Excerpt from A/59/38

Annex VIII

Decision of the Committee on the Elimination of Discrimination against Women, declaring a communication inadmissible under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

Communication No.: 1/2003, Ms. B.-J. v. Germany*
(Decision adopted on 14 July 2004, thirty-first session)

Submitted by:	Ms. B.-J.
Alleged victim:	The author
State party:	Germany
Date of communication:	20 August 2002 (initial submission)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on: 14 July 2004

Adopts the following:

Decision on admissibility

1. The author of the communication dated 20 August 2002, with supplementary information dated 10 April 2003, is Ms. B.-J, a German citizen of about 57 years of age in April 2004, currently residing in Nörten-Hardenberg, Germany. She claims to be a victim of violations by Germany of articles 1, 2 (a-f), 3, 5 (a and b), 15 (2) and 16 (1.c, d, g and h) of the Convention on the Elimination of All Forms of Discrimination against Women. The author is representing herself. The Convention and its Optional Protocol entered into force for the State party on 9 August 1985 and 15 April 2002, respectively.

The facts as presented

2.1 In 1969, the author got married. Although she was a nurse by training, the author and her husband agreed that she would take on the role of homemaker during the marriage and not further her education so as to allow her husband to pursue his career. The author has three grown children, born in 1969, 1970, and 1981.

2.2 The author wanted to continue her education in 1984, but her husband requested her not to do so, and to support him in a period of

* Pursuant to rule 60 of the Committee's rules of procedure, Ms. Hanna Beate Schöpp-Schilling did not participate in the examination of this communication. The text of an individual opinion signed by two Committee members, Ms. Krisztina Morvai and Ms. Meriem Belmihoub-Zerdani, is appended.

professional difficulty. By 1998, the author's husband's difficulties were resolved and she again wished to continue her education, but in May 1999 the author's husband applied for a divorce.

2.3 In September 1999, in connection with her separation, the author and her husband agreed in a settlement before a family court in Northeim that he would pay her DM 973 per month in separation maintenance, DM 629 per month in child support for their youngest child and DM 720 per month to cover the mortgage on the house in which the author continued to live.

2.4 The divorce became final on 28 July 2000. While the issue of the equalization of pensions was resolved as part of the divorce, no decisions have been reached regarding the equalization of accrued gains and maintenance after termination of the marriage.

2.5 On 10 July 2000, the author submitted a complaint to the Federal Constitutional Court, claiming that statutory regulations regarding the law on the legal consequences of divorce violated her constitutional right to equality protected under articles 3.2 and 3.3 of the Constitution.

2.6 On 30 August 2000, the Federal Constitutional Court decided not to accept the complaint for decision.

2.7 In April 2004, the Court of Göttingen awarded the author a maintenance payment of € 280 per month with retroactive effect to August 2002, the date that the author's husband had stopped payment of separation maintenance. The author has appealed against the decision.

2.8 The author has also written without success to the Federal Ministry of Justice and the Ministry of Justice and of Women's Issues of the Land Niedersachsen on 28 July 2001, 6 February 2002, and 2 March 2002, and on 15 January 2003, 22 February 2003, claiming disregard for marriage and family as well as gender-specific discrimination by the courts of Niedersachsen.

2.9 Proceedings concerning maintenance after divorce, as well as equalization of accrued gains continue.

The complaint

3.1 The author alleges that she was subjected to gender-based discrimination under the statutory regulations regarding the law on the legal consequences of divorce (equalization of accrued gains, equalization of pensions, and maintenance after termination of marriage) and that she has since continued to be affected by those regulations. In her view, the regulations systematically discriminate against older women with children who are divorced after long marriages.

3.2 With respect to the issue of accrued gains, the author suggests that, although the law provides that the spouse with the lesser accrued gains receives half the excess of the higher-earning spouse, the law does not take into account the improved or devalued "human capital" of marriage partners. She maintains that this constitutes discrimination,

as it results in providing a husband with his wife's unremunerated labour. The author claims that the law relating to reallocation of pension entitlements is similarly discriminatory and that vague, unclear and discriminatory provisions govern the question of maintenance.

