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HUMAN RIGHTS COMMITTEE

Eightieth session

15 March - 2 April 2004

VIEWS

Communication No. 976/2001

<u>Submitted by:</u>	Cecilia Derksen, on her own behalf and on behalf of her daughter Kaya Marcelle Bakker (represented by counsel, A.W.M. Willems)
<u>Alleged victim:</u>	The author
<u>State party:</u>	The Netherlands
<u>Date of communication:</u>	11 August 2000 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 91 decision, transmitted to the State party on 23 May 2001 (not issued in document form)
<u>Date of adoption of Views:</u>	1 April 2004

On 1 April 2004, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 976/2001. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of
the Optional Protocol to the International Covenant on Civil and Political rights

Eightieth session

concerning

Communication No. 976/2001**

Submitted by: Cecilia Derksen, on her own behalf and on behalf of
her daughter Kaya Marcelle Bakker (represented by
counsel, A.W.M. Willems)

Alleged victim: The author

State party: The Netherlands

Date of communication: 11 August 2000 (initial submission)

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

Meeting on 1 April 2004,

Having concluded its consideration of communication No. 976/2001, submitted to the
Human Rights Committee on behalf of Cecilia Derksen and her daughter Kaya Marcelle
Bakker under the Optional Protocol to the International Covenant on Civil and Political
Rights,

Having taken into account all written information made available to it by the author of
the communication, and the State party,

Adopts the following:

** The following members of the Committee participated in the examination of the present
communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine
Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin,
Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin,
Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman
Wieruszewski and Mr. Maxwell Yalden.

Two separate individual opinions signed by Mr. Nisuke Ando and Sir Nigel Rodley
are appended to the present document.

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

1. The author of the communication is Cecilia Derksen, a Dutch national. She submits the communication on her own behalf and on behalf of her child Kaya Marcelle Bakker, born on 21 April 1995, and thus 5 years old at the time of the initial submission. She claims that she and her child are the victims of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

The facts as submitted by the author

2.1 The author shared a household with her partner Marcel Bakker from August 1991 to 22 February 1995. It is stated that Mr. Bakker was the breadwinner, whereas Ms. Derksen took care of the household and had a part-time job. They had signed a cohabitation contract and when Ms. Derksen became pregnant, Mr. Bakker recognized the child as his. The author states that they intended to marry. On 22 February 1995, Mr. Bakker died in an accident.

2.2 On 6 July 1995, the author requested benefits under the General Widows and Orphans Law (AWW, Algemene Weduwen en Wezen Wet). On 1 August 1995, her request was rejected because she had not been married to Mr. Bakker and therefore could not be recognized as widow under the AWW. Under the AWW, benefits for half-orphans were included in the widows' benefits.

2.3 On 1 July 1996, the Surviving Dependents Act (ANW, Algemene Nabestaanden Wet) replaced the AWW. Under the ANW, unmarried partners are also entitled to a benefit. On 26 November 1996 Ms. Derksen applied for a benefit under the ANW. On 9 December 1996, her application was rejected by the Social Insurance Bank (Sociale Verzekeringsbank) on the grounds that "(...) only those who were entitled to a benefit under the AWW on 30 June 1996 and those who became widow on or after 1 July 1996 are entitled to a benefit under the ANW".

2.4 Ms. Derksen's request for revision of the decision was rejected by the Board of the Social Insurance Bank on 6 February 1997. Her further appeal was rejected by the District Court Zutphen (Arrondissementsrechtbank Zutphen) on 28 November 1997. On 10 March 1999, the Central Council of Appeal (Centrale Raad van Beroep) declared her appeal unfounded. With this, all domestic remedies are said to be exhausted.

The complaint

3.1 According to the author, it constitutes a violation of article 26 of the Covenant to distinguish between half-orphans whose parents were married and those whose parents were not married. It is stated that the distinction between children born of married parents and children born of non-married parents cannot be justified on objective and reasonable grounds. With reference to the Human Rights Committee's decision in *Danning v. the Netherlands*, it is argued that the Committee's considerations do not apply in the present case, as the decision not to marry has no influence on the rights and duties in the parent-child relationship.

3.2 The author further points out that under the ANW, half-orphans whose parent died on or after 1 July 1996 do have an entitlement to a benefit, whether the parents were married or not, thereby eliminating the unequal treatment complained of above. According to the author it is

unacceptable to maintain the unequal treatment for half-orphans whose parent died before 1 July 1996.

3.3 The author further claims that she herself is also a victim of discrimination. She accepts, on the basis of the Committee's decision in *Danning v. the Netherlands*, the decision not to grant her a benefit under the AWW, since benefits under that law were limited to married partners. However, now that the law has changed and allows benefits for unmarried partners, she cannot accept that she is still being refused a benefit solely on the basis that her partner died before 1 July 1996. The author argues that once it is decided to treat married and unmarried partners equally this should apply to all regardless of the date of the death of the partner and that the failure to do so constitutes a violation of article 26 of the Covenant.

