

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

III. JURISPRUDENCE

ICCPR

- *Lovelace v. Canada* (6/24) (24/1977), ICCPR, A/36/40 (30 July 1981) 166 at paras 13.1 and 14-18.

...

13.1 The Committee considers that the essence of the present complaint concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve...In this respect the significant matter is her last claim, that "the major loss to a person ceasing to be Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity".

...

14. The rights under article 27 of the Covenant have to be secured to "persons belonging" to the minority. At present Sandra Lovelace does not qualify as an Indian under Canadian legislation. However, the Indian Act deals primarily with a number of privileges which, as stated above, do not as such come within the scope of the Covenant. Protection under the Indian Act and protection under article 27 of the Covenant therefore have to be distinguished. Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as "belonging" to this minority and to claim the benefits of article 27 of the Covenant. The question whether these benefits have been denied to her, depends on how far they extend.

15. The right to live on a reserve is not as such guaranteed by article 27 of the Covenant. Moreover, the Indian Act does not interfere directly with the functions which are expressly mentioned in that article. However, in the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language "in community with the other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists. On the other hand, not every interference can be regarded as a denial of rights within the meaning of article 27. Restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant...

16. In this respect, the Committee is of the view that statutory restrictions affecting the right

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be...

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

18. In view of this finding, the Committee does not consider it necessary to examine whether the same facts also show separate breaches of the other rights invoked...The rights to choose one's residence (article 12), and the rights aimed at protecting family life and children (articles 17, 23 and 24) are only indirectly at stake in the present case. The facts of the case do not seem to require further examination under those articles...

- *Kitok v. Sweden* (197/1985), ICCPR, A/43/40 (27 July 1988) 221 at paras. 9.1-9.8.

...

9.1 The main question before the committee is whether the author of the communication is the victim of a violation of article 27 of the Covenant because, as he alleges, he is arbitrarily denied immemorial rights granted to the Sami community, in particular, the right to membership of the Sami community and the right to carry out reindeer husbandry. In deciding whether or not the author of this communication has been denied the right to "enjoy [his] own culture", as provided for in article 27 of the Covenant, and whether section 12, paragraph 2, of the 1971 Reindeer Husbandry Act, under which an appeal against a decision of a Sami community to refuse membership may only be granted if there are special reasons for allowing such membership, violates article 27 of the Covenant, the Committee bases its findings on the following considerations.

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant...

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

9.3 ...[T]he right to enjoy one's own culture in community with the other members of the group cannot be determined *in abstracto* but has to be placed in context. The Committee is thus called upon to consider statutory restrictions affecting the right of an ethnic Sami to membership of a Sami village.

9.4 With regard to the State party's argument that the conflict in the present case is not so much between a conflict between the author as a Sami and the State party, but rather between the author and the Sami community...[T]he Committee observes that the State party's responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged...[A] decision of the Sami community to refuse membership can only be granted if there are special reasons for allowing such membership...[T]he right of the Länsstyrelsen to grant such an appeal should be exercised very restrictively.

9.5 According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective measures are required to ensure the future of reindeer breeding and the livelihood of those for whom reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

9.6 The Committee has none the less had grave doubts as to whether certain provisions of the Reindeer Husbandry Act, and their application to the author, are compatible with Article 27 of the Covenant...

9.7 ...[T]he Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation. It has further noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible...for him to do so.

9.8 In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the *ratio decidendi* in the Lovelace case (No. 24/1977, *Lovelace v. Canada*), d/ namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party...

Notes

...

d/ Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XVIII.

- *Ominayak v. Canada* (167/1984), ICCPR, A/45/40 vol. II (26 March 1990) 1 at paras. 2.2, 2.3, 32.2 and 33.

...

2.2 Chief Ominayak is the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta. They are subject to the jurisdiction of the Federal Government of Canada, allegedly in accordance with a fiduciary relationship assumed by the Canadian Government with respect to Indian peoples and their lands located within Canada's national borders. The Lubicon Lake Band is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they have, until recently, had little contact with non-Indian society. Band members speak Cree as their primary language. Many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy.

2.3 It is claimed that the Canadian Government, through the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), recognized the right of the original inhabitants of that area to continue their traditional way of life. Despite these laws and agreements, the Canadian Government had allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration). In so doing, Canada is accused of violating the Band's right to determine freely its political status and to pursue its economic, social and cultural development, as guaranteed by article 1, paragraph 1, of the Covenant. Furthermore, energy exploration in the Band's territory allegedly entails a violation of article 1, paragraph 2, which grants all peoples the right to dispose of their natural wealth and resources. In destroying the environment and undermining the Band's economic base, the Band is allegedly being deprived of its means to subsist and of the enjoyment of the right of self-determination guaranteed in article 1.

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

...

32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong...

33. Historical inequities...and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band and constitute a violation of article 27 so long as they continue.

For dissenting opinion in this context, see Ominayak v. Canada (167/1984), ICCPR, A/45/40 vol. II (26 March 1990) 1 at Individual Opinion by Mr. Nisuke Ando, 28.

- *Davidson and McIntyre v. Canada (359 and 385/1989), ICCPR, A/48/40 vol. II (31 March 1993) 91 (CCPR/C/47/D/359/1989/385/1989) at paras. 2.1, 2.2, 4.4, 11.2-11.4, 13, Individual Opinion by Mr. Kurt Herndl (concurring in part), 107, Individual Opinion by Mr. Bertil Wennergren (concurring), 108 and Individual Opinion by Mrs. Elizabeth Evatt cosigned by Messrs. Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic (concurring), 109.*

...

