

# Common Property or Personal Property?

A recent case involving two Icelandic fishermen shows how fisheries management can be incompatible with the non-discrimination principle of the International Covenant on Civil and Political Rights

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

—Article 26, United Nations International Covenant on Civil and Political Rights

Is the Icelandic fisheries management system incompatible with the non-discrimination principle (Article 26) of the International Covenant on Civil and Political Rights? Yes, says the Human Rights Committee of the

October 2007 after taking into account all written information made available to it by the authors of the communication, and the State party.

The authors stated that in practice, and notwithstanding Iceland Fisheries Management Act, No. 38/1990 providing that the fishing banks around Iceland are a common property of the Icelandic nation and that allocation of catch entitlements does not endow individual parties with a right of ownership of such entitlements, fishing quotas have been treated as a personal property of those to whom they were distributed free of charge during the reference period 1980-1983. Other persons, such as the authors, must therefore purchase or lease a right to fish from the beneficiaries of the arrangement, or from others who have, in turn, purchased such a right from them. The authors considered that Iceland's most important economic resource has, therefore, been donated to a privileged group. The money paid for access to the fishing banks does not revert to the owner of the resource—the Icelandic nation—but to the private parties personally, they contended.

**Is the Icelandic fisheries management system incompatible with the non-discrimination principle (Article 26) of the International Covenant on Civil and Political Rights?**

## General permit

During the reference period, the authors worked as captain and boatswain. In 1998, they established a private company, Fagrimúli ehf, together with a third man, and purchased the fishing vessel *Sveinn Sveinsson*, which had a general fishing permit. The company

United Nations in its views on a communication submitted against the Iceland State by Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson, two professional Icelandic fishermen who have been fishing since their boyhood. The Committee's Views were adopted on 24

*Excerpted, with some changes, from **Views: Communication No. 1306/2004.** Human Rights Committee of the International Covenant on Civil and Political Rights, CCPR/C/91/D/1306/2004, dated 14 December 2007, United Nations*

was the registered owner of the vessel. During the fishing year 1997-1998, when the vessel was purchased, various harvest rights (catch entitlements) were transferred, but no specific quota share was associated with the vessel.

At the beginning of the fishing year 2001-2002, the *Sveinn Sveinsson* was allocated harvest rights for the first time for the species ling, tusk and monkfish, which amounted to very small harvest rights. The authors claimed to have repeatedly applied for catch entitlements on various grounds, but unsuccessfully.

In particular, the Fisheries Agency stated that there was no legal authorization for providing them with a quota. As a result, they had to lease all catch entitlements from others, at exorbitant prices, and eventually faced bankruptcy.

They decided to denounce the system, and on 9 September 2001, they wrote to the Ministry of Fisheries, declaring that they intended to catch fish without catch entitlements, in order to obtain a judicial decision on the issue and to determine whether they would be able to continue their occupation without paying exorbitant amounts of money to others. In its reply of 14 September 2001, the Ministry of Fisheries drew the authors' attention to the fact that under the penalty provisions of the Fisheries Management Act, No. 38/1990, and the Treatment of Exploitable Marine Stocks Act, No. 57/1996, catches made in excess of fishing permits were punishable by fines or up to six years' imprisonment, as well as the deprivation of fishing permits.

On 10, 11, 13, 19, 20 and 21 September 2001, the first author, as managing director, board member of Fagrimúli hf, owner of the company operating the *Sveinn Sveinsson* and captain of that ship, and the second author, as chairman of the board of that company, sent the ship to fish, and landed, without the necessary catch entitlements, a catch of a total of 5,292 kg of gutted cod, 289 kg of gutted haddock, 4 kg of gutted catfish and 606 kg of gutted plaice. Their only purpose in doing this was to be reported, so that their case could be heard in court. On 20 September, the Fisheries Agency received a report that

the *Sveinn Sveinsson* had landed a catch at Patreksfjörður on that day.

