EQUALITY AND DISCRIMINATION -
GENDER DISCRIMINATION - General

III. JURISPRUDENCE

ICCPR

- *Mauritian Women v. Mauritius* (35/1978) (R.9/35), ICCPR, A/36/40 (8 April 1981) 134 at paras. 7.2-7.4, 9.2, 9.2(b)1, 9.2(b)(i) - (b)(2)(i)8, 9.2(b)2(ii)2-4, 9.2(c)2 and 10.1.

...
7.2 Up to 1977, spouses (husbands and wives) of Mauritian citizens had the right of free access to Mauritius and enjoyed immunity from deportation. They had the right to be considered *de facto* as residents of Mauritius. The coming into force of the Immigration (Amendment) Act, 1977, and of the Deportation (Amendment) Act, 1977, limited these rights to the wives of Mauritius citizens only. Foreign husbands must apply to the Minister of the Interior for a residence permit and in case of refusal of the permit they have no possibility to seek redress before a court of law.

7.3 Seventeen of the co-authors are unmarried. Three of the co-authors were married to foreign husbands when, owing to the coming into force of the Immigration (Amendment) Acts 1977, their husbands lost the residence status in Mauritius which they had enjoyed before. Their further residence together with their spouses in Mauritius is based under the statute on a limited, temporary residence permit to be issued in accordance with section 9 of the Immigration (Amendment) Act, 1977. This residence permit is subject to specified conditions which might at any time be varied or cancelled by a decision of the Minister of the Interior, against which no remedy is available. In addition, the Deportation (Amendment) Act, 1977, subjects foreign husbands to a permanent risk of being deported from Mauritius.

7.4 In the case of Mrs. Aumeeruddy-Cziffra, one of the three married co-authors, more than three years have elapsed since her husband applied to the Mauritian a authorities for a residence permit, but so far no formal decision has been taken. If her husband's application were to receive a negative decision, she would be obliged to choose between either living with her husband abroad and giving up her political career, or living separated from her husband in Mauritius and there continuing to participate in the conduct of public affairs of that country.
...
9.2 ...A person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant. If the law or practice has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged victim's risk of being affected is more than a

theoretical possibility.

...

9.2 (b) 1 The Committee will next examine that part of the communication which relates to the effect of the laws of 1977 on the family life of the three married women.

9.2 (b) 2 The Committee notes that several provisions of the Covenant are applicable in this respect. For reasons which will appear below, there is no doubt that they are actually affected by these laws, even in the absence of any individual measure of implementation (for instance, by way of a denial of residence, or an order of deportation, concerning one of the husbands). Their claim to be "victims" within the meaning of the Optional Protocol has to be examined.

9.2 (b) 2 (i) 1 First, their relationships to their husbands clearly belong to the area of "family" as used in article 17 (1) of the Covenant. They are therefore protected against what that article calls "arbitrary or unlawful interference" in this area.

9.2 (b) 2 (i) 2 The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, and as the State party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of article 17. In principle, article 17 (1) applies also when one of the spouses is an alien. Whether the existence and application of immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either "arbitrary or unlawful" as stated in article 17 (1), or conflicts in any other way with the State party's obligations under the Covenant.

9.2 (b) 2 (i) 3 In the present cases, not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands in Mauritius represents, in the opinion of the Committee, an interference by the authorities of the State party with the family life of the Mauritian wives and their husbands. The statutes in question have rendered it uncertain for the families concerned whether and for how long it will be possible for them to continue their family life by residing together in Mauritius. Moreover, as described above (para. 7.4) in one of the cases, even the delay for years, and the absence of a positive decision granting a residence permit, must be seen as a considerable inconvenience, among other reasons because the granting of a work permits and hence the possibility of the husband to contribute to supporting the family, depends on the residence permit, and because deportation without judicial review is possible at any time.

9.2 (b) 2 (i) 4 Since, however, this situation results from the legislation itself, there can be no question of regarding this interference as "unlawful" within the meaning of article 17 (1) in the present cases. It remains to be considered whether it is "arbitrary" or conflicts in any

other way with the Covenant.

9.2 (b) 2 (i) 5 The protection owed to individuals...is subject to the principle of equal treatment of the sexes which follows from several provisions of the Covenant. It is an obligation of the State parties under article 2(1) generally to respect and ensure the rights of the Covenant "without distinction of any kind, such as...(i.e.) sex", and more particularly under article 3 "to ensure the equal right of men and women to the enjoyment" of all these rights, as well as under article 26 to provide "without any discrimination" for "the equal protection of the law.

9.2 (b) 2 (i) 6 The authors who are married to foreign nationals are suffering from the adverse consequences of the statutes...only because they are women. The precarious residence status of their husbands...results from the 1977 laws which do not apply the same measures of control to foreign wives.

9.2 (b) 2 (i) 7 In these circumstances, it is not necessary for the Committee to decide in the present cases how far such or other restrictions on the residence of foreign spouses might conflict with the Covenant if applied without discrimination of any kind.

9.2 (b) 2 (i) 8 The Committee considers that it is also unnecessary to say whether the existing discrimination should be called an "arbitrary" interference with the family within the meaning of article 17. Whether or not the particular interference could as such be justified if it were applied without discrimination does not matter here. Whenever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of that right regarded in isolation, is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination. Here it is sufficient, therefore, to note that in the present position an adverse distinction based on sex is made, affecting the alleged victims in their enjoyment of one of their rights. No sufficient justification for this difference has been given. The Committee must then find that there is a violation of articles 2 (1) and 3 of the Covenant, in conjunction with article 17 (1).

...

9.2 (b) 2 (ii) 2 ...[T]he principle of equal treatment of the sexes applies by virtue of articles 2(1), 3 and 26, of which the latter is also relevant because it refers particularly to the "equal protection of the law". Where the Covenant requires a substantial protection as in article 23, it follows from those provisions that such protection must be equal, that is to say not discriminatory, for example on the basis of sex.

9.2 (b) 2 (ii) 3 It follows also in this line of argument the Covenant must lead to the result that the protection of a family cannot vary with the sex of one or the other spouse. Though

it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them for security reasons...legislation which only subjects foreign spouses of Mauritian women to these restrictions, not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements.