3.3 The author furthermore claims more generally that women are subjected to procedural discrimination because the risks and stress of court proceedings to resolve the consequences of divorce are carried unilaterally by women, who are also prevented from enjoying equality of arms. She also claims that all divorced women in situations similar to hers are victims of systematic discrimination, disadvantage and humiliation.

3.4 The author claims that she exhausted all domestic remedies when the Constitutional Court decided not to accept for review her complaint of omission on the part of the legislator to fulfil the Constitution's equal treatment provisions (art. 3.2 and 3.3 of the Constitution) in respect of the statutory regulations regarding the law on the legal consequences of divorce.

The State party's observations on admissibility

4.1 By its submission of 26 September 2003, the State party objected to the admissibility of the communication.

4.2 The State party notes that the divorce decree, which the author did not submit with her initial submissions, only contained a decision on pension equalization. No final decision has yet been reached in separate proceedings regarding maintenance after termination of the marriage and equalization of accrued gains. The State party further notes that the author filed a constitutional complaint against the divorce decree and against the law on the legal consequences of divorce, in general, which the Federal Constitutional Court did not accept for adjudication. In the ensuing period, the author repeatedly turned to Federal and State Ministries to achieve an amendment of the statutory regulations.

4.3 As regards relevant legal provisions governing the effects of marriage and of the rights and duties of spouses, as well as those concerning divorce and the legal consequences of divorce, the State party explained that in event of divorce, "accrued gains" are to be equalized, if the spouses live in the statutory marital regime of community of gains. The value of the assets of the spouses at the time of marriage (original assets) and at the time of termination (final assets) is first determined. The "accrued gains" are the amount by which the final assets of a spouse exceed his or her original assets. The spouse with the lower accrued gains is entitled to an equalization claim amounting to one half of the difference in value compared to the accrued gains of the other spouse (Section 1378 BGB). Regulations concerning maintenance after termination of marriage are initially based on self-responsibility of (former) spouses. Following the divorce, the spouses are in principle required to be responsible for their own livelihood. Consequently, maintenance is really only envisaged for certain categories of cases. However, since these prerequisites are regularly met in a large number of divorce cases, the

existence of a claim to maintenance tends to be more the rule. The reason for this is the opinion of the legislature that, owing to his or her personal and financial situation, the financially weaker, needy spouse should be able to rely on the post-marital solidarity of the financially stronger, capable spouse. The law also provides under certain circumstances for a maintenance claim for a period of training or education for a spouse who may have omitted to acquire or interrupted formal education or vocational training in the expectation of, or during marriage. Furthermore, the law on equalization of pensions creates the duty of the spouse who acquired greater overall pension entitlements than the other spouse during marriage to equalize by one half of the difference in value.

4.4 According to the State party, the communication is inadmissible for lack of grievance under article 2 of the Optional Protocol as only *victims*, who have to illustrate that they, themselves are directly affected by a violation of the law, can submit claims. An abstract review of constitutionality by means of an individual complaint is inadmissible. The situation could be different if the author were already directly adversely affected by the legal position created by existing legal provisions. However, this is not the case as the law on the legal consequences of divorce still has to be implemented by the courts in regard to the author. The State party submits that the author of a complaint cannot achieve a general and fundamental review of German law on the legal consequences of divorce with her complaint.

4.5 Based on this argument, the State party submits that the author's basis for complaint is her own divorce proceedings; only in this framework can the applied legal provisions relating to the law on the legal consequences of divorce be (directly) reviewed.

4.6 The State party also argues inadmissibility for lack of sufficient substantiation. The lack of concrete information from the author regarding the financial settlements made in the divorce proceedings, the legal basis on which they were reached and whether and to what extent they put her at a financial disadvantage compared to her divorced husband, make it impossible to examine whether and which rights set forth in the Convention were violated in the author's case.