As a consequence, the Fisheries Agency filed charges against the authors with the commissioner of police at Patreksfjörður for violations of the Treatment of Exploitable Marine Stocks

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Act, No. 57/1996, the Fisheries Management Act, No. 38/1990, and the fishing in Iceland Fisheries Jurisdiction Act, No. 79/1997. On 4 March 2002, the National Commissioner of Police brought a criminal action against the authors before the West Fjords District Court.

#### Penal provisions

The authors confessed to the acts they were accused of, but challenged the constitutional validity of the penal provisions that the indictment relied on. On 2 August 2002, with reference to the precedent of the Supreme

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Fishing vessels in Iceland are not permitted to land catches without the necessary entitlements

Court judgement of 6 April 2000 in the *Vatneyri* case, the District Court convicted the authors and sentenced them to a fine of ISK 1,000,000 (approx. US\$13,600) each or three months imprisonment, and to payment of costs. On appeal, the Supreme Court, on 20 March 2003, upheld the judgement of the District Court.

On 14 May 2003, the authors' company was declared bankrupt. Their ship was sold on auction for a fraction of the price the authors had paid for it four years earlier. Their bank then requested the forced sale of the company's shore facilities and of their homes. One of the authors was able to conclude an installment agreement with the bank and started working as an officer on board a vessel used for industrial purposes. The other author lost his home, moved from his home community and started working as a mason. At the time of submission of the communication, he was unable to pay his debts.

The authors claimed to be victims of a violation of Article 26 of the UN Covenant, because they are lawfully obliged to pay money to a privileged group of fellow citizens, in order to be allowed to pursue the occupation of their choice. The authors requested, in accordance with the principles of freedom of employment and equality, an opportunity

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to pursue the occupation of their choice without having to surmount barriers placed in advance, which constitute privileges for others.

The authors claimed compensation for the losses endured as a result of the fisheries management system.

#### **Iceland State's response**

On 29 October 2004, the State party challenged the admissibility of the communication on three grounds: non-substantiation of the authors' claim that they are *victims* of a violation of

Article 26, non-exhaustion of domestic remedies, and the communication's incompatibility with the provisions of the Covenant.

The State party argued that the authors have not shown how Article 26 of the Covenant is applicable to their case, or how the principle of equality has been violated against them as individuals. They have not demonstrated that they were treated worse, or were discriminated against, as compared with other persons in a comparable position; or that any distinction made between them and other persons was based on irrelevant considerations. They merely make a general assertion that the Icelandic fisheries management system violates the principle of equality in Article 26.

The State party noted that the authors have worked many years at sea, one of them as captain and the other as marine engineer. They worked as employees on ships whose catch performance was not of direct benefit to them, but to their employers, who, unlike the authors, had invested in ships and equipment in order to run fishing operations. One of the main reasons for the introduction of the Fisheries Management Act, No.38/1990, was that it would create acceptable operating conditions for those who had invested in fisheries operations, instead of their being subject to same catch restrictions as other persons who had not made such investments.

The authors have not demonstrated how they were discriminated against when they were refused a quota, or whether other vessel captains or seamen in the same position received quota allocations. In addition they did not make any attempt to have these refusals reversed by the courts on the ground that they constituted discrimination in violation of Article 65 of the Constitution or Article 26 of the Covenant.

When they invested in the purchase of the *Sveinn Sveinsson* in 1998, the authors were aware of the system. They bought the ship without a quota, with the intention to rent it on the quota exchange, as a basis for their fishing operations. As a result of the increased demand of quotas on the market, the

prices of quotas rose, which changed the economic basis for the authors' fishing operations. After they fished without a quota, they were tried and sentenced, as would have happened to any other person under the same circumstances. The State party concluded that the communication should be declared inadmissible as the authors have not sufficiently substantiated their claims that they are victims of a violation of the Covenant.