2.1 The authors of the first communication (No. 359/1989), Mr. Ballantyne and Ms. Davidson, sell clothes and paintings to a predominantly English-speaking clientele, and have always used English signs to attract customers.

2.2 The author of the second communication (No. 385/1989), Mr. McIntyre, states that in July 1988, he received notice from the Commissioner-Enquirer of the "Commission de protection de la langue française" that following a "checkup" it had been ascertained that he had installed a sign carrying the firm name "Kelly Funeral Home" on the grounds of his establishment, which constituted an infraction of the Charter of the French Language. He was requested to inform the Commissioner within 15 days in writing of measures taken to correct the situation and to prevent the recurrence of a similar incident. The author has since removed his company sign.

...

4.4 Section 58 of the Charter, as modified in 1989 by section 1 of Bill No. 178, now reads:

"58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French..."

...

11.2 As to article 27, the Committee observes that this provision refers to minorities in

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

States; this refers, as do all references to the "State" or to "States" in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that its provisions extend to all parts of Federal States without any limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.

11.3 Under article 19 of the Covenant, everyone shall have the right to freedom of expression; this right may be subjected to restrictions, conditions for which are set out in article 19, paragraph 3. The Government of Quebec has asserted that commercial activity such as outdoor advertising does not fall within the ambit of article 19. The Committee does not share this opinion. Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.

11.4 Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. The Committee notes that the State party does not seek to defend Bill 178 on these grounds. Any constraints under paragraphs 3 (a) and 3 (b) of article 19 would in any event have to be shown to be necessary. The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.

...

13. The Committee calls upon the State party to remedy the violation of article 19 of the Covenant by an appropriate amendment to the law.

...

C. Individual Opinion by Mr. Kurt Herndl (concurring in part)

I agree with the Committee's Views that the facts of the McIntyre case disclose a violation of article 19 of the Covenant. As to the communication of Mr. Ballantyne and Ms. Davidson, I believe that a question remains whether they are indeed "victims" within the meaning of article 1 of the Optional Protocol.

With respect to the Committee's rationale in paragraph 11.2 of its Views, the communications in my opinion do not raise issues under article 27 of the Covenant. The question as to whether the authors can or cannot be considered as belonging to a "minority" in the sense of article 27 would seem to be moot in as much as the rights that the authors invoke are not "minority rights" as such, but rather rights pertaining to the principle of freedom of expression, as protected by article 19 of the Covenant, which obviously must be taken to include commercial advertising. On this account, as the Committee rightly states in paragraphs 11.3 and 11.4 of its Views, there has been violation of a provision of the Covenant, i.e. article 19.

D. Individual Opinion by Mr. Bertil Wennergren (concurring)

I concur with the Committee's findings...that the authors have no claim under article 27 of the Covenant, but I do so because a prohibition to use any other language than French for commercial outdoor advertising in Quebec does not infringe on any of the rights protected under article 27. It is, under the circumstances, of no relevance, whether English speaking persons in Quebec are entitled to the protection of article 27 or not. I feel, however, that...the issue of what constitutes a minority in a State must be decided on a case by case basis, due regard being given to the particular circumstances of each case.

E. Individual Opinion by Mrs. Elizabeth Evatt, Messrs. Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic (concurring)

...

It may be correct to conclude that the authors are not members of a linguistic minority whose right to use their own language in community with the other members of their group have been violated by the Quebec laws in question. This conclusion can be supported by reference to the general application of those laws - they apply to all languages other than French - and to their specific purpose - which attracts the protection of article 19.

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

My difficulty with the decision is that it interprets the term "minorities" in article 27 solely on the basis of the number of members of the group in question in the State party. The reasoning is that because English speaking Canadians are not a numerical minority in Canada they cannot be a minority for the purposes of article 27.

I do not agree, however, that persons are necessarily excluded from the protection of article 27 where their group is an ethnic, linguistic or cultural minority in an autonomous province of a State, but is not clearly a numerical minority in the State itself, taken as a whole entity. The criteria for determining what is a minority in a State (in the sense of article 27) has not yet been considered by the Committee, and does not need to be foreclosed by a decision in the present matter, which can in any event be determined on other grounds. The history of the protection of minorities in international law shows that the question of definition has been difficult and controversial and that many different criteria have been proposed. For example, it has been argued that factors other than strictly numerical ones need to be taken into account. Alternatively, article 50, which envisages the application of the Covenant to "parts of federal States" could affect the interpretation of article 27.

To take a narrow view of the meaning of minorities in article 27 could have the result that a State party would have no obligation under the Covenant to ensure that a minority in an autonomous province had the protection of article 27 where it was not clear that the group in question was a minority in the State considered as a whole entity. These questions do not need to be finally resolved in the present matter and are better deferred until the proper context arises.

For dissenting opinion in this context, see Davidson and McIntyre v. Canada (359 and 385/1989), ICCPR, A/48/40 vol. II (31 March 1993) 91 (CCPR/C/47/D/359/1989/385/1989) at Individual Opinion by Mr. Birame Ndiaye, 105 and Individual Opinion by Mr. Kurt Herndl (dissenting in part), 107.

