] With regard to the exhaustion of internal remedies, the HRC observed that "domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result. Taking into account the clear wording of the sections of the VEA in question, and noting that the State party itself admits that an appeal to the AAT would not have been successful, the Committee concludes that there were no effective remedies that the author might have pursued" (para. 9.4). On this point, see also the individual opinion of the Committee members Mrs. Wedgwood and Mr. De Pasquale.

[78] *Supra*, note 76, para. 10.4.

[79] *Supra*, note 74, para. 14.

But in *Young v. Australia* the same arguments cannot be relied upon, because same-sex couples cannot decide whether to enter into marriage or live in a *more uxorio* cohabitation. Moreover, Australia did not provide any arguments on reasonableness and objectiveness of the difference in treatment between same-sex partners and unmarried heterosexual partners under the VEA, like for any other justification, thus the Committee concluded that denial of the pension for Mr. Young was discriminative and in contrast with Art. 26 ICCPR.

Having ascertained a violation of the Covenant, the Committee indicated a remedy to give satisfaction to Mr. Young, i.e. the reconsideration of his pension application without discrimination based on sex or sexual orientation, if necessary through an amendment of the law, and invited Australia to ensure that similar violations of the Covenant would not occur in future.

23.4.2.2 The Case of *X v. Colombia*

Similarly, in *X v. Colombia*[80] (later, *Casadiego v. Colombia*)[81] the Committee examined the communication submitted by a Colombian citizen who was the survived partner of a same-sex couple and asked, in light of the neutral wording of the internal law, to benefit from the pension transfer after the death of his partner, who was dependant. The Social Welfare Fund of the Colombian Congress denied the benefit arguing that the law did not permit the transfer of a pension to a person of the same sex. The same interpretation had been confirmed in subsequent (and several) actions brought by the complainant in order to obtain the review the Fund's decision.[82]

In his communication, Mr. Casadiego recalled both the neutral wording of the internal regulation on pensions, which does not specify the sex of the partners, and that legislation had been amended in order to remove any form of discrimination between married couples and *more uxorio* couples with regard to the pension transfer benefit. The denial of the pension transfer in case of same-sex couples made him into a victim of the infringement of several ICCPR provisions, in particular: discrimination on the ground of sex and sexual orientation under Art. 2, paras 1, 3 and 26: failure to respect the principles of equality and non-discrimination under Art. 5,

[80] View in no. 1361/2005 *X v. Colombia* 30th March 2007.

[81] Initially, the complainant asked for his personal data and those of his partner to be kept confidential, but in the latest HRC Reports—follow-up section, the communication 1361/2005 regarding Colombia is quoted as *Casadiego v. Colombia*.

[82] It is worth mentioning that, in the appeal before the Bogotá Circuit Criminal Court No. 50, judges "ordered the modification of the earlier ruling [which did not specify that the two partners must be of different sexes] and called on the Procurator-General to conduct an investigation into errors committed by staff of the Fund" (para. 2.4).

paras 1 and 2[83]; failure to respect equality before the courts under Art. 14, para. 1; negative interference in his private life under Art. 17 of the Covenant. In its counterclaim, Colombia, *inter alia*, considered some of the invoked provisions irrelevant (e.g., Art. 3, on gender discrimination) and insufficiently substantiated (e.g., Arts. 5 and 17), thus it requested the communication to be declared inadmissible under Art. 2 of the Protocol.

In the wake of *Young v. Australia*, considering that Colombian same-sex partners are not allowed to marry along with the lack of arguments or justifications in support of the reasonableness and objectiveness of the distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, the Committee declared that denying the complainant's right to his life partner's pension on the basis of his sexual orientation amounted to a violation of Art. 26 of the Covenant. The claims on Art. 2, paras 1, and 17 ICCPR were considered absorbed as it was not necessary to consider them, while the declaration of inadmissibility affected the other provisions invoked.

Just like in *Young v. Australia*, the Committee indicated, as a remedy for the victim, the reconsideration of his request for a pension without discrimination on grounds of sex or sexual orientation and the State party's obligation to take steps to prevent similar violations of the Covenant in future.