9.2 (b) 2 (ii) 4 The Committee therefore finds that there is also a violation of articles 2(1), 3 and 26 of the Covenant in conjunction with the right of the three married co-authors under article 23(1).

...

9.2 (c) 2 The Committee considers that restrictions established by law in various areas may prevent citizens in practice from exercising their political rights, i.e. deprive them of the opportunity to do so, in ways which might in certain circumstances be contrary to the purpose of article 25 or to the provisions of the Covenant against discrimination, for example if such interference with opportunity should infringe the principle of sexual equality.

...

10.1 Accordingly, the Human Rights Committee...is of the view that the facts...disclose violations of the Covenant, in particular of articles 2 (1), 3 and 26 in relation to articles 17 (1) and 23 (1) with respect to the three co-authors who are married to foreign husbands, because the coming into force of the Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977, resulted in discrimination against them on the ground of sex.

- *Lovelace v. Canada* (R.6/24), ICCPR, A/36/40 (30 July 1981) 166 at paras. 13.1, 15-18 and Individual Opinion by Mr. Néjib Bouziri, 175.

...

13.1 The Committee considers that the essence of the present complaint concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve.

...

15. ...Restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant. This also follows from the restrictions to article 12 (1) of the Covenant set out in article 12 (3). The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people. However, the obligations which the Government has since undertaken under the Covenant must also be taken into account.

16. In this respect, the Committee is of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be...

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

18. In view of this finding, the Committee does not consider it necessary to examine whether the same facts also show separate breaches of the other rights invoked...The rights to choose one's residence (article 12), and the rights aimed at protecting family life and children (articles 17, 23 and 24) are only indirectly at stake in the present case. The facts of the case do not seem to require further examination under those articles...

...

Individual Opinion by Mr. Nejib Bouziri

In the Lovelace case, not only article 27 but also articles 2 (para. 1), 3, 23 (paras. 1 and 4) and 26 of the Covenant have been breached, for some of the provisions of the Indian Act are discriminatory, particularly as between men and women. The Act is still in force and, even though the Lovelace case arose before the date on which the Covenant became applicable in Canada, Mrs. Lovelace is still suffering from the adverse discriminatory effects of the Act in matters other than that covered by article 27.

- *Broeks v. The Netherlands* (172/1984), ICCPR, A/42/40 (9 April 1987) 139 at paras. 14-16.

...

14. It therefore remains for the Committee to determine whether the differentiation in Netherlands law at the time in question and as applied to Mrs. Broeks constituted discrimination within the meaning of article 26. The Committee notes that in Netherlands

law the provisions of articles 84 and 85 of the Netherlands Civil Code impose equal rights and obligations on both spouses with regard to their joint income. Under section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV), a married woman, in order to receive WWV benefits, had to prove that she was a 'breadwinner' - a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable...

15. The circumstances in which Mrs. Broeks found herself at the material time and the application of the then valid Netherlands law made her a victim of a violation, based on sex, of article 26 of the International Covenant on Civil and Political Rights because she was denied a social security benefit on an equal footing with men.

16. The Committee...notes with appreciation that the discriminatory provisions in the law applied to Mrs. Broeks have, subsequently, been eliminated. Although the State party has thus taken the necessary measures to put an end to the kind of discrimination suffered by Mrs. Broeks at the time complained of, the Committee is of the view that the State party should offer Mrs. Broeks an appropriate remedy.

- *Avellanal v. Peru* (202/1986), ICCPR, A/44/40 (28 October 1988) 196 at paras. 2.1, 10.1, 10.2 and 11.

...

2.1 The author is the owner of two apartment buildings in Lima, which she acquired in 1974. It appears that a number of tenants took advantage of the change in ownership to cease paying rent for their apartments. After unsuccessful attempts to collect the overdue rent, the author sued the tenants on 13 September 1978. The court of first instance found in her favour and ordered the tenants to pay her the rent due since 1974. The Superior Court reversed the judgement on 21 November 1980 on the procedural ground that the author was not entitled to sue, because, according to article 168 of the Peruvian Civil Code, when a woman is married only the husband is entitled to represent matrimonial property before the Courts ("*El marido es el representante de la sociedad conyugal*"). On 10 December 1980 the author appealed to the Peruvian Supreme Court, submitting, *inter alia*, that the Peruvian Constitution now in force abolished discrimination against women and that article 2 (2) of the Peruvian Magna Carta provides that "the law grants rights to women which are not less than those granted to men". However, on 15 February 1984 the Supreme Court upheld the decision of the Superior Court. Thereupon, the author interposed the recourse of *amparo* on 6 May 1984, claiming that in her case article 2 (2) of the Constitution had been violated by denying her the right to litigate before the courts only because she is a woman. The Supreme

Court rejected the recourse of *amparo* on 10 April 1985.
...
10.1 With respect to the requirement set forth in article 14, paragraph 1, of the Covenant that "all persons shall be equal before the courts and tribunals", the Committee notes that the court of first instance decided in favour of the author, but the Superior Court reversed that decision on the sole ground that according to article 168 of the Peruvian Civil Code only the husband is entitled to represent matrimonial property, i.e. that the wife was not equal to her husband for purposes of suing in Court.

10.2 With regard to discrimination on the ground of sex the Committee notes further that under article 3 of the Covenant State parties undertake "to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant" and that article 26 provides that all persons are equal before the law and are entitled to the equal protection of the law. The Committee finds that the facts before it reveal that the application of article 168 of the Peruvian Civil Code to the author resulted in denying her equality before the courts and constituted discrimination on the ground of sex.

11. The Human Rights Committee...is of the view that the events of this case...disclose violations of articles 3, 14, paragraph 1 and 26 of the Covenant.

- *Vos v. The Netherlands* (218/1986), ICCPR, A/44/40 (29 March 1989) 232 at paras. 2.1, 11.3 and 12.

