

New Zealand

Fishing for Rights?

Mahuika v New Zealand in the UN Human Rights Committee

Introduction

The attempt to settle Maori fishing rights under the Treaty of Waitangi has been a prolonged and litigious affair, not only between the Crown and Maori, but within Maoridom itself. Furthermore, the litigation has occupied both a domestic and an international dimension, with a number of Maori complaining to the United Nations Human Rights Committee (HRC) that New Zealand had violated a number of their rights under the International Covenant on Civil and Political Rights (ICCPR). In a ruling during its final session of 2000, the Committee held that New Zealand had not breached its obligations under the Covenant to the authors of the communication.¹

Background

The Treaty of Waitangi between the British Crown and the Maori tribes (*iwi*) and sub-tribes (*hapu*) of New Zealand (Aotearoa) was signed in 1840. Under the Treaty, the Crown acquired sovereign rights over New Zealand and its people. While the precise status of the Treaty in international law is doubtful, domestic jurisprudence has determined that the Treaty only has legal effect when it is incorporated by statute. In some cases, however, statutory effect has been given to the “principles” of the Treaty, the elucidation of which has been left to the courts.² The Waitangi Tribunal which was established in 1972 also has competence to investigate matters pertaining to the Treaty, particularly alleged breaches, and, although its decisions and pronouncements are not binding, they nevertheless carry considerable authority (*mana*).³

¹ *Apirana Mahuika et al. v New Zealand*, Communication No. 547/1993, New Zealand, 15 November 2000, CCPR/C/70/D/547/1993.

² P.A. Joseph, *Constitutional and Administrative Law in New Zealand* (1993), pp. 43–46; Paul McHugh, *The Maori Magna Carta* (1991), chapter 7; Sir Kenneth Keith, “The Treaty of Waitangi in the Courts”, (1990) 14 *New Zealand Universities Law Review* 37.

³ On the constitution and powers of the Waitangi Tribunal, see the Tribunal’s website at www.knowledge-basket.co.nz/waitangi/about/wtrib.html.

Article II of the Treaty of Waitangi guarantees Maori:

“The full exclusive 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 . . .”

In 1840 this referred almost exclusively to small-scale coastal fishing, but, over time, the New Zealand fishing industry developed into a multi-million dollar enterprise. In 1986, the New Zealand Government introduced a Quota Management System (QMS) which allocated permanent transferable property rights to fishers for commercial fish species to which the QMS applied.⁴ Because few Maori were commercial fishers, the introduction of the system was clearly detrimental to their interests, and, since section 88(2) of the Fisheries Act provided that “nothing in the Act shall affect Maori fishing rights”, Maori were able to secure an injunction from the High Court to protect their interests. Following negotiations with Maori representatives, the government adopted an interim solution by passing the Maori Fisheries Act 1989. Under this Act, 10 per cent of all quota was transferred immediately to a Maori Fisheries Commission who managed it on behalf of all Maori.⁵

In 1992 Maori negotiators became aware that the largest Australasian fisheries concern, Sealords, was to be sold and proposed that the government settle Maori claims by funding the purchase of the company. After some hesitation, the government decided that this would be a convenient way of not only acquiring more quota for Maori, but also for settling the Ngai Tahu claim. In this latter claim, the Waitangi Commission found that Ngai Tahu, whose *roha* or tribal area covered the greater part of the South Island (Te Wai Pounamu), was entitled to a substantial share of the fishery within the South Island’s 200-mile EEZ.⁶ Under a memorandum of understanding (MOU), the New Zealand Government agreed that it would finance the purchase of Sealords, grant 20 per cent of all new commercial stock brought into the QMS and give special statutory protection to special places to Maori for the gathering of sea food (*kai moana*). In return, Maori agreed to withdraw all pending litigation and claims. Following the signing of the MOU the Maori negotiators submitted it to a national *hui* (gathering) for discussion and took it to a number of important *marae* (places set aside for the practice of Maori custom or *tikanga Maori*) for consideration. The negotiators’ report showed that a clear majority of *iwi* and individual Maori supported the proposed settlement.⁷ Following this, the government drew up a Deed of Settlement which implemented the MOU and by

⁴ For a description of the QMS, see New Zealand Ministry of Fisheries, www.fish.govt.nz.

⁵ This process is described by the Treaty of Waitangi Fisheries Commission (Te Ohu Kai Moana), www.tokm.co.nz/profiles/profiles_frmmain.htm.

⁶ J. Scott Davidson, “The Ngai Tahu Fisheries Report”, (1993) 8 *International Journal of Marine and Coastal Law* 330.