4.7 The State party notes, in particular, non-disclosure of the contents, or submission of the divorce decree, lack of information as to whether, and which legal provisions may have been applied in the author's case and with what financial consequences, lack of information about equalization of pensions and accrued gains, and about the amount of maintenance the author receives after termination of marriage. The State party concludes that the author's claims of being financially disadvantaged by German law on the legal consequences of divorce compared to her divorced husband remain unsubstantiated and that a global reference to studies on the alleged financial disadvantages of divorced women is insufficient in this respect.

4.8 The State party further submits, only by way of precaution and notwithstanding inadmissibility for lack of grievance, lack of exhaustion of domestic remedies, which, in this case, would be the filing, in admissible fashion, of a constitutional complaint. While the

author filed a constitutional complaint against the law on the legal consequences of divorce in general, according to the Supreme Federal Constitutional Court Act (section 93, para. 3), a complaint directly against a law can only be filed within one year of the law entering into force, making the author's constitutional complaint against the law in general inadmissible for this reason alone.

4.9 The State party also submits that only the issue of equalization of pensions has been settled so far in conjunction with the divorce. The author restricted her appeal against the divorce decree solely to the pronouncement of the divorce itself, omitting to also make the equalization of pensions the subject of the review by the appellate court (Oberlandesgericht Braunschweig). This would have been admissible and could have been reasonably expected of the author. Failure to lodge a required and reasonable appeal must result in inadmissibility of a complaint pursuant to article 4.1 of the Optional Protocol.

4.10 As regards inadmissibility *ratione temporis*, the State party submits that the facts that are the subject of the complaint occurred prior to the entry into force of the Optional Protocol for the Federal Republic of Germany. In this regard, the State party submits that since the divorce proceedings alone are the subject of the complaint and a final and conclusive decision has so far only been reached on the equalization of pensions in conjunction with the divorce, the decisive point for inadmissibility *ratione temporis* is the time at which this decision became final, i.e. on 28 July 2000. The Optional Protocol entered into force for Germany on 15 April 2002.

The author's comments on the State party's observations on admissibility

5.1 The author submits that the State party's explanation of relevant legal provisions governing the effects of marriage and of the rights and duties of spouses, as well as those concerning divorce and the legal consequences of divorce, fail to describe the continuous discrimination and disadvantage of persons who are entitled to equalization in divorce proceedings, who, as a rule, are women. She notes that, in Germany, social structures ensure that men, as a rule, advance professionally during marriage, while women have to interrupt their careers and professional advancement because of their continuing main responsibility for the family and the raising of children, thus putting them at a striking disadvantage, especially after separation or divorce. These fundamental societal, familial and marital realities, as well as their differential consequences after divorce are however, not sufficiently, or not at all, accounted for in the law on the legal consequences of divorce, to the disadvantage of women. This is particularly the case for divorced older women who have deferred their own career plans during marriage.

5.2 The author also submits that enforcement of claims upon divorce is rendered extremely difficult because courts commonly ignore marital agreements and family situations to the detriment of women, and equalization provisions are made dependent upon women's proper behaviour during marriage and after divorce, subjecting women to rigid social control by the divorced husband and the courts.

Inappropriate behaviour by a husband, on the other hand, is not subject to any kind of sanction. The author argues that such discrimination and disadvantage of divorced women is only possible because of insufficient and vague legislation.

5.3 The author rejects the State party's argument with respect to inadmissibility for lack of grievance by noting that since her divorce, she continues to be personally and directly affected by the law on the legal consequences of divorce. She maintains that she is affected not only by the decisions of the family court, but by the discrimination in the court proceedings resulting especially from an omission by the legislator to regulate the consequences of divorce in accordance with article 3.2 of the Constitution, in a manner in which no discrimination or disadvantage occurs. In this regard, her constitutional complaint was directed specifically against an "omission on the part of the legislator".

5.4 On the issue of lack of sufficient substantiation, the author submits that, while she had quoted statistics and expert opinions in her constitutional complaint and also in her submissions to ministries, the insufficient legislative provisions and court practice and the resulting discrimination against women were borne out by her personal situation as a divorced woman. The author maintains that she has given a concrete account of her fundamental material disadvantage. Had she not deferred to family responsibilities and her husband's needs, she would have been able to achieve her own income in the amount of euro 5,000 per month, with a commensurate old age pension.

