SOCIAL SECURITY AND INSURANCE

III. JURISPRUDENCE

ICCPR

- *Y. L. v. Canada* (112/1981), ICCPR, A/41/40 (8 April 1986) 145 at paras. 9.1-9.5 and 10.

...

9.1 With regard to the alleged violation of the guarantees of "a fair and public hearing by a competent, independent and impartial tribunal established by law," contained in article 14, paragraph 1, of the Covenant, it is correct to state that those guarantees are limited to criminal proceedings and to any "suit at law." The latter expression is formulated differently in the various language texts of the Covenant and each and every one of those texts is, under article 53, equally authentic.

9.2 The *travaux préparatoires* do not resolve the apparent discrepancy in the various language texts. In the view of the Committee the concept of a "suit at law" or its equivalent in other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in the light of its particular features.

9.3 In the present communication, the right to a fair hearing in relation to the claim for a pension by the author must be looked at globally, irrespective of the different steps which the author had to take in order to have his claim for a pension finally adjudicated.

9.4 ...It is clear from the observations made by the State party on the author's communication that the Canadian legal system subjects the proceedings in those various bodies to judicial supervision and control, because the Federal Court Act does provide the possibility of judicial review in unsuccessful claims of this nature. It would be hazardous to speculate on whether that Court would or would not have, first, quashed the decision of the Board on the grounds advanced by the author and, secondly, directed the Board to give the author a fair hearing on his claim. The fact that the author was not advised that he could have resorted to judicial review is irrelevant in determining the question whether the claim of the author was of a kind subject to judicial supervision and control. It has not been claimed by the author that this remedy would not have complied with the guarantees provided in article 14, paragraph 1, of the Covenant. Nor has he claimed that this remedy would not have availed in correcting whatever deficiencies may have marked the hearing of his case before the lower

jurisdictions, including any grievance that he may have had regarding the denial of access to his medical file.

9.5 In the view of the Committee, therefore, it would appear that the Canadian legal system does contain provisions in the Federal Court Act to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the Covenant.

10. The Committee therefore concludes that...

The communication is inadmissible.

For dissenting opinions in this context, see Y. L. v. Canada (112/1981), ICCPR, A/41/40 (8 April 1986) 145 at Individual Opinion by Messrs. Bernhard Graefrath, Fausto Pocar and Christian Tomuschat, 150 at paras. 2 and 3.

- *Danning v. The Netherlands* (180/1984), ICCPR, A/42/40 (9 April 1987) 151 at paras. 12.4, 13 and 14.

...
12.4 Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

13. 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.

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

law for married couples. The Committee concludes that the differentiation...does not constitute discrimination in the sense of article 26 of the Covenant.

See also:

- *Hoofdman v. The Netherlands* (602/1994), ICCPR, A/54/40 vol. II (3 November 1998) 36 (CCPR/C/64/D/602/1994) at paras. 11.3 and 11.4.

- *Zwaan-de Vries v. The Netherlands* (182/1984), ICCPR, A/42/40 (9 April 1987) 160 at paras. 12.2-16.

...

12.2 The Committee has ...examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant *travaux preparatoires* of the International Covenant on Civil and Political Rights, namely the summary records of the discussions that took place in the Commission on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, which provide a 'supplementary means of b/). The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3 For the purpose of determining the scope of article 26, the Committee has taken into account the 'ordinary meaning' of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4 Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

12.5 The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

13. 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.

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. Zwaan-de Vries 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 imposes 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, and this seems to have been effectively acknowledged even by the State party by the enactment of a change in the law on 29 April 1985, with retroactive effect to 23 December 1984 (see para. 4.5 above).

15. The circumstances in which Mrs. Zwaan-de Vries 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 that the State party had not intended to discriminate against women and further notes with appreciation that the discriminatory provisions in the law applied to Mrs. Zwaan-de Vries 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. Zwaan-de Vries at the time complained of, the Committee is of the view that the State party should offer Mrs. Zwaan-de Vries an appropriate remedy.

Notes

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b/ United Nations, *Juridical Yearbook 1969* (United Nations publication, Sales No. E.71.V.4), p. 140.

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See also:

- *Broeks v. The Netherlands* (172/1984), ICCPR, A/42/40 (9 April 1987) 139 at paras. 12.4, 14 and 15.