...
2.1 The author states that since 1 October 1976 she had received an allowance from the New General Trade Association under the General Disablement Benefits Act (AAW) but that in May 1979, following the death of her ex-husband (from whom she had bee divorced in 1957), payment of the disability allowance was discontinued, in accordance with article 32, subsection 1 (b), of AAW, because she then became entitled to a payment under the General Widows and Orphans Act (AWW). Under the latter, she receives some 90 guilders per month less than she had been receiving under AAW.
...
11.3 ...[W]hat is at issue is not whether the State party is required to enact legislation such as the General Disablement Benefits Act or the General Widows and Orphans Act, but whether this legislation violates the author's rights contained in article 26 of the International Covenant on Civil and Political Rights. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. Further, differences in result

of the uniform application of laws do not *per se* constitute prohibited discrimination.

12. It remains for the Committee to determine whether the disadvantageous treatment complained of by the author resulted from the application of a discriminatory statute and thus violated her rights under article 26 of the Covenant. In the light of the explanations given by the State party with respect to the legislative history, the purpose and application of the General Disablement Benefits Act and the General Widows and Orphans Act...the Committee is of the view that the unfavourable result complained of by Mrs. Vos follows from the application of a uniform rule to avoid overlapping in the allocation of social security benefits. This rule is based on objective and reasonable criteria, especially bearing in mind that both statutes under which Mrs. Vos qualified for benefits aim at ensuring to all persons falling thereunder subsistence level income. Thus the Committee cannot conclude that Mrs. Vos has been a victim of discrimination within the meaning of article 26 of the Covenant.

For dissenting opinion in this context, see Vos v. The Netherlands (218/1986), ICCPR, A/44/40 (29 March 1989) 232 at Individual Opinion by Messrs. Francisco Aquilar Urbina and Bertil Wennergren, 239 at paras. 1 and 5.

- *Pauger v. Austria* (415/1990), ICCPR, A/47/40 (26 March 1992) 325 (CCPR/C/41/D/415/1990) at paras. 7.2-7.4 and 8.

...
7.2 The Committee has already had the opportunity to express the view a/ that article 26 of the Covenant is applicable also to social security legislation. It reiterates that article 26 does not of itself contain any obligation with regard to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact pension legislation. However, when it is adopted, then such legislation must comply with article 26 of the Covenant.

7.3 The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

7.4 In determining whether the Austrian Pension Act, as applied to the author, entailed a differentiation based on unreasonable or unobjective criteria, the Committee notes that the Austrian family law imposes equal rights and duties on both spouses, with regard to their income and mutual maintenance. The Pension Act, as amended...however provides for full pension benefits to widowers only if they have no other source of income; the income

requirement does not apply to widows. In the context of the said Act, widowers will only be entitled to full pension benefits on equal footing with widows as of 1 January 1995. This in fact means that men and women, whose social circumstances are similar, are being treated differently merely on the basis of sex. Such a differentiation is not reasonable, as is implicitly acknowledged by the State party when it points out that the ultimate goal of the legislation is to achieve full equality between men and women in 1995.

8. The Human Rights Committee...is of the view that the application of the Austrian Pension Act in respect of the author after 10 March 1988, the date of entry into force of the Optional Protocol for Austria, made him a victim of a violation of article 26 of the International Covenant on Civil and Political Rights because he, as a widower, was denied full pension benefits on equal footing with widows.

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Notes

a/ See Official Records of the General Assembly, Forty-second Session, Supplement no. 40 (A/42/40), annex VIII, sects. D and B, *Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, and *Broeks v. The Netherlands*, Communication No. 172/1984, Views adopted on 9 April 1987.

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- *J. A. M. B.-R v. The Netherlands* (477/1991), ICCPR, A/49/40 vol. II (7 April 1994) 294 (CCPR/C/50/D/477/1991) at paras. 2.1-2.6 and 5.3-5.6.

...

2.1 The author, who is married, was employed as a schoolteacher from August 1982 to August 1983. As of 1 August 1983, she was unemployed. She claimed, and received, unemployment benefits by virtue of the Unemployment Act. Pursuant to the provisions of that Act, the benefits were granted for a maximum period of six months, that is, until 1 February 1984. The author subsequently found new employment as of 18 August 1985.

2.2 Having received benefits under the Unemployment Act for the maximum period ending on 1 February 1984, the author contends that she was entitled, thereafter, to a benefit under the then Unemployment Provision Act, for a period of up to two years. Those benefits would have amounted to 75 per cent of the last salary, whereas the benefits under the Unemployment Act amounted to 80 per cent of the last salary.

2.3 On 1 April 1985, the author applied for benefits under the Unemployment Benefits Act; her application was, however, rejected by the Municipality of De Lier on 23 May 1985, on

the grounds that as a married woman who did not qualify as a breadwinner, she did not meet the requirements of the Act. The rejection was based on article 13, paragraph 1, subsection 1, of the Unemployment Benefits Act, which did not apply to married men.

2.4 On 26 February 1987, the municipality confirmed its earlier decision. On 26 April 1989, however, it partly revoked its decision and granted the author benefits under the Unemployment Benefits Act for the period from 23 December 1984 to 18 August 1985. It still refused benefits for the period from 1 February to 23 December 1984 (see para. 2.5 below). The author appealed the decision to the Board of Appeal at The Hague, which, on 15 November 1989, declared her appeal unfounded. The author subsequently appealed to the Central Board of Appeal, which, by judgement of 5 July 1991, confirmed the Board of Appeal's decision.

2.5 In its judgement of 5 July 1991, the Central Board of Appeal refers to its judgement of 10 May 1989 in the case of Mrs. Cavalcanti Araujo-Jongen, a/ in which it noted that article 26 in conjunction with article 2 of the International Covenant on Civil and Political Rights applies also to the granting of social security benefits and similar entitlements. The Central Board further observed that the explicit exclusion of married women, unless they met specific requirements that are not applicable to married men, implied direct discrimination on the ground of sex in relation to marital status. The Central Board, having made reference to article 26 of the Covenant, indicated that it was to have direct applicability as of 23 December 1984.

