Decisions of the CEDAW Committee: lack of consistency in admissibility decisions

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Abstract:

The mechanism for individual complaints of breach of the Convention on the Elimination of Discrimination against Women contains various requirements for the admissibility of complaints. For a complaint to be considered by the Committee, the author of the complaint must have exhausted domestic remedies, and the facts complained of must have arisen after the complaints procedure came into force in the respondent state party. These admissibility requirements were at issue in two of the early decisions of the Committee: those concerning Ms. A.T. and Ms. B.J.. While a wide interpretation of these requirements was taken with respect to Ms. A.T.'s complaint, a contrasting narrow and legalistic interpretation was taken in Ms. B.J.'s case. Both decisions are shown to be inconsistent with jurisprudence that has developed in other human rights treaty bodies. This inconsistency is potentially detrimental to the goal of moving away from the treatment of women's international human rights as "second class". However, it must be recalled that the complaints procedure is not a domestic legal procedure, so issues of precedent and consistency need not carry as much sway. Nevertheless, reference to decisions of other bodies would provide assistance to the Committee.

Introduction

The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"/"the Convention") was adopted by the UN General Assembly in 1979. Twenty years later, an Optional Protocol[1] to the Convention introduced a procedure for individual complaints to a committee of experts ("the Committee"). This mechanism was intended to provide force to the rights set out in the Convention and to redress the historic problems of inadequate enforcement and implementation of the Convention.[2]

Like the decisions of other treaty monitoring bodies,[3] the decisions of the Committee are not legally binding at international law. However, the prospect of a ruling by an international committee as to a possible breach of the Convention can put heavy pressure on state parties to ensure that violations do not occur in the future.[4] Decisions also affirm state accountability, and enable a body of jurisprudence to develop and grow[5], which can be used to "guide governments, NGOs and inter-governmental organizations in interpreting and understanding the content and relevance of international human rights norms".[6]

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[1] Adopted by the UN General Assembly on 6 October 1999.

[2] Hilary Charlesworth and Christine Chinkin *The Boundaries of International Law: a Feminist Analysis* (Manchester: Manchester University Press, 2000) at 220-222 and 244-245 ["Charlesworth and Chinkin"] and R. Andrew Painter, "Human Rights Monitoring: Universal and Regional Treaty Bodies" in *Administrative and Expert Monitoring of International Treaties* Paul C. Szasz (ed.) (Ardsley, New York: Transnational Publishers Inc, 1999), at 54 ["Painter"].

[3] Such as those monitoring the Convention on the Elimination of Racial Discrimination, the International Covenant on Civil and Political Rights, the Convention Against Torture and the European Charter of Human Rights, each of which have similar mechanisms. See Painter supra n2 at 67

[4] Manfred Nowak, "The Prohibition of Gender-specific Discrimination under the International Coventant on Civil and Political Rights" 105-118, at 106

[5] Painter supra n2at 66. Dinah Shelton, "Human Rights: Commentary & Conclusions" in Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System Dinah Shelton (ed.) (Oxford: Oxford University Press, 2000), at 451-452.

[6] Gerd Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Cambridge: Polity, 2007) at 99 ["Oberleitner"]

Before a complaint can be considered by the Committee, it must be "admissible".[7] The admissibility requirements are set out in the Optional Protocol to the Convention ("the Protocol"). The Protocol was drafted by reference to the practice and jurisprudence of other treaty bodies, such as the HRC[8] and the European Commission on Human Rights[9] which have considerable experience of individual complaints.[10] A stated goal of the Committee is consistency with these bodies.[11] Thus, the decisions of these established bodies provide important sources of principle for the Committee.

This essay considers two admissibility requirements: that domestic remedies must be exhausted ("exhaustion of remedies"), and that complaints can only be made regarding facts that occurred after the Protocol came into force for that party ("*ratione temporis*"). This essay highlights inconsistencies between two key decisions, and between the Committee's decisions and those of other human rights treaty bodies. I consider the extent to which the Committee should be criticized for this inconsistency, and conclude that while the avoidance of inconsistency is desirable, it must also be recognized that the Committee is not a domestic court.

[7] These are set out in the Optional Protocol.
[8] built up a considerable jurisprudence in its sphere, and its decisions are often cited in courts and scholarly writings Oberleitner supra n6 at 99.
[9] The commission began considering individual petitions in 1955, and has a high degree of procedural and jurisprudential development. It received 39,000 complaints between 1955 and 1997. Painter supra n2 at 57.
[10] Wouter Vandenhole, *The Procedures Before the UN Human Rights Treaty Bodies: Divergence or Convergence?* (Intersentia: Antwerp-Oxford, 2004) at 313 ["Vandenhole 2004"]
[11] Consistency with these other bodies is a stated goal of the Committee (Principally because they often refer to other bodies in sessional and annual reports), and it has shown a strong willingness to bring its practices in line with those of other treaty bodies: – see ibid. at 316.