- *P. P. C. v. The Netherlands* (212/1985), ICCPR, A/43/40 (24 March 1988) 244 at para. 6.2.

...

6.2 ...The Committee has already had an opportunity to observe that the scope of article 26 can...cover cases of discrimination with regard to social security benefits (communications Nos. 172/1984, 180/1984 and 182/1984). a/ It considers, however, that the scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits. In the case at issue, the author merely states that the determination of compensation benefits on the basis of a person's income in the month of September led to an unfavourable result in his case. Such determination is, however, uniform for all persons with a minimum income in the Netherlands. Thus, the Committee finds that the law in question is not *prima facie* discriminatory, and that the author does not, therefore, have a claim...

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a/ Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII, sect. B to D.

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- *Vos v. The Netherlands* (218/1986), ICCPR, A/44/40 (29 March 1989) 232 at paras. 2.1, 11.2, 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 Ma~ 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.

...

11.2 The Committee notes that the State party in its submission under article 4, paragraph

2, of the Optional Protocol has reserved its position with respect to the applicability of article 26 of the Covenant in the field of social security rights...In this connection, the Committee has already expressed the view in its case law b/ that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, e.g. the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, its remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.

11.3 The Committee further observes that what 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.

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b/ CCPR/C/29/D/172/1984, CCPR/C/29/D/180/1984 and CCPR/C/29/D/182/1984.

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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.

- *Gueye v. France* (196/1985), ICCPR, A/44/40 (3 April 1989) 189 at paras. 1.2, 9.4, 9.5 and 10.

  ...
  1.2 The authors claim to be victims of a violation of article 26 of the Covenant by France because of alleged racial discrimination in French legislation, which provides for different treatment in the determination of pensions of retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal in 1960 and who receive pensions that are inferior to those enjoyed by retired French soldiers of French nationality.
  ...
  9.4 The Committee has noted the authors' claim that they have been discriminated against on racial grounds, that is, one of the grounds specifically enumerated in article 26. It finds that there is no evidence to support the allegation that the state party has engaged in racially discriminating practices *vis-à-vis* the authors. It remains, however, to be determined whether the situation encountered by the encountered by the authors falls within the purview of article 26. The Committee recalls that the authors are not generally within French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights. It notes that nationality does not figure among the prohibited grounds of discrimination listed in article 26, and that the Covenant does not protect the right to a pension, as such. Under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. There has been a differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to "other status" in the second sentence of article 26. The Committee takes into account, as it did in communication No. 182/1984, that "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.

  9.5 In determining whether the treatment of the authors is based on reasonable and objective criteria, the Committee notes that it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past...A subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided. Nor can difference in

the economic, financial and social conditions as between France and Senegal be invoked as a legitimate justification. If one compared the case of retired soldiers of Senegalese nationality in Senegal with that of retired soldiers of French nationality in Senegal, it would appear that they enjoy the same economic and social conditions. Yet, their treatment for the purpose of pension entitlements would differ. Finally, the fact that the State party claims that it can no longer carry out checks of identity and family situation, so as to prevent abuses in the administration of pension schemes cannot justify a difference in treatment. In the Committee's opinion, mere administrative convenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment. The Committee concludes that the difference in treatment of the authors is not based on reasonable and objective criteria and constitutes discrimination prohibited by the Covenant.

10. The Human Rights Committee...is of the view that the events of this case...disclose a violation of article 26 of the Covenant.

- *Pauger v. Austria* (415/1990), ICCPR, A/47/40 (26 March 1992) 325 (CCPR/C/44/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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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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- *Sprenger v. The Netherlands* (395/1990), ICCPR, A/47/40 (31 March 1992) 311 (CCPR/C/44/D/395/1990) at paras. 3, 7.2-7.4 and Individual Opinion by Mr. Nisuko Ando, Mr. Kurt Herndl and Mr. Birama Ndiaya (concurring), 315.

...

3. The author claims that she is a victim of a violation by the State party of article 26 of the Covenant, because she was denied co-insurance under the Health Insurance Act, which distinguished between married and unmarried couples, whereas other social security legislation already recognized the equality of status between common law and official marriages.

...