The State party argued that the case hinged on whether the restriction in the authors' freedom of employment is excessive, as they consider that the prices of certain commercial catch quotas are unacceptable and constitute an obstacle to their right to choose freely their occupation. The State party pointed out that freedom of employment was not protected *per se* by the Covenant and that in the absence of specific arguments showing that the restrictions of his freedom of employment were discriminatory, the communication would be inadmissible as incompatible with the provisions of the Covenant, under Article 3 of the Optional Protocol.

The State party also provided observations on the merits of the communication. It argued that no unlawful discrimination was made between the author and those to whom harvest rights were allocated. What was involved was a justifiable differentiation: the aim of the differentiation was lawful and based on reasonable and objective grounds, prescribed in law and showing proportionality between the means employed and the aim. The State party explained that public interest demanded that restrictions be imposed on the freedom of individuals to engage in commercial fishing in order to prevent overfishing. Restrictions aimed at this goal were prescribed by the detailed fisheries legislation. The State party further argued that the allocation of a limited resource cannot take place without some sort of discrimination and stated that the legislature employed a pragmatic method in allocating the permits. The State party rejected the authors' view that the principle of equality protected by Article 26 of the Covenant was to be interpreted

in such a way as to entail a duty to allocate a share of limited resources to all citizens who are, or have been, employed as seamen or captains.

### Equality principle

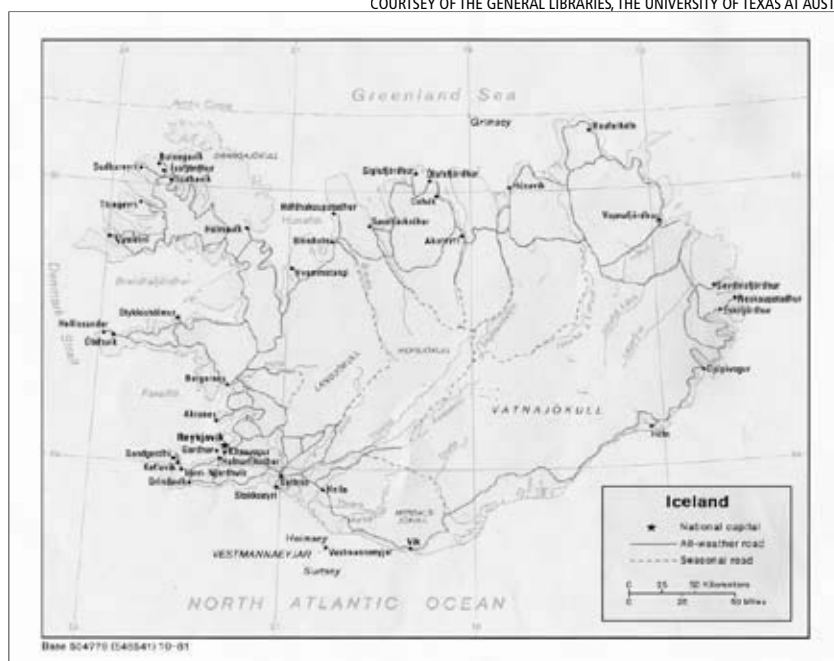
Such an arrangement would violate the principle of equality with regards to the group of individuals who have,

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through extensive investment in vessel operations and the development of commercial enterprises, tied their fishing competence, assets and livelihood to the fisheries sector.

The State party emphasized that the arrangement by which harvest rights are permanent and transferable was based mainly on the consideration that this enables individuals to plan their activities in the long term and to increase or reduce their harvest rights to particular species as best suits them, which led to the profitable utilization

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Iceland's Fisheries Management Act, No.38/1990, was meant to create acceptable operating conditions for those who had invested in fisheries operations

of the fish stocks for the national economy. The State party maintained that the permanent and transferable nature of the harvest rights led to economic efficiency and was the best method of achieving the economic and biological goals that are the aims of fisheries management.