5.5 The author states that the concrete *equalization* of pension payments reached in a divorce is irrelevant as the discriminatory disadvantages only start, and continue, after divorce. In her concrete case, since her husband's filing for divorce in May 1999, the 500 euro/months for her old age pension had stopped. Had she not deferred to her husband's or family's needs, between 47,000 (had she remained married) and 94,000 euro (in case of her own income) would have been made towards her old age pension.

5.6 With respect to exhaustion of domestic remedies, the author maintains that her constitutional complaint was directed against the legal consequences of divorce because articles 3.2 and 3.3 of the Constitution had been infringed in her very personal case, and was not solely directed *in general* against the legal consequences of divorce. Her complaint had not been directed "in general" against a law, but rather against the discrimination contained therein and the omission of the legislator to eliminate such discrimination and the disadvantage experienced by divorced women, and from which she was directly affected.

5.7 She notes that the constitutional complaint was admissible and thus, she exhausted domestic remedies. Her complaint concerning the legal consequences of divorce had not been rejected as "inadmissible" or "unfounded" but rather had not been accepted for decision. The author further submits that article 93 of the Federal Constitutional Court Act does not establish a statute of limitations in regard to omissions by the State. In support of her argument, the author refers to

a decision of the Federal Constitutional Court (BverfGE 56, 54, 70) that constitutional complaints concerning continuing omission on the part of the legislator do not necessarily require prior use of legal remedies and do not require adherence to the statute of limitations provided for in article 93.2 of the Federal Constitutional Court Act. In addition, she submits that her Constitutional complaint against the law on the legal consequences of divorce was admissible also without prior exhaustion of legal remedies in accordance with article 90.2, second sentence, of the Federal Constitutional Court Act, because of the general importance and the fundamental constitutional questions posed.

5.8 The author further submits that her requests for financial assistance to cover legal proceedings had been denied to her in several instances, because of a lack of prospects to prevail in such proceedings, and the courts had not taken into consideration family and marital facts. Without such assistance she was prevented from using domestic remedies because of financial constraints. Lastly, while divorce proceedings are dealt with very expeditiously by courts, proceedings on the legal consequences of divorce take forever when women claim equalization payments. This was also true in her case where she had tried to obtain, since September 2001, the relevant information from her divorced husband to calculate maintenance after termination of marriage, leading to her filing a suit in August 2002 to obtain such information. These proceedings had not yet resulted in obtaining the required information.

5.9 The author reiterates that by August 2003, there was no Court decision concerning maintenance after termination of marriage. While she had received monthly maintenance payments of 497 euro 497, these were no longer paid as of August 2002, after a lengthy and difficult court procedure that went against her. The author submits that, while she has appealed against this decision, she has no hope that the courts would be considering her concerns. She estimates that, had she completed her studies and focused on her career instead of supporting her husband and caring for the family, she would today be able to earn as much income as her husband, i.e., 5,000 euro per month.

5.10 As regards the State party's arguments concerning inadmissibility *ratione temporis*, the author notes that, while the divorce decree became final in July 2000, she continues to be directly affected by the discriminatory provisions of the law on the legal consequences of divorce. The steps she took — constitutional complaint and interventions with ministries — did not lead to results. Likewise, she continues to experience discrimination, disadvantage and humiliations by the courts.

Additional comments of the State party on admissibility pursuant to a request of the Working Group

6.1 According to the State party, the author's general constitutional complaint against the law on the consequences of divorce of 10 July 2000 had been inadmissible on the whole for several reasons.

6.2 The State party submits that, according to Section 93, para. 3, of the Federal Constitutional Court Act a constitutional complaint

immediately directed against an Act may only be lodged within one year following its entry into force. This preclusive time limit serves the purpose of legal security. Failure to observe the deadline, as in the case of the constitutional complaint (file no. 1 BvR 1320/00) generally filed by the author against the "law on the consequences of divorce" on 10 July 2000, will render the constitutional complaint inadmissible. The Federal Constitutional Court will not accept an inadmissible constitutional complaint for adjudication.

