HUMAN RIGHTS COMMITTEE

Gobin v. Mauritius

Communication No. 787/1997

16 July 2001

CCPR/C/72/D/787/1997

ADMISSIBILITY

Submitted by: Mr. Vishwadeo Gobin

Alleged victim: The author

State party: Mauritius

Date of communication: 25 November 1996 (initial submission)

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

Meeting on 16 July 2001,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 25 November 1996, is Mr. Vishwadeo Gobin, a Mauritian citizen, born on 22 January 1945, who claims to be a victim of a violation by Mauritius of article 26 of the Covenant. He is represented by his son, Maneesh Gobin.

The facts as presented by the author

2.1 In September 1991, the author stood as a candidate in the general election for the legislature in Mauritius. He ranked fourth in his constituency in terms of number of votes received. According to Mauritian law, only the first three candidates from his constituency were directly elected but the author was, in principle, eligible for one of the eight additional seats which are not directly related to the constituency. However, he states that he was not given this seat because he did not belong

to the "appropriate community", and another candidate from the same constituency who had received less votes than him was allocated the seat.

2.2 The author explains that the electoral system for the legislature of Mauritius provides for 21 constituencies. In 20 of them, the three candidates with the highest number of votes are elected and in one constituency, the two candidates with the most votes are elected. Sixty-two members of the legislature are thus elected directly. The remaining eight seats are allocated to the "best losers". According to the First Schedule of the Constitution of Mauritius, all candidates have to indicate to which community (Hindu, Muslim, Sino-Mauritian or general) they belong. When appointing the eight additional members of the legislature, the Electoral Supervisory Commission applies article 5 of the First Schedule which provides that the candidates should belong to the "appropriate community". According to article 5 (8) of the First Schedule, the "appropriate community" means the community that has an unreturned candidate available and that would have the highest number of persons (as determined by the 1972 census) in relation to the number of seats in the Assembly held immediately before the allocation of the seat.

The Complaint

3. The author claims that the constitutional provision of the State party according to which he had to be part of the "appropriate community" in order to be granted a seat of "best loser" is discriminatory because the criteria on which the decision is taken are based on race and religion. The said provision is thus contrary to article 26 of the International Convention on Civil and Political Rights.

Observations by the State party

4.1 In a submission dated 25 May 1998, the State party made some observations on the admissibility of the communication.

4.2 The State party first argues that the author has not exhausted domestic remedies because he did not use his right under section 17 of the Constitution to apply to the Supreme Court in a discrimination matter protected by section 16 of the State party's Constitution. In this regard, the State party also contends, with regard to the author's argument that no Court of law in Mauritius can rule against the Constitution, the supreme law of the land, that the author is surmising as to the outcome of such an application and points out that he would also have had the possibility to appeal to the Judicial Committee of the Privy Council since the matter is related to the interpretation of the Constitution.

4.3 It also considers that the communication is incompatible with the provisions of the International Covenant on Civil and Political Rights. The procedure of allocation of the eight additional seats is indeed organized so as to ensure that all minorities of the country are adequately represented in the legislature and has proved to be an effective barrier against racial discrimination in the sense of article 26 of the Covenant. The purpose of the communication is thus incompatible with the provisions of the Covenant because the absence of such a constitutional provision would entail discrimination on the grounds of race, religion, national, or social origin.

4.4 Finally, the State party argues that the communication constitutes an abuse of the right of submission of such communications, because the delay between the time when the alleged discrimination took place, in 1991, and the date of the communication, 25 November 1996, is excessive and without acceptable justification. Moreover, the State party considers that the important delay removes the possibilities of an effective remedy.

Additional Comments by the author

5.1 In a submission dated 13 November 1998, the author comments on the observations by the State party.

5.2 With regard to the question of exhaustion of domestic remedies, the author first alleges that an application to the Supreme Court under section 17 of the Constitution, such as it is supported by the State party, would be aimed at challenging an action that is contrary to section 16 of the Constitution. However, in the present case, section 16 has undoubtedly not been violated; it was correctly applied. The question here is rather whether section16 itself constitutes a violation of article 26 of the Covenant, and this is not what is provided for under section 17 of the Constitution. Secondly, the author notes that section 16 of the Constitution refers to a violation of the principle of non-discrimination by a "law", that is an Act of Parliament, and not by the Constitution itself, which means that section 16 cannot be invoked in the Supreme Court with any reasonable prospect of success. Thirdly, it is undisputable that the Supreme Court cannot take a decision that goes against the Constitution because the latter is the supreme law of the land. Moreover, because the Covenant is not incorporated in Mauritian law, the Supreme Court could only draw some guidance from the Covenant. The same is true for the Judicial Committee of the Privy Council that would apply Mauritian law and would therefore encounter the same obstacle as the Supreme Court.