The CEDAW cases: Ms B.J. and Ms A.T.

Background

In *Ms B. J. v Germany*[12] the author alleged that she had suffered from gender-based discrimination as a result of her divorce. In short, her claim was that the family property laws discriminated against her as an older woman with children who divorced after a long marriage. The law did not take into account the "human capital" she had provided to the marriage. Some aspects of the divorce had been finally resolved in the courts, while others were ongoing at the time of the communication. The Committee found the complaint to be inadmissible both because the author had not exhausted domestic remedies,[13] and because the relevant facts arose prior to the entry into force of the Optional Protocol.[14]

In *Ms. A.T. v Hungary*[15] the author claimed that the State Party had failed to effectively protect her from severe domestic violence and threats by her former partner. Although the proceedings were not concluded in that case either, the Committee applied an exception in the Protocol that makes complaints admissible where domestic remedies are "unreasonably prolonged". The relevant facts occurred both before and after the Optional Protocol came into force, but as they were of a continuous nature, the Committee concluded that the whole sequence of events was admissible.

[12] Communication No 1/2003, Decision adopted on 14 July 2004, thirty-first session
[13] at para 8.5
[14] at para 8.4
[15] Communication No 2/2003, views adopted on 26 January 2005, thirty-second session

The first admissibility requirement: exhaustion of domestic remedies

A state should have the opportunity to remedy matters in its own legal system prior to a dispute being referred to an international body,[16] thus article 4(1) of the Protocol provides:

> The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

The Committee concluded that Ms B.J. had not exhausted domestic remedies on three fronts. First, although the author had appealed the divorce decree, she did not specify the equalization of pensions as a ground of appeal. Second, she had failed to properly bring the issue before the Federal Constitutional Court.[17] Third, proceedings regarding equalization of accrued gains and maintenance after marriage were ongoing at the time of the complaint and thus had not been settled definitively.[18]

This can be contrasted against the Committee's decision in *A.T.* There were criminal proceedings as a result of some of the assaults on the author (in 1999 and 2001), which had resulted in a conviction and fine (in 2004). There were also civil proceedings that were unresolved at the time of the complaint.[19] The Committee concluded that the outcome of the civil proceedings was not likely to bring effective relief, and expressed

[16] Tom Zwart, *The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee* (Martinus Nijhoff, Dordrecht: 1995) at 187 ["Zwart"]
[17] She had made a claim that her constitutional right to equality had been breached, but it was ineffective as it was improperly filed – as it was timebarred: See paras 6.2 and 8.6.
[18] At para 8.7
[19] The author had appealed against a decision giving her former partner access to the family residence.

the view regarding the criminal proceedings that "a delay of over three years from the dates of the incidents in question would amount to an unreasonably prolonged delay".[20]

There is a contradiction between the view that three years delay in the criminal proceedings for Ms A.T.'s complaint would have been too long, but four years of unresolved divorce proceedings did not qualify Ms B.J.'s complaint. The result in *B.J.* also contradicts decisions of the Human Rights Committee.

In the HRC context domestic remedies are unavailable where they are costly and there is no legal aid available.[21] It is unfortunate that the Committee did not consider this access to justice issue in Ms B.J.'s case, particularly as it appears to have been part of her argument.[22] Taking into account the nature of her claim (lack of financial support), it might be assumed that Ms B.J.'s financial situation may have contributed to her failure to lodge all appeals and properly make constitutional challenges. Given growing worldwide concerns regarding the feminization of poverty, this was an issue that should have been considered by the Committee.

The contrast between these decisions may also reflect the fact that Ms B.J. had not shown that the eventual outcome would not be effective, but Ms A.T. had.[23] However, Ms B.J. need not have waited for the German courts to decide her case. In the HRC, a

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[20] At para 8.4
[21] see Vandenhole 2004 supra n10 at 216 and Zwart supra n16 at 189
[22] She had argued that "women are subjected to procedural discrimination because the risks and stress of court proceedings to resolve the consequences of divorce are carried unilaterally by women, who are also prevented from enjoying equality of arms." See para 3.3.
[23] This point had been conceded by Hungary.

complainant can meet the exhaustion requirement if she/he shows that the eventual court decision is unlikely to be effective. For example, in a complaint regarding loss of Indian status in Canadian law through marriage, Sandra Lovelace was able to meet the exhaustion of domestic remedies requirement by presenting a previous court precedent that had upheld the loss of status in similar circumstances. She was thus able to show that any remedy she could pursue domestically had no reasonable prospect of success.[24]