7.2 The Committee observes that, although a State is not required under the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant. Equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria. b/

7.3 ...[T]he State party submits that there are objective differences between married and unmarried couples, which justify different treatment. In this context the State party refers to the Committee's views in *Danning v. The Netherlands*, in which a difference of treatment between married and unmarried couples was found not to constitute discrimination within the meaning of article 26 of the Covenant.

7.4 The Committee recalls that its jurisprudence permits differential treatment only if the

grounds therefore are reasonable and objective. Social developments occur within States parties and the Committee has in this context taken note of recent legislation reflecting these developments, including the amendments to the Health Insurance Act. The Committee has also noted the explanation of the State party that there has been no general abolition of the distinction between married persons and cohabitants, and the reasons given for the continuation of this distinction. The Committee finds this differential treatment to be based on reasonable and objective grounds. The Committee recalls its findings in communication No. 180/1984 and applies them to the present case.

Notes

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b/ See [Official Records of the General Assembly, Forty-second Session Supplement No. 40 (A/42/40)], sect. B, *Broeks v. The Netherlands*, Communication No. 172/1984, and *ibid*., sect. D, *Zwaan-de Vires v. The Netherlands*, Communication No. 182/194, Views adopted on 9 April 1987.

Individual Opinion by Mr. Nisuko Ando, Mr. Kurt Herndl and Mr. Birama Ndiaya

We concur in the Committee's finding that the facts before it do not reveal a violation of article 26 of the Covenant. We further believe that this is an appropriate case to expand on the Committee's rationale, as it appears in these views and in the Committee's views in communications Nos. 180/194, *Danning v. The Netherlands* and 182/1984, *Zwaan-de-Vries v. The Netherlands.* a/

While it is clear that article 26 of the Covenant postulates an autonomous right to non-discrimination, we believe that the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

We note, firstly, that the determination whether prohibited discrimination within the meaning of article 26 has occurred depends on complex considerations, particularly in the field of economic, social and cultural rights. Social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. While the aims of social justice vary from country to country, they must be compatible with the Covenant. Moreover, whatever distinctions are made must be based on reasonable and objective criteria. For instance, a system of progressive taxation, under which persons with higher incomes fall into a higher tax bracket and pay a greater percentage of their income for taxes, does not entail a violation of article 26 of the Covenant, since the distinction between higher and lower incomes is objective and the purpose of more equitable distribution of wealth is reasonable and compatible with the aims of the Covenant.

Surely, it is also necessary to take into account the reality that the socio-economic and cultural needs of society are constantly evolving, so that legislation - in particular in the field of social security - may well, and often does, lag behind developments. Accordingly, article 26 of the Covenant should not be interpreted as requiring absolute equality or non-discrimination in that field at all times; instead, it should be seen as a general undertaking on the part of States parties to the Covenant regularly to review their legislation in order to ensure that it corresponds to the changing needs of society. In the field of civil and political rights, a State party is required to respect Covenant rights such as the right to a fair trial, freedom of expression and freedom of religion immediately from the date of entry into force of the Covenant, and to do so without discrimination. On the other hand, with regard to rights enshrined in the International Covenant on Economic, Social and Cultural Rights, it is generally understood that States parties may need time for the progressive implementation of these rights and to adapt relevant legislation in stages; moreover, constant efforts are needed to ensure that distinctions that were reasonable and objective at the time of enactment of a social security provision are not unreasonable and discriminatory by the socio-economic evolution of society. Finally, we recognize that legislative review is a complex process entailing consideration of many factors, including limited financial resources, and the potential effects of amendments on other existing legislation.

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a/ See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII, sects. C and D, Views adopted on 9 April 1987.

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- *Oulajin and Kaiss v. The Netherlands* (406/1990 and 426/1990), ICCPR, A/48/40 vol. II (23 October 1992) 131 (CCPR/C/46/D/406/1990) at paras. 7.3-7.5 and Individual Opinion by Messrs. Kurt Herndl, Rein Mullerson, Birame N'Diaye and Waleed Sadi, 9.

...