State party's observations

4.1 By submission of 23 November 2001, the State party accepts the facts as described by the author. It adds that the Central Council of Appeal, in rejecting the author's appeal, considered that provisions outlawing discrimination such as article 26 of the Covenant are not designed to offer protection from disadvantages which may be caused by time restraints inherent to amendments of legislation. In the opinion of the Council, when new rights are provided, no obligation exists to extend those rights to cases predating the change.

4.2 The State party explains that when the AWW was replaced by the ANW, the transitional regime was based on respect for prior rights, in the sense that existing rights under the AWW were respected and no new rights could be claimed resulting from a death prior to the entry into force of the ANW.

4.3 Concerning the admissibility of the communication, the State party points out that the author has not appealed the decision of 1 August 1995 by which her application under the AWW was rejected. The State party argues that to the extent that the communication relates to the distinctions made in the AWW, it should be declared inadmissible.

4.4 As to the merits, the State party refers to the Committee's prior jurisprudence in cases concerning social security, and seeks to infer from these decisions that it is for the State to determine what matters it wishes to regulate by law and under what conditions entitlement is granted, as long as the legislation adopted is not discriminatory in nature. From the earlier decisions in which the Committee has reviewed the Dutch social security legislation the State party concludes that the distinction between married and unmarried couples is based on reasonable and objective grounds. The State party recalls that the Committee has based its view on the fact that persons are free to choose whether or not to engage in marriage and accept the responsibilities and rights that go with it.

4.5 The State party rejects the author's opinion that the new legislation should be applied to old cases as well. It points out that the ANW was introduced to reflect the changes in the society where living together as partners otherwise than through marriage has become common. In the State's party's opinion, it is up to the national legislature to judge the need for a transitional regime. The State party emphasizes that those persons who are now entitled to benefits under the ANW are persons with established rights. This distinguishes them from persons who like the author do not have established rights. Before 1 July 1996, marriage was a relevant factor for benefits under the surviving dependants' legislation, and people were

free to marry and thereby safeguard entitlement to the benefits, or not to marry and thereby choose to be excluded from such entitlement. The fact that the ANW has now abolished the differential treatment between married and unmarried cohabiting persons does not alter this pre-existing position. The State party concludes that the transitional regime does not constitute discrimination against the author.

4.6 To the extent that the communication relates to Ms. Derksen's daughter, the State party states that its above observations apply *mutatis mutandis* also to the claim of unequal treatment of half-orphans. The State party explains in this respect that, as was also the case under the old law, it is not the half-orphan herself who is entitled to the benefit but the surviving parent. Since neither the old nor the new legislation grants entitlements to half-orphans, the State party is of the opinion that there can be no question of discrimination within the meaning of article 26 of the Covenant.

4.7 Concerning the claim that the AWW made a prohibited distinction between children born out of wedlock and children born of a marriage, the State party argues first that the author has not exhausted domestic remedies in this respect. It further argues that the claim is groundless, because the status of the child was irrelevant to the determination under the AWW whether or not a surviving spouse was entitled to a benefit as it was the status of the spouse that determined whether or not a benefit would be provided for the half-orphan.

The author's comments

5.1 By letter dated 25 January 2002, the author notes that the main question is whether or not equal cases may be treated differently because of the time factor, i.e. whether equal treatment between married and unmarried cohabitants may be restricted to those cases in which one of the partners died after 1 July 1996. The author remarks that the insurance scheme established by the ANW is a collective national scheme in which all taxpayers participate. The author refers to the history of other schemes (such as old age pensions, children's benefits) and states that these applied to all eligible residents and not just to those who became eligible only after the date of enactment. The author further argues that social insurance schemes cannot be compared with commercial insurance schemes and claims that profit considerations would deny the special character of social insurance schemes.

5.2 As to the transitional provisions of the ANW, the author points out that originally the law was enacted in order to provide for equality between men and women, and that the equality between married and unmarried partners was only added after debate in Parliament. The reason for the transitional scheme was that the new law established stricter requirements than the old law, but that for reasons of legal security all those who had been eligible under the old law would also be eligible under the new law, whereas the stricter requirements would apply to newly eligible persons. According to the author, the question whether surviving dependants of unmarried persons who had died before 1 July 1996 should be granted benefits was never posed, and there was thus no conscious decision in this respect. The author further argues that through changes in the calculation of benefits and earlier termination of benefits, the ANW was intended to lower the costs, as is borne out by the statistics over the years 1999, 2000 and 2001 which show that less people are entitled to benefits under the ANW than under the old AWW. In the opinion of the author, the extension to 'old' cases of unmarried dependants could thus be easily financed. Moreover, the author recalls that like all taxpaying residents she and her partner paid premiums under the AWW.

