



Leo Hertzberg *et al.* v. Finland, Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985).

Communication No. 61/1979

Submitted by: Leo R. Hertzberg, Ulf Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA, on 7 August 1979

Alleged victims: The authors

State party: Finland

Date of adoption of views: 2 April 1982 (fifteenth session)

Concept of victim-No in abstracto review of national legislation-Homosexuality-Freedom of expression and information (radio and television)-Protection of public morals-Margin of discretion

Article of Covenant: 19

Articles of Optional Protocol: 1 and 2

Views under article 5 (4) of the Optional Protocol'

1. The authors of this communication (initial letter dated 7 August 1979) are five individuals, who are represented by a Finnish organization, SETA (Organization for Sexual Equality).

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 censoring, 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 offence, 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 Ulf 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.

2.6 The authors claim that their case is an illustration of the adverse effects of the wide interpretation given to that provision; which does not permit an objective description of homosexuality. According to their allegations, it is extremely difficult, if not impossible, for a journalist to start preparing a programme in which homosexuals are portrayed as anything else than sick, disturbed, criminal or wanting to change their sex. They contend that several of such programmes have been broadcast by FBC in the recent past.

2.7 The authors state that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

3. By its decision of 28 March 1980, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility.

4. By a note dated 9 June 1980, the State party, while rejecting the allegation that the Government of Finland was in breach of article 19 of the Covenant, confirmed that there were no further domestic remedies available to the alleged victims in the sense of article 5 (2) (b) of the Optional Protocol. The State party argued that the authors of the communication appeared to give to the concept of freedom of speech, protected by article 19 of the Covenant, a content different from that generally used by maintaining that it would restrict the right of the owner of a means of communication to decide what material will be published. The State party expressed its expectation that the Committee would focus its attention on this issue when considering the question of admissibility of the communication in the light of the provisions of article 3 of the Optional Protocol.

5. By decision of 25 July 1980 and on the basis of the information before it, the Committee concluded:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it.

6.1 In its submission under article 4 (2) of the Optional Protocol, dated 25 February 1981, the State party refutes the allegation that there has been a violation of the Covenant on Civil and Political Rights in Finland. It affirms that the Finnish legislation in force, including the Finnish Penal Code, was scrutinized in connection with the process of ratifying the Covenant and found to be in conformity with it. It stresses that the purpose of the prohibition of public encouragement to indecent behaviour between members of the same sex is to reflect the prevailing moral conceptions in Finland as interpreted by the Parliament and by large groups of the population. It further contends that discussion in the Parliament indicates that the word "encouragement" is to be interpreted in a narrow sense. Moreover, the Legislative Committee of the Parliament expressly provided that the law shall not hinder the presentation of factual information on homosexuality.

6.2 The State points out that there has not been any case where any person was convicted under paragraph 9 (2) of chapter 20 of the Penal Code and concludes that "the application of the paragraph in question shows no indication of an interpretation of the term in such a large sense that might be considered to unduly limit the freedom of expression".

6.3 While admitting that paragraph 9 (2) constitutes a certain restriction on freedom of expression, the State specifically refers to article 19 (3) of the Covenant, which states that the exercise of the rights provided for in article 19 (2) may be subject to certain restrictions, in so far as these are provided by law and are necessary for the protection of public order, or of public health or morals.

6.4 Yet, the State contends that the decision of the Finnish Broadcasting Company concerning the programmes referred to by the submitting organization did not involve the application of censorship but were based on "general considerations of programme policy in accordance with the internal rules of the Company".

7. On 7 May 1981, the authors presented an additional submission in which they discuss in general terms the impact of paragraph 9 (2) of chapter 20 of the Penal Code on journalistic freedom. They argue that article 19 in connection with article 2 (1) of the Covenant requires Finland "to ensure that FBC not only deals with the subject of homosexuality in its programmes but also that it affords a reasonable and, in so far as is possible, an impartial coverage of information and ideas on the subject, in accordance with its own programming regulations". On this basis they challenge, in particular, the relevant programme directive of FBC of 30 October 1975, still in force today, which states, *inter alia*, "All persons responsible for programmes are requested to observe maximum strictness and carefulness, even when factual information about homosexuality is given", drawing attention at the same time to the fact that on the same day a written warning had been issued to the head of the film service of FBC to reject any production which gave a "positive picture of homosexuality". In addition, they dispute the State party's contention that the decisions taken by the Finnish Broadcasting Company with respect to radio and television programmes dealing with homosexuality were based on general considerations of programme policy and did not constitute censorship measures taken in pursuance of paragraph 9 (2) of chapter 20 of the Penal Code.

8. The Committee, considering the present communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol, hereby decides to base its views on the facts as submitted by the parties, which are not in dispute.

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 connection to its earlier views on communication No. 35/1978 (S. Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius *supra*).

10.1 Concerning Leo Rafael Hertzberg, the Committee observes that he cannot validly claim to be a victim of 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.

APPENDIX

Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. 61/1979

Individual opinion appended to the Committee's views at the request of Mr. Torkel Opsahl:

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

This conclusion prejudices 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. Stateimposed 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).

' The text of an individual opinion submitted by a Committee member is appended to these views.