7.3 In its constant jurisprudence, the Committee has held that although a State party is not required by the Covenant on Civil and Political Rights to adopt social security legislation, if it does, such legislation and the application thereof must comply with article 26 of the Covenant. The principle of non-discrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria.3/

7.4 With respect to the Child Benefit Act, the State party submits that there are objective differences between one's own children and foster children, which justify different treatment under the Act. The Committee recognizes that the distinction is objective and need only

focus on the reasonableness criterion. Bearing in mind that certain limitations in the granting of benefits may be inevitable, the Committee has considered whether the distinction between one's own children and foster children under the Child Benefit Act, in particular the requirement that a foster parent be involved in the upbringing of the foster children, as a precondition to the granting of benefits, is unreasonable. In the light of the explanations given by the State party, the Committee finds that the distinctions made in the Child Benefit Act are not incompatible with article 26 of the Covenant.

7.5 The distinction made in the Child Benefit Act between own children and foster children precludes the granting of benefits for foster children who are not living with the applicant foster parent. In this connection, the authors allege that the application of this requirement is, in practice, discriminatory, since it affects migrant workers more than Dutch nationals. The Committee...observes…that the Child Benefit Act makes no distinction between Dutch nationals and non-nationals, such as migrant workers. The Committee considers that the scope of article 26 of the Covenant does not extend to differences resulting from the equal application of common rules in the allocation of benefits.

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3/ See *Brooks v. The Netherlands*, Communication No. 172/1984, and *Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, Views adopted on 9 April 1987, paragraphs 12.4; *Vos v. The Netherlands*, Communication No. 218/1986, Views adopted on 29 March 1989, paragraph 11.3; *Pauger v. Austria*, Communication No. 415/1990, Views adopted on 26 March 1992, paragraph 7.2; *Sprenger v. The Netherlands*, Communication No. 395/1990, Views adopted on 31 March 1992, paragraph 7.2.

Individual Opinion by Messrs. Kurt Herndl, Rein Mullerson, Birame N'Diaye and Waleed Sadi

We concur in the Committee's finding that the facts do not reveal a violation of article 26 of the Covenant...[W]e consider it proper to briefly expand on the Committee's rationale...

It is obvious that while article 26 of the Covenant postulates an autonomous right to non-discrimination, the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

With regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social

justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to reevaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties.

Furthermore it would seem to us that it is essential to keep one's sense of proportion. With respect to the present cases, we note that the authors are asking for child benefits not only for their own children - to which they are entitled under the legislation of the Netherlands - but also for siblings, nephews and nieces, for whom they claim to have accepted responsibility and hence consider them as dependents. On the basis of the information before the Committee, such demands appear to run counter to a general sense of proportion, and their denial by the government concerned cannot be considered unreasonable in view of the budget limitations which exist in any social security system. While States parties to the Covenant may wish to extend benefits to such wide-ranging categories of dependents, article 26 of the Covenant does not require them to do so.

- *Orihuela v. Peru* (309/1988), ICCPR, A/48/40 vol. II (14 July 1993) 48 (CCPR/C/48/D/309/1988) at para. 6.4.

...
6.4 The Committee has noted the author's claim that he has not been treated equally before the Peruvian courts in connection with his pension claims. The State party has not refuted his allegation that the courts' inaction, the delays in the proceedings and the continued failure to implement the resolution of October 1989 concerning his severance pay are politically motivated. The Committee concludes on the basis of the material before it, that the denial of severance pay to a long standing civil servant who is dismissed by the Government constitutes, in the circumstances of this case, a violation of article 26 and that Mr Orihuela Valenzuela did not benefit "without any discrimination (from) equal protection of the law". Therefore the Committee finds that there has been a violation of article 26 of the Covenant.

- *Cavalcanti v. The Netherlands* (418/1990), ICCPR, A/49/40 vol. II (22 October 1993) 114 (CCPR/C/49/D/418/1990) at paras. 7.3 and 7.4.

...
7.3 The Committee recalls its earlier jurisprudence and observes that, although a State is not required under the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant.

7.4 ...The Committee finds that the requirement of being unemployed at the time of application for benefits is…reasonable and objective, in view of the purposes of the

legislation in question, namely to provide assistance to persons who are unemployed. The Committee therefore concludes that the facts before it do not reveal a violation of article 26 of the Covenant.

- *Neefs v. The Netherlands* (425/1990), ICCPR, A/49/40 vol. II (15 July 1994) 120 (CCPR/C/51/D/425/1990) at paras. 7.2-7.4.

...

