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Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 131/2018*,**

Communication submitted by:	V.P. (represented by the Belarusian Helsinki Committee)
Alleged victim:	The author
State party:	Belarus
Date of communication:	20 November 2017 (initial submission)
References:	Transmitted to the State party on 24 September 2018 (not issued in document form)
Date of adoption of views:	28 June 2021
Subject matter:	Discrimination against women, social security rights
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Gender-based discrimination affecting access by women to a retirement pension
Articles of the Convention:	1, 2 (b)–(d) and (f) and 11 (1) (e)

* Adopted by the Committee at its seventy-ninth session (21 June–1 July 2021).

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Background

1. The author of the communication is V.P., a Belarus national, born in 1961. She claims that the State party has violated her rights under article 2 (b)–(d) and (f) and article 11 (1) (e), read in conjunction with article 1, of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention and its Optional Protocol entered into force for the State party on 3 September 1981 and 3 May 2004, respectively. The author is represented by the association Belarusian Helsinki Committee.

Facts as submitted by the author

2.1 In February 2016, upon reaching the retirement age of 55, the author lodged an application with the local pension commission for an old-age pension. At that time, her employment record included 24 years, 2 months and 19 days of general labour experience (this includes all periods of gainful employment, as well as studies, maternity leave, compulsory military service, etc.). Of that period, her pensionable service (periods of employment with contributions to the pension insurance fund) amounted to 12 years, 10 months and 24 days.

2.2 On 26 February 2016, the commission refused the application for the old-age pension on the grounds that the author did not have a sufficient amount of pensionable service. The commission noted that, in accordance with order No. 534 of the President of Belarus dated 31 December 2015 (in force since 1 January 2016), to be entitled to the old-age pension, individuals must have contributed to the pension insurance fund for at least 15 years and 6 months. At the time of the events, order No. 534 was in conflict with the Belarus law on the pension system (the pension law). Article 15 of the law provided that 10 years of pensionable service were necessary to be eligible for the contributory pension. Article 11 of the same law introduced additional preconditions of 20 years of general labour experience (regardless of payment of contributions to the pension insurance fund) and having reached the age of 55 years for women.

2.3. On 31 May 2016, the author filed an administrative appeal against the decision of 26 February 2016 with the Commission for Labour, Employment and Social Protection of the Minsk Regional Executive Committee. The decision of the pension commission was recognized as well founded, and her appeal was dismissed.

2.4 In July 2016, the author appealed to the Borisovskiy District Court. She indicated, inter alia, that, from 1998 to 2009, she was taking care of her children, until her youngest son turned 14 years old. Thereafter, she looked after a person with a disability from 6 April 2009 to 1 May 2010 and from 23 September 2011 to 1 February 2016 (i.e., for more than 5.5 years in total). Those periods between 2009 and 2016, as well as maternity leave, were calculated towards her general labour experience, but not towards pensionable service. A sharp increase in the required amount of pensionable service effectively deprived her of any real chance of qualifying for the old-age pension. At the same time, she is not yet eligible for the social non-contributory pension, as it is payable to women only upon their reaching 60 years of age.

2.5 On 23 August 2016, the Borisovskiy District Court dismissed the author's appeal and upheld the decision to refuse her application for the old-age pension. It reiterated that the author had only 12 years, 10 months and 24 days of pensionable service, which was below the amount required under order No. 534. Periods indicated by the author (taking care of her children and of an individual with a disability) were not considered for the purpose of calculating the pensionable service, since the author

did not make any contributions to the pension insurance fund. The court further stressed that the order took precedence over the provisions of the pension law.

2.6 The author appealed to the Minsk Regional Court. She reiterated her arguments and stressed that domestic law created a situation of indirect discrimination against women, since unpaid care work in Belarus was mostly carried out by women. The author, inter alia, invoked provisions of general comment No. 19 (2007) on the right to social security of the Committee on Economic, Social and Cultural Rights, in which the Committee called for measures to be taken to allow women to have equal access to social benefit funds, considering breaks in employment caused by the need to fulfil family duties. On 17 October 2016, the Minsk Regional Court dismissed the author's appeal and fully endorsed the reasoning of the trial court.

