L. G. Danning v. The Netherlands, Communication No. 180/1984, U.N. Doc. CCPR/C/OP/2 at 205 (1990).

Communication No. 180/1984

Submitted by: L. G. Danning on 19 July 1984
Alleged victim: The author
State party: The Netherlands
Date of adoption of views: 9 April 1987 (twenty-ninth session) (see footnote 1)

Subject matter: Denial of insurance benefits on the ground of marital status-Disability pension

Procedural issues: Competence of the HRC to examine rights embodied in the ICESCR-Relevance of travaux preparatoirs-Supplementary means of interpretation-Vienna Convention on the Law of Treaties, articles 31 and 32-Examination of general issues of ICESCR not "same matter" under article S (2J (a) of the Optional Protocol-Non-participation of Committee member in decision substantive issues: Scope of application of article 26-Discrimination based on other status-Cohabitation-Marital status-Differentiation based on objective and reasonable criteria-Right to social security-Unemployment benefits-Disability pension

Article of the Covenant: 26

Article of the Optional Protocol: 5 (2) (a)

Rule of Procedure: 85

1. The author of the communication (initial letter dated 19 July 1984 and subsequent letters dated 13 August 1984, 8 July 1985 and 25 June 1986) is Ludwig Gustaaf Danning, a Netherlands citizen born in 1960. He is represented by legal counsel.

2.1. The author claims to be a victim of a violation by the Government of the Netherlands of article 26 in conjunction with article 2, paragraph 1 of the International Covenant on Civil and Political Rights.

2.2. He states that, as a consequence of an automobile accident in 1979, he became disabled and confined to a wheelchair. During the first year after the accident he received payments from his employer's insurance; after the first year, payments were received under another insurance programme for employees who have been medically declared unfit to work. This programme provides for higher payments to married beneficiaries. The author claims that since 1977 he has been engaged to Miss Esther Verschuren and that they live together in common-law marriage. Therefore he maintains that he should be accorded insurance benefits as a married man and not as a single person. Such benefits, however, have been denied to him and he has taken the case to the competent instances in the Netherlands. The Raad van Beroep in Rotterdam (an organ dealing with administrative appeals in employment issues) held in 1981 that his claim was ill-founded; he subsequently appealed to the Centrale Raad van Beroep in Utrecht, which in 1983 confirmed the decision of the lower instance. He claims that this appeal exhausted domestic remedies.

2.3. The same matter has not been submitted for examination to any other procedure of international investigation or settlement.

3. By its decision of 16 October 1984, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of

procedure, to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

4.1. In its submission dated 29 May 1985 the State party underlined, *inter alia*, that:

(a) The principle that elements of discrimination in the realization of the right to social security are to be eliminated is embodied in article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights;

(b) The Government of the Kingdom of the Netherlands has accepted to implement this principle under the terms of the International Covenant on Economic, Social and Cultural Rights. Under these terms, States parties have undertaken to take steps to the maximum of their available resources with a view to achieving progressively the full realization of the rights recognized in that Covenant (art. 2, para. I);

(c) The process of gradual realization to the maximum of available resources is well on its way in the Netherlands. Remaining elements of discrimination in the realization of the rights are being and will be gradually eliminated;

(d) The International Covenant on Economic, Social and Cultural Rights has established its own system for international control of the way in which States parties are fulfilling their obligations. To this endStates parties have undertaken to submit to the Economic and Social Council reports on the measures they have adopted and the progress they are making. The Government of the Kingdom of the Netherlands to this end submitted its first report in 1983.

4.2. The State party then posed the question whether the way in which the Netherlands was fulfilling its obligations under article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights could become, by way of article 26 of the International Covenant on Civil and Political Rights, the object of an examination by the Human Rights Committee. The State party submitted that that question was relevant for the decision whether the communication was admissible.

4.3. The State party stressed that it would greatly benefit from receiving an answer from the Human Rights Committee to the question mentioned in paragraph 4.2 above. "Since such an answer could hardly be given without going into one aspect of the merits of the case-i.e., the question of the scope of article 26 of the International Covenant on Civil and Political Rights-the Government would respectfully request the Committee to join the question of admissibility to an examination of the merits of the case."

4.4. In case the Committee did not grant that request and declared the communication admissible, the State party reserved the right to submit, in the course of the proceedings, observations which might have an effect on the question of admissibility.