5.3 The author maintains that the transitional provisions are discriminatory and points out that if her partner had died 17 months later, she and the child would have been entitled to a benefit. They face the same circumstances as dependants whose partner/parent died after 1 July 1996. The unequal treatment of equally situated persons is clearly in violation of article 26 of the Covenant.

5.4 As to the author's daughter, the author notes that she is being treated differently than children whose father was married to their mother or whose father died after 1 July 1996. In the opinion of the author this amounts to prohibited discrimination as the child has no influence on the decision whether her parents marry or not. With reference to the jurisprudence of the European Court on Human Rights, the author argues that differential treatment between children born in and children born out of wedlock is not permissible.

5.5 The author recalls that differential treatment which is not based on objective and reasonable grounds and which does not have a legitimate aim constitutes discrimination. She also recalls that in March 1991 the Government had already introduced legislation abolishing the distinction between married and unmarried dependants, but that this proposal was withdrawn at the time. She argues that she and her daughter should not pay for the slow pace of enactment of these amendments. She submits that unmarried cohabitation has been accepted practice in the Netherlands for years before the law was changed. The author concludes that she and her daughter have been subjected to different treatment for which no objective and reasonable grounds exist, and which has no legitimate aim.

State party's further observations

6.1 By letter of 7 May 2002, the State party states that it does not share the author's view that article 26 of the Covenant envisages that new legislation must be applied to pre-existing cases. The State party refers to its previous observations and concludes that the transitional regime does not constitute discrimination.

6.2 The State party refers to the Committee's decision in the case of *Hoofdman v. the Netherlands* in which the Committee was of the opinion that the distinction between married and unmarried partners under the AWW did not constitute discrimination. The State party submits that different legal regimes applied to married and unmarried couples at the time the author decided to cohabit with her partner without marrying him and that the decision not to marry entailed legal consequences that were known to the author.

6.3 The State party also argues that the transitional regime cannot be considered discriminatory in itself, as it distinguishes between two different groups: surviving dependants who were entitled to a benefit under the AWW and those who were not. The distinction was made for reasons of legal security in order to guarantee the rights that people had acquired under the old legislation.

6.4 Furthermore, the State party argues that the ANW being a national insurance scheme to which all residents contribute, it obliges the government to keep the collective costs as low as possible. As to the author's reference to the introduction of other social security schemes, the State party points out that a distinction must be made between the introduction of such a scheme and the alteration of an existing scheme.

6.5 As to the status of half-orphans born outside marriage, the State party reiterates that the status of the child is not relevant to eligibility for benefits, under either the new or the old scheme. It is the surviving parent who cares for the child who is eligible for benefits. Therefore, the status of the parents was and still is the deciding factor. As long as the distinction between married and unmarried cohabitating parents was justified, as it is according to the Committee's Views in *Hoofdman v. the Netherlands*, the ANW can not be said to perpetuate discriminatory treatment.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has noted the State party's objections to the admissibility of the communication on the grounds that the author has not exhausted available domestic remedies with regard to the refusal of a benefit under the AWW. The Committee considers that in so far as the communication relates to alleged violations resulting from the decision not to grant her a benefit under the AWW, this part of the communication is inadmissible under article 5, paragraph 2(a) of the Optional Protocol.

7.3 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2(a) of the Optional Protocol.

8. Accordingly, the Committee decides that the communication in so far as it relates to the refusal of benefit under the ANW is admissible and should be considered on its merits.

Consideration of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The first question before the Committee is whether the author of the communication is a victim of a violation of article 26 of the Covenant, because the new legislation which provides for equal benefits to married and unmarried dependants whose partner has died is not applied to cases where the unmarried partner has died before the effective date of the new law. The Committee recalls its jurisprudence concerning earlier claims of discrimination against the Netherlands in relation to social security legislation. The Committee reiterates that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The Committee recalls that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons. By enacting the new legislation the State party has provided equal treatment to both married and unmarried cohabitants for purposes of surviving dependants' benefits. Taking into account that the past practice of distinguishing between

married and unmarried couples did not constitute prohibited discrimination, the Committee is of the opinion that the State party was under no obligation to make the amendment retroactive. The Committee considers that the application of the legislation to new cases only does not constitute a violation of article 26 of the Covenant.