23.4.2.3 The Follow-Up of Cases on the Deceased Partner's Pension

In both cases the HCR ascertained a violation of Art. 26 ICCPR and indicated the reconsideration of the pension application as a remedy for the complainants, adding, as a further prescription, to avoid similar violations in future. The Committee also requested to be informed about the measures taken to comply with its view.

In 2008 Australia changed its legislation and from 1st July 2009 a same-sex partner can receive the war widower's pension,[84] thus it is likely that Mr. Young's pension application has been reconsidered without any discriminatory element. In 2010 the Colombian Constitutional Court stated that administrative, judicial and pension fund bodies could not deny the pension to same-sex partners opposing unjustified barriers and to this aim it adopted a group of orders with *intercomunis* effects, i.e. extended to all gay people.[85] Following this judgement, Mr. Casadiego

[83] According to the HRC jurisprudence, also Art. 5 has accessory character (see views in no. 1167/2003 *Rayos v. Philippines* 27th July 2004, para. 6.8, and in no. 1011/2001 *Madafferi and Madafferi v. Australia* 26th July 2004, para. 8.6).

[84] Information kindly provided by the Sexual Orientation, Sex and Gender Identity Team of the Australian Human Rights Commission, which the author thanks.

[85] Constitutional Court, T-051/10 of 2nd February 2010 (file No. T-2.292.035, T-2.299.859, T-2.386.935). On this judgement, see also the chapter by Cabrales Lucio in this volume.

received, from the Colombian Congress Pension Fund, some arrears and the monthly pension until he passed.[86]

Even if those States parties complied belatedly with the HRC view,[87] the outcome can be considered satisfying, since the discriminatory element in their legislations (or its effect) was removed as a consequence of its decisions. In fact, Australia changed its legislation after the Australia Human Right Commission's recommendation to the Australian Government to amend laws which discriminated against same-sex couples and their children also in light of the Committee's case-law.[88] Moreover, it is worth mentioning that in Australia a debate is in progress on the absence of a provision prohibiting discrimination on grounds of sexual orientation at the federal level.[89] As to Colombia, in its 2010 judgement the High Court affirmed that such judgment was also intended to implement the Human Rights Council's recommendations 112 and 113 on the protection and assertion of LGBT rights,[90] i.e. part of the outcome of the latest universal periodic review involving Colombia,[91] whose aim is to remind and to encourage States to respect their international human rights obligations, which include compliance with the treaty-based monitoring bodies decisions.

23.4.2.4 The Potential of Art. 26 ICCPR

The pension cases confirm the potential of Art. 26 as an autonomous right, which can be invoked independently of the other ICCPR provisions to sanction unreasonable, non-objective discrimination in the legislation adopted by States parties independently of the field of law.

It found expression initially in the aforementioned Dutch Social Security cases, originated from discrimination between heterosexual married and unmarried couples and decided by the HRC both by sanctioning unreasonable forms of discrimination and by admitting justified differences of treatment in the enjoyment of a

[86] Information kindly provided by the Colombian Fondo de Previsión Social del Congreso de la República, which the author thanks.

[87] *Young v. Australia* was decided in 2003, and *X v. Colombia* in 2007. Of note, the latest HRC Annual Report (A/67/40 (Vol. II), 103rd and 104th sessions) indicates that the follow-up dialogue on both cases is officially ongoing, but the situation may change on the basis of information received from one of the parties to the case (information kindly provided by the Petitions and Inquiries Section of the UN Office of the High Commissioner for Human Rights, which the author thanks).

[88] Final Report of 2007 "Same-Sex: Same Entitlements", available at http://www.humanrights.gov.au/human_rights/samesex/report/index.html.

[89] See the chapter by Rundle in this volume.

[90] *Supra*, note 85, para. 6.12.