See also:

- *Singer v. Canada (455/1991), ICCPR, A/49/40 vol. II (26 July 1994) 155 (CCPR/C/51/D/455/1991) at paras. 12.1 and 12.2.*
- *Länsman v. Finland (511/1992), ICCPR, A/50/40 vol. II (26 October 1994) 66 (CCPR/C/52/D/511/1992) at paras. 9.1-9.8 and 10.*

...

9.1 ...The issue to be determined by the Committee is whether quarrying on the flank of Mt. Etelä-Riutusvaara, in the amount that has taken place until the present time or in the amount

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

that would be permissible under the permit issued to the company which has expressed its intention to extract stone from the mountain (i.e. up to a total of 5,000 cubic metres), would violate the authors' rights under article 27 of the Covenant.

9.2 It is undisputed that the authors are members of a minority within the meaning of article 27 and as such have the right to enjoy their own culture; it is further undisputed that reindeer husbandry is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community. 21/

9.3 The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant. Furthermore, mountain Riutusvaara continues to have a spiritual significance relevant to their culture. The Committee also notes the concern of the authors that the quality of slaughtered reindeer could be adversely affected by a disturbed environment.

9.4 A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.

9.5 The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region. The Committee recalls paragraph 7 of its General Comment on article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".

9.6 Against this background, the Committee concludes that quarrying on the slopes of Mt. Riutusvaara, in the amount that has already taken place, does not constitute a denial of the authors' right, under article 27, to enjoy their own culture. It notes in particular that the interests of the Muotkatunturi Herdsmens' Committee and of the authors were considered

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

during the proceedings leading to the delivery of the quarrying permit, that the authors were consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.

9.7 As far as future activities which may be approved by the authorities are concerned, the Committee further notes that the information available to it indicates that the State party's authorities have endeavoured to permit only quarrying which would minimize the impact on any reindeer herding activity in Southern Riutusvaara and on the environment; the intention to minimize the effects of extraction of stone from the area on reindeer husbandry is reflected in the conditions laid down in the quarrying permit. Moreover, it has been agreed that such activities should be carried out primarily outside the period used for reindeer pasturing in the area. Nothing indicates that the change in herding methods by the Muotkatunturi Herdsmen's Committee...could not be accommodated by the local forestry authorities and/or the company.

9.8 With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

10. The Human Rights Committee...is of the view that the facts as found by the Committee do not reveal a breach of Article 27 or any other provision of the Covenant.

Notes

...

21/ Views on Communication No.197/1985 (*Kitok v. Sweden*), adopted on 27 July 1988, paragraph 9.2.

- *Länsman v. Finland* (671/1995), ICCPR, A/52/40 vol. II (30 October 1996) 191 (CCPR/C/58/D/671/1995) at paras. 10.5-10.7.

...

10.5 After careful consideration of the material placed before it by the parties, and duly noting that the parties do not agree on the long-term impact of the logging activities already carried out and planned, the Committee is unable to conclude that the activities carried out as well as approved constitute a denial of the authors' right to enjoy their own culture. It is

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

uncontested that the Muotkatunturi Herdsmen's Committee, to which the authors belong, was consulted in the process of drawing up the logging plans and in the consultation, the Muotkatunturi Herdsmen's Committee did not react negatively to the plans for logging. That this consultation process was unsatisfactory to the authors and was capable of greater interaction does not alter the Committee's assessment. It transpires that the State party's authorities did go through the process of weighing the authors' interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management, i.e. logging methods, choice of logging areas and construction of roads in these areas. The domestic courts considered specifically whether the proposed activities constituted a denial of article 27 rights. The Committee is not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors' rights under article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied article 27 of the Covenant in the light of the facts before it.

10.6 As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party's forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsman, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors.

10.7 The Committee considers that if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

- *Waldman v. Canada* (694/1996), ICCPR, A/55/40 vol. II (3 November 1999) 86

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

(CCPR/C/67/D/694/1996) at paras. 10.2, 10.4-10.6 and Individual Opinion by Martin Scheinin (concurring), 100 at paras. 3-5.

...

10.2 The issue before the Committee is whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in religious school, constitutes a violation of the author's rights under the Covenant.

...

10.4 The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation.

10.5 With regard to the State party's argument that it is reasonable to differentiate in the allocation of public funds between private and public schools, the Committee notes that it is not possible for members of religious denominations other than Roman Catholic to have their religious schools incorporated within the public school system. In the instant case, the author has sent his children to a private religious school, not because he wishes a private non-government dependent education for his children, but because the publicly funded school system makes no provision for his religious denomination, whereas publicly funded religious schools are available to members of the Roman Catholic faith. On the basis of the facts before it, the Committee considers that the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the author's religion, which are private by necessity, cannot be considered reasonable and objective.

10.6 The Committee has noted the State party's argument that the aims of the State party's secular public education system are compatible with the principle of nondiscrimination laid down in the Covenant. The Committee...notes, however, that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools...[T]he Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.

Individual Opinion by Martin Scheinin

While I concur with the Committee's finding that the author is a victim of a violation of article 26 of the Covenant, I wish to explain my reasons for such a conclusion.

...