2.6 On 24 April 1985, the State party abolished the requirement of article 13, paragraph 1, subsection 1, limiting the retroactive effect, however, to persons who had become unemployed on or after 23 December 1984. In 1991, further amendments to the Unemployment Benefits Act resulted in the abolition of this limitation, as a consequence of which women can claim benefits also when they became unemployed before 23 December 1984, provided they satisfy the other requirements of the Act. One of the other requirements is that the applicant must be unemployed on the date of application.

...

5.3 The Committee notes that the author contends that she is entitled without discrimination to benefits for the period of 1 February to 23 December 1984 and that the amendments in the law do not provide her with a remedy. The Committee notes that the author applied for benefits under the Unemployment Benefits Act on 1 April 1985, and that benefits were granted retroactively as from 23 December 1984. With reference to its constant jurisprudence, b/ the Committee recalls that, while article 26 requires that discrimination be prohibited by law and that all persons be guaranteed equal protection against discrimination, it does not concern itself with which matters may be regulated by law. Thus, article 26 does not of itself require States parties either to provide social security benefits or to provide them

retroactively, in respect of the date of application. However, when such benefits are regulated by law, then such a law must comply with article 26 of the Covenant.

5.4 The Committee notes that the law in question grants to men and women alike benefits as from the day of application, unless there are sufficient reasons to grant benefits as from an earlier date. The Committee also notes the view expressed by the Central Board of Appeal that benefits for those women who did not qualify for benefits under the old law should be granted retroactively as from 23 December 1984 but not earlier. The author has failed to substantiate, for purposes of admissibility, that these provisions were not equally applied to her, in particular that men who belatedly apply are granted wider retroactive benefits, as from the date in which they have become eligible for benefits, whereas she, as a woman, was denied such benefits. Accordingly, the Committee finds that the author has failed to substantiate her claim under article 2 of the Optional Protocol in this regard.

5.5 As regards the author's claim that the discriminatory nature of the law from 1 February to 23 December 1984, and the application of the law at that time, made her a victim of a violation of the right to equality before the law, the Committee notes that the author, in the period between 1 February and 23 December 1984, did not apply for benefits under the Unemployment Benefits Act. Therefore, she cannot claim to be a victim of a violation of article 26 by the application of the law in force during that period, even if the law in question were found to be discriminatory in respect of some of those applying under it. This aspect of the communication is thus inadmissible under article 1 of the Optional Protocol.

5.6 As to the issue raised by the author whether article 26 of the Covenant acquired direct effect in the Netherlands as from 11 March 1979, the date on which the Covenant entered into force for the State party, or in any event as from 1 February 1984, the Committee notes that the Covenant applies for the Netherlands as from its date of entry into force. The question of whether the Covenant can be invoked directly before the Courts of the Netherlands is however a matter of domestic law. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

Notes

a/ Mrs. Cavalcanti's communication to the Human Rights Committee was registered as No. 418/1990; views were adopted on 22 October 1993...

b/ See *inter alia* the Committee's views with regard to communications No. 172/1984 (*Broeks v. the Netherlands*) and No. 182/1984 (*Zwaan-de Vries v. the Netherlands*), adopted on 9 April 1987, (Official Records of the General Assembly, Forty-second Session, Supplement No. 40, (A/42/40), annexes VIII.B and D) and communication No. 415/1990

(*Pauger v. Austria*), adopted on 26 March 1992 (*ibid*., forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.R).

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- *Pepels v. The Netherlands* (484/1991), ICCPR, A/49/40 vol. II (15 July 1994) 221 (CCPR/C/51/D/484/1991) at paras. 7.2 and 7.5.

...
7.2 The Committee refers to its earlier jurisprudence and recalls that, while article 26 requires that discrimination be prohibited by law and that all persons be guaranteed equal protection against discrimination, it does not concern itself with which matters may be regulated by law. Thus, article 26 does not of itself require States parties either to provide social security benefits or to provide them retroactively in respect of the date of application. However, when such benefits are regulated by law, then such law must comply with article 26 of the Covenant.
...
7.5 The Committee observes that since December 1988 AWW benefits are granted to widows and widowers alike. The Act provides for the grant of retroactive benefits for up to one year preceding the date of application; only in exceptional circumstances can benefits be granted as from an earlier date. This provision is being applied to men and women alike, and the information before the Committee does not show that Mr. Pepels was treated differently than others. The Committee, therefore, concludes that the way in which the law is applied since 1988 does not reveal a violation of article 26 of the Covenant.

- *Pauger v. Austria* (716/1996), ICCPR, A/54/40 vol. II (25 March 1999) 202 (CCPR/C/65/D/716/1996) at paras. 3, 10.2 and 11.

...
3. It is submitted that the lump-sum payment of AS 500,612 finally awarded by the Styria Regional Education Board is AS 133, 976 less than would be a lump-sum payment calculated on the basis of full pension entitlements a widow would be able to claim. The author contends that this constitutes sex-based discrimination against him, in violation of article 26 of the Covenant.
...
10.2 The question before the Committee is whether the basis of calculation of the lump-sum payment which the author received under the Pension Act is discriminatory. The lump-sum payment, consisting of 70 monthly instalments, was calculated partly, i.e. until 31 December 1994, on the basis of the reduced pension. The Committee upholds its views concerning

communication No. 415/1990, that these reduced pension benefits for widowers are discriminatory on the ground of sex. Consequently, the reduced lump-sum payment received by the author is likewise in violation of article 26 of the Covenant, since the author was denied a full payment on equal footing with widows.

11. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 26 of the Covenant.

- *Vos v. The Netherlands* (786/1997), ICCPR, A/54/40 vol. II (26 July 1999) 271 at paras. 7.2 and 7.4-7.6.