2.7 The author filed a supervisory appeal with the President of the Minsk Regional Court. She reiterated her arguments raised before the lower courts. On 16 February 2017, her appeal was dismissed.

2.8 On 17 July 2017, the Deputy President of the Supreme Court of Belarus dismissed the author's supervisory appeal and upheld the decisions of the lower courts.

Complaint

3.1 The author submits that the rejection of her application for the old-age pension violates article 11 (1) (e) of the Convention, as it entails indirect discrimination against women, since women face breaks in employment periods more frequently, owing to their being the primary caretakers of children and persons with disabilities, and, consequently, are unable to accumulate the legally required amount of pensionable service. The author specifies that, according to information from representatives of the Ministry of Labour and Social Protection of Belarus, in 2015, 99 per cent of caretakers of children under 3 years of age were women. She argues that, while domestic legal provisions introduce equal requirements for men and women, the latter are put in less favourable conditions. It is much harder for women to accumulate the required amount of pensionable service, especially when caretaking activities, despite being recognized at the State level as socially significant, are not counted towards it.

3.2 In 2010, the Committee on the Elimination of Discrimination against Women had already asked the State party to adopt legislation on gender equality that would include a definition of direct and indirect discrimination against women. Such legislation has not been adopted, which constitutes a violation of the author's rights under article 2 (b) of the Convention.

3.3 In accordance with article 2 (c) of the Convention, the State party must establish legal protection of the rights of women on an equal basis with men and ensure through competent national tribunals the effective protection of women against any act of discrimination. In the circumstances of the present case, the author argues that the State party has failed to provide her with such remedies. The burden of proof of discriminatory treatment was on the author. National courts did not take into account the provisions of international legal instruments.

3.4 According to the author, the State party, by adopting order No. 534 and other legislative acts that have increased the minimum requirements for pensionable service, have violated her rights under article 2 (d) of the Convention, since such legislation disproportionately affects women.

3.5 Lastly, the author submits that the State party has also violated her rights under article 2 (f) of the Convention, as it has failed to abolish such laws and regulations that constitute discrimination. The author notes that the State party has adopted order

No. 233 of the President of Belarus dated 29 June 2017, which establishes, inter alia, that individuals taking care of persons with disabilities require only 10 years of pensionable service to qualify for the old-age pension. However, the same order requires such individuals to accumulate an increased amount of general labour experience (35 years for women and 40 for men). Therefore, the new order does not abolish the discriminatory practice but introduces a new difference in treatment.

State party's observations on admissibility and the merits

4.1 The State party provided its observations in a note verbale dated 26 December 2018.

4.2 With respect to admissibility, the State party submits that decisions of national courts that have already entered into force may be appealed against through the supervisory review procedure. The author lodged such appeals against the decision of 23 August 2016 of the Borisovskiy District Court with the President of the Minsk Regional Court and the Deputy President of the Supreme Court of Belarus. The author did not avail herself of the right to bring a supervisory appeal to the President of the Supreme Court. Moreover, she did not file a complaint against the courts' decisions with a prosecutor's office. Therefore, the communication is inadmissible pursuant to article 4 of the Optional Protocol, as the author has failed to exhaust all available domestic remedies.

4.3 Turning to the merits of the complaint, the State party refers to the Constitution of Belarus, submitting that every citizen is guaranteed equal opportunities. The Labour Code of Belarus provides for the equal right to labour for men and women. Any discrimination on the basis of age or gender is explicitly prohibited. The State party undertakes efforts to mitigate historical and cultural stereotypes that affect the distribution of family duties between men and women. Women, who are more likely to have gaps in their employment, are provided with special guarantees to facilitate their return to the labour market. In particular, there are specific education programmes and career counselling for, inter alia, women close to retirement age. As a result, unemployment rates are lower for women than for men (3.6 per cent for women against 5.7 per cent for men in 2018, and 4.2 per cent for women against 7.5 per cent for men in 2016).