[91] Human Rights Council Report on its 10th session, A/HRC/10/29, 9th November 2009, in particular decision n. 10/114 "Outcome of the universal periodic review: Colombia".

right not covered by the Covenant.[92] That jurisprudence played an important role in deciding the same-sex pension cases, which focused on the same field of law, i.e. social security legislation, and concerned allegedly differential treatment; in other words, it could be argued that the decisions in the Dutch Social Security cases solved the same-sex pension ones.

It is worth highlighting that the potential of Art. 26 ICCPR is the result of its liberal and forward-looking interpretation,[93] which is different from the method used in *Joslin v. New Zealand* regarding Art. 23 and which allowed the Committee to expand the field of application of the prohibition to discriminate to rights that are not directly protected by the Covenant. That progressive and expansive interpretation represents the core of the potential of Art. 26, which the Committee handled cautiously[94] and in order to bring the understanding of substantive equality to fruition into the field of social, economic and cultural rights.[95] Exactly this approach towards searching substantive equality in the enjoyment of rights could guarantee other rights in future to same-sex couples faced with national discriminatory legislation on other material consequences—such as tax issues, health insurance benefits or problems with tenancy in the deceased same-sex partner's name.

23.5 Final Remarks

The analysis of the relevant case-law has shown a patchy picture in the protections of same-sex couples issues. On the one hand, the literal interpretation of Art. 23 ICCPR in *Joslin v. New Zealand* did not support the right to marry; on the other hand, the forward-looking interpretation of Art. 26 in the pension cases sanctioned forms of discrimination against same-sex couples and could, in future, guarantee other material consequences. It seems that interpretation issues determine the extent of the protection of same-sex couples' rights under the Covenant, based on the problem at stake. That being said, some further (and concluding) considerations are due on two aspects.

[92] That potential is testified by some reservations on Art. 26, formulated after the "Dutch Social Security" cases by some States (for instance, Germany and Turkey) that had not yet become parties to the Covenant or the Protocol, in order to limit the competence of the HRC in applying Art. 26 over the Covenant, *de facto* denying its freestanding nature.

[93] *Ex multis*, Nowak (2005), p. 629 and Conte and Burchill (2009), pp. 14 and 17.

[94] Edelembos (2009), p. 79.

[95] Nowak (2005), p. 629.

23.5.1 *Interpretation of the Covenant, Marriage and Same-Sex Partnership*

An initial set of considerations have to do with the future interpretation of the Covenant in relation with the same-sex issues (mentioned or not) in *Joslin v. New Zealand*. In other words, can it be excluded that a less literal approach will be followed in future when interpreting Art. 23 of the Covenant in light of the social, cultural and legal changes that occurred over the last decade? And could one envisage that there will be an opening to same-sex marriages? Only practice will provide an answer to these questions; nonetheless some considerations can be made.

If in future the HRC adopts the textual approach in interpreting Art. 23 ICCPR, the outcome will be unquestionably (again) the denial of the right to marry for same-sex couples: indeed, only 13 out of the 114 States parties to ICCPR and its Protocol (and 14 out of 160 ICCPR States parties),[96] not covering all geographical areas and legal traditions, allow same-sex marriages as of today. But if the Committee adopts a different approach in cases dealing with same-sex marriage in light of social, cultural and legal changes,[97] some developments are possible, also in the direction of an extensive interpretation of Art. 23 ICCPR. For instance, this is what happened with the Strasbourg Court in *Schalk and Kopf v. Austria* of 2010[98]: the regional court denied the right to marry under Art. 12 ECHR for lack of consensus in the European area, but in light of social developments (and in spite of the reference contained in that provision to "men and women"), it offered a more extensive interpretation of marriage, affirming that

> the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint.[99]

Anyhow, if the HRC gave a (more or less) broader interpretation of Art. 23, the impact would be wide-ranging as the Covenant has an universal vocation and its legal obligations apply to a large number of States parties, belonging to different regional areas and legal traditions. Moreover, the latter observation would point to the unlikelihood of such a jurisprudential development in the next few years in respect of a sensitive issue like marriage, which is closely connected to family as an institution as well as being deeply rooted in States' societies and traditions.

[96] Some US States allow same-sex marriages, but USA is not party to the Protocol.