6.3 The State party disagrees with the author's argument that the deadline of Section 93, para. 3, of the Federal Constitutional Court Act is not applicable because her constitutional complaint is aiming at an omission by the legislator. An omission does not already exist when certain demands are not met or are not met to the desired extent. Rather, the decisive factor is the legislator's consideration of these demands. In the law on the consequences of divorce the legislator has stipulated numerous legal provisions which, from his point of view are sufficient, adequate and appropriate. Regulations exist for the respective situations of life. It is not relevant that the author considers these regulations to be an infringement of Article 3, paras. 2 and 3, of the Basic Law for the Federal Republic of Germany because of, in her view, insufficient consideration of matrimonial and family work, and thus does not constitute a case of omission.

6.4 The State party furthermore argues that her constitutional complaint generally directed against the "law on the consequences of divorce" of 10 July 2000 had already been inadmissible for other reasons. As a prerequisite for an examination of whether the deadline of Section 93, para. 3, of the Federal Constitutional Court Act has been met, an applicant has to state first against which actual provision, i.e. against which paragraph and which subparagraph his or her complaint is directed. This is not the case in the author's constitutional complaint of 10 July 2000 which does not refer to particular sections, paragraphs or subparagraphs of the Civil Code as infringements of the Constitution, nor does it indicate the number of provisions complained about, thus making her constitutional complaint inadmissible.

6.5 In addition, the State party asserts that the prerequisites of Section 90 of the Federal Constitutional Court Act had also not been fulfilled. Pursuant to Section 90, para. 1, of the Federal Constitutional Court Act anyone may lodge a constitutional complaint on the assertion that he or she has been violated in his or her fundamental rights or in one of the rights granted by Article 20, para. 4, Articles 33, 38, 101, 103 and 104 of the Basic Law for the Federal Republic of Germany by the public authority. Section 90, para. 2, of the Federal Constitutional Court Act furthermore states that the constitutional complaint may only be filed when recourse to the courts has been taken — as far as this is admissible in case of an infringement of rights. If recourse to the courts can be taken, these legal remedies have to be exhausted, i.e. recourse must be had to all instances. This requirement of exhaustion of legal remedies and thus the principle of subsidiarity applies particularly to constitutional complaints against legal provisions. A constitutional complaint is not a general action. It

cannot be lodged by anybody but only by someone who asserts that his or her rights protected by Section 90 of the Federal Constitutional Court Act have been violated by the public authority.

6.6 The State party consequently notes that, exceptionally, a legal provision can only be directly contested with a constitutional complaint if the applicant himself or herself is currently and immediately — and not by means of an act of enforcement — affected by this provision. In order to determine whether and to what extent an Act and/or a concrete provision affects the individual citizen, the concrete case first has to be subsumed under a specific legal provision for decision by a court. This also applies to the author in regard to the law on the consequences of divorce which she complains is not consistent with fundamental rights. For this reason as well, and irrespective of whether the deadline of Section 93, para. 3, of the Federal Constitutional Court Act had been observed, the author could not lodge a general constitutional complaint against the law on the consequences of divorce. She would first have had to take action to obtain a decision by the competent specialist courts concerning the different consequences of divorce such as post-marital spousal support, pension sharing and equalization of accrued gains. Only subsequently is it admissible to lodge a constitutional complaint based on the assertion that the concrete provisions of the law on the consequences of divorce applied by the courts are infringing Article 3, paras. 2 and 3, of the Basic Law. In the latter case, a deadline of one month following the service, pronouncement or communication of the decision at last instance applies pursuant to Section 93, para. 1, of the Federal Constitutional Court Act.