...
7.2 The issue before the Committee is whether Mr. Vos is a victim of a violation of article 26, because the calculation of the incorporation of his general pension into his ABP pension is different for him as a married man than for married women, as a consequence of which he receives less pension than a married woman.
...
7.4 The State party has explained that the difference in calculation of the pension is a leftover of the initial different treatment between married men and married women with regard to the general pension, which was abolished in 1985 by amending the general pension legislation. The Committee recalls its jurisprudence that, when a State party enacts legislation, such legislation must comply with article 26 of the Covenant. Once it equalled general pensions for married men and women, it would have been open to the State party to change the General Law on Civil Service Pensions (*Algemene Burgerlijke Pensioenwet*) in order to prevent the difference in calculation of civil service pensions for married men and married women who as of 1 April 1985 enjoyed equal rights to the general pension. The State party, however, failed to do so and as a result a married man with pension entitlements of before 1 January 1986 has a higher percentage of general pension deducted from his civil service pension than a married woman in the same position.

7.5 The State party has argued that no discrimination has occurred since at the time when the author became entitled to a pension, married women and married men were not in a comparable position with regard to the general pension. The Committee notes, however, that the issue before it concerns the calculation of the pension as of 1 January 1986, and considers that the explanation forwarded by the State party does not justify the present difference in calculation of the pension of married men and married women with civil service pension entitlements of before 1986.

7.6 ...The Committee observes that what is at issue in the instant communication under the

Optional Protocol to the International Covenant on Civil and Political Rights is not the progressive implementation of the principle of equality between men and women with regard to pay and social security, but whether or not the application to the author of the relevant legislation was in compliance with article 26 of the Covenant. The pension paid to the author as a married male former civil servant whose pension accrued before 1985 is lower than the pension paid to a married female former civil servant whose pension accrued at the same date. In the Committee's view this amounts to a violation of article 26 of the Covenant.

- *Müller and Engelhard v. Namibia* (919/2000), ICCPR, A/57/40 vol. II (26 March 2002) 243 (CCPR/C/74/D/919/2000) at paras. 2.1-2.6, 6.7-6.9 and 8.

...
2.1 Mr. Müller, a jewellery maker, came to Namibia in July 1995 as a visitor, but was so taken up with the country that he decided to settle in the city of Swakopmund. He started to work for Engelhard Design, a jewellery manufacturer since 1993, owned by Ms. Engelhard. The authors married on 25 October 1996. Before getting married, they sought legal advice concerning the possibility of adopting Ms. Engelhard's surname. A legal practitioner informed them that this was possible. After the marriage, they returned to the same legal practitioner to complete the formalities to change the surname. They were then informed that whereas a wife could assume her husband's surname without any formalities, a husband would have to apply to change his surname.

2.2 The Aliens Act No. 1 of 1937 (hereinafter named the Aliens Act) Section 9, paragraph 1 as amended by Proclamation A.G. No. 15 of 1989, states that it is an offence to assume another surname than a person has assumed, described himself, or passed before 1937, without the authorisation by the Administrator General or an officer in the Government Service, and such authority has been published in the Official Gazette, or unless one of the listed exceptions apply. The listed exception in the Aliens Act Section 9, paragraph 1 (a), is when a woman on her marriage assumes the surname of her husband. Mr. Müller submits that the said section infringes his rights under the Namibian Constitution to equality before the law and freedom from discrimination on the grounds of sex (article 10), his and his family's right to privacy (article 13, paragraph 1), his right to equality as to marriage and during the marriage (article 14 paragraph 1), and his right to have adequate protection of his family life by the State party (article 14 paragraph 3).

2.3 Mr. Müller further submits that there are numerous reasons for his wife's and his own desire that he assumes the surname of Ms. Engelhard. He contends that his surname, Müller, is extremely common in Germany, and exemplifies this by explaining that the phonebook in Munich were he comes from, contained several pages of the surname Müller, and that

there were 11 Michael Müller alone in the phonebook for Munich. He contends that Engelhard is a far more unusual surname, and that the name is important to his wife and him because their business has established a reputation under the name Engelhard Design. It would be unwise to change the name to Müller Design because the surname is not distinctive. It is likewise important that jewellery manufacturers trade under a surname because the use of one's surname implies that one takes pride in one's work, and customers believe that it ensures a higher quality of workmanship. Mr. Müller submits that if he were to continue to use his surname, and his wife were to continue to use hers, customers and suppliers would assume that he was an employee. Mr. Müller and his wife also have a daughter who has been registered under the surname of Engelhard, and Mr. Müller would like to have the same surname as his daughter to avoid exposing her to unkind remarks about him not being the father.

2.4 Mr. Müller filed a complaint to the High Court of Namibia on 10 July 1997, alleging that Section 9, paragraph 1 of the Aliens Act was invalid because it conflicted with the Constitution with regard to the right to equality before the law and freedom from discrimination, the right to privacy, the right to equality as to marriage and during the marriage, and with regard to the right to family life.

2.5 Ms. Engelhard filed an affidavit with her husband's complaint, in which she stated that she supported the complaint and that she also wanted the joint family surname to be Engelhard rather than Müller, for the reasons given by her husband. The case was dismissed with costs on 15 May 1998.

...

6.7 With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case; that section 9, paragraph 1, of the Aliens Act differentiates on the basis of sex, in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.8/ A different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9, paragraph 1, remove this provision from the verdict of being discriminatory.

6.8 The Committee notes the State party's argument that the purpose of Aliens Act section 9, paragraph 1, is to fulfil legitimate social and legal aims, in particular to create legal

security. The Committee further notes the States party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surname, while in practice men so far never have wished to assume their wives' surname; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9, paragraph 1, of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the Covenant.

6.9 In the light of the Committee's finding that there has been a violation of article 26 of the Covenant, the Committee considers that it is not necessary to pronounce itself on a possible violation of articles 17 and 23 of the Covenant.

...

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, avoiding any discrimination in the choice of their common surname. The State party should further abstain from enforcing the cost order of the Supreme Court or, in case it is already enforced, to refund the respective amount of money.

Notes

...

8/ See Views *Danning v. The Netherlands*, Case No. 180/1984.

EQUALITY AND DISCRIMINATION - GENDER DISCRIMINATION - General

- *Hoyos v. Spain* (1008/2001), ICCPR, A/59/40 vol. II (30 March 2004) 472 at paras. 2.1-2.5, 6.5, 7 and Individual Opinion of Ruth Wedgwood (concurring), at 487-488.