4.4 The State party submits that domestic legislation provides for a wide range of pension regimes, including a contributory old-age pension and a non-contributory social pension. At the relevant time, the old-age pension was guaranteed for women upon reaching 56 years of age and for men upon reaching 61 years of age (pensionable age is subject to a gradual increase of six months per year to 58 years of age for women and 63 years of age for men in 2022). The social pension is payable to women and men upon reaching 60 and 65 years of age, respectively.[1] The difference in age was introduced to achieve de facto equality and account for the effects of cultural stereotypes affecting family role distribution between genders. At the same time, upon reaching retirement age, women are free to continue to work without any legislative restrictions.

4.5 The old-age pension is payable under the condition that an individual has contributed to the pension insurance fund for 10 years (requirement in force from 1 January 2014), 15 years (requirement in force from 1 January 2015) or 15.5 years (requirement in force from 1 January 2016). This requirement will be increased by six months every year until it reaches 20 years in 2025. The pensionable service requirement is the same for both men and women. At the same time, there are special

[1] The State party notes that social pension benefits are lower than old-age pension benefits. However, individuals receiving a social pension may be entitled to other supplementary benefits.

regimes for certain categories of women. For example, mothers of five or more children or of children with disabilities are only required to have five years of pensionable service to become entitled to the old-age pension. Domestic law does not count the caretaking of children and individuals with disabilities, periods of education and military service towards the pensionable service. This approach excludes from pensionable service not only activities usually performed by women, but also the ones primarily carried out by men (e.g., military service). In 2012–2017, the average duration of such activities was roughly equal for men and women (4.3 and 4.5 years, respectively).

4.6 The decision to increase age and pensionable service requirements was taken to adapt to population ageing in Belarus, a trend common to many countries. The newly increased pensionable service is adequate and attainable for both men and women. According to information from the Ministry of Labour and Social Protection, the average length of pensionable service in 2012–2017 is 29 years for women and 32.2 years for men. National statistics show that, in 2017, 96.7 per cent of all women of retirement age received old-age pension benefits (against 89.4 per cent of men). Between 2014 and 2016, only 0.8 per cent of all women of retirement age were denied old-age pension owing to an insufficient length of pensionable service (0.6 per cent for men). Therefore, unfavourable situations related to old-age pension entitlement for women were not caused by direct or indirect discrimination practices and regulations in Belarus but by the individuals' personal life choices.

4.7 The author has less than 13 years of pensionable service. She performed caretaking activities not only for individuals with disabilities but also for her children until the youngest was 14 years of age, well above the three years' period established for maternity leave. Lack of required length of pensionable service is a legal ground for refusal of an old-age pension. She also did not accumulate the 35 years of general labour experience required to qualify for the special regime established under order No. 233, by which individuals taking care of persons with disabilities are eligible for the old-age pension with only 10 years of pensionable service.

4.8 At the same time, the author requested employment assistance only in 2016. From 22 June to 25 October 2016, she was registered as unemployed. Social services provided her with several job placements; however, she either refused them or was not hired by the employers. The State party notes that the author did not attempt to appeal against the decisions not to employ her, while any discriminatory refusal could have been challenged in court. On 25 October 2016, the author requested her deregistration as unemployed. She did not apply for any employment assistance thereafter. In any event, the author will be entitled to a non-contributory social pension once she reaches 60 years of age.

4.9 The State party also submits that orders of the President were adopted in full compliance with domestic law. They take legal precedence over provisions of the pension law of Belarus. The State party notes that the author challenges the legality of the orders unfavourable to her, but not the ones introducing preferential regimes for selected categories. In this regard, the State party refers to order No. 233, by which a special regime was introduced for individuals unable to achieve the required pensionable service owing to the performance of other socially crucial functions. Eligible individuals are required to contribute to the pension insurance fund for 10 years only. The increased length of general labour experience (35 years for women and 40 years for men) is not discriminatory but serves as proof of a lack of ability to engage in regular employment.

