

SELF-DETERMINATION

III. JURISPRUDENCE

ICCPR

- *Ominayak v. Canada* (167/1984), ICCPR, A/45/40 vol. II (26 March 1990) 1 at para. 32.1.

...

32.1 ...While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a “people” is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is, however, no objection to a group of individuals, who can claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.

- *E. P. v. Colombia* (318/1988), ICCPR, A/45/40 vol. II (25 July 1990) 184 at para. 8.2.

...

8.2 ...[T]he Covenant recognizes and protects in most resolute terms a people’s right to self-determination as an essential condition for the effective guarantee of observance of individual human rights and for the promotion and strengthening of those rights. However...the authors cannot claim under the Optional Protocol to be victims of a violation of the right to self-determination enshrined in article 1 of the Covenant. a/ The Optional Protocol provides a procedure under which individuals can claim that individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. The Committee further notes no individual, or group of individuals, can in the abstract, by way of *actio popularis*, challenge a law or practice deemed to be contrary to the Covenant. An individual, or a group of individuals can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she, or they, are actually affected.

Notes

a/ See [*Ominayak v. Canada* (167/1984), A/45/40 (26 March 1990), 1-30], para. 32.1.

SELF-DETERMINATION

See also:

- *A. B. v. Italy* (413/1990), ICCPR, A/46/40 (2 November 1990) 320 (CCPR/C/40/D/413/1990) at para. 3.2.
- *R. L. v. Canada* (358/1989), ICCPR, A/47/40 (5 November 1991) 358 (CCPR/C/43/D/358/1989) at para. 6.2.

- *Diergaardt et al. v. Namibia* (760/1997), ICCPR, A/55/40 vol. II (25 July 2000) 140 at paras. 2.3-2.5, 10.3, 10.8, and Individual Opinion by Martin Scheinin (concurring).

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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.

...

10.3 The authors have alleged that the termination of their self-government violates article 1 of the Covenant. The Committee recalls that while all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the community to which the authors belong is a “people” is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. ^{3/} As shown by the Committee’s jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27.

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10.8 The authors have also claimed that the termination of self-government for their

SELF-DETERMINATION

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

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3/ See the Committee's Views in case No. 167/1984 (*Ominayak v. Canada*), Views adopted on 26 March 1990.

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

SELF-DETERMINATION

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.

- *Äärelä and Näkkäläjärvi v. Finland* (779/1997) ICCPR, A/57/40 vol. II (24 October 2001) 117 (CCPR/C/73/D/779/1997) at paras. 2.1, 2.2, 7.5 and 7.6.

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2.1 The authors are reindeer breeders of Sami ethnic origin and members of the Sallivaara Reindeer Herding Co-operative. The Co-operative has 286,000 hectares of State-owned land available for reindeer husbandry. On 23 March 1994, the Committee declared a previous communication, brought by the authors among others and which alleged that logging and road-construction activities in certain reindeer husbandry areas violated article 27 of the Covenant, inadmissible for non-exhaustion of domestic remedies. ^{1/} In particular, the Committee considered that the State party had shown that article 27 could be invoked in the relevant domestic proceedings, which the authors should have engaged before coming to the Committee. Thereafter, following unsuccessful negotiations, the authors brought a suit in the Lappi District Court of first instance against the National Forestry and Park Service (Forestry Service). The suit sought the enjoinder, on the basis *inter alia* of article 27 of the Covenant, of any logging or road-construction in the Mirhaminmaa-Kariselkä area. This area is said to be amongst the best winter herding lands of the Sallivara Co-operative.

2.2 On 30 August 1996, the District Court decided, following an on-site forest inspection at the authors' request, to prohibit logging or road construction in the 92 hectare Kariselkä area, but to allow it in the Mirhaminmaa area. ^{2/} The Court applied a test of "whether the harmful effects of felling are so great that they can be deemed to deny to the Sami a possibility of reindeer herding that is part of their culture, is adapted to modern developments, and is profitable and rational". The Court considered that logging in the Mirhaminmaa area would be of long-term benefit to reindeer herding in the area and would be convergent with those interests. In the Kariselkä area, differing environmental conditions meant that there would be a considerable long-term decrease in lichen reserves. Relying *inter alia* on the decisions of the Committee, ^{3/} the Court found that these effects of logging, combined with the fact that the area was an emergency feeding ground, would prevent reindeer herding in that area. A factor in the decision was the disclosure that an expert testifying for the Forestry Service disclosed he had not visited the forest in question. After the decision, logging duly proceeded in the Mirhaminmaa area.

...