...
2.1 The author was the firstborn daughter of Mr. Alfonso de Hoyos y Sánchez, who died on 15 July 1995. Subsequently, she applied to the King for succession to the ranks and titles held by her father, including the *Dukedom of Almodóvar del Río*, with the rank of *Grandee of Spain*. She asserts that she made a formal application with the intention of placing on record her greater right to succession to the title in question.

2.2 In an Order published in the *Boletín Oficial del Estado* of 21 June 1996, succession to the title of *Duke of Almodóvar del Río* was granted to the author's brother, Isidoro Hoyos y Martínez de Irujo.

2.3 The author asserts that, although as firstborn daughter she had the greater right, she had agreed to renounce the title under an agreement she had made with her brothers on the distribution of their father's titles of nobility. She asserts that at the time this took place, the criterion established by the judgement of the Supreme Court of 20 June 1987, pronouncing the precedence for males in succession to titles of nobility discriminatory and unconstitutional, was in force. However, the Constitutional Court's judgement of 3 July 1997 abrogated that decision; it stated that male primacy in the order of succession to the titles provided for in the Acts of 4 May 1948 and 11 October 1820, was neither discriminatory nor unconstitutional, given that article 14 of the Spanish Constitution, which guaranteed equality before the law, was not applicable in view of the historical and symbolic nature of the institution. 1/ The author argues that this led to her brothers initiating legal proceedings to strip her of her titles.

2.4 As a result, in June 1999, the author instituted legal proceedings against her brother Isidoro in Majadahonda Court of First Instance No. 6, asserting her greater right to the title.

2.5 In its judgement of 11 May 2000, the Majadahonda Court dismissed the claim, in accordance with the Constitutional Court's judgement of 3 July 1997. The judge said, however, that she sympathized with the author's position but she could not deviate from the interpretation the Constitutional Court had given to the laws and provisions of the legal regime.
...
6.5 The Committee notes that while the State party has argued that hereditary titles of nobility are devoid of any legal and material effect, they are nevertheless recognized by the State party's laws and authorities, including its judicial authorities. Recalling its established

jurisprudence, 7/ the Committee reiterates that article 26 of the Covenant is a free-standing provision which prohibits all discrimination in any sphere regulated by a State party to the Covenant. However, the Committee considers that article 26 cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26. It therefore concludes that the author's communication is incompatible *ratione materiae* with the provisions of the Covenant, and thus inadmissible pursuant to article 3 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;
...

Notes

1/ Two individual votes by three judges dissented from the content of the judgement; they considered that the provision in question should have been declared unconstitutional.
...
7/ See e.g. Views on communication No. 182/1984 (*Zwaan de Vries v. The Netherlands*), Views adopted 9 April 1987.

Individual Opinion of Ruth Wedgwood (concurring)

In its review of country reports, as well as in its views on individual communications, the Human Rights Committee has upheld the rights of women to equal protection of the law, even in circumstances where compliance will require significant changes in local practice. It is thus troubling to see the Committee dismiss so cavalierly the communication of Isabel Hoyos Martínez de Irujo.

The distribution of family titles in Spain is regulated by public law. Decisions on succession to titles of honour or nobility are published as official acts of State in the *Boletin Oficial del Estado*. The order of succession is not a matter of private preference of the current titleholder. Rather, female descendants are statutorily barred from any senior claim to a title, pursuant to the preference for males, regardless of the wishes of the ascendant titleholder. Such a statutory rule, see statute of 4 June 1948, would seem to be a public act of discrimination.

The Committee's stated reasons for dismissing the communication of Ms. Hoyos Martínez

de Iraujo, in her claim to inheritance of the title of the Duchy of Almodovar de Rio, can give no comfort to the State party. In rejecting her petition, as inadmissible *ratione materiae*, the Committee writes that hereditary titles of nobility are "an institution that…lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26". This cryptic sentence could be read to suggest that the continuation of hereditary titles is itself incompatible with the Covenant. One hopes that the future jurisprudence of the Committee will give appropriate weight to the desire of many countries to preserve the memory of individuals and families who figured prominently in the building of the national State.

The use of titles can be adapted to take account of the legal equality of women. Even within the tradition of a title, a change of facts may warrant a change in discriminatory rules. For example, in an age of national armies, it is no longer expected that a titleholder must have the ability to fight on the battlefield. (Admittedly, Jeanne d'Arc might suggest a wider range of reference as well.)

In its accession to modern human rights treaties, Spain recognized the difficulties posed by automatic male preference. Spain ratified the International Covenant on Civil and Political Rights on 27 July 1977. Spain also approved the Convention on the Elimination of All Forms of Discrimination against Women on 16 December 1983. In the latter accession, Spain made a single reservation that has importance here. Spain noted that the Convention shall not affect the constitutional provisions concerning succession to the Spanish crown. This unique protection for royal succession was not accompanied by any other similar reservation concerning lesser titles.

Spain did not make any similar reservation to the International Covenant on Civil and Political Rights in 1977. Still, good practice would suggest that Spain should be given the benefit of the same reservation in the application of the Covenant, in light of the Committee's later interpretation of article 26 as an independent guarantee of equal protection of the law. But the bottom line is that, even with this reservation, Spain did not attempt to carve out any special protection to perpetuate gender discrimination in the distribution of other aristocratic titles.

It is not surprising that a State party should see the inheritance of the throne as posing a unique question, without intending to perpetuate any broader practice of placing women last in line. Indeed, we have been reminded by the incumbent King of Spain that even a singular and traditional institution such as royalty may be adapted to norms of equality. King Juan Carlos recently suggested that succession to the throne of Spain should be recast. Under Juan Carlos' proposal, after his eldest son completes his reign, the son's first child would succeed to the throne, regardless of whether the child is a male or a female. In an age when many

women have served as heads of State, this suggestion should seem commendable and unremarkable.

In its judgement of 20 June 1987, upholding the equal claim of female heirs to non-royal titles, the Supreme Court of Spain referenced the Convention on the Elimination of All Forms of Discrimination against Women, as well as article 14 of the 1978 Spanish Constitution. In its future deliberations, Spain may also wish to reference general comment No. 18 of the Human Rights Committee, which states that article 2 of the Covenant "prohibits discrimination in law or in fact in any field regulated and protected by public authorities". And it is worth recalling that under the rules of the Committee, the disposition of any particular communication does not constitute a formal precedent in regard to any other communication or review of country reports.