4.10 Lastly, the State party submits that the principle of equality of all individuals before the law is universal in Belarus and that there is therefore no need to introduce any special anti-discrimination legislation. The State party provided a general

description of relevant domestic legal provisions. Specifically, it notes that the Constitution of Belarus provides that all men and women have equal rights and opportunities. Under article 42 of the Constitution, men and women have the right to equal compensation for their labour. The right to an effective remedy without any discrimination is provided for in the Civil Code, the Code of Civil Procedure, the Code of Administrative Offences and other legislative acts. Article 190 of the Criminal Code introduces criminal responsibility for the limitation of rights or the introduction of distinctions made on the basis of, inter alia, gender, nationality and age. Moreover, article 14 of the Labour Code contains a definition of discrimination and allows individuals to apply to a court for protection from discriminatory practices.

Author's comments on the State party's observations on admissibility and the merits

5.1 The author provided her comments on 9 April and 10 May 2019.

5.2 Replying to the State party's objection on admissibility, the author notes, on the basis of the long-standing jurisprudence of the Human Rights Committee,[2] that supervisory review appeals to the President of the Supreme Court or a prosecutor's office are not the remedies to be exhausted, as they are extraordinary remedies that depend on the discretion of a prosecutor or a judge.

5.3 Turning to the merits of the case, the author reiterates that domestic law in Belarus does not contain a universal definition of discrimination. The definition contained in article 14 of the Labour Code is applicable only to labour relations. The lack of the requisite legal framework that would afford an effective protection mechanism against discrimination has been noted by the Human Rights Committee,[3] the Committee on the Elimination of Racial Discrimination[4] and the Committee on the Elimination of Discrimination against Women.[5]

5.4 The author notes that statistical data provided by the State party are not relevant, as they only show the general situation and do not allow for the monitoring of the personal situations of individuals performing caretaking activities.

5.5 The author also submits that, while requirements for the length of general labour experience differ between men and women, the State party does not explain why there is no difference in the required length of pensionable service. This is discriminatory, as women more frequently engage in activities that are not counted towards pensionable service.

5.6 The author further argues that her choice to engage in caretaking activities could not be seen as an intentional refusal of future pension benefits, as she could not anticipate a sudden increase in the required amount of pensionable service.

5.7 The author claims that the State party has not put forward any reasonable justifications for the considerable increase in required amount of pensionable service within a short period of time. Moreover, there have been no transitional period or measures. This particularly affected women in situations similar to that of the author. She thus found herself without any support, as she will be eligible for the social pension only when she reaches 60 years of age.[6] Failure to take those factors into

[2] *Koktish v. Belarus* (CCPR/C/111/D/1985/2010), para. 7.3; *Kruk v. Belarus* (CCPR/C/115/D/1996/2010), para. 7.3; and *Yuzepchuk v. Belarus* (CCPR/C/112/D/1906/2009), para. 7.4.

[3] CCPR/C/BLR/CO/5, paras. 15–16.

[4] CERD/C/BLR/CO/20-23, paras. 10–11.

[5] CEDAW/C/BLR/CO/8, paras. 8–9.

[6] The author highlights on several occasions that social pension benefits are only 50 per cent of the minimum wage and currently amount to roughly €50 per month.

account is contrary to the State party's obligations under article 2 (d) of the Convention.

5.8 The author also notes that order No. 233 did not remedy her situation as, together with reducing the required length of pensionable service, it increased the required length of general labour experience to 35 years for women. The author argues that the State party should have allowed for the period spent taking care of children up to 14 years of age to be calculated towards general labour experience. This would allow the author to meet the special requirements introduced under order No. 233.

5.9 The author submits a table describing her periods of employment and other activities from 1975 to 2016 and notes that she has been unable to find any gainful employment since May 2010.

5.10 In the light of such considerations, the author invites the Committee on the Elimination of Discrimination against Women to conclude that there has been a violation of her rights under article 2 and article 11 (1) (e) of the Convention.