9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. The author, however, has argued that, even if the distinction between married and unmarried couples does not constitute discrimination because different legal regimes apply and the choice lies entirely with the partners whether to marry or not, the decision not to marry cannot affect the parents' obligations towards the child and the child has no influence on the parents' decision. The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observes that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect. However, as the communication has been declared admissible only in respect of the period after 1 July 1996, the Committee merely addresses the failure of the State party to terminate the discrimination from that day onwards which, in the Committee's view, constitutes a violation of article 26 in regard of Kaya Marcelle Bakker in respect of whom half orphan's benefits through her mother was denied under the ANW.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it relating to Kaya Marcelle Bakker disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide half orphans' benefits in respect of Kaya Marcelle Bakker or an equivalent remedy. The State party is also under an obligation to prevent similar violations

12. 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 article 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 in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

APPENDIX

Individual opinion of Committee member, Mr. Nisuke Ando

Unfortunately I cannot share the Committee's conclusion that the ANW violates article 26 of the Covenant in denying half orphan benefits to unmarried partners before 1 July 1996, while granting the same benefits to children of unmarried partners after that date.

The facts in the present case, as I see them, are the following: On 1 July 1996, the Surviving Dependants Act (ANW) replaced the General Widows and Orphans Law (AWW). Under the new law, unmarried partners are entitled to a benefit, to which only married couples were entitled under the old law. The author applied for the benefit under ANW but was rejected because her partner died on 22 February 1995, seventeen months before the new law was enacted, and since the law has no retroactive effect, she is not entitled to apply for the benefit. The author claims that, once it is decided to treat married couples and unmarried partners equally, this should apply to all regardless of the date of the death of their partner and that the failure to do so constitutes a violation of article 26 to the detriment not only of herself but also of her daughter. (3.3, 5.3 and 5.4)

It is unfortunate that the new law affects her as well as her daughter unfavourably in the present case. However, in interpreting and applying article 26, the Human Rights Committee must take into account the following three factors: First, the codification history of the Universal Declaration of Human Rights makes it clear that only those rights contained in the International Covenant on Civil and Political Rights are justiciable and the Optional Protocol is attached to that Covenant, while the rights contained in the International Covenant on Economic, Social and Cultural Rights are not justiciable. Second, while the principle of non-discrimination enshrined in article 26 of the former Covenant may be applicable to any field regulated and protected by public authorities, the latter Covenant obligates its States parties to realize rights contained therein only progressively. Third, the right to social security, the very right at issue in the present case, is provided not in the former Covenant but in the latter Covenant and the latter Covenant has its own provision on non-discriminatory implementation of the rights it contains.

Consequently, the Human Rights Committee needs to be especially prudent in applying its article 26 to cases involving economic and social rights, which States parties to the International Covenant on Economic, Social and Cultural Rights are to realize without discrimination but step-by-step through available means. In my opinion, the State party in the present case is attempting to treat married couples and unmarried partners equally but progressively, thus making the application of ANW not retroactive. To tell the State party that it is violating article 26 unless it treats all married couples and unmarried partners exactly on the same footing at once sounds like telling the State party not to start putting water in an empty cup if it cannot fill the cup all at once!

[Signed] Nisuke Ando

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

Individual of Committee member, Sir Nigel Rodley (dissenting)

I do not consider that the Committee's finding of a violation in respect of Kaya Marcelle Bakker, the author's daughter (paragraph 9.3), withstands analysis. To comply with the Committee's interpretation of the Covenant, the State Party would have had to make the ANW retroactive. Indeed, it is the very absence of retroactivity that, according to the Committee, constitutes the violation. Since most legislation has the effect of varying people's rights as compared with the situation prior to the adoption of the legislation, the Committee's logic would imply that all legislation granting a new benefit must be retroactive if it is to avoid discriminating against those whose rights fall to be determined under the previous legislation.

Furthermore, I believe the Committee is straining beyond endurance the notion of victim in the present case. Whether under the AWW or the ANW, no person born out of wedlock had or has any independent right to a benefit. The mother, in this case the author, was and is free to dispose of the benefit without being obliged to apply it to her child's welfare. The already vulnerable doctrine of indirect discrimination that the Committee is here applying is being subjected to intolerable pressure in being asked to sustain the Committee's argument. After all, the asserted indirect discrimination between children of mothers who bore them before or after the ANW was adopted does not begin to compare with the direct discrimination between children born within and those born out of wedlock. Yet the Committee refrains from finding that discrimination to be incompatible with the Covenant, simply by deciding that the communication is admissible only in respect of the applicability of the ANW (paragraph 7.2). (In this connection I also note that, since the Committee's decision on the merits concerns a difference between the ANW and the AWW, then the logic of this is that the inadmissibility decision should have applied to both pieces of legislation; after all, a successful remedy in respect of the AWW would have resolved the apparent discrepancy in the application of the ANW.)

Accordingly, while regretting that the State Party could not have arranged to be more generous in its introduction of the ANW to benefit all those families in the position of Ms. Baakker and her daughter, I am unable to find a violation of the Covenant.

[Signed] Sir Nigel Rodley

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