3. In the present case the Committee correctly focussed its attention on article 26. Although both General Comment No. 22 [48] and the *Hartikainen* case are related to article 18, there is a considerable degree of interdependence between that provision and the non-discrimination clause in article 26. In general, arrangements in the field of religious education that are in compliance with article 18 are likely to be in conformity with article 26 as well, because non-discrimination is a fundamental component in the test under article 18 (4). In the cases of *Blom v. Sweden* (Communication No. 191/1985) and *Lundgren et al. and Hjord et al. v. Sweden* (Communications 288 and 299/1988) the Committee elaborated its position in the question what constitutes discrimination in the field of education. While the Committee left open whether the Covenant entails, in certain situations, an obligation to provide some public funding for private schools, it concluded that the fact that private schools, freely chosen by the parents and their children, do not receive the same level of funding as public schools does not amount to discrimination.

4. In the Province of Ontario, the system of public schools provides for religious instruction in one religion but adherents of other religious denominations must arrange for their religious education either outside school hours or by establishing private religious schools. Although arrangements exist for indirect public funding to existing private schools, the level of such funding is only a fraction of the costs incurred to the families, whereas public Roman Catholic schools are free. This difference in treatment between adherents of the Roman Catholic religion and such adherents of other religions that wish to provide religious schools for their children is, in the Committee's view, discriminatory. While I concur with this finding I wish to point out that the existence of public Roman Catholic schools in Ontario is related to a historical arrangement for minority protection and hence needs to be addressed not only under article 26 of the Covenant but also under articles 27 and 18. The question whether the arrangement in question should be discontinued is a matter of public policy and the general design of the educational system within the State party, not a requirement under the Covenant.

5. When implementing the Committee's views in the present case the State party should in my opinion bear in mind that article 27 imposes positive obligations for States to promote

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

religious instruction in minority religions, and that providing such education as an optional arrangement within the public education system is one permissible arrangement to that end. Providing for publicly funded education in minority languages for those who wish to receive such education is not as such discriminatory, although care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds. The same rule applies in relation to religious education in minority religions. In order to avoid discrimination in funding religious (or linguistic) education for some but not all minorities States may legitimately base themselves on whether there is a constant demand for such education. For many religious minorities the existence of a fully secular alternative within the public school system is sufficient, as the communities in question wish to arrange for religious education outside school hours and outside school premises. And if demands for religious schools do arise, one legitimate criterion for deciding whether it would amount to discrimination not to establish a public minority school or not to provide comparable public funding to a private minority school is whether there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system of education. In the present case this condition was met. Consequently, the level of indirect public funding allocated to the education of the author's children amounted to discrimination when compared to the full funding of public Roman Catholic schools in Ontario.

- *Diergaardt et al. v. Namibia* (760/1997), ICCPR, A/55/40 vol. II (25 July 2000) 140 at paras. 2.3-2.6, 10.2, 10.4, 10.6, 10.8, Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga (concurring), 157 and Individual Opinion by Martin Scheinin (concurring), 160.

...

2.3 By Act No. 56 of 1976, passed by the South African parliament, the Rehoboth people were granted “self-government in accordance with the Paternal Law of 1872”. The law provided for the election of a Captain every five years, who appointed the Cabinet. Laws promulgated by the Cabinet had to be approved by a ‘Volksraad’ (Council of the people), consisting of nine members.

2.4 According to counsel, in 1989, the Rehoboth Basters accepted under extreme political pressure, the temporary transfer of their legislative and executive powers into the person of the Administrator-General of South West Africa, so as to comply with UN Security Council resolution nr.435 (1978)...

2.5 ...According to the counsel, this has had the effect of annihilating the means of subsistence of the community, since communal land and property was denied.

2.6 On 22 June 1991, the Rehoboth people organized general elections for a Captain, Council and Assembly according to the Paternal Laws. The new bodies were entrusted with

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

protecting the communal properties of the people at all cost. Subsequently, the Rehoboth Baster Community and its Captain initiated a case against the Government of Namibia before the High Court. On 22 October 1993 the Court recognized the community's *locus standi*. Counsel argues that this implies the recognition by the Court of the Rehoboth Basters as a people in its own right. On 26 May 1995, the High Court however rejected the community's claim to the communal property. On 14 May 1996, the Supreme Court rejected the Basters' appeal ...

...

10.2 The Committee regrets that the State party has not provided any information with regard to the substance of the authors' claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at its disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations to the extent that they are substantiated.

...

10.4 The authors have made available to the Committee the judgement which the Supreme Court gave on 14 May 1996 on appeal from the High Court which had pronounced on the claim of the Baster community to communal property. Those courts made a number of findings of fact in the light of the evidence which they assessed and gave certain interpretations of the applicable domestic law. The authors have alleged that the land of their community has been expropriated and that, as a consequence, their rights as a minority are being violated since their culture is bound up with the use of communal land exclusive to members of their community. This is said to constitute a violation of Article 27 of the Covenant.

...

10.6 ...[T]he Committee observes that it is for the domestic courts to find the facts in the context of, and in accordance with, the interpretation of domestic laws. On the facts found, if "expropriation" there was, it took place in 1976, or in any event before the entry into force of the Covenant and the Optional Protocol for Namibia on 28 February 1995. As to the related issue of the use of land, the authors have claimed a violation of article 27 in that a part of the lands traditionally used by members of the Rehoboth community for the grazing of cattle no longer is in the *de facto* exclusive use of the members of the community. Cattle raising is said to be an essential element in the culture of the community. As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples. ^{4/} However, in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of article 27 of the Covenant in the present case.

...