7.5 Turning to the claim of a violation of article 27 in that logging was permitted in the Kariselkä area, the Committee notes that it is undisputed that the authors are members of a minority culture and that reindeer husbandry is an essential element of their culture. The Committee's approach in the past has been to inquire whether interference by the State party

SELF-DETERMINATION

in that husbandry is so substantial that it has failed to properly protect the authors' right to enjoy their culture. The question therefore before the Committee is whether the logging of the 92 hectares of the Kariselkä area rises to such a threshold.

7.6 The Committee notes that the authors, and other key stakeholder groups, were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response to criticisms from those quarters. The District Court's evaluation of the partly conflicting expert evidence, coupled with an on-site inspection, determined that the Kariselkä area was necessary for the authors to enjoy their cultural rights under article 27 of the Covenant. The appellate court finding took a different view of the evidence, finding also from the point of view of article 27, that the proposed logging would partially contribute to the long-term sustainability of reindeer husbandry by allowing regeneration of ground lichen in particular, and moreover that the area in question was of secondary importance to husbandry in the overall context of the Collective's lands. The Committee, basing itself on the submissions before it from both the authors and the State party, considers that it does not have sufficient information before it in order to be able to draw independent conclusions on the factual importance of the area to husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under article 27 of the Covenant. Therefore, the Committee is unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party to properly protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant.

Notes

1/ *Sara et al. v. Finland*, Communication 431/1990.

2/ The State party points out that the 92 hectare area amounts to some 3 per cent of the 6,900 hectares of the Co-operative's lands used for forestry.

3/ *Sara v. Finland* (Communication 431/1990), *Kitok v. Sweden* (Communication 197/1985), *Ominayak v. Canada* (Communication 167/1984), *Ilmari Länsman v. Finland* (Communication 511/1992); and moreover the Committee's General Comments 23 (50).

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- *Gillot v. France* (932/2000), ICCPR, A/57/40 vol. II (15 July 2002) 270 (CCPR/C/75/D/932/2000) at paras. 2.1-2.7, 11.2, 12.1, 12.2, 13.1-13.8, 14.1-14.7 and 15.

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2.1 On 5 May 1998, two political organizations in New Caledonia, the *Front de Libération*

SELF-DETERMINATION

Nationale Kanak Socialiste (FLNKS) and the *Rassemblement pour la Calédonie dans la République* (RPCR), together with the Government of France, signed the so-called Noumea Accord. The Accord, which forms part of a process of self-determination, established the framework for the institutional development of New Caledonia ... over the next 20 years.

2.2 Implementation of the Noumea Accord led to a constitutional amendment in that it involved derogations from certain constitutional principles, such as the principle of equality of political rights (restricted electorate in local ballots). Thus, by a joint vote of the French Parliament and Senate, and approval of a draft constitutional amendment by the Congress, the Constitution Act of New Caledonia (No. 98-610) of 20 July 1998 inserted a title XIII reading "Transitional provisions concerning New Caledonia" in the Constitution. The title comprises the following articles 76 and 77:

Article 76 of the Constitution provides that:

"The people of New Caledonia shall, before 13 December 1998, express their views on the provisions of the accord signed at Noumea on 5 May 1998 and published on 27 May 1998 in the *Journal Officiel* of the French Republic. Those persons fulfilling the requirements established in article 2 of Act No. 88-1028 of 9 November 1988 shall be eligible to vote. The measures required for the conduct of the voting shall be taken by decree of the Council of State, after consideration by the Council of Ministers."

Article 77 provides that:

"Following approval of the Accord in the referendum provided for in article 76, the Organic Law, adopted following consultation with the deliberative assembly of New Caledonia, shall establish, to ensure the development of New Caledonia with due respect for the guidelines provided for in the Accord and in accordance with the procedures necessary for its implementation: [...] - regulations on citizenship, the electoral system [...] - the conditions and time frame for a decision by the people concerned in New Caledonia on accession to full sovereignty."

2.3 An initial referendum was held on 8 November 1998. The Noumea Accord was approved by 72 per cent of those voting, and it was established that one or more referendums would be held thereafter. The authors were not eligible to participate in that ballot.

2.4 The authors contest the way in which the electorates for these various referendums, as established under the Noumea Accord and implemented by the French Government, were determined.

SELF-DETERMINATION

2.5 For the first referendum on 8 November 1998, Decree No. 98-733 of 20 August 1998 on organization of a referendum of the people of New Caledonia, as provided for by article 76 of the Constitution, determined the electorate with reference to article 2 of Act No. 88-1028 of 9 November 1988 (also determined in article 6.3 of the Noumea Accord), namely: "Persons registered on the electoral rolls for the territory on that date and resident in New Caledonia since 6 November 1988 shall be eligible to vote."