5.11 On 4 April 2020, in her additional submissions, the author informed the Committee that she was still unable to find a job and requested that the proceedings be expedited.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

6.2 In accordance with article 4 (2) (a) of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the communication ought to be declared inadmissible under article 4 (1) of the Optional Protocol for non-exhaustion of domestic remedies, because the author has neither brought a supervisory appeal to the President of the Supreme Court of Belarus nor filed a complaint against the courts' decisions with a prosecutor's office. The Committee recalls that, under article 4 (1) of the Optional Protocol, it is precluded from considering a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief. In that connection, the Committee recalls that requests for supervisory review to the president of a court directed against court decisions that have entered into force depend on the discretionary power of a judge and constitute an extraordinary remedy. The State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case. In the present case, however, the State party has not shown whether and in how many cases petitions to the President of the Supreme Court for supervisory review procedures were applied successfully in cases akin to the one at stake. The Committee also notes that a petition to a prosecutor's office requesting a review of court decisions that have taken effect does not constitute either a remedy that has to be exhausted for the purposes of article 4 (1) of the Optional Protocol.[7] The Committee therefore considers that it is not precluded by the requirements of article 4 (1) of the Optional Protocol from considering the present communication.

[7] See, mutatis mutandis, *Malei v. Belarus* (CCPR/C/129/D/2404/2014), para. 8.4.

6.4 Having found no impediment to the admissibility of the communication, the Committee declares the communication admissible and proceeds to its consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided for in article 7 (1) of the Optional Protocol.

7.2 The author asserts that the State party has violated her rights under article 11 (1) (e), read in conjunction with article 1, of the Convention by refusing her application for an old-age pension. She argues, in particular, that this constitutes indirect discrimination on the grounds of gender, since women face breaks in employment periods more frequently, owing to their being the primary caretakers of children and persons with disabilities, and, consequently, are unable to accumulate the totality of the legally required amount of pensionable service. The author also claims that the State party has failed to comply with its obligations under article 2 (b)–(d) and (f) of the Convention, as it has not abolished discriminatory laws and regulations and failed to establish a domestic legal framework capable of providing sufficient legal protection against gender-based discrimination.

7.3 The issue before the Committee, therefore, is whether by changing the legal framework and the requirements for the old-age pension, which has personally affected the author to her detriment, the State has failed to comply with its obligations under article 2 (b)–(d) and (f), as well as article 11 (1) (e), read in conjunction with article 1, of the Convention.

7.4 The Committee recalls that, under the Convention, any distinction, exclusion or restriction made on the basis of sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field is prohibited. Indirect discrimination refers to laws, policies or practices that appear neutral at face value but have a disproportionate impact on the exercise of Convention rights as distinguished by prohibited grounds of discrimination.

7.5 The Committee observes that the right to social security is of central importance in guaranteeing human dignity. The right to social security carries significant financial implications for States, but those should ensure the satisfaction of, at the very least, minimum essential levels of that right. Among other things, they are required to ensure access to a social security scheme that provides a minimum essential level of benefits, without discrimination of any kind. States should provide non-contributory old-age benefits, social services and other assistance for all older persons who, when reaching the retirement age prescribed in national legislation, have not completed a qualifying period of contributions or are not otherwise entitled to an old-age insurance-based pension or other social security benefit or assistance and who have no other source of income. Non-contributory schemes must also take account of the fact that women are more likely to live in poverty than men, that they often have sole responsibility for the care of children and that it is more often they who have no contributory pensions.[8]

7.6 The Committee notes that States parties have a large margin of appreciation in adopting the measures that they consider necessary to ensure that everyone enjoys the right to social security, with a view to, inter alia, ensuring that retirement pension systems are efficient, sustainable and accessible for everyone. States may therefore

[8] *Ciobanu v. Republic of Moldova* (CEDAW/C/74/D/104/2016), para. 7.6.

establish requirements or conditions that claimants must meet in order to be eligible for social security schemes or to receive a retirement pension or other benefit, provided that the conditions are reasonable, proportionate and transparent. In general, those conditions should be communicated to the public in a timely and sufficient manner so as to ensure that access to retirement pensions is predictable, in particular when the measures adopted by the States parties are regressive in character and no transitional arrangements are put in place to offset the negative consequences thereof.[9]