10.8 The authors have also claimed that the termination of self-government for their community and the division of the land into two districts which were themselves amalgamated in larger regions have split up the Baster community and turned it into a minority with an adverse impact on the rights under Article 25(a) and (c) of the Covenant. The right under Article 25(a) is a right to take part in the conduct of public affairs directly or through freely chosen representatives and the right under Article 25(c) is a right to have equal access, on general terms of equality, to public service in one's country. These are individual rights. Although it may very well be that the influence of the Baster community, as a community, on public life has been affected by the merger of their region with other regions when Namibia became sovereign, the claim that this has had an adverse effect on the enjoyment by individual members of the community of the right to take part in the conduct of public affairs or to have access, on general terms of equality with other citizens of their country, to public service has not been substantiated. The Committee finds therefore that the facts before it do not show that there has been a violation of article 25 in this regard.

Notes

...

4/ See *Kitok v. Sweden* (197/1985), *Ominayak v. Canada* (167/1984), *I. Länsman et al. v. Finland* (511/1992), *J. Länsman et al. v. Finland* (671/1995), as well as General Comment No. 23 [50], para. 7.

Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga

It is clear on the facts and from the 1996 decision of the High Court that the ownership of the communal lands of the community had been acquired by the government of Namibia before the coming into force of the Covenant and the Optional Protocol and that the authors cannot substantiate a claim on the basis of any expropriation. However, the significant aspect of the authors' claim under article 27 is that they have, since that date, been deprived of the use of lands and certain offices and halls that had previously been held by their government for the exclusive use and benefit of members of the community. Privatization of the land and overuse by other people has, they submit, deprived them of the opportunity to pursue their traditional pastoral activities. The loss of this economic base to their activities has, they claim, denied them the right to enjoy their own culture in community with others. This claim raises some difficult issues as to how the culture of a minority which is protected by the Covenant is to be defined, and what role economic activities have in that culture. These issues are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. In the present case, the authors have defined their culture almost solely in terms of the economic activity of grazing cattle. They cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture. Their claim is, essentially, an economic rather than a cultural claim and does not draw the protection of article 27.

Individual Opinion by Martin Scheinin

I share the Committee's conclusions in relation to all aspects of the case. On one particular point, however, I find that the Committee's reasoning is not fully consistent with the general line of its argumentation. In paragraph 10.8, the Committee, in my opinion unnecessarily, emphasizes the individual nature of rights of participation under article 25. In my view there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation. As is emphasized at the end of paragraph 10.3 of the Views, the right of self-determination under article 1 affects the interpretation of article 25. This obiter statement represents, in my opinion, proper recognition of the interdependence between the various rights protected by the Covenant, including article 1 which according to the Committee's jurisprudence cannot, on its own, serve as the basis for individual communications under the Optional Protocol.

Irrespective of what has been said above, I concur with the Committee's finding that there was no violation of article 25. In my opinion, the authors have failed to substantiate how the 1996 law on regional government has adversely affected their exercise of article 25 rights, in particular the operation and powers of local or traditional authorities. On the basis of the material they presented to the Committee, no violation of article 25 can be established.

- *Mahuika et al. v. New Zealand* (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11 at paras. 5.1-5.13, 9.3-9.11 and 10

...

5.1 The Maori people of New Zealand number approximately 500,000, 70% of whom are affiliated to one or more of 81 iwi. ^{1/} The authors belong to seven distinct iwi (including two of the largest and in total comprising more than 140,000 Maori) and claim to represent these. In 1840, Maori and the predecessor of the New Zealand Government, the British Crown,

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

signed the Treaty of Waitangi, which affirmed the rights of Maori, including their right to self-determination and the right to control tribal fisheries. In the second article of the Treaty, the Crown guarantees to Maori:

"The full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession..." 2/

The Treaty of Waitangi is not enforceable in New Zealand law except insofar as it is given force of law in whole or in part by Parliament in legislation. However, it imposes obligations on the Crown and claims under the Treaty can be investigated by the Waitangi Tribunal. 3/

5.2 No attempt was made to determine the extent of the fisheries until the introduction of the Quota Management System in the 1980s. That system, which constitutes the primary mechanism for the conservation of New Zealand's fisheries resources and for the regulation of commercial fishing in New Zealand, allocates permanent, transferable, property rights in quota for each commercial species within the system.

5.3 The New Zealand fishing industry had seen a dramatic growth in the early 1960s with the expansion of an exclusive fisheries zone of nine, and later twelve miles. At that time, all New Zealanders, including Maori, could apply for and be granted a commercial fishing permit; the majority of commercial fishers were not Maori, and of those who were, the majority were part-time fishers. By the early 1980s, inshore fisheries were over-exploited and the Government placed a moratorium on the issue of new permits and removed part-time fishers from the industry. This measure had the unintended effect of removing many of the Maori fishers from the commercial industry. Since the efforts to manage the commercial fishery fell short of what was needed, in 1986 the Government amended the existing Fisheries Act and introduced a quota management system for the commercial use and exploitation of the country's fisheries. Section 88 (2) of the Fisheries Act provides "that nothing in this Act shall affect any Maori fishing rights". In 1987, the Maori tribes filed an application with the High Court of New Zealand, claiming that the implementation of the quota system would affect their tribal Treaty rights contrary to section 88(2) of the Fisheries Act, and obtained interim injunctions against the Government.