4.5. The State party confirmed that the author had exhausted domestic remedies.

5. Commenting on the State party's submission under rule 91, the author, in a letter dated 8 July 1985, contends that the fact that the International Covenant on Economic, Social and Cultural Rights obliges the Governments of the States parties to eliminate discrimination in their system of social security, does not mean that the individuals of the State parties which are also parties to the Optional Protocol to the International Covenant on Civil and Political Rights are precluded from having recourse to the Human Rights Committee in case of a violation of any right set forth in the latter

Covenant that at the same time constitutes discrimination in the exercise of a social security right.

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

6.2. Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection the Committee observes that the examination of State reports, submitted under article 16 of the International Covenant on Economic, Social and Cultural Rights, does not, within the meaning of article 5 (2) (a), constitute an examination of the "same matter" as a claim by an individual submitted to the Human Rights Committee under the Optional Protocol.

6.3. The Committee further observes that a claim submitted under the Optional Protocol concerning an alleged breach of a provision of the International Covenant on Civil and Political Rights is not necessarily incompatible with the provisions of that Covenant (see art. 3 of the Optional Protocol), because the facts also relate to a right protected by the International Covenant on Economic, Social and Cultural Rights or any other international instrument. It still had to be tested whether the alleged breach of a right protected by the International Covenant on Civil and Political Rights was borne out by the facts.

6.4. Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. The parties to the present communication agree that domestic remedies have been exhausted.

6.5. With regard to the State party's inquiry concerning the scope of article 26 of the International Covenant on Civil and Political Rights, the Committee did not consider it necessary to pronounce on its scope prior to deciding on the admissibility of the communication. However, having regard to the State party's statement (para. 4.4 above) that it reserved the right to submit further observations which might have an effect on the question of the admissibility of the case, the Committee pointed out that it would take into account any further observations received on the matter.

7. On 25 October 1985 the Human Rights Committee therefore decided that the communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures, if any, that might have been taken by it.

8.1. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 20 May 1986, the State party again objected to the admissibility of the communication, reiterating the arguments advanced in its submission of 29 May 1985.

8.2. In discussing the merits of the case, the State party elucidates first the factual background and the relevant legislation as follows:

Paragraph 2.2 of the Human Rights Committee's decision of 23 July 1985 sets forth the events prior to Mr. Danning's complaint. The facts of the case need to be stated more precisely. After the accident, Mr. Danning received benefit under the Sickness Benefits Act (ZW), which was supplemented by his employer. As from 14 July 1980 he received disablement benefit in accordance with the General Disablement Benefits

Act (AAW) and the Disability Insurance Act (WAO). This benefit was supplemented by payments made in accordance with the General Assistance Act (ABW).

To obtain a clear picture of the present matter it is important to consider the regulations for disability for work in the Netherlands. Employed persons pay contributions, based on their income, towards various forms of social insurance. The most important of these in the present case are the Sickness Benefits Act (ZW), the Disability Insurance Act (WAO and the General Disablement Benefits Act (AAW). If the employee falls ill, he can receive benefit equivalent to 70 per cent of his most recent income (up to a yearly income ± f. 60,000) for a period of up to one year under ZW. The employer will in most cases contribute the remaining 30 per cent of the employee's income. If the employee remains ill for more than one year, sickness benefit is replaced by payments made under the provisions of AAW and WAO.

AAW is a basic payment for (long-term) disability and is linked to the minimum subsistence income as defined in the Netherlands. Persons who were in full-time employment prior to becoming disabled qualify in the first instance for a standard payment, based on what is termed the "base figure".

In the case of total disability, the base figure will give a payment equivalent to 70 per cent of the current net statutory minimum wage. Only married people with a dependent spouse and unmarried people with one or more dependent children may qualify for an increase of the base figure by 15 to 30 per cent, depending on the amount of the insured person's own income (art. 10 AAW). "Married person" is defined in such a way as to exclude unmarried cohabitants.

This rather complicated system, involving two different Acts concerning disablement, can be explained in historical terms. WAO dates from 18 February 1967 and AAW from 11 December 1975. The introduction of AAW (which unlike WAO was not

restricted to employees, but also included the self-employed) meant that WAO (which was usually higher than AAW) acquired the function of a supplementary payment.