2.6 For future referendums, the electorate was determined by the French Parliament in article 218 of the Organic Law of New Caledonia (No. 99-209) of 19 March 1999 (reflecting article 2.2 of the Noumea Accord)^{2/}, pursuant to which:

"Persons registered on the electoral roll on the date of the referendum and fulfilling one of the following conditions shall be eligible to vote:

- (a) They must have been eligible to participate in the referendum of 8 November 1998;
- (b) They were not registered on the electoral roll for the referendum of 8 November 1998, but fulfilled the residence requirement for that referendum;
- (c) They were not registered on the electoral roll for the 8 November 1998 referendum owing to non-fulfilment of the residence requirement, but must be able to prove that their absence was due to family, professional or medical reasons;
- (d) They must enjoy customary civil status or, having been born in New Caledonia, they must have their main moral and material interests in the territory;
- (e) Having one parent born in New Caledonia, they must have their main moral and material interests in the territory;
- (f) They must be able to prove 20 years continuous residence in New Caledonia on the date of the referendum or by 31 December 2014 at the latest;
- (g) Having been born before 1 January 1989, they must have been resident in New Caledonia from 1988 to 1998;
- (h) Having been born on or after 1 January 1989, they must have reached voting age on the date of the referendum and have one parent who fulfilled the conditions for participation in the referendum of 8 November 1998.

Periods spent outside New Caledonia for the performance of national service, for

SELF-DETERMINATION

study or training, or for family, professional or medical reasons shall, in the case of persons previously domiciled in the territory, be included in the periods taken into consideration in order to determine domicile."

2.7 The authors, who did not fulfil the above criteria, state that they were excluded from the referendum of 8 November 1998 and that they will also be excluded from referendums planned from 2014 onwards.

...

11.2 The Committee has to determine whether the restrictions imposed on the electorate for the purposes of the local referendums of 8 November 1998 and in 2014 or thereafter constitute a violation of articles 25 and 26 of the Covenant, as the authors maintain.

12.1 The authors maintain, first, that they have an absolute, acquired and indivisible right to vote in all political ballots organized in their place of residence.

12.2 On this point the Committee recalls its decisions in relation to article 25 of the Covenant, namely that the right to vote is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable.22/

13.1 The authors maintain, secondly, that the criteria used to determine the electorates in local ballots represent a departure from French rules on electoral matters (the right to vote can be made dependent only on the criterion of inclusion on an electoral roll, either of the commune of domicile, irrespective of the period of residence, or of the commune of actual residence for at least 6 months) and thereby impose on them discriminatory restrictions which are contrary to the International Covenant on Civil and Political Rights.

13.2 In order to determine the discriminatory or non-discriminatory character of the criteria in dispute, in conformity with its above-mentioned decisions, the Committee considers that the evaluation of any restrictions must be effected on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality.

13.3 In the present case, the Committee has taken note of the fact that the local ballots were conducted in the context of a process of self-determination of the population of New Caledonia. In this connection, it has taken into consideration the State party's argument that these referendums - for which the procedures were fixed by the Noumea Accord and established according to the type of ballot by a vote of Congress 23/ or Parliament 24/ - must, by virtue of their purpose, provide means of determining the opinion of, not the whole of the national population, but the persons "concerned" by the future of New Caledonia.

13.4 Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in

SELF-DETERMINATION

article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.

13.5 In relation to the authors' complaints, the Committee observes, as the State party indeed confirms, that the criteria governing the right to vote in the referendums have the effect of establishing a restricted electorate and hence a differentiation between (a) persons deprived of the right to vote, including the author(s) in the ballot in question, and (b) persons permitted to exercise this right, owing to their sufficiently strong links with the territory whose institutional development is at issue. The question which the Committee must decide, therefore, is whether this differentiation is compatible with article 25 of the Covenant. The Committee recalls that not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant.

13.6 The Committee has, first of all, to consider whether the criteria used to determine the restricted electorates are objective.

13.7 The Committee observes that, in conformity with the issue in each ballot, apart from the requirement of inclusion on the electoral rolls, the criteria used are: (a) for the 1998 referendum relating to the continuation or non-continuation of the process of self-determination, the condition of length of residence in New Caledonia; and (b) for the purpose of future referendums directly relating to the option of independence, additional conditions relating to possession of customary civil status, the presence in the territory of moral and material interests, combined with birth of the person concerned or his parents in the territory. It accordingly follows, as the date for a decision on self-determination approaches, that the criteria are more numerous and take into account the specific factors attesting to the strength of the links to the territory. To the length of residence condition (as opposed to the cut-off points for length of residence) for determining a general link with the territory are added more specific links.