5.4 In 1988, the Government started negotiations with Maori, who were represented by four representatives. The Maori representatives were given a mandate to negotiate to obtain 50% of all New Zealand commercial fisheries. In 1989, after negotiation and as an interim measure, Maori agreed to the introduction of the Maori Fisheries Act 1989, which provided for the immediate transfer of 10% of all quota to a Maori Fisheries Commission which would administer the resource on behalf of the tribes. This allowed the introduction of the quota system to go ahead as scheduled. Under the Act, Maori can also apply to manage the fishery in areas which had customarily been of special significance to a tribe or sub-tribe, either as a

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

source of food or for spiritual reasons.

5.5 Although the Maori Fisheries Act 1989 was understood as an interim measure only, there were limited opportunities to purchase any more significant quantities of quota on the market. In February 1992, Maori became aware that Sealords, the largest fishing company in Australia and New Zealand was likely to be publicly floated at some time during that year. The Maori Fisheries Negotiators and the Maori Fisheries Commission approached the Government with a proposition that the Government provide funding for the purchase of Sealords as part of a settlement of Treaty claims to Fisheries. Initially the Government refused, but following the Waitangi Tribunal report of August 1992 on the Ngai Tahu Sea Fishing, in which the Tribunal found that Ngai Tahu, the largest tribe from the South Island of New Zealand, had a development right to a reasonable share of deep water fisheries, the Government decided to enter into negotiations. These negotiations led on 27 August 1992 to the signing of a Memorandum of Understanding between the Government and the Maori negotiators.

5.6 Pursuant to this Memorandum, the Government would provide Maori with funds required to purchase 50% of the major New Zealand fishing company, Sealords, which owned 26% of the then available quota. In return, Maori would withdraw all pending litigation and support the repeal of section 88 (2) of the Fisheries Act as well as an amendment to the Treaty of Waitangi Act 1975, to exclude from the Waitangi Tribunal's jurisdiction claims relating to commercial fishing. The Crown also agreed to allocate 20% of quota issued for new species brought within the Quota Management System to the Maori Fisheries Commission, and to ensure that Maori would be able to participate in "any relevant statutory fishing management and enhancement policy bodies." In addition, in relation to non-commercial fisheries, the Crown agreed to empower the making of regulations, after consultation with Maori, recognizing and providing for customary food gathering and the special relationship between Maori and places of customary food gathering importance.

5.7 The Maori negotiators sought a mandate from Maori for the deal outlined in the memorandum of understanding. The memorandum and its implications were debated at a national hui 4/ and at hui at 23 marae 5/ throughout the country. The Maori negotiators' report showed that 50 iwi comprising 208,681 Maori, supported the settlement. 6/ On the basis of this report, the Government was satisfied that a mandate for a settlement had been given and on 23 September 1992, a Deed of Settlement was executed by the New Zealand Government and Maori representatives. The Deed implements the Memorandum of Understanding and concerns not only sea fisheries but all freshwater and inland fisheries as well. Pursuant to the Deed, the Government pays the Maori tribes a total of NZ\$ 150,000,000 to develop their fishing industry and gives the Maori 20% of new quota for species. The Maori fishing rights will no longer be enforceable in court and will be replaced by regulations. Paragraph 5.1 of the Deed reads:

“Maori agree that this Settlement Deed, and the settlement it evidences, shall

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal."

Paragraph 5.2 reads:

"The Crown and Maori agree that in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognise use and management practices of Maori in the exercise of their traditional rights."

The Deed recorded that the name of the Maori Fisheries Commission would be changed to the "Treaty of Waitangi Fisheries Commission", and that the Commission would be accountable to Maori as well as to the Crown in order to give Maori better control of their fisheries guaranteed by the Treaty of Waitangi.

5.8 According to the authors the contents of the Memorandum of Understanding were not always adequately disclosed or explained to tribes and sub-tribes. In some cases, therefore, informed decision-making on the proposals contained in the Memorandum of understanding was seriously inhibited. The authors emphasize that while some of the Hui were supportive of the proposed Sealords deal, a significant number of tribes and sub-tribes either opposed the deal completely or were prepared to give it conditional support only. The authors further note that the Maori negotiators have been at pains to make clear that they had no authority and did not purport to represent individual tribes and sub-tribes in relation to any aspect of the Sealords deal, including the conclusion and signing of the Deed of Settlement.

5.9 The Deed was signed by 110 signatories. Among the signatories were the 8 Maori Fisheries Negotiators (the four representatives and their alternates), two of whom represented pan-Maori organisations; 7/ 31 plaintiffs in proceedings against the Crown relating to fishing

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

rights, including representatives of 11 iwi; 43 signatories representing 17 iwi; and 28 signatories who signed the Deed later and who represent 9 iwi. The authors observe that one of the difficulties of ascertaining the precise number of tribes who signed the Deed of Settlement relates to verification of authority to sign on behalf of the tribes, and claim that it is apparent that a number of signatories did not possess such authority or that there was doubt as to whether they possessed such authority. The authors note that tribes claiming major commercial fisheries resources, were not among the signatories.

5.10 Following the signing of the Deed of Settlement, the authors and others initiated legal proceedings in the High Court of New Zealand, seeking an interim order to prevent the Government from implementing the Deed by legislation. They argued *inter alia* that the Government's actions amounted to a breach of the New Zealand Bill of Rights Act 1990.^{8/} The application was denied on 12 October 1992 and the authors appealed by way of interlocutory application to the Court of Appeal. On 3 November 1992, the Court of Appeal held that it was unable to grant the relief sought on the grounds that the Courts could not interfere in Parliamentary proceedings and that no issue under the Bill of Rights had arisen at that time.