Finally, the State party pointed out that the Fisheries Management Act stated clearly that the allocation of harvest rights endowed the parties neither with the right to ownership nor with irrevocable jurisdiction over harvest rights. Harvest rights were, therefore, permanent only in the sense that they could only be abolished or amended by an act of law. The State party concluded that the differentiation that results from the fisheries management system was based on objective and relevant criteria and was aimed at achieving lawful goals that are set forth in law. In imposing restrictions on the freedom of employment, the principle of equality has been observed and the authors have not sufficiently substantiated their claim that they were victims of unlawful discrimination in violation of Article 26 of the Covenant.

#### **Committee's Views**

The main issue before the Human Rights Committee was whether the authors, lawfully obliged to pay money to fellow citizens in order to acquire quotas necessary for exercising commercial fishing of certain fish species and thus to have access to such fish stocks that are the common property of the Icelandic nations, are

**The State party concluded that the differentiation that results from the fisheries management system was based on objective and relevant criteria and was aimed at achieving lawful goals that are set forth in law.**

victims of discrimination in violation of Article 26 of the Covenant. The Committee recalled its jurisprudence that under Article 26, States parties are bound, in their legislative, judicial and executive action, to ensure that everyone is treated equally and without discrimination based on any ground

such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

It reiterated that discrimination should not only be understood to imply exclusions and restrictions but also preferences based on any such grounds if they have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of rights and freedoms. It recalled that not every distinction constituted discrimination, in violation of Article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant.

The Committee firstly noted that the authors' claim was based on the differentiation between groups of fishers.

The first group received for free a quota share because they engaged in fishing of quota-affected species during the period between 1 November 1980 and 31 October 1983. Members of this group are not only entitled to use these quotas themselves but can sell or lease them to others.

The second group of fishers must buy or rent a quota share from the first group if they wish to fish quota affected species for the simple reason that they were not owning and operating fishing vessels during this reference period.

The Committee concluded that such distinction is based on grounds equivalent to those of property. While the Committee found that the aim of this distinction adopted by the State party, namely, the protection of its fish stocks, which constitute a limited resource, was a legitimate one, it must determine whether the distinction is based on reasonable and objective criteria.

The Committee noted that every quota system introduced to regulate access to limited resources privileged, to some extent, the holders of such quotas and disadvantaged others without necessarily being discriminatory. At the same time, it noted the specificities of the present case: On the one hand, the first Article of the Fisheries Management Act No 38/1990 of Iceland stated that the fishing banks around Iceland are common property of the Icelandic nation. On the other hand, the distinc-

tion based on the activity during the reference period, which initially, as a temporary measure, might have been a reasonable and objective criterion, became not only permanent with the adoption of the Act but also transformed original rights to use and exploit a public property into individual property. Allocated quotas no longer used by their original holders could be sold or leased at market prices instead of reverting to the State for allocation to new quota holders, in accordance with fair and equitable criteria. The State party had not shown that this particular design and modalities of implementation of the quota system met the requirement of reasonableness. While not required to address the compatibility of quota systems for the use of limited resources with the Covenant as such, the Committee concluded that, in the particular circumstances of the present case, the property entitlement privilege accorded permanently to the original quota owners, to the detriment of the authors, was not based on reasonable grounds.

The Committee was of the view that the facts before it disclose a violation of Article 26 of the Covenant. In accordance with Article 2, paragraph 3 (a), of the Covenant, the State party was under an obligation to provide the authors with an effective remedy, including adequate compensation and review of its fisheries management system.

Bearing in mind that the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to Article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction, the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days (by 21 April 2008), information about the measures taken to give effect to the Committee's Views. ¶

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#### For more



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**International Covenant on Civil and Political Rights**

<http://www.fao.org/fi/fcp/en/ISL/body.htm>

**FAO Information on Fisheries Management in the Republic of Iceland**

<http://www.fisheries.is/managem/index.htm>

**Information Centre of the Icelandic Ministry of Fisheries**