In the case of partial disability or part-time employment, AAW and WAO payments are reduced proportionately. If the payment calculated in this way is less than the official subsistence level, it can be supplemented by a (partial) payment under the provisions of the General Assistance Act (ABW), which contains regulations on the minimum subsistence income. The size of payments made under the provisions of ABW is also linked to the net minimum wage. Unlike both AAW and WAO, ABW takes account of the financial position and income of the recipient's partner.

This complicated system will in fact probably be discontinued in the near future. For some time now, the Netherlands Government has been planning to simplify the social security system, partly with a view to eliminating complaints of unequal treatment of recipients. To this end the Government put a package of proposed reform legislation before the Lower House in 1985. The Bill is currently going through parliament. Important changes will be made to AAW and WAO. There will be a single Disablement Benefits Act, and the "base figure" system of AAW will disappear.

It will be replaced by a Supplementary Benefits Act, which will provide for supplementary payments in cases where the basic payment is less than the official minimal subsistence income. In the course of drafting this new legislation, the question whether married people and unmarried cohabitants will be accorded equal treatment, and if so to what extent, will be examined.

Mr. Danning submitted that he was in receipt of a supplementary payment under the provisions of ABW. This payment is apparently made because the AAW/WAO payment is below the official subsistence level.

The AAW payment made to Mr. Danning, who at the time of applying was cohabiting with his girl-friend, was based on the general base figure and not on the higher, married person's base figure. In fact it would make no difference to the total payment made to Mr. Damning if the AAW payment were to be calculated using the married person's base figure. This is because he lives with his girl-friend and therefore receives a supplementary family allowance under the provisions of ABW, which brings his total social security payment up to the same level (i.e., the net minimum wage) as an AAW payment based on the married person's base figure. Since Mr. Danning is in receipt of a supplementary allowance under ABW, the Netherlands Government is of the opinion that the difference between ABW and AAW in respect of the partner's financial position and income is not a factor in the present case. The conclusion is therefore that Mr. Danning's complaint is based purely on considerations of principle.

8.3. With regard to the scope of article 26 of the International Covenant on Civil and Political Rights, the State party argues, *inter alia*, as follows:

The Netherlands Government takes the view thai article 26 of the Covenant does entail an obligation to avoid discrimination, but that this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights, not necessarily limited to those civil and political rights that are embodied in the Covenant. The Government could, for instance, envisage the admissibility under the Optional Protocol of a complaint concerning discrimination in the field of taxation. But the Government cannot accept the admissibility of a complaint concerning the enjoyment of economic, social and cultural rights. The latter category of rights is the object of a separate United Nations convention. Mr. Danning's complaint relates to rights in the sphere of social security, which fall under the International Covenant on Economic, Social and Cultural Rights. Articles 2, 3 and 9 of that Covenant are of particular relevance here. That Covenant has its own specific system and its own specific organ for international monitoring of how States parties meet their obligations and deliberately does not provide for an individual complaints procedure.

The Government considers it incompatible with the aims of both the Covenants and the Optional Protocol that an individual complaint with respect to the right of social security, as referred to in article 9 of the International Covenant on Civil and Political Rights, could be dealt with by the Human Rights Committee by way of an individual complaint under the Optional Protocol based on article 26 of the international Covenant on Civil and Political Rights.

The Netherlands Government reports to the Economic and Social Council on matters concerning the way it is fulfilling its obligations with respect to the right to social security, in accordance with the relevant rules of the International Covenant on Economic, Social and Cultural Rights . . .

Should the Human Rights Committee take the view that article 26 of the International Covenant on Civil and Political Rights ought to be interpreted more broadly, thus that this article is applicable to complaints concerning discrimination in the field of social security, the Government would observe that in that case article 26 must also be interpreted in the light of other comparable United Nations Conventions laying down obligations to combat and eliminate discrimination in the field of economic, social and cultural rights. The Government would particularly point to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

If article 26 of the International Covenant on Civil and Political Rights were deemed applicable to complaints concerning discriminatory elements in national legislation in the field of those conventions, this could surely not be taken to mean that a State party would be required to have eliminated all possible discriminatory elements from its legislation in those fields at the time of ratification of the Covenant. Years of work are required in order to examine the whole complex of national legislation in search of discriminatory elements. The search can never be completed. either, as distinctions in legislation which are justifiable in the light of social views and conditions prevailing when they are first made may become disputable as changes occur in the views held in society . . .

