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HUMAN RIGHTS COMMITTEE
Forty-fifth session

DECISIONS

Communication No. 381/1989

Submitted by : L.E.S.K.
Alleged victim : The author
State party : The Netherlands
Date of communication : 28 July 1988 (initial submission)
Documentation references : Prior decisions - Special Rapporteur's
rule 91 decision,
transmitted to the
State party on
14 November 1989 (not
issued in document
form)
Date of present decision : 21 July 1992

Decision on admissibility

[See Annex]

*/ All persons handling this document are requested to

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respect and observe its confidential nature.

DEC381.45 cm

ANNEX **/

Decision of the Human Rights Committee under the Optional
Protocol
to the International Covenant on Civil and Political Rights
- Forty-fifth session -

concerning

Communication No. 381/1989

Submitted by : L.E.S.K. (name deleted)
Alleged victim : The author
State party : The Netherlands
Date of communication : 28 July 1988 (initial submission)

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

Meeting on 21 July 1992,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission dated 28 July 1988 and subsequent submissions) is L.E.S.K., a citizen of the Netherlands currently residing in France. She claims to be the victim of a violation by the Netherlands of articles 2, paragraph 3(a); 14, paragraph 1; 17, paragraph 1; 18; 19; 23, paragraph 4; and 27 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author :

2.1 The author, an illustrator and a painter, was married in 1972. She and her husband were members of the board of the "Stichting Verbindingsgroep 2000-3000", a foundation pursuing ideal and mystical aims, which had been founded by the author's

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father. At present she is living in the French section of this foundation, which is a self-supporting community.

**/ Made public by decision of the Human Rights Committee.

2.2 On 15 February 1978 the author's husband filed a petition for divorce or judicial separation. In reply, the author denied that the marriage had irrevocably broken down, claiming subsidiarily that the marital dispute was mainly the fault of her husband, whom she suspected had filed for divorce in order to force her to sell their residence, and thus enable him to start his own business in Amsterdam. She filed a counter-petition, requesting maintenance in the event that either one of her husband's claims was granted.

2.3 On 9 October 1980, the District Court of Zutphen pronounced the divorce and dismissed the author's application for maintenance. The Court accepted the argument of "irrevocable breakdown" of the marriage, after the author had stated that she no longer opposed the divorce. The Court also inferred from her statement that she no longer opposed the petition on the ground that her husband was primarily responsible for the breakdown; under Netherlands divorce law, this defence may defeat a divorce petition.

2.4 By interlocutory judgment of 2 December 1981, the Court of Appeal of Arnhem upheld the decision of the District Court to the extent it had pronounced the divorce and determined the reasons leading to it. It considered that, from the point of view of both parties, the breakdown of marriage was due to "diverging convictions of life" and could be deemed definitive from the moment the wife left the conjugal residence in March 1977. The Court of Appeal rejected a new claim put forth by the author, i.e. that her husband had had extra-marital affairs since 1977 and was therefore responsible for the failure of their marriage. Furthermore, the Court of Appeal ordered a hearing in order to collect information in respect of two other claims concerning the loss of pension rights and the dismissal of the author's application for maintenance.

2.5 On 15 October 1982, the Supreme Court rejected the author's further appeal, which was based on the argument that the Court of Appeal had unjustly considered her to have left the conjugal residence in March 1977, and that the affairs of her husband were merely a symptom of the irrevocable breakdown of the marriage.

2.6 In the proceedings, the date of departure from the conjugal residence was determined on the basis of a letter of 20 August 1980, which the author had addressed to the lawyer representing

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her before the District Court of Zutphen. The author claims that her lawyer erred in disclosing the contents of this letter, that it should have been excluded from the proceedings, and that the judgments which followed should have been set aside.

2.7 Her arguments were rejected by the Court of Appeal on 22 June 1983. It stated, inter alia, that the action of the legal representative did not prejudice her case, since the precise date of abandoning the conjugal residence was not considered to be pertinent; the departure was merely a symptom, but not the cause, of the irrevocable breakdown. On 3 February 1984, the Supreme Court dismissed the author's appeal against the latter decision.

2.8 By yet another interlocutory judgment of 27 February 1985, the Court of Appeal rejected the author's claim concerning the alleged loss of pension rights, thereby confirming the judgment of the District Court of 9 October 1980. However, the Court ordered another hearing in connection with the request for maintenance.

2.9 Finally, on 13 November 1985, the Court of Appeal rejected the author's request for maintenance. L.E.S.K. submitted her case to the European Commission of Human Rights. On 17 December 1987, the Commission concluded that the author had not exhausted all domestic remedies, as she could have appealed against the judgment of 27 February 1985. The complaint against her lawyer based on violation of his professional obligation was deemed inadmissible as incompatible ratione personae. The allegation of a violation of article 8 of the European Convention, concerning the use as evidence of the letter of 20 August 1980, was rejected as manifestly ill-founded.