7.2 The Committee refers to its prior jurisprudence and reiterates that, although a State is not required under article 26 of the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant. 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. 1/

7.3 In the instant case, the Committee notes that the author's claim that he is a victim of a violation of article 26, is based on the fact that he is sharing a household with his mother and on that basis receives a lower level of benefit under the Social Security Act than he would have if he had shared it with a non-relative or with a relative in respect of whom the regulations under the Act allow evidence of a commercially shared household.

7.4 The Committee observes that benefits under the Social Security Act are granted to persons with low or no income in order to provide for their costs of living. The author himself has conceded that his costs of living are reduced since he is sharing a household with his mother, be this on a commercial basis or on a basis of mutual support...[T]he Committee finds that the different treatment of parents and children and of other relatives respectively, contained in the regulations under the Social Security Act, is not unreasonable nor arbitrary, and its application in the author's case does not amount to a violation of article 26 of the Covenant.

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1/ See *inter alia* the Committee's Views with regard to Communication No. 395/1990*(M.T. Sprenger v. The Netherlands*, adopted on 31 March 1992, paragraph 7.2) and No.415/1990 (*Dietmar Pauger v. Austria*, adopted on 22 March 1991, paragraph 7.3)

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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.

See also:

- *J. A. M. B.-R v. The Netherlands* (477/1991), ICCPR, A/49/40 vol. II (7 April 1994) 294 (CCPR/C50/D/477/1991) at paras. 5.3 and 5.4.

- *Pons v. Spain* (454/1991), ICCPR, A/51/40 vol. II (30 October 1995) 30 (CCPR/C/55/D/454/1991) at paras. 9.3-9.5.

...

9.3 Before addressing the merits in this case, the Committee observes that although the right to social security is not protected, as such, in the International Covenant on Social and Political Rights, issues under the Covenant may nonetheless arise if the principle of equality contained in articles 14 and 26 of the Covenant is violated.

9.4 In this context the Committee reiterates its jurisprudence that not every differentiation in treatment can be deemed to be discriminatory under the relevant provisions of the Covenant. a/ A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination.

9.5 The Committee notes that the author claims to be the only unemployed substitute judge who does not receive unemployment benefits. The information before the Committee

reveals, however, that the relevant category of recipients of unemployment benefits encompasses only those unemployed substitute judges who cannot immediately return to another post upon the completion of their temporary assignments. The author does not belong to this category, since he enjoys the status of a civil servant. In the Committee's opinion, a distinction between unemployed substitute judges who are not civil servants on leave and those who are cannot be deemed arbitrary or unreasonable. The Committee therefore concludes that the alleged differentiation in treatment does not entail a violation of the principle of equality and non-discrimination enunciated in article 26 of the Covenant.

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Notes

a/ See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII.D, Communication No. 182/1984 *(Zwaan de Vries v. The Netherlands*), Views adopted on 9 April 1987, para. 13; and *ibid*., No. 516/1992 (*Simunek et al. v. The Czech Republic*), Views adopted on 19 July 1995, para. 11.5.

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- *Drake v. New Zealand* (601/1994), ICCPR, A/52/40 vol. II (3 April 1997) 273 (CCPR/C/59/D/601/1994) at paras. 8.4-8.6.

...

8.4 The authors claim that the failure of New Zealand to provide a remedy for the injustices suffered by them during their incarceration by Japan, and for their residual disabilities and incapacities, violates article 26 of the Covenant. This claim relates to the distinction said to have been made between civilian and war veterans, and between military personnel who were prisoners of the Japanese and those who were prisoners of the Germans. The authors and the groups of whom they are representatives include both civilians and war veterans.

8.5 As regards the claim that the exclusion of civilian detainees from entitlements under the War Pensions Act is discriminatory, the Committee notes from the information before it that the purpose of the Act is specifically to provide pension entitlements for disability and death of those who were in the service of New Zealand in wartime overseas, not to provide compensation for incarceration or for human rights violations. In other words if disability arises from war service it is irrelevant to the entitlement to a pension whether the person suffered imprisonment or cruel treatment by captors. Keeping in mind the Committee's prior jurisprudence 12/ according to which a distinction based on objective and reasonable criteria does not constitute discrimination within the meaning of article 26 of the Covenant, the Committee considers that the authors' claim is incompatible with the provisions of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

8.6 The authors have further claimed that those who were in war service are victims of a violation of article 26 of the Covenant because of the narrow class of disability for which pensions are made available under the War Pensions Act. The Committee notes that the authors have failed to provide information as to how this affects their personal situation. The authors have thus failed to substantiate their claim, for purposes of admissibility, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

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12/ See, *inter alia*, the Committee's Views concerning Communications Nos. 172/1984 (*Brooks v. The Netherlands*), para. 13; 180/1984 (*Danning v. The Netherlands*), para. 13; 182/1984 (*Zwaan-de Vries v. The Netherlands*), para. 13; 415/1990 (*Pauger v. Austria*), para. 7.3; and 425/1990 (*Neefs v. The Netherlands*), para. 7.2 See also the Committee's General Comment No. 18 (Non-Discrimination), para. 13.