[97] Nowak (2005), pp. 526–527 and Conte and Burchill (2009). The latter consider the view in *Joslin v. New Zealand* outdated in light of recent developments and the dynamic nature of family law.

[98] *Schalk and Kopf v. Austria*, application n. 30141/04, judgment of 24th June 2010. See the chapter by Pustorino in this volume.

[99] *Ibidem*, para. 61.

Both factors make marriage proof against substantial changes (for instance, from being a heterosexual institution to becoming neutral gender-marriage), especially when not inspired by internal legislative processes.

A further consideration regards same-sex partnerships. The case of *Joslin v. New Zealand* was focused on the right to marry, so much so that, in their individual opinions, two HRC members underlined that the communication continuously referred to the recognition of same-sex unions in the specific form of marriage. But what could have happened if the New Zealand couples had simply applied for being legally recognized as a couple before the law? Does the ICCPR support such a right, for instance as a consequence of an individual right to the protection of privacy and family life? The answer belongs (again) to the future HRC case-law; however, unlike the marriage issue, some developments can be envisaged in the direction of affording legal protection to same-sex couples. Reference can be made in this regard to the (wide-ranging, in the HRC jurisprudence) notion of family,[100] the right to family life under Art. 17 ICCPR and the corresponding need for legal protection, as already happened, in cases involving same-sex couples, in the European and the American systems for the protection of human rights.[101]

23.5.2 HRC as a Forum *for Same-Sex Couples*

Secondly, in spite of its limits and deficiencies, the HRC represents an available and approachable *forum* for same-sex couples living in countries which have ratified the Protocol. Following the denial, at a national level, of LGBT and same-sex couples' rights, the Committee's competence to examine individual communications represents a further chance to obtain justice.

This is true for individuals living in countries not belonging to a regional system of protection of human rights, for instance Asian countries or Australia and New Zealand; but there is more to that. Also same-sex couples living in areas with a regional system of human rights can consider the Committee as a desirable *forum*. The HRC practice reports a certain number of communications coming from countries belonging to regional systems—for instance, Europe or Latin America—and often individuals' communications are sent after an unfavourable outcome before a regional body. Only individuals living in States parties which have entered a reservation and/or a declaration on Art. 5, para. 2, of the Protocol have to recall that *electa una via*, *non datur recursus ad alteram*: all the others can take advantage of the availability of a further *forum* for the protection of their rights.

[100] *Ex multis*, see Nowak (2005), pp. 393–394 and 515.

[101] See the chapters by Pustorino and Crisafulli on the Strasbourg Court and the one by Magi on the Inter-American Court of Human Rights. On the Strasbourg case-law, see also Johnson (2013), p. 113.

In particular, the Committee represents a desirable and available *forum* in cases of unreasonable and non-objective discrimination not only for individuals that are not covered by a regional system of human rights protection, but also for those who do not benefit from a general provision against discrimination in the framework of a regional system. For instance, this is the case of the ECHR. Following the entry into force of Protocol 12 attached to the European Convention, the prohibition of discrimination pursuant to Art. 14 ECHR stands as an autonomous right and it can be invoked also separately from another substantive right protected by the Convention.[102] This is a welcome development for the international protection of human rights, but it is worth mentioning that only 18 ECHR States parties out of 37[103] signatories have ratified Protocol 12, and the low number of ratifications, as Scheinin noted, is likely to slow down the emergence of a Strasbourg case-law on discrimination[104]—which *de facto* leaves it to the HRC jurisprudence to play a leading role in this highly controversial field of law.