The complaint :

3.1 The author complains that she was denied due protection of the law, which led to various violations of her human rights. She contends that the Netherlands judicial authorities discriminated against her "by ignoring her ethical points of view and attitudes during the proceedings". More specifically, she complains that her contention was not duly heard that she never left the conjugal residence as such, but that the divorce proceedings were initiated by her husband in order to force her to sell their house. The author further contends that the letter of 20 August 1980 was used as evidence of her deliberate abandonment of the common home, whereas it had never been introduced as part of the evidence. She reiterates that the relevant passage from the letter influenced the course of proceedings to her detriment. Although the author does not specify which articles she considers

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to have been violated with respect to this part of her complaint, it would appear from the above that she invokes violations of article 14, paragraph 1, and article 17, paragraph 1, of the Covenant.

3.2 Furthermore, the author complains that the conjugal residence was illegally sold on 15 June 1978 with the collaboration of the notary and registration officer, both of whom were civil servants. The author notes that the house was sold without even her knowledge, much less her approval, and even before the divorce was pronounced. From the context of her submission, it transpires that the author deems this to be a violation of article 2, paragraph 3(a), and article 23, paragraph 4, of the Covenant.

3.3 Finally, the author submits that her right to freedom of expression under article 19, as well as her right to freedom of conviction and religion under article 18, was violated, because the Netherlands courts held that the marriage had irrevocably broken down merely on account of the spouses' diverging convictions of life.

The State party's observations :

4.1 The State party notes that, although the author has not appealed to the Supreme Court against the interlocutory judgment of 27 February 1985 or the final judgment of 13 November 1985 of the Court of Appeal, it does not challenge the admissibility on the ground that the domestic remedies have not been exhausted. It explains that, once that all of the author's appeals had been dismissed, her lawyer advised her not to appeal against the dismissal of her application for maintenance, because he saw no merit in her case.

4.2 In relation to the issue of whether the author's representative violated his code of conduct by disclosing the contents of private correspondence, the State party outlines the provisions of the Code of Civil Procedure governing the "desaveu procedure". It notes that, although the legal representative cannot be held responsible, the author could have filed a complaint under the Counsel Act (Advocatenwet), which provides for disciplinary measures against legal representatives. Furthermore, the State party notes that it cannot be held responsible for the actions of a legal representative. Accordingly, it considers that this part of the communication should be declared inadmissible ratione personae pursuant to article 3 of the Optional Protocol, in so far as it is directed against a private individual.

4.3 The State party submits that both of the author's appeals to the Court of Appeal and the Supreme Court were dismissed since L.E.S.K. herself did not insist on the defence of denial of irrevocable breakdown of marriage. Since the irrevocable breakdown of the marriage was a fact at the moment of abandoning the conjugal residence, the contents of her letter of 20 August 1980 were totally irrelevant to the course of the proceedings.

4.4 Moreover, the State party contends that the author's separate complaints are unsubstantiated, that the facts do not disclose any violations of any of the rights protected by the Covenant, and that this part of the communication should be declared inadmissible pursuant to article 2 of the Optional Protocol.

Issues and proceedings before the Committee :

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

5.2 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. The Committee has ascertained that the case is not under examination elsewhere. The consideration of the same matter in 1987 by the European Commission of Human Rights does not preclude the Committee's competence.

5.3 The Committee notes that the author's claim concerning the sale of the conjugal residence relates primarily to an alleged violation of her right to property. The right to property, however, is not protected by the International Covenant on Civil and Political Rights. Accordingly, the author's allegations in respect of this issue are inadmissible ratione materiae, pursuant to article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

5.4 As to the author's claims to have been a victim of unfair proceedings and judicial bias, the Committee notes that they relate in essence to the evaluation of facts and evidence by the

Netherlands courts. The Committee recalls its established jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in any particular case. It is not, in principle, for the Committee to review the facts and the evidence presented to, and evaluated by, domestic courts, unless it can be ascertained that the proceedings were manifestly arbitrary, that there were procedural irregularities amounting to a denial of justice, or that the judge manifestly violated his obligation of impartiality. After careful consideration of the material placed before it, the Committee cannot find such defects. Accordingly, this part of the communication is inadmissible under article 3 of the Optional Protocol.

5.5 With regard to the claims of a violation of articles 17, 18, 19, 23 and 27, the Committee notes that the author has failed to substantiate her allegations, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author of the communication.

[Done in English, French, Russian and Spanish, the English text being the original version]