7.7 The Committee considers that States must review restrictions on access to social security schemes to ensure that they do not discriminate against women in law or in practice. In particular, States must bear in mind that, because of the persistence of stereotypes and other structural causes, women spend much more time than men in unpaid work, including to provide care to children both with and without disabilities. States should take steps to eliminate the factors that prevent women from making equal contributions to social security schemes that link benefits with contributions, or ensure that schemes take account of such factors in the design of benefit formulas, for example, by considering periods spent, especially by women, taking care of their children, both with and without disabilities, and adult dependants.

7.8 Turning to the case at hand, the Committee observes that the author has reached retirement age but could not qualify for the old-age pension under the new requirements, as she lacks the requisite amount of pensionable service.

7.9 The Committee notes that the State party has introduced both contributory and non-contributory pension schemes. While the latter is conditional only on age, the former also requires a period of contributions to the pension insurance fund. The Committee observes that this period is of equal duration for men and women. Under domestic law, the caretaking of children and individuals with disabilities, periods of education and military service are not counted towards the pensionable service period. In this regard, the Committee recalls the author's argument that the exclusion of caretaking from pensionable service is discriminatory towards women, as they are more frequently involved in such activities, owing to the effects of cultural stereotypes affecting family role distribution between genders.

7.10 The Committee considers that, when relevant information is presented in a communication indicating, prima facie, the existence of a legal provision that, although formulated neutrally, might in fact affect a much higher percentage of women than men, it is for the State party to show that such a situation does not constitute indirect discrimination on the grounds of gender.

7.11 The Committee takes into account the statistical information provided by the State party. That information shows that the average duration of activities excluded from pensionable service is roughly equal for men and women (4.3 and 4.5 years, respectively, in 2012–2017). Moreover, in 2017, a predominant majority of women of retirement age received an old-age pension (96.7 per cent, against 89.4 per cent of men). The proportion of women of retirement age denied old-age pension benefits was very low in general and just marginally higher than that of men. The author did not contest the veracity of the statistical data provided by the State party. Furthermore, the Committee observes that the State party introduced a number of special pension regimes with less strict pensionable service requirements, inter alia, for mothers with several children or children with disabilities. The Committee recognizes this attempt to remedy the effects of the increase in the pensionable service requirement on the most vulnerable groups. In view of the above, it could not be said that the legal framework in itself creates a discriminatory environment that is more burdensome for

[9] Ibid., para. 7.7.

women. It remains for the Committee to examine whether the application of pension rules in the author's case was in compliance with the requirements of the Convention.

7.12 The Committee observes from the outset that the author had only 12 years, 10 months and 24 days of pensionable service upon reaching retirement age. The author took care of her children from 1998 to 2009, until her youngest son reached 14 years of age. The Committee notes the author's argument that she had to extend her maternity leave beyond the statutory prescribed three years owing to her son being frequently ill. However, the author did not clearly specify the nature of her son's ailments that had obliged her to refrain from seeking gainful employment for such a lengthy period of time. Moreover, while the author noted that she was unable to secure employment after 2009, she did not explain why she had applied for employment assistance only in 2016 and received it in June 2016 before withdrawing a few months later, on 25 October 2016. She also did not indicate whether she had attempted to challenge in court any refusals by private employers to hire her.

7.13 In view of the above, the Committee notes that, while changes to the pension law clearly affected the author's personal situation, it could not be concluded that her failure to meet the requirements for any of the existing contributory pension schemes could be fully attributed to the State party. The author did not substantiate to a sufficient degree that she was denied an old-age pension owing to the domestic legal framework and to practices being disproportionately unfavourable towards women.

7.14 Acting under article 7 (3) of the Optional Protocol, the Committee concludes that the changes to the domestic legal framework and the requirements for the old-age pension, as well as their effects on the author, do not constitute a breach of article 2 (b)–(d) and (f) or article 11 (1) (e), read in conjunction with article 1, of the Convention.