6.7 The State party submits that a final decision has still not been reached in the legal proceedings before the family court initiated by the author for post-marital spousal support (Local Court of Göttingen, file no. 44 F 316/02). In the main proceedings for post-marital spousal support, the author has been granted legal aid and is represented by attorney. The court is still to reach a decision on the amount of support to be paid to the author. The author may file an appeal against this decision. Only then can it be considered to bring the matter to the Federal Constitutional Court.

6.8 The State party submits that the proceedings concerning the equalization of accrued gains are at the stage of consideration of the author's application of 8 September 2003 for legal aid and assignment of an attorney-at-law for the litigation. This application remains pending due to subsequent motions of the author seeking disqualification of the judge on grounds of conflict of interest in the proceedings for spousal support. The author has also remonstrated against the decision of the Higher Regional Court of Braunschweig of 11 February 2004, on which the latter still has to decide.

6.9 The State party concludes that domestic legal remedies had not yet been exhausted when the author lodged a general constitutional complaint against the law on the consequences of divorce on 10 July 2000. Also for this reason the constitutional complaint had been inadmissible.

6.10 The State party lastly argues that it is not sufficient merely to quote scientific publications to justify a constitutional complaint, and to maintain in general, as the author did, that the equalization of accrued gains as such or the pension sharing and/or the law on spousal support as such would be contrary to the Constitution.

6.11 The State party emphasized that the author's constitutional complaint against the law on the consequences of divorce of 10 July 2000 was inadmissible in general for the above-stated reasons. Since only a complaint of unconstitutionality lodged in a lawful manner fulfils the prerequisites for exhaustion of legal remedies, the author's communication is inadmissible pursuant to article 4, para. 1, of the Optional Protocol.

6.12 The State party lastly recalls the other reasons set forth in its original submission to declare the communication inadmissible.

Additional comments of the author on admissibility

7.1 In regard to the divorce proceedings in first instance in 1999 (Amtsgericht Northeim), the author recalls that the divorce judgement of 10 November 1999 also included the equalization of pensions, a legal requirement in accordance with article 1587 of the Civil Code, on the basis of a formula described in her earlier submission. The author reiterates that this presumably "just equalization" is deeply unjust, unbalanced and discriminatory as it does not take into account the post-marital consequences of the division of labour and of understandings reached during marriage. In her concrete case, her divorced husband will reach a pension that will be significantly above the amount determined by the equalization of pensions. On the other hand, there were serious doubts whether, when and to what degree she will be able to obtain the determined amount.

7.2 The author further submits that notwithstanding her repeated urgings, the questions of post-marital support and of equalization of accrued gains were dealt with neither in the divorce judgement nor in her appeal against the divorce, which the appellate court (Oberlandesgericht Braunschweig) denied on 23 May 2000. This was the case as certain private commitments and marital agreements concerning her material, social and old-age security had been handed over by the Family Court to the Civil Court for decision. The author asserts that the justifications of the Family Court of first instance as well as of the appellate court in her divorce show that the organs of Justice simply and solely take into consideration, and favour, the views and interest of the male spouse who files for divorce.

7.3 The author, in regard to her constitutional complaint with decision of 30 August 2000, refers to her extensive earlier submissions and confirms that the discriminatory nature of the legal consequences of divorce continues to exist.

7.4 In regard to the exhaustion of remedies, the author asserts that contrary to the State's views, it was not necessary to file a distinct separate appeal against the equalization of pensions as such equalization is part of the divorce judgement. Contrary to the State party's assertion, such a separate appeal was, according to the established jurisprudence of the Constitutional Court, neither

necessary nor expected, as the statutory equalization of pensions is, according to article 1587 of the Civil Code, an "unambiguous legislative provision", and a repeal of the divorce would automatically also have resulted in a repeal of the equalization of pensions. Thus, the author asserts that her constitutional complaint was admissible and justified also against the statutory equalization of pensions without prior exhaustion of remedies in the lower courts. The Constitutional Court's decision not to accept for decision her complaint also included part B of her complaint, i.e. the complaint against the statutory equalization of pensions. The author reiterates that her constitutional complaint was not directed generally against the legal consequences of divorce but rather against the omission of the legislator to eliminate those elements that were discriminatory and disadvantageous to divorced women. As a result, the author submits that her complaint is admissible also in relation to the statutory equalization of pensions in accordance with article 4.1 of the Optional Protocol as domestic remedies were exhausted with the admissible constitutional complaint, which was, however, not accepted for decision.