The hereditary title in question here has been represented by the State party as "devoid of any material or legal content" and purely *nomen honoris*... Thus, it is important to note the limits of the Committee's instant decision. The Committee's Views should not be taken as sheltering any discriminatory rules of inheritance where real or chattel property is at stake. In addition, these views do not protect discrimination concerning traditional heritable offices that may, in some societies, still carry significant powers of political or judicial decision-making. We sit as a monitoring committee for an international covenant, and cannot settle broad rules in disregard of these local facts.

For dissenting opinions in this context, see Hoyos v. Spain (1008/2001), ICCPR, A/59/40 vol. II (30 March 2004) 472 at Individual Opinion of Rafael Rivas Posada, 481-482 and Individual Opinion of Mr. Hipólito Solari Yrigoyen, 483-486.

See also:

- *Barcaiztegui v. Spain* (1019/2001), ICCPR, A/59/40 vol. II (30 March 2004) 489 at paras. 2.1, 2.2, 2.4, 6.4 and individual opinion of Ruth Wedgwood, at 503-504.

- *Guido Jacobs v. Belgium* (943/2000), ICCPR, A/59/40 vol. II (7 July 2004) 138 at paras. 2.1-2.10, 9.2-9.6, 9.8, 9.9, 9.11 and Individual Opinion of Ruth Wedgwood (concurring), at 158.

...

2.1 On 2 February 1999 the *Moniteur belge* published the Act of 22 December 1998 amending certain provisions of part two of the Judicial Code concerning the High Council of Justice, the nomination and appointment of magistrates and the introduction of an evaluation system.

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2.2 As amended, article 259 bis-1, paragraph 1, of the Judicial Code provides that the High Council of Justice1/ shall comprise 44 members of Belgian nationality, divided into one 22-member Dutch-speaking college and one 22-member French-speaking college. Each college comprises 11 justices and 11 non-justices.

2.3 Article 259 bis-1, paragraph 3, stipulates:

> "The group of non-justices in each college shall have no fewer than four members of each sex and shall be composed of no fewer than:
>
> 1. Four lawyers with at least 10 years' professional experience at the bar;
>
> 2. Three teachers from universities or colleges in the Flemish or French communities with at least 10 years' professional experience relevant to the High Council's work;
>
> 3. Four members holding at least a diploma from a college in the Flemish or French community and with at least 10 years' professional experience in legal, economic, administrative, social or scientific affairs relevant to the High Council's work [...]."

2.4 Article 259 bis-2, paragraph 2, also stipulates:

> "Non-justices shall be appointed by the Senate by a two-thirds majority of those voting. Without prejudice to the right to submit individual applications, candidates may be put forward by each of the bar associations and each of the universities and colleges in the French community and the Flemish community. In each college, at least five members shall be appointed from among the candidates proposed."

2.5 Lastly, in accordance with paragraph 4 of the same article, "a list of alternate members of the High Council shall be drawn up for the duration of the term [...]. For non-justices this list shall be drawn up by the Senate [...] and shall comprise the candidates who are not appointed".

2.6 Article 259 bis-2, paragraph 5, stipulates that nominations should be sent to the Chairman of the Senate, by registered letter posted within a strict deadline of three months following the call for candidates.

2.7 On 25 June 1999, the Senate published in the *Moniteur belge* a call for candidates for a non-justice seat on the High Council of Justice.

2.8 On 16 September 1999, Mr. G. Jacobs, first legal assistant in the Council of State,

submitted his application within the legal three-month period.

2.9 On 14 October 1999, the Senate published a second call.

2.10 On 29 December 1999, the Senate elected the members of the High Council of Justice. The author was not elected but was included in the list of alternates for non-justices as provided in article 295 bis-2, paragraph 4.

...

9.2 With regard to the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant, arising from article 295 bis-1, paragraph 3, of the Act of 22 December 1998, the Committee takes note of the author's arguments challenging the gender requirement for access to a non-justice seat on the High Council of Justice on the grounds that it is discriminatory. The Committee also notes the State party's argument justifying such a requirement by reference to the law, the objective of the measure, and its effect in terms of the appointment of candidates and the constitution of the High Council of Justice.

9.3 The Committee recalls that, under article 25 (c) of the Covenant, every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, to have access, on general terms of equality, to public service in his or her country. In order to ensure access on general terms of equality, the criteria and processes for appointment must be objective and reasonable. States parties may take measures in order to ensure that the law guarantees to women the rights contained in article 25 on equal terms with men 8/. The Committee must therefore determine whether, in the case before it, the introduction of a gender requirement constitutes a violation of article 25 of the Covenant by virtue of its discriminatory nature, or of other provisions of the Covenant concerning discrimination, notably articles 2 and 3 of the Covenant, as invoked by the author, or whether such a requirement is objectively and reasonably justifiable. The question in this case is whether there is any valid justification for the distinction made between candidates on the grounds that they belong to a particular sex.

9.4 In the first place, the Committee notes that the gender requirement was introduced by Parliament under the terms of the Act of 20 July 1990 on the promotion of a balance between men and women on advisory bodies 9/. The aim in this case is to increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there 10/. On this point, the Committee finds the author's assertion that the insufficient number of female applicants in response to the first call proves there is no inequality between men and women to be unpersuasive in the present case; such a situation may, on the contrary, reveal a need to encourage women to apply for public service on bodies such as the High Council of Justice, and the need for taking measures in this regard. In the present case, it appears to the Committee that a body such as the High

Council of Justice could legitimately be perceived as requiring the incorporation of perspectives beyond one of juridical expertise only. Indeed, given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that perspective to be included in a body involved in judicial appointments. Accordingly, the Committee cannot conclude that the requirement is not objective and reasonably justifiable.