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- *van Oord v. The Netherlands* (658/1995), ICCPR, A/52/40 vol. II (23 July 1997) 311 (CCPR/C/60/D/658/1995) at paras. 8.4-8.6.

...

8.4 The Committee has noted the authors' claim that they have been discriminated against on the basis of their nationality, because (a) their benefits are reduced for the period between their 15th birthday and 1 January 1957 that they were not living in the Netherlands, whereas they are not reduced for Dutch citizens living in the Netherlands, and (b) their benefits are reduced and they are required to pay taxes on them whereas other former citizens of the Netherlands, now citizens of Canada, Australia or New Zealand do not suffer similar reductions.

8.5 With regard to this claim, the Committee observes that it is undisputed that the criteria used in determining the authors' pension entitlements are equally applied to all former Dutch citizens now living in the USA, and that the authors also benefit from a treaty concluded between the Netherlands and the USA, which has the effect of raising their pension to a higher level than originally agreed. According to the authors, the fact that former Dutch citizens now living in Australia, Canada and New Zealand benefit from other privileges, entails discrimination. The Committee observes, however, that the categories of persons being compared are distinguishable and that the privileges at issue respond to separately negotiated bilateral treaties which necessarily reflect agreements based on reciprocity. The Committee recalls its jurisprudence that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. 32/

8.6 The Committee finds therefore that the facts presented by the authors do not raise an issue under article 26 of the Covenant...This part of the communication is therefore inadmissible.

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32/ *Inter alia*, the Committee's Views with regard to Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, adopted by the Committee on 9 April 1987.

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- *Singh v. Canada* (761/1997), ICCPR, A/52/40 vol. II (29 July 1997) 348 (CCPR/C/60/D/761/1997) at paras. 3.5, 4.3 and 5.

...

3.5 Finally, the author claims that the State party's failure to provide social security to himself and his dependent children, while he is unable to sustain his family as a consequence of his forced withdrawal from the University, constitutes inhuman and degrading treatment, in violation of article 7 of the Covenant.

...

4.3 ...[T]he Committee considers that the non-provision of social security services to the author or his family after his withdrawal from the University of Western Ontario raises no issues under article 7.

...

5. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible...

- *Snijders v. The Netherlands* (651/1995), ICCPR, A/53/40 vol. II (27 July 1998) 135 (CCPR/C/63/D/651/1995) at paras. 2.3, 2.4 and 8.2-8.5.

...

2.3 On July 1 1989, the authors, who are single, were levied for an own contribution...for their stay in a nursing home in Zandvoort. They appealed...arguing that the distinction between married persons and persons who cohabit on the one hand and single persons on the other hand constituted discrimination in violation of article 26 of the Covenant. By decision of 14 January 1991, the Board of Appeal allowed their appeal, finding that the distinction between married or cohabitating persons and single persons, while not discriminatory *per se*, was not justified in the specific circumstances and amounted to a discrimination of single persons...

2.4 ...[T]he regional executive body for the levy of income-related contributions, appealed the Board's decision to the Central Board of Appeal (*Centrale Raad van Beroep*), which, by judgement of 1 October 1992, quashed the decision of the Board of Appeal and rejected the authors' claim...

...

8.2 The question before the Committee is whether the principle of equality as laid down in article 26 has been violated (a) because the authors are required to make personal contributions under the AWBZ [*Algemene Wet Bijzondere Ziektekosten*] because they are in residential care, whereas insured persons who are not in residential care are not required to make personal contributions; and because the calculation of the personal contributions puts the authors at a disadvantage, since (b) they are required to pay income-related contributions whereas married or cohabiting persons whose partner is not in care, only pay a fixed non-income related contribution, regardless of their income, and (c) couples where both partners are in care, pay the same maximum amount as a single person.