7.5 The author submits that, contrary to the State's assertions, in regard to her constitutional complaint of violation of articles 3.2 and 3 of the Constitution, exhaustion of remedies through the courts was not necessary for reasons that article 3.2 clarified the explicit instruction of the Constitution concerning the content and scope of the legislator's duty to legislate. Furthermore, prior exhaustion of remedies was also not necessary as her constitutional complaint raised issues of general relevance and fundamental constitutional issues, in accordance with article 90.2 of the BVerfGG. The author reiterates that her complaint is admissible under article 4.1 of the Optional Protocol as the exhaustion of remedies through the courts was not necessary, and domestic remedies had been exhausted with the admissible constitutional complaint which had, however, not been accepted for decision.

Issues and proceedings before the Committee concerning admissibility

8.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol.

8.2 In accordance with rule 66 of its rule of procedure, the Committee may decide to consider the question of admissibility and merits of a communication separately.

8.3 The Committee has ascertained that the matter has not already been or is being examined under another procedure of international investigation or settlement.

8.4 The Committee considers that the facts that are the subject of the communication concern the consequences of divorce, i.e. in particular with regard to equalization of accrued gains, equalization of pensions, and maintenance after termination of marriage. It notes that divorce proceedings were initiated by the author's husband in May 1999. It also notes that the divorce, itself, became final together with the matter of the equalization of pensions on 28 July 2000, that is, prior to the entry into force of the Optional Protocol in respect of the State

party on 15 April 2002. Considering that the author has not made any convincing arguments that would indicate that the facts, insofar as they relate to the equalization of pensions, continued after this date, the Committee considers that, in accordance with article 4, paragraph 2 (e), of the Optional Protocol, it is precluded *ratione temporis* from considering the part of the communication that relates to the equalization of pensions.

8.5 Furthermore, with regard to the issue of the equalization of pensions, the Committee notes the State party's argument that the author restricted her appeal against the divorce decree solely to the pronouncement of the divorce itself and did not make the equalization of pensions the subject of a review by an appellate court. The Committee also notes the author's contention that a successful appeal of the divorce decree would automatically have repealed the equalization of pensions as this element is a mandatory part of the divorce decree. The Committee considers that notwithstanding the mandatory resolution of the equalization of pensions in divorce decrees, the author could reasonably have been expected to include a specific appeal on the issue to the appellate court, as well as in her constitutional complaint. It concludes that the author has thereby not exhausted domestic remedies concerning the issue of the equalization of pensions. This part of the communication is therefore inadmissible also under article 4, paragraph 1, of the Optional Protocol.

8.6 The Committee further notes that the author's complaint was rejected by the Federal Constitutional Court and, in this connection, relies on the State party's explanation that the filing was carried out in an inadmissible manner for several reasons, including because the complaint was time-barred. The Committee is not persuaded by the author's argument that her constitutional complaint was filed in an admissible manner as a complaint of omission on the part of the legislator to eliminate discriminatory elements of the legislation by which she was personally affected — rather than a general complaint about the legal consequences of divorce. The Committee therefore concludes that the improperly filed constitutional complaint of 10 July 2000 cannot be considered an exhaustion of domestic remedies by the author.

8.7 The Committee notes that separate proceedings regarding both the equalization of accrued gains and maintenance after termination of marriage have not yet been settled definitively. In light of the fact that the author has not denied that this was the case nor argued persuasively for the purpose of admissibility that the proceedings have been unreasonably prolonged or are unlikely to bring relief, the Committee considers that these claims are inadmissible under article 4, paragraph 1, of the Optional Protocol.