References

Ando N (2002) The follow-up procedure of the human rights committee's views. In: Ando N, McWhinney E, Wolfrum R (eds) Liber Amicorum Judge Shigeru Oda, vol II. Kluwer Law International, The Hague/London/New York, pp 1437–1447

Ando N (2009) The development of the human rights committee's activities under the ICCPR and its optional protocol through my twenty-year experience as a committee member. In: Bariatti S, Venturini G (eds) Liber Fausto Pocar: Diritti individuali e Giustizia Internazionale. Giuffrè Editore, Milano, pp 3–17

Aust A (2007) Modern treaty law and practice. Cambridge University Press, Cambridge

Bair J (2005) The international covenant on civil and political rights and its (first) optional protocol. Peter Lang GmbH, Frankfurt an Main

Conte A, Burchill R (2009) Defining civil and political rights. Ashgate, Farnham/Burlington

De Zayas A (2009) Petitions before the United Nations treaty bodies: focus on the human rights committee's optional protocol procedure. In: Alfredsson G, Grimhemed J, Ramcharan BG, De Zayas A (eds) International human rights monitoring mechanisms: essays in honour of Jakob Th. Moller. Martinus Nijhoff Publishers, Leiden/Boston, pp 35–76

Edelembos C (2009) Jurisprudence under Article 26 of the ICCPR: the hidden revolution. In: Alfredsson G, Grimhemed J, Ramcharan BG, De Zayas A (eds) International human rights monitoring mechanisms: essays in honour of Jakob Th. Moller. Martinus Nijhoff Publishers, Leinden/Boston, pp 77–82

[102] On Protocol 12, see Harris et al. (2009) and Johnson (2013).

[103] http://conventions.coe.int, visited at February 2013. Of 47 ECHR States parties, 37 signed the Protocol and 10 did not (Bulgaria, Denmark, France, Lithuania, Malta, Monaco, Poland, Sweden, Switzerland and UK). Albania, Andorra, Armenia, BiH, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, The Netherlands, Romania, San Marino, Serbia, Slovenia, Spain, FYROM and Ukraine have ratified the Protocol, while Austria, Azerbaijan, Belgium, Czech Republic, Estonia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Moldova, Norway, Portugal, Russia, Slovakia and Turkey have not.

[104] Scheinin (2008), p. 552.

Hanski R, Scheinin M (2003) Leading cases of the human rights committee. Institute for Human Rights, Åbo Akademi University
Harris DJ, O'Boyle M, Bates EP, Buckley CM (2009) The law of the European convention on human rights. Oxford University Press, New York
Hennebel L (2007) La jurisprudence du Comité des droits de l'homme des Nations Unies: Le Pacte international relatif aux droits civils et politiques et son mécanisme de protection individuelle. Bruylant, Bruxelles
Johnson P (2013) Homosexuality and the European court of human rights. Routledge, Abingdon, Oxon
Joseph S (1994) Gay rights under the ICCPR - commentary on Toonen v Australia. Tasman Law Rev 13:392–411
Joseph S, Schulz J, Castan M (2005) The international covenant on civil and political rights: cases, materials and commentary. Oxford University Press, New York
Joseph S, Mitchell K, Gyorki L, Benninger-Budel C (2006) Seeking remedies for torture victims: a handbook on the individual complaints, Procedures of the UN treaty bodies. OMCT Handbook Series, Geneva/Brussels
Maaldon T (2009) Sexual orientation discrimination: a necessary and emerging area of United Nations concern. In: Alfredsson G, Grimhemed J, Ramcharan BG, De Zayas A (eds) International human rights monitoring mechanisms: essays in honour of Jakob Th. Moller. Martinus Nijhoff Publishers, Leinden/Boston, pp 429–438
Möller JT, De Zayas A (2009) United Nations human rights committee case law 1977–2008: a handbook. NP Engel Publisher, Kehl am Rhein
Nowak M (2005) U.N. covenant on civil and political rights: CCPR commentary. N. P. Engel Publisher, Kehl am Rhein
Office of the United Nations High Commissioner for Human Rights (2005) Civil and political rights: The Human Rights Committee. Fact Sheet No. 15 (Rev. 1)
Scheinin M (2008) Human rights committee: not only a committee on civil and political rights. In: Langford M (ed) Social rights jurisprudence: emerging trends in international and comparative law. Cambridge University Press, Cambridge, pp 540–552
Sudre F (2011) Droit européen et international des droit de l'homme. Presses Universitaires de France, Paris
Tyagi Y (2011) The UN human right committee: practice and procedure. Cambridge University Press, Cambridge