⁷ *Mahuika*, note 1 above at para. 5(9).

which Maori agreed to the extinction of all past, present and future claims to commercial fisheries. Rights to traditional, non-commercial fisheries were left unimpaired. The Deed of Settlement was signed by 110 signatories including the four negotiators and their alternates, two of whom represented pan-Maori organisations.⁸

Despite the fact that a majority of *iwi* and individual Maori approved of the settlement through traditional means of consultation and discussion, a minority objected to the way in which its rights under the Treaty of Waitangi were being extinguished. The members of this minority complained that the MOU had not been adequately explained at the national and other *hui* (meetings) and that some of the signatories had not been competent to represent their *iwi* (tribes) for the purposes of signing the Deed of Settlement. They therefore sought an injunction to prevent the government from implementing the Deed by legislation on the grounds that it violated the New Zealand Bill of Rights Act 1990. This application was denied by the High Court and Court of Appeal on the grounds that the courts in New Zealand cannot interfere with the legislative process. A further claim was brought before the Waitangi Tribunal which found that, although the settlement was not of itself contrary to the Treaty of Waitangi, nonetheless the proposed extinction of commercial fisheries rights was. Despite this, the government passed the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 which gave effect to the Deed of Settlement and extinguished any fisheries claims which Maori might have. The Act also provided that “no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interest of Maori in commercial fishing, or the quantification thereof”.⁹

The HRC's Views

The authors of the communication claimed to be victims of a violation of Articles 1 (right to self-determination), 2 (freedom from discrimination), 14(1) (right to a fair trial), 16 (right to recognition as a person), 18 (freedom of thought, conscience and religion), 26 (right to equality before the law) and 27 (minority rights).¹⁰ While the HRC found that the communication satisfied the requirements for admissibility in respect of Articles 1, 14(1) and 27, it held that the authors had failed to substantiate a violation of the other rights.¹¹ In past cases, the HRC has seemed reluctant to offer views on the meaning of the right to self-determination, but in this case it offered the promise that Article 1 “may be

⁸ *Ibid.*

⁹ J. Scott Davidson, “Maori Fishing Rights”, (1994) 9 *International Journal of Marine and Coastal Law* 408; Paul McHugh, “Sealords and Sharks: The Maori Fisheries Agreement”, (1992) *New Zealand Law Journal* 354; S. Wactford, “The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992”, (1993) 7 *Auckland University Law Review* 402.

¹⁰ *Mahuika*, note 1 above at para. 1.

¹¹ *Ibid.*, para. 2.

relevant in the interpretation of other rights protected by the Covenant, in particular Article 27".¹² In the final analysis, however, this promise remained essentially unfulfilled. Indeed, in rejecting the authors' complaint, the HRC displayed an apparent unwillingness to engage in the more difficult and controversial aspects of an extremely complex case. This is not unusual since the Committee has consistently taken the view that, whereas Article 1 is a right of peoples which is not cognisable under the Optional Protocol, Article 27 relates to rights conferred on individuals and is, as such, cognisable.¹³

Article 27 of the ICCPR provides:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

In analysing Article 27, the HRC was able to draw on its previous jurisprudence in the field of minority rights and culture in the cases of *Kitok v Sweden*¹⁴ and *Länsman et al. v Finland*,¹⁵ both of which involved members of the indigenous Sami people. In *Kitok*, the complainant had been denied the right to husband reindeer by a statute which was designed to secure the future of the Sami by placing reindeer breeding on a sound ecological and economic footing, while in *Länsman* the question was whether the state had violated Article 27 by permitting quarrying to take place in an area in which the Sami carried out their reindeer husbandry activities. In both cases, the HRC found that, while economic activities are normally a matter for state regulation, they may come within the ambit of Article 27 if they are an essential element of the culture of a community.¹⁶ While the definition of culture in Article 27 would undoubtedly lead to an interesting debate, the Committee has found that in the communications it has considered so far it has been able to avoid this since there has been no dispute that the activities in question—reindeer husbandry and fishing—are part of the cultural heritage of the peoples concerned. The question of whether indigenous people are a "minority" within the meaning of Article 27 has also been unproblematic. By implication the Committee seems to have taken the view that, if an ethnic, linguistic or religious group occupies a numerically inferior position within a state, then it follows that it is a minority. In strict linguistic terms, this conclusion would appear to be unavoidable, but it has become evident that indigenous peoples are opposed to being classified as a "minority" within their own lands. Nonetheless, for the purposes of utilising the individual

¹² *Ibid.*, para. 3.

¹³ "The Rights of Minorities (Art. 27)", 8 April 1994, CCPR General Comment 23.

¹⁴ Communication No. 197/1985, *Kitok v Sweden*, 27 July 1988, CCPR/C/33/D/197/1985.

¹⁵ Communication No. 511/1992, *Länsman v Finland*, 26 October 1994, CCPR/C/52/D/511/1992.

¹⁶ *Kitok*, note 14 above at para. 9(2); *Länsman*, note 15 above at para. 9(3); *Mahuika*, note 1 above at para. 9(3).

communication procedure under the Optional Protocol, classification of indigenous people as a minority is clearly inescapable.