8.8 The Committee therefore decides:

(a) That the communication is inadmissible under article 4, paragraph 1, for the author's failure to exhaust domestic remedies, and paragraph 2 (e), because the disputed facts occurred prior to the entry into force of the Optional Protocol for the State party and did not continue after that date;

(b) That this decision shall be communicated to the State party and to the author.

Appendix

Individual opinion of Committee members Krisztina Morvai and Meriem Belmihoub-Zerdani (dissenting)

In our view, the author's communication is partly admissible. While I agree with the majority that the claim concerning the divorce and equalization of pensions decision of 28 July 2000 is inadmissible *ratione temporis* I believe that the separate claim regarding the ongoing proceedings concerning the issues of accrued gains and spousal maintenance in fact do meet all admissibility criteria.

In the majority's view, the separate claims (regarding the alleged violations of the Convention in relation to substantive and procedural aspects of the equalization of accrued gains and of post-divorce maintenance) are inadmissible due to the lack of exhaustion of domestic remedies (Article 4.1).

In accordance with the Optional Protocol as a general rule all available domestic remedies have to be exhausted, "*unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief*".

In our view, the domestic proceedings must be evaluated on a case-by-case basis regarding their "unreasonably prolonged" character.

In the present case, proceedings concerning spousal maintenance and accrued gains have been ongoing for about five years. (According to para. 7.2 of the Committee's decision on admissibility the author submitted that "notwithstanding her repeated urgings, the questions of post-marital support and of equalization of accrued gains were dealt with neither in the divorce judgement nor in her appeal against the divorce, which the appellate court/Oberlandesgericht Braunschweig/ denied on 23 May 2000". According to the State party's observations on admissibility, summarized in paragraph 4.2 of the Committee's decision, "No final decision has yet been reached in separate proceedings regarding maintenance after termination of the marriage and equalization of accrued gains".) Even though in April 2004, the Court of Göttingen awarded the author a maintenance payment of 280 euros per month, with retroactive effect to August 2002 (see para. 2.7 of the decision of the Committee), the decision regarding maintenance is still not final, due to the author's appeal. Similarly, no final decision has been reached in the equalization of accrued gains case. Two years of these ongoing proceedings period follow the ratification of the Optional Protocol by the State party.

Indeed, there might be cases and situations where the same length of time could not be considered "unreasonably prolonged". However, in the present situation the subject matter of the proceedings is basically *the determination and granting of the financial/material sources of the survival of the author*. Ms. B.-J. is now 57 years old, she was 52 when her husband divorced her after three decades of

marriage. The author, as so many women in the world, devoted her whole adult life to unpaid work in the family, while her husband, on whom she was therefore financially dependent, had advanced his career and his income. According to the submissions of the author her financial situation is deeply uncertain, to say the least. There are times when she receives some maintenance, and there are times when she does not receive anything. (In the meantime, the former husband, who successfully capitalized the 30 years of unremunerated work of the author, apparently has an income of about 5,000 euros per month, a very good salary (see decision of the Committee, para. 5.9, final sentence)). The applicant, who has no work experience outside the home and the family and who is considered to be an "older woman", has very little chance to enter the labour market and to support herself financially. It is sad and shameful that following the upbringing of three children and a lifetime of work in the home she has to live without a regular, reliable income, even five years after the divorce that took place against her will. In these circumstances, the domestic courts should have determined and granted a decent maintenance for her a long time ago. A legal and judicial system that is able to finalize contested divorce proceedings following three decades of marriage in just one year would be able to finalize post-divorce maintenance (and accrued gains) proceedings with similar speed and efficiency. For an older woman who raised three children and worked for the benefit of her spouse for three decades living in such uncertainty five years after the divorce is rightly considered to be unacceptable and a serious violation of her human rights in and of itself.

In our opinion it follows that under all the circumstances of the case the application of domestic remedies is *unreasonably prolonged*. Moreover, it follows that the general rule in article 4.1 concerning the need to exhaust all domestic remedies does not apply here, instead the "unreasonable prolongation" exception to the rule applies.

(*Signed*) Krisztina **Morvai**

(*Signed*) Meriem **Belmihoub-Zerdani**