5.3 It is therefore wrong to consider that the author had an available and effective domestic remedy in this particular case. The only authority entitled to change the Constitution under certain circumstances is the Mauritian Parliament and, up to now, it has not brought any change in this direction. The Committee should consequently waive in the present case the requirement of the exhaustion of domestic remedies.

5.4 In respect of the argument of the State party that the communication is incompatible with the provisions of the Covenant, the author considers that the question of election should be left to the electors and that the State should not be overprotective. Most of all, since the Mauritian population is for purpose of elections divided in four "communities" according to religion and race, the author is of the view that allocating seats on the basis of race and religion is unacceptable and fundamentally in contradiction with article 26 of the Covenant.

5.5 Finally, concerning the delay after which the communication was submitted, the author notes that a delay of five years is in many other cases a delay that is not considered to be excessive by the State party and therefore claims the same for his communication, especially where the interest of justice in international law are of such importance that they should take precedence.

Issues and proceedings before the Committee

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

6.2 The author claims that his rights under article 26 were violated by application of an arrangement enshrined in the Constitution relating to division of parliamentary seats according to ethnic affiliation. The State party has not contested that the said arrangement is enshrined in the Constitution nor that the domestic courts do not have the power to review the Constitution in order to ensure its compatibility with the Covenant. In these circumstances it is abundantly clear that legal action would have been futile and that the author had no available domestic remedy for the alleged violation of his Covenant rights. The Committee therefore dismisses the State party's claim that the communication be declared inadmissible for failure to exhaust domestic remedies.

6.3 The State party claims that because of the delay in submission of the communication the Committee should consider it as inadmissible as an abuse of the right of submission under article 3 of the Optional Protocol. The Committee notes that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself involve abuse of the rights of communication. However, in certain circumstances, the Committee expects a reasonable explanation justifying a delay. In the present case, the alleged violation took place at periodic elections held five years before the communication was submitted on behalf of the alleged victim to the Committee with no convincing explanation in justification of this delay. In the absence of such explanation the Committee is of the opinion that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission, which renders the communication inadmissible under article 3 of the Optional Protocol.

7. The Committee therefore decides:

(a) that the communication is inadmissible under article 3 of the Optional Protocol;

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

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

** Under rule 84 (1) (a) of the Committee's rules of procedure, Mr. Rajsoomer Lallah did not participate in the examination of the case.

*** The texts of a dissenting individual opinion, signed by Ms. Christine Chanet, Mr. Louis Henkin, Mr. Martin Scheinin, Mr. Ivan Shearer and Mr. Max Yalden, and of a separate dissenting opion signed by Mr. Eckart Klein are appended.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated into Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion by Committee members Christine Chanet, Louis Henkin, Martin Scheinin, Ivan Shearer and Max Yalden (dissenting)

The signers of the present opinion cannot agree that the five-year period between the alleged violation and the submission of the communication is, in the absence of any convincing justification by the author, a key element in declaring the communication inadmissible under article 3 of the Optional Protocol.

The Protocol does not set any time limit for the submission of a communication.

The Committee cannot, in this way, introduce a preclusive time limit in the Optional protocol.

No particular harm was done to the State party as a result of the delay.

[Signed] Christine Chanet

[Signed] Louis Henkin

[Signed] Martin Scheinin

[Signed] Ivan Shearer

[Signed] Max Yalden

Individual opinion by Committee member Eckart Klein (dissenting)

To my regret I am not in a position to follow the majority on the issue of the abuse of the author's right to submit a communication (see para. 6.3 of the Views). I agree that the mere fact that the Optional Protocol does not fix a time-limit for submission of communications does not principally exclude the application of the general rule of abuse of rights. However, in order to conclude that a right has been abused (despite the lack of any time-limit) a considerable period of time must have elapsed, and the adequate length of time for submitting a communication should be assessed against the background of each individual case. In addition, it would be generally for the State party to show that the requirements for the application of the abuse of rights rule are fulfilled.

In the case at hand, the State party merely argued in a very unspecific way characterizing the submission of the communication as excessive and without acceptable justification (see para. 4.4. of the Views). Likewise, the Committee is putting the burden of argument upon the author. This shift of the burden of argument would only be acceptable if the submission of the communication would be so much delayed that this delay could not be understood at all without further explanation. Taking into account that here the relevant length of time is five years only, a shift of burden of argument cannot be assumed, leaving the burden on the State party, which in this case did not argue accordingly. The mere fact that the alleged violation took place at periodic elections is not sufficient in itself. I therefore do not think that the delay in the submission of this communication can be regarded as constituting an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

[Signed] Eckart Klein