13.8 The Committee considers that the above-mentioned criteria are based on objective elements for differentiating between residents as regards their relationship with New Caledonia, namely the different forms of ties to the territory, whether specific or general - in conformity with the purpose and nature of each ballot. The question of the discriminatory or non-discriminatory effects of these criteria nevertheless arises.

...

14.1 Lastly, the authors argue that the cut-off points set for the length of residence requirement, 10 and 20 years respectively for the referendums in question, are excessive and affect their right to vote.

SELF-DETERMINATION

14.2 The Committee considers that it is not in a position to determine the length of residence requirements. It may, however, express its view on whether or not these requirements are excessive. In the present case, the Committee has to decide whether the requirements have the purpose or effect of restricting in a disproportionate manner, given the nature and purpose of the referendums in question, the participation of the "concerned" population of New Caledonia.

14.3 In addition to the State party's position that the criteria used for the determination of the electorates favour long-term residents over recent arrivals owing to actual differences in concern with regard to New Caledonia, the Committee notes, in particular, that the cut-off points for length of residence are designed, according to the State party, to ensure that the referendums reflect the will of the population "concerned" and that their results cannot be undermined by a massive vote by people who have recently arrived in the territory and have no proven, strong ties to it.

14.4 The Committee notes that the 21 authors were excluded from the 1998 referendum because they did not meet the 10 years' continuous residence requirement. It also notes that one author will not be able to participate in the next referendum because of the 20 years' continuous residence requirement, whereas the other 20 authors do, as things stand, have the right to vote in that referendum - 18 authors on the basis of the residence criterion and 2 others on the strength of having been born in New Caledonia, their ethnic origin and national extraction being of no consequence in this respect.

14.5 The Committee considers, first, that the cut-off points adopted do not have a disproportionate effect, given the nature and purpose of the referendums in question, on the authors' situation, particularly since their non-participation in the first referendum manifestly has no consequences for nearly all of them as regards the final referendum.

14.6 The Committee further considers that each cut-off point should provide a means of evaluating the strength of the link to the territory, in order that those residents able to prove a sufficiently strong tie are able to participate in each referendum. The Committee considers that, in the present case, the difference in the cut-off points for each ballot is linked to the issue being decided in each vote: the 20-year cut-off point - rather than 10 years as for the first ballot - is justified by the time frame for self-determination, it being made clear that other ties are also taken into account for the final referendum.

14.7 Noting that the length of residence criterion is not discriminatory, the Committee considers that, in the present case, the cut-off points set for the referendum of 1998 and referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is

SELF-DETERMINATION

being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.

15. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of any article of the Covenant.

Notes

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2/ Article 2.2 of the Noumea Accord: "The electorate for the referendums on the political organization of New Caledonia to be held once the period of application of this Accord has ended (sect. 5) shall consist only of: voters registered on the electoral rolls on the dates of the referendums provided for under section 5 who were eligible to participate in the referendum provided for in article 2 of the Referendum Act, or who fulfilled the conditions for participating in that referendum; those who are able to prove that any interruptions in their continuous residence in New Caledonia were attributable to professional or family reasons; those who have customary status or were born in New Caledonia and whose property and personal ties are mainly in New Caledonia; and those who, although they were not born in New Caledonia, have one parent born there and whose property and personal ties are mainly in New Caledonia. Young people who have reached voting age and are registered on the electoral rolls and who, if they were born before 1988, resided in New Caledonia from 1988 to 1998, or, if they were born after 1988, have one parent who fulfilled or could have fulfilled the conditions for voting in the referendum held at the end of 1998, shall also be eligible to vote in these referendums. Persons who, in 2013, are able to prove that they have resided continuously in New Caledonia for 20 years may also vote in these referendums."

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22/ Communications No. 500/1992, *J. Debreczeny v. Netherlands*; No. 44/1979, *Alba Pietraroia on behalf of Rosario Pietraroia Zapala v. Uruguay*; General Comment No. 18 relating to article 25 (fifty-seventh session, 1996), paras. 4, 10, 11 and 14.

23/ Constitutional Act (No. 98-610) of 20 July 1998, whose article 76 determined conditions for participation in the 1998 ballot. Congress is constituted by the meeting of the National Assembly and the Senate for the purposes of amending the Constitution, in accordance with article 89 of the Constitution of 4 October 1958.

24/ Organic Law (No. 99-209) of 19 March 1999, whose article 218 determines conditions for participation in ballots as from 2014.