The second admissibility requirement: ratione temporis

This requirement embodies the principle against retrospectivity. Article 4(2)(e) of the Optional Protocol provides that:

> 2. The Committee shall declare a communication inadmissible where:
> …
> (e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

This requirement was a barrier to Ms B.J.'s complaint, but not Ms A.T.'s. Ms B.J.'s husband had applied for divorce, and it had been made final prior to the Optional Protocol coming into force for Germany in 2002. By 2004 a decision had been made regarding maintenance, which Ms B.J. had appealed. The proceedings for that issue and the equalization of marriage gains were continuing at the time of the communication. The Committee concluded that the "facts that are the subject of the communication" were the "consequences of divorce."[25] But those consequences appear to have ended at the time of the divorce. As the divorce proceedings were initiated, became final, and the equalization of pensions issue became final prior to the entry into force of the Optional

[24] *Sandra Lovelace v Canada,* Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 10 (1984). available at http://www1.umn.edu/humanrts/undocs/html/24_1977.htm
[25] para 8.4

Protocol, the Committee concluded that the proceedings were inadmissible on this ground.

In the *A.T.* case, the majority of the domestic violence had occurred prior to the Optional Protocol coming into force for Hungary in March 2001, but there was one serious incident of violence that occurred in July 2001. The Committee was persuaded that it was

> competent *ratione temporis* to consider the communication in its entirety, because the facts that are the subject of the communication cover the alleged lack of protection/alleged culpable inaction on the part of the State Party for the series of severe incidents of battering and threats of further violence that has uninterruptedly characterized the period beginning in 1998 to the present.[26]

The Committee thus applied the 'continuing breach clause' for Ms A.T., but not for Ms B.J.. It assumes that the consequences for Ms B.J. ended at the time of her divorce. This date could be said to be as arbitrary and unrealistic as the date Ms A.T. separated from her abusive partner. The difference perhaps reflects the relative invisibility of financial disadvantage, as compared to than physical danger. The *B.J.* decision reinforces the unfairness of the German courts granting a divorce decree itself without resolving the financial consequences.

The fact that the continuation of the breach in *A.T.* made the whole of the facts admissible in A.T. contradicts the jurisprudence of the European Commission, which would divide the time period in two: events occurring before the Protocol came into force being inadmissible, but that occurring afterwards being admissible.[27] Further, according to the jurisprudence of the HRC and the European Commission, Ms B.J.'s claim could be

[26] para 8.5
[27] Zwart supra n16 at 124-125

admissible on the basis either that the effects of the breach were continuing, or that the breach had been reaffirmed by the State Party.

Continuing breach

In the *Lovelace* decision the author had married her husband (and thus lost her Indian status) several years before the Covenant came into force in Canada, so the Committee could only consider violations of human rights occurring on or after that date.[28] But the Committee recognized that the effects of violations, if continuing, are violations in themselves.[29] The Committee found that "the essence of the present complaint concerns the continuing effect of the Indian Act ... [t]his fact persists after the entry into force of the Covenant, and its effects have to be examined, without regard to their original cause."[30] Thus the HRC the communication was admissible in so far as the author could point to the discriminatory effect of the loss of status on her since the Covenant came into force. The HRC has reached a similar conclusion in a case where a law was applied to an individual after the Protocol came into force.[31]

[28] *Lovelace v. Canada* Communication No. R.6/24*/ 30 July 1981at 10 ... http://www.javier-leon-diaz.com/minorities/Lovelace%20v.%20Canada.pdf
[29] (at 11)
[30] (at13.1)
[31] In *Dietmar Pauger v Austria* the author was a male who under Austrian law had a lesser entitlement to a widower's pension than he would had he been a widow. His wife had died in 1984, prior to the Optional Protocol entering into force for Austria in 1988. A widower pension was introduced, and the effect of the transitional provisions was that the author received no pension for the first year, and after 1985 obtained a reduced pension. In the end, the Committee concluded that the "the application of the Austrian Pension Act in respect of the author after 10 March 1988, the date of entry into force of the Optional Protocol for Austria, made him a victim of a violation of article 26 of the International Covenant on Civil and Political Rights, because he, as a widower, was denied full pension benefits on equal footing with widows.": Communication No. 415/1990 26 March 1992 CCPR/C/44/D/415/1990 available at www.iwraw-ap.org/protocol/cases/Pauger_v_Austria.doc ; Admissibility decision Communication No. 415/1990 CCPR/C/41/D/415/1990* 22 March 1991 http://www.bayefsky.com/pdf/100_austria415.pdf

In *De Becker*[32] the applicant was serving a life sentence for war crimes, and the judgment included forfeiture of the right to freedom of expression. The European Commission was competent to consider the claim even though the judgment was issued prior to the Convention coming into force. The Commission considered that it was not the judgment itself that was complained against, but the permanent consequences of forfeiture – which were continuing.