5.11 Claims were then brought to the Waitangi Tribunal, which issued its report on 6 November 1992. The report concluded that the settlement was not contrary to the Treaty except for some aspects which could be rectified in the anticipated legislation. In this respect, the Waitangi Tribunal considered that the proposed extinguishment and/or abrogation of Treaty interests in commercial and non-commercial fisheries was not consistent with the Treaty of Waitangi or with the Government's fiduciary responsibilities. The Tribunal recommended to the Government that the legislation make no provision for the extinguishment of interests in commercial fisheries and that the legislation in fact affirm those interests and acknowledge that they have been satisfied, that fishery regulations and policies be reviewable in the courts against the Treaty's principles, and that the courts be empowered to have regard to the settlement in the event of future claims affecting commercial fish management laws.

5.12 On 3 December 1992, the Treaty of Waitangi (Fisheries Claims) Settlement Bill 1992 was introduced. Because of the time constraints involved in securing the Sealords bid, the Bill was not referred to the competent Select Committee for hearing, but immediately presented and discussed in Parliament. The Bill became law on 14 December 1992.... The Act provides *inter alia* for the payment of NZ\$ 150,000,000 to Maori. The Act also states in section 9, that "all claims (current and future) by Maori in respect of commercial fishing ... are hereby finally settled" ... With respect to the effect of the settlement on non-commercial Maori fishing rights and interests, it is declared that these shall continue to give rise to Treaty obligations on the Crown and that regulations shall be made to recognise and provide for customary food gathering by Maori. The rights or interests of Maori in non-commercial fishing giving rise to such claims shall no longer have legal effect and accordingly are not enforceable in civil

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

proceedings and shall not provide a defence to any criminal, regulatory or other proceeding, except to the extent that such rights or interests are provided for in regulations. According to the Act, the Maori Fisheries Commission was renamed to Treaty of Waitangi Fisheries Commission, and its membership expanded from seven to thirteen members. Its functions were also expanded. In particular, the Commission now has the primary role in safeguarding Maori interests in commercial fisheries.

5.13 The joint venture bid for Sealords was successful. After consultation with Maori, new Commissioners were appointed to the Treaty of Waitangi Fisheries Commission. Since then, the value of the Maori stake in commercial fishing has grown rapidly. In 1996, its net assets had increased to a book value of 374 million dollars. In addition to its 50% stake in Sealords, the Commission now controls also Moana Pacific Fisheries Limited (the biggest in-shore fishing company in New Zealand), Te Waka Huia Limited, Pacific Marine Farms Limited and Chatham Processing Limited. The Commission has disbursed substantial assistance in the form of discounted annual leases of quota, educational scholarships and assistance to Maori input into the development of a customary fishing regime. Customary fishing regulations have been elaborated by the Crown in consultation with Maori.

...

9.3 The first issue before the Committee therefore is whether the authors' rights under article 27 of the Covenant have been violated by the Fisheries Settlement, as reflected in the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community. 14/ The recognition of Maori rights in respect of fisheries by the Treaty of Waitangi confirms that the exercise of these rights is a significant part of Maori culture. However, the compatibility of the 1992 Act with the treaty of Waitangi is not a matter for the Committee to determine.

9.4 The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology. In this case the legislation introduced by the State affects, in various ways, the possibilities for Maori to engage in commercial and non-commercial fishing. The question is whether this constitutes a denial of rights. On an earlier occasion, the Committee has considered that:

" A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27." 15/

9.5 The Committee recalls its general comment on article 27, according to which, especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them. 16/ In its case law under the Optional Protocol, the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.17/ The Committee acknowledges that the Treaty of Waitangi (Fisheries Settlement) Act 1992 and its mechanisms limit the rights of the authors to enjoy their own culture.

9.6 The Committee notes that the State party undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. The Settlement was enacted only following the Maori representatives' report that substantial Maori support for the Settlement existed. For many Maori, the Act was an acceptable settlement of their claims. The Committee has noted the authors' claims that they and the majority of members of their tribes did not agree with the Settlement and that they claim that their rights as members of the Maori minority have been overridden. In such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected. 18/

9.7 As to the effects of the agreement, the Committee notes that before the negotiations which led to the Settlement the Courts had ruled earlier that the Quota Management System was in possible infringement of Maori rights because in practice Maori had no part in it and were thus deprived of their fisheries. With the Settlement, Maori were given access to a great percentage of quota, and thus effective possession of fisheries was returned to them. In regard to commercial fisheries, the effect of the Settlement was that Maori authority and traditional methods of control as recognised in the Treaty were replaced by a new control structure, in an entity in which Maori share not only the role of safeguarding their interests in fisheries but also the effective control. In regard to non-commercial fisheries, the Crown obligations under

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

the Treaty of Waitangi continue, and regulations are made recognising and providing for customary food gathering.

9.8 In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, *inter alia* to securing the possibility of Maori individuals and communities to engage themselves in non-commercial fishing activities. While it is a matter of concern that the settlement and its process have contributed to divisions amongst Maori, nevertheless, the Committee concludes that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, are compatible with article 27.

9.9 The Committee emphasises that the State party continues to be bound by article 27 which requires that the cultural and religious significance of fishing for Maori must deserve due attention in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act. With reference to its earlier case law 19/, the Committee emphasises that in order to comply with article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group. The State party is under a duty to bear this in mind in the further implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act.