9.5 Secondly, the Committee notes that the gender clause requires there to be at least four applicants of each sex among the 11 non-justices appointed, which is to say just over one third of the candidates selected. In the Committee's view, such a requirement does not in this case amount to a disproportionate restriction of candidates' right of access, on general terms of equality, to public office. Furthermore, and contrary to the author's contention, the gender requirement does not make qualifications irrelevant, since it is specified that all non-justice applicants must have at least 10 years' experience. With regard to the author's argument that the gender requirement could give rise to discrimination between the three categories within the group of non-justices as a result, for example, of only men being appointed in one category, the Committee considers that in that event there would be three possibilities: either the female applicants were better qualified than the male, in which case they could justifiably be appointed; or the female and male applicants were equally well qualified, in which case the priority given to women would not be discriminatory in view of the aims of the law on the promotion of equality between men and women, as yet still lacking; or the female candidates were less well qualified than the male, in which case the Senate would be obliged to issue a second call for candidates in order to reconcile the two aims of the law, namely, qualifications and gender balance, neither of which may preclude the other. On that basis, there would appear to be no legal impediment to reopening applications. Lastly, the Committee finds that a reasonable proportionality is maintained between the purpose of the gender requirement, namely to promote equality between men and women in consultative bodies; the means applied and its modalities, as described above; and one of the principal aims of the law, which is to establish a High Council made up of qualified individuals. Consequently, the Committee finds that paragraph 3 of article 295 bis-1 of the Act of 22 December 1998 meets the requirements of objective and reasonable justification.

9.6 In the light of the foregoing, the Committee finds that article 295 bis-1, paragraph 3, does not violate the author's rights under the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

...

9.8 With regard to the complaint of discrimination between categories within the group of non-justices arising from the introduction of the gender requirement, the Committee finds that the author has not sufficiently substantiated this part of the communication and, in

particular, has produced no evidence to show that any female candidates were appointed despite being less well qualified than male candidates.

9.9 With regard to the complaint of discrimination between applicants in connection with the Senate's second call for applications, and to the claim that the second call was illegal, the Committee notes that this call was issued because of the insufficient numbers of applications from women, i.e., two applications from women for the Dutch-speaking college - which the author concedes - whereas under article 295 bis-1, paragraph 3, each group of non-justices on the High Council of Justice must comprise at least four members of each sex. The Committee finds, therefore, that the second call was justified to allow the Council to be constituted and, furthermore, that there was no impediment to such action either in law or in parliamentary practice, particularly as the applications submitted in response to the first call remained valid.

...

9.11 The Committee therefore finds that the application of the Act of 22 December 1998, and in particular of article 295 bis-1, paragraph 3, does not violate the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

Notes

1/ Article 151 of the Constitution instituting the High Council of Justice provides in paragraph 2:

> "One High Council of Justice exists for all of Belgium. In the exercise of its attributes the High Council of Justice shall respect the independence referred to in paragraph 1. It shall consist of a French-speaking college and a Dutch-speaking college. Each college shall have an equal number of members and shall be composed equally of judges and officials of the public prosecutor's office directly elected by their peers under the conditions and according to the form determined by law, and of other members nominated by the Senate by a two-thirds majority of those voting, under the conditions established by law."
>
> "Within each college there shall be a nomination and appointments committee and an advisory and investigative committee, on which representation shall be equally distributed as provided in the previous paragraph […]."

Paragraph 3:

> "The High Council of Justice shall exercise its authority in the following areas:
>
> 1. Presentation of candidates for appointment as judges […] or members of the prosecutor's office;

2. Presentation of candidates for designation to the duties […] of *chef de corps* in the public prosecutor's office;
3. Access to the position of judge or member of the public prosecutor's office;
4. Training of judges and members of the public prosecutor's office;
5. Establishment of general profiles for the designations referred to in 2;
6. Issuance of opinions and proposals concerning the general operation and organization of the judicial branch;
7. General supervision and promotion of the use of internal monitoring methods;
8. To the exclusion of all disciplinary and criminal tribunals:
    - Acceptance and follow-up of complaints concerning the operation of the judicial branch;
    - Initiation of inquiries into the operation of the judicial branch [...]."

...

8/ General comment No. 28, on article 3 of the Covenant (sixty-eighth session, 2000), para. 29.

9/ "Since the High Council also serves as an advisory body, each college shall comprise eight members of each sex." Bill of 15 July 1998, Discussion, p. 44, Belgian Chamber of Representatives. See also para. 6.3 of the present communication.

10/ "A study of the actual situation reveals that, in the majority of the advisory bodies, the membership includes a very small number of women." Preamble to the Bill, p.1, 27 March 1990, Chamber of Representatives, parliamentary documents; "A survey of the national consultative bodies shows that the proportion of women is no more than 10 percent." Introduction to the Bill by the Secretary of State for Social Emancipation, p.1, 3 July 1990, Belgian Senate.

____

...

Individual Opinion of Ruth Wedgwood (concurring)

The Committee has concluded that the norms of non-discriminatory access to public service and political office embodied in article 25 of the Covenant do not preclude Belgium from requiring the inclusion of at least four members of each gender on its High Council of Justice. The Council is a body of some significant powers, recommending candidates for appointment as judges and prosecutors, as well as issuing opinions and investigating complaints concerning the operation of the judicial branch. However, it is pertinent to note that the membership of the Council of Justice is highly structured by many other criteria as well, under the Belgium Judicial Code. The Council is comprised of two separate "colleges" for French-speaking and Dutch-speaking members. Within each college of 22 members, half are directly elected by sitting judges and prosecutors. The other "non-justice" members are

chosen by the Belgium Senate, and the slate must include a minimum number of experienced lawyers, college or university teachers, and other professionals, with “no fewer than four members of each sex” included among the 11 members of these “non-justice” groups. This electoral rule may benefit men as well as women, although it was rather clearly intended to assure the participation of women on this “advisory” body. It is important to note that the constitution or laws of some States parties to the Covenant may disdain or forbid any use of set-asides or minimum numbers for participation in governmental bodies, and nothing in the instant decision interferes with that national choice. The Committee only decides that Belgium is free to choose a different method in seeking to assure the fair participation of women as well as men in the processes of government.