While the issue of continuation was considered in *B.J.*, the Committee noted that "the author has not made any convincing arguments that would indicate that the facts, insofar as they relate to the equalization of pensions, continued after this date".[33] The Committee has thus assumed that because one issue[34] was not continuing, the whole complaint became inadmissible.[35] No mention is made of whether the Committee was convinced that other issues had continuing effects for Ms B.J. If they were, then the Committee should have considered itself competent to consider those aspects of the complaint.

Reaffirmation

Under the jurisprudence of the European Commission, where a court delivers judgment after the coming into force of the complaints mechanism, the court is competent to consider the whole proceedings, as the final decision is deemed to embody the preceding

[32] European Commission Application No. 214/56, Yearbook 2, pp. 230-234. Cited in Zwart supra n16 at 126-127.
[33] At para 8.4
[34] i.e. equalization of pensions
[35] This may also be because the Committee had concluded that the complaint was inadmissible on other grounds.

procedure.[36] A similar approach is taken by the HRC, where the HRC considers itself competent to consider allegations of breaches where a state body has "affirmed" a discriminatory decision after the relevant Optional Protocol is in force.[37] At the very least, the German courts had made a decision regarding maintenance after the Protocol was in force, so this could have been considered in *B.J.*. However, part of the difficulty for Ms B.J. was combination of admissibility problems she faced. As the proceedings were unresolved, there was no overall affirmation by the State. Nevertheless, HRC jurisprudence supports the argument that a state party can affirm violations “either through actions or implicitly”.[38] Thus, by the continued failure to resolve the domestic proceedings, it could be argued that the state was implicitly approving the potential violation of the Convention.

The relevance of consistency

By contrasting the cases involving Ms B.J. and Ms A.T., this essay has shown that there is inconsistency within the Committee’s own decisions, and between the decisions of the Committee and those of other bodies. The decision in *B.J.* is shown to be strict and legalistic. This may be a strength, as a thorough consideration of the admissibility requirements affirms the legitimacy of the Committee in the international arena and in the eyes of state parties.

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[36] Zwart supra n16 at 124-125, citing the decision of the European Commission Application No. 6916/75, D.R. 6 p. 111. The greater part of the legal proceedings in that case had occurred prior to the European Convention coming into force for the state party, only the judgment had been read after that date. The Commisison held that the procedure before a court may be corrected in the final decision, therefore it was deemed to incorporate any possible defects.

[37] See Vandenhole 2004 supra n10 at 203.

[38] Human Rights Committee Communication No. 871/1999, cited by the CEDAW Committee in *Christina Munoz-Varrgas y Sainz de vicuna v Spain* Communication No. 7/2005, decision 9 August 2007, 29th Session at para 11.4

However, the issue of inconsistency between human rights bodies is a major challenge in the international human rights arena, with the proliferation of human rights treaties leading to a "risk of redundant and inconsistent work".[39] This is particularly problematic where substantive rights and norms are interpreted between bodies.[40] As this essay has shown, inconsistencies in the interpretation of procedural standards are also present.[41] The importance of procedural inconsistencies should not be discounted as "it is only by procedurally applying it that law is determined, possibly enforced and made real."[42]

This lack of consistency is particularly lamentable given that CEDAW has been seen as having "second class" status internationally.[43] Efforts at seeing "women's rights as human rights" and gender mainstreaming should not be subverted by the Committee taking an inconsistent approach to procedure.

Nevertheless, this criticized lack of consistency should be further examined in light of the Committee's role. While the individual complaints mechanism is said to be "perhaps the most potent invention in all of human rights law", it is not a judicial procedure.[44] The

[39] Painter supra n2 at 75. The concern that has received most attention is the duplication and possible inconsistency in the state reporting procedure has been much commented upon. This has lead to proposals for reform suggesting that a common state reporting procedure should be introduced cite UN Reform proposals, cited in Vandenhole 2004 supra n10 at 322

[40] This also leads to the concern that complainants will engage in forum shopping. Painter at 75 et seq.. In an examination of the way the substantive principles of non-discrimination have been interpreted by treaty bodies, Vandenhole concluded that "only partial harmonisation of non-discrimination and equality standards" had so far taken place: Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* (Intersentia, Antwerpen-Oxford: 2005) at 292.

[41] Vandenhole 2004 supra n10comments on the differences in the practice of different human rights treaty bodies.

[42] Gernot Biehler, *Procedures in International Law,* (Berlin