8.3 The Committee is of the opinion that the requirement that individuals, when benefitting from the AWBZ insurance scheme, pay a personal contribution towards the costs of residential care, is as such not in violation of the principle of equality before the law. With regard to the issue under (a), the State party has explained that those using the system have to contribute to the scheme lest this become not affordable. The Committee considers that the explanation given by the State party justifies the distinction between those who are required to pay personal contributions and those who are not required to do so, and the distinction thus does not constitute a violation of article 26 of the Covenant.

8.4 Personal contributions under the AWBZ should however be calculated objectively and without arbitrariness. In relation to the issue under (b), the Committee has taken note of the State party's explanation that the distinction in the contribution is based upon the factual difference that married or cohabitating persons leave behind a partner who continues to live in what was their common household and therefore does not save the same amount of money as does a single person in residential care. For this reason they are requested to pay a fixed contribution. The Committee considers that this distinction, based on a presumption that has its basis in the factual circumstances of life of persons benefitting from the scheme, is objective and reasonable. Therefore it does not constitute a violation of article 26 of the Covenant. This conclusion is not affected by the argument of the authors that the State party might have at its disposal alternative methods of levying sufficient funding for the AWBZ scheme.

8.5 With regard to the issue under (c), the Committee notes that the State party has explained that in calculating the amount of money each person must pay as an income-related contribution, it takes into account each individual's ability to pay as well as domestic circumstances. In case of a couple where both spouses are in care, their total income forms

the basis of the calculation of their contribution. This, however, does not affect the ceiling of the own contribution which is the same (NLG 1,350) for single persons and couples alike. None of the authors was levied for an own contribution that would amount to this ceiling. Consequently, the authors have failed to show that they are victims of 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.

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

...

2.1 The author was in a same-sex relationship with a Mr. C for 38 years. Mr. C was a war veteran, for whom the author cared in the last years of his life. He died on 20 December 1998, at the age of 73. On 1 March 1999, the author applied for a pension under section 13 of the Veteran's Entitlement Act ("VEA") as a veteran's dependant. On 12 March 1999, the Repatriation Commission denied the author's application in that he was not a dependant as defined by the Act. In its decision the Commission sets out the relevant legislation as follows:

SOCIAL SECURITY AND INSURANCE

Section 11 of the Act states:

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

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

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

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

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

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

2.2 On 16 March 1999, the author applied to the Veterans Review Board ("VRB") for a review of the Commission's decision. On 27 October 1999, the Board affirmed the Commission's decision, finding that the author was not a dependant as defined by the Act. In its decision the Board outlines the legislation as above and considers that it "has no

discretion in its application of the Act and in this case it is bound to have regard to Section 11 of the Act. Hence, under the current legislation, the Board is required to affirm the decision under review in relation to the status of the applicant".

...

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

...

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

10.3 The Committee notes that the State party fails specifically to refer to the impugned sections of the Act (sections 5(E), 5(E) 2 and 11) on the basis of which the author was refused a pension because he did not meet with the definition of a "member of a couple" by not "living with a member of the opposite sex". The Committee observes that the State party does not deny that the refusal of a pension on this basis is a correct interpretation of the VEA but merely refers to other grounds in the Act on which the author's application could have been rejected. The Committee considers, that a plain reading of the definition "member of

a couple" under the Act suggests that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The State party does not contest this. Consequently, it remains for the Committee to decide whether, by denying a pension under the VEA to the author, on the ground that he was of the same sex as the deceased Mr. C, the State party has violated article 26 of the Covenant.

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

...

12. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee concludes that the author, as a victim of a violation of article 26 is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

Notes

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

...

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

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

SOCIAL SECURITY AND INSURANCE

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

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

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

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

On the facts and in the particular posture of this case, the Committee has concluded that the differentiation made by Australia between same-sex and heterosexual civil partners has not been sustained against Mr. Young's challenge. The trespass is not based on a right of privacy under Article 17, but rather on the claimed right to equality before the law under Article 26 of the Covenant.

...