If the Human Rights Committee should decide that article 26 of the International Covenant on Civil and Political Rights entails obligations with regard to legislation in the economic, social and cultural field, such obligations could, in the Government's view, not comprise more than an obligation of States to subject national legislation to periodic examination after ratification of the Covenant with a view to seeking out discriminatory elements and, if they are found, to progressively taking measures to eliminate them to the maximum of the State's available resources. Such examinations are under way in the Netherlands with regard to various aspects of discrimination, including discrimination between men and women.

If the Human Rights Committee accepts the above considerations, qtr. Danning's claim that the Netherlands has violated article 26 of the Covenant seems to be illfounded.

8.4. With regard to the concept of discrimination in article 26 of the Covenant, the State party explains the distinctions made in Dutch law as follows:

In the Netherlands, the fact that people live together as a married or unmarried couple has long been considered a relevant factor to which certain legal consequences may be attached. Persons living together as unmarried cohabitants have a free choice of whether or not to enter into marriage, thereby making themselves subject either to one set of laws or to another. The differences between the two are considerable; the cohabitation of married persons is subject to much greater legal regulation than is the cohabitation of unmarried persons.. A married person is, for example, obliged to provide for his or her spouse's maintenance; the spouse is also jointly liable for debts incurred in respect of common property; a married person also requires the permission or co-operation of his or her spouse for certain undertakings, such as buying goods on hire purchase which would normally be considered a part of the household, transactions relating to the matrimonial home, etc. The Civil Code contains extensive regulations governing matrimonial law concerning property. The legal consequences

of ending a marriage by divorce are also the subject of a large number of provisions in the Civil Code, including a provision allowing the imposition of a maintenance allowance payable to the former spouse. The law of inheritance, too, is totally geared to the individual's formal status. The Government cannot accept that the differences in treatment by the Netherlands law, described above, be- tween married and unmarried cohabitants could be considered to be "discrimination" within the legal meaning of that term under article r 26 of the Covenant. There is no question of "equal cases" being treated differently under the law. There is an objective justification for the differences in the legal position of married and unmarried cohabitants. provided for by the Netherlands legislation.

9. In his comments, dated 25 June 1986, the author welcomes the forthcoming changes in the General Disablement Benefits Act (AAW) and the Disability In. surance Act (WAO), mentioned in the State party's sub. mission. However, he notes that while he understands that it is not possible for the Netherlands Government to bring into effect immediately all desired changes to the existing laws, "individuals should not suffer as a consequence of not being able to benefit from proposed changes in the legislation which are about to affect their situation." He claims that the existing law is "clearly discriminatory" and that article 26 of the Covenant ap. plies because the differentiation between married and unmarried couples is discriminatory in itself.

10. The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

11. Article _'6 of the International Covenant on Civil and Political Rights provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on

any ground such as race. colour. sex. language, religion, political or other opinion, national or social origin, property, birth or other status.

12.1. The State party contends that there is considerable overlapping of the provisions of article 26 with the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in international instruments, for example, 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, theinternational Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it 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.

12.2. The Committee has also 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 interpretation" (art. 32 of the Vienna Convention on the Law of Treaties) (see footnote 2). 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 Mr. Danning constituted discrimination within the meaning of article 26. In the light of the explanations given by the State party with respect to the differences made by Netherlands legislation between married and unmarried couples (para. 8.4 above), the Committee is persuaded that the differentiation complained of by Mr. Danning is based on objective and reasonable criteria. The Committee observes, in this connection, that the decision to enter into a legal status by marriage, which provides, in Netherlands law, both for certain benefits and for certain duties and responsibilities, lies entirely with the cohabiting persons. By choosing not to enter into marriage, Mr. Danning and his cohabitant have not, in law, assumed the full extent of the duties and responsibilities incumbent on married couples. Consequently, Mr. Danning does not receive the full benefits provided for in Netherlands law for married couples. The Committee concludes that the differentiation complained of by Mr. Danning does not constitute discrimination in the sense of article 26 of the Covenant.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted do not disclose a violation of any article of the International Covenant on Civil and Political Rights.

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1. Pursuant to rule 85 of the provisional rules of procedure, Committee member Mr. Joseph Mommersteeg, although participating in the consideration of the communication, did not take part in the adoption of the views.

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