9.10 The authors' complaints about the discontinuance of the proceedings in the courts concerning their claim to fisheries must be seen in the light of the above. While in the abstract it would be objectionable and in violation of the right to access to court if a State party would by law discontinue cases that are pending before the courts, in the specific circumstances of the instant case, the discontinuance occurred within the framework of a nation wide settlement of exactly those claims that were pending before the courts and that had been adjourned awaiting the outcome of negotiations. In the circumstances, the Committee finds that the discontinuance of the authors' court cases does not amount to a violation of article 14(1) of the Covenant.

9.11 With regard to the authors' claim that the Act prevents them from bringing claims concerning the extent of their fisheries before the courts, the Committee notes that article 14(1) encompasses the right to access to court for the determination of rights and obligations in a suit at law. In certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14(1). In the present case, the Act excludes the courts' jurisdiction to inquire into the validity of claims by Maori in respect to commercial fishing, because the Act is intended to settle these claims. In any event, Maori recourse to the Courts to enforce claims regarding fisheries was limited even before the 1992 Act; Maori rights in commercial fisheries were enforceable in the Courts only

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

to the extent that s 88(2) of the Fisheries Act expressly provided that nothing in the Act was to affect Maori fishing rights. The Committee considers that whether or not claims in respect of fishery interests could be considered to fall within the definition of a suit at law, the 1992 Act has displaced the determination of Treaty claims in respect of fisheries by its specific provisions. Other aspects of the right to fisheries, though, still give the right to access to court, for instance in respect of the allocation of quota and of the regulations governing customary fishing rights. The authors have not substantiated the claim that the enactment of the new legislative framework has barred their access to court in any matter falling within the scope of article 14, paragraph 1. Consequently, the Committee finds that the facts before it do not disclose a violation of article 14, paragraph 1.

10. The Human Rights Committee ... is of the view that the facts before it do not reveal a breach of any of the articles of the Covenant.

Notes

1/ Iwi: tribe, incorporating a number of constituent hapu (sub-tribes).

2/ Counsel submits that the Maori text contains a broader guarantee than is apparent from a bare reading of the English text. He explains that one of the most important differences in meaning between the two texts relates to the guarantee, in the Maori text, of "te tino rangatiratanga" (the full authority) over "taonga" (all those things important to them), including their fishing places and fisheries. According to counsel, there are three main elements embodied in the guarantee of rangatiratanga: the social, cultural, economical and spiritual protection of the tribal base, the recognition of the spiritual source of taonga and the fact that the exercise of authority is not only over property, but of persons within the kinship group and their access to tribal resources. The authors submit that the Maori text of the Treaty of Waitangi is authoritative.

3/ The Waitangi Tribunal is a specialized statutory body established by the Treaty of Waitangi Act 1975 having the status of a commission of enquiry and empowered *inter alia* to inquire into certain claims in relation to the principles of the Treaty of Waitangi.

4/ Hui: assembly.

5/ Marae: area set aside for the practice of Maori customs.

6/ The report showed also that 15 iwi representing 24,501 Maori, opposed the settlement and 7 iwi groups comprising 84,255 Maori were divided in their views.

7/ The National Maori Congress, a non-governmental organisation comprising representatives from up to 45 iwi, and the New Zealand Maori Council, a body which represents district

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

Maori councils throughout New Zealand.

8/ Breaches were claimed of sections 13 (freedom of thought, conscience and religion), 14 (freedom of expression), 20 (rights of minorities) and 27 (right to justice).

...

14/ See *inter alia* the Committee's Views in *Kitok v. Sweden*, communication No. 197/1985, adopted on 27 July 1988, CCPR/C/33/D/197/1985, paragraph 9.2. See also the Committee's Views in the two *Länsman* cases, Nos. 511/1992, 26 October 1994 (CCPR/C/52/D/511/1992) and 671/1995, 30 October 1996 (CCPR/C/58/D/671/1995).

15/ Committee's Views on case No. 511/1992, *Lansmann et al. v. Finland*, CCPR/C/52/D/511/1992, para. 9.4.

16/ General Comment No. 23, adopted during the Committee's 50th session in 1994, paragraph 3.2.

17/ Committee's Views on case 511/1992, *I. Länsman et al. v. Finland*, paras. 9.6 and 9.8 (CCPR/C/52/D/511/1992).

18/ See the Committee's Views in case No. 197/1985, *Kitok v. Sweden*, adopted on 27 July 1988, CCPR/C/33/D/197/1985.

19/ Committee's Views on case 511/1992, *I. Länsman et al. v. Finland*, para. 9.8, CCPR/C/52/D/511/1992.

For dissenting opinion in this context, see Mahuika et al. v. New Zealand (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11 at Individual Opinion by Mr. Martin Scheinin (partly dissenting), 29.

For dissenting opinions in this context generally see:

- *Hopu v. France (549/1993) (549/1997), ICCPR, A/52/40 vol. II (29 July 1997) 70 (CCPR/C/60/D/549/1993) at Individual Opinion by David Kretzmer and Thomas Buergenthal, Nisuke Ando and Lord Colville (dissenting), 81 at paras. 1-7.*
- *T.K. v. France (220/1987), ICCPR, A/45/40 vol. II (8 November 1989) 118 at Individual Opinion by Mrs. Rosalyn Higgins (dissenting in part), 125.*