In a case of this moment, it is perhaps surprising that Australia has not chosen to enter into any discussion, pro or con, on the merits of the claim made under Article 26 of the Covenant. Australia has offered no views concerning Mr. Young's argument that the distinction made by statute between same sex and heterosexual civil partners is unfounded, and the Committee has essentially entered a default judgment. Under Covenant jurisprudence, a State party must offer "reasonable and objective criteria" for making any distinction on grounds of sex or

(according to our "guidance" to the state party in paragraph 8.7 of the Toonen case) on grounds of sexual orientation. Yet, as the Committee notes in paragraph 10.4 of the instant case of Mr. Young, "The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced." In every real sense, this is not a contested case.

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

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

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Notes

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

2/ *Id.*, paragraph 6.2.

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

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- *Althammer et al. v. Austria* (998/2001), ICCPR, A/58/40 vol. II (8 August 2003) 317 (CCPR/C/78/D/998/2001) at paras. 2.1, 2.2 and 10.2.

...

2.1 The authors are retired employees of the Social Insurance Board in Salzburg *(Salzburger Gebietskrankenkasse*). Counsel states that they receive retirement benefits under the relevant schemes of the Regulations A of Service for Employees of the Social Insurance Board (*Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern*).

2.2 Amongst various monthly entitlements, the Regulations provided for monthly

household entitlements of ATS 220 and children's entitlements of ATS 260 per child for those with children up to the age of 27. On 1 January 1996, an amendment to the regulations came into effect which abolished the monthly household entitlement and increased the children's benefits to ATS 380 per child.

...

10.2 The authors claim that they are victims of discrimination because the abolition of the household benefits affects them, as retired persons, to a greater extent than it affects active employees. The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.7/ However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts...was based on objective and reasonable grounds. For these reasons, the Committee concludes that, in the circumstances of the instant case, the abolition of monthly household payments, even if examined in the light of previous changes of the Regulations of Service for Employees of the Social Insurance Board, does not amount to discrimination as prohibited in Article 26 of the Covenant.

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7/ See the Committee's general comment No. 18 on non-discrimination and the Committee's Views adopted on 19 July 1995 in Case No. 516/1992 (*Simunek et al. v. the Czech Republic*) (CCPR/C/54/D/516/1992, para. 11.7)

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- *Hruska v. Czech Republic* (1191/2003), ICCPR, A/59/40 vol. II (30 October 2003) 565 (CCPR/C/79/D/1191/2003) at paras. 2.1-2.4, 4.2 and 5.

...

2.1 On 3 March 2001, the State Social Security Administration, Prague Office, (Ceska sprava socialniho zabezpeceni Praha) issued a decision regarding the calculation of the author's disability benefits.

2.2 On 13 April 2001, the author appealed this decision in the Regional Court at Brno requesting a review of the decision to the effect that it include an additional insurance period for purposes of calculating her disability benefits. The Regional Court at Brno, by judgement of 12 September 2002, upheld the decision of the Social Security Administration, considering the author's claim to be unreasonable.

2.3 The author appealed to the High Court at Olomouc on 24 October 2002, claiming that the decision of the Regional Court violated the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and article 95, paragraph 1, of the Czech Constitution.

2.4 On 16 December 2002, the High Court halted the proceedings and informed the author that as a consequence of an amendment of the law and the resulting expiry of the Court's jurisdiction in the matter, the author would need to submit her appeal to the Supreme Administrative Court. The author was also informed that complainants before the Supreme Administrative Court are required to have a representative who is a lawyer or has at least higher legal education.

...

4.2 The Committee recalls its jurisprudence to the effect that it does not consider that the requirement of legal representation before the highest national judicial instance is not based on objective and reasonable criteria.2/ The author has not advanced any arguments in support of her claim, beyond the mere assertion that this requirement was discriminatory. The Committee accordingly considers that she has not substantiated her claim, for purposes of admissibility.

5. Accordingly, the Committee decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol.

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Notes

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2/ See decision on case no. 866/1999, decision of 31 August 2001, *Marina Torregrosa Lafuente et al. v. Spain*, para. 6.3.

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- *Derksen v. The Netherlands* (976/2001), ICCPR, A/59/40 vol. II (1 April 2004) 173 at paras. 1, 2.1-2.4, 9.2, 9.3, 10 and 11.

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.

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 Dependants 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.

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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 with regard to Kaya Marcelle Bakker in respect of whom half-orphans' benefits through her mother was denied under the ANW.

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10. The Human Rights Committee...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.