In the *Mahuika* case therefore, Maori were considered by the HRC to be a minority and fishing was accepted to be an integral part of their culture. The question which exercised the Committee, however, was how to reconcile the demands of cultural practices with the changing commercial environment of the modern world. Its solution was to adopt an approach which might best be described as evolutionary and developmental. The Committee held:

“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.”

The state in providing a framework for indigenous people to engage in commercial activities by the adaptation of their cultural practices must, however, ensure that individual members of a minority culture are not denied the right to enjoy that culture. Not only does this require states to take positive measures of protection, but it would also seem that states must also ensure that individuals are able to participate effectively in decisions which affect them. As the Committee remarked:¹⁷

“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.”

In *Mahuika*, the HRC acknowledged that the Treaty of Waitangi (Fisheries Settlement) Act had limited the right of the authors of the communication to enjoy their own culture, but the question which arose was whether Maori had been properly consulted in the decision-making process associated with the legislation. Without articulating it, the Committee was actually asking whether the people complaining of a violation of Article 27, who were essentially a minority of a minority, had been given a proper opportunity to exercise an element of the right of self-determination. It was asking, in other words, whether the complainants had effectively taken part in a decision which intimately affected their economic, cultural and—to a certain extent—political destiny. It answered the question thus:¹⁸

¹⁷ *Mahuika*, note 1 above at para. 9(5). The case law referred to was *Länsmann*, note 15 above at paras 9(6) and 9(8).

¹⁸ *Ibid.*, para. 9(6), citing *Kitok*, note 14 above.

“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.”

Applying this form of instrumentalist utilitarian calculation to resolve the issue before it, the HRC found that New Zealand had undertaken a complicated process of consultation to secure broad Maori support for the settlement and regulation of fishing activities, and that it had proceeded to legislate only after it had received such broad support. The Committee further noted that, with the settlement, Maori were given access to a large percentage of quota and that, effectively, “possession of fisheries was returned to them”.¹⁹ The new statutory mechanisms of supervision under the settlement which allowed Maori “effective control” of their interests in both commercial and non-commercial fisheries also meant that New Zealand had complied with its obligations under Article 27. The Committee concluded its consideration of the communication under Article 27 by observing:²⁰

“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 among 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.”

The process of consultation was also seen as important in the consideration of Article 14(1) of the ICCPR by the HRC, since the Committee viewed the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 as the outcome of widespread consultation and the nationwide settlement which had been sought. Article 14(1) provides in the material part:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

¹⁹ *Länsmann*, note 15 above at para. 9(7).

²⁰ *Ibid.*, para. 9(8).

The authors of the communication alleged that, since the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 prevented them from bringing claims before the courts in respect of commercial fishing, the legislation violated this provision. The HRC observed that, since the objective of the Act was to settle all commercial fisheries claims, the removal of the jurisdiction of the courts was not objectionable.²¹ The Committee also noted that the non-commercial aspects of fisheries and access to quotas were still matters over which Maori could resort to the courts in the event of a dispute.²²

Conclusion

In recent years the HRC has been criticised both for the poverty of its jurisprudence and for its apparent willingness to allow the Optional Protocol communication procedure to be used by groups as a mechanism for challenging social policy rather than breaches of individual rights.²³ In the present case, the Committee's jurisprudence has an opacity which is perhaps born of its desire to avoid some extremely controversial issues in both human rights and international law. The avoidance of any attempt to relate self-determination rights to cultural rights seems to signify an unwillingness on the part of the HRC to open a door which, once open, would be particularly difficult to shut. In a sense, this demonstrates the unsuitability of the ICCPR for dealing with certain aspects of indigenous people's rights, as opposed to the rights of minorities proper. At least New Zealand can be satisfied that its inclusive, consultative approach in the fisheries settlement procedure has been vindicated by an impartial international tribunal, and the Committee can be satisfied that it has avoided the possibility of criticism on the second of the grounds mentioned above. Despite this ruling of the HRC, however, it seems that the internal wrangling among Maori over the allocation of fisheries rights and resources among themselves seems destined to continue for some time yet.²⁴

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²¹ *Ibid.*, para. 9(10).

²² *Ibid.*, para. 9(11).

²³ Anne Bayefsky, "Human Rights" in International Law Association, *Report of the Sixty-Seventh Conference Held at Helsinki, Finland, 12–17 August 1996* (1996), p. 346; Don Mackay, "The UN Covenants and the Human Rights Committee", (1999) 29 *Victoria University of Wellington Law Review* 11.

²⁴ See, for example, the speech by Harry Mikaere, Chairperson of the Treaty Tribes Coalition, 19 September 2000, www.scoop.co.nz/archive/scoop/stories/49/09/200009190048.b894b2a6.html. This speech makes reference to the dispute between Maori over whether fisheries resources should be allocated on the basis of population or on the length of coastline occupied by particular *iwi*. The latter would give Ngai Tahu of the South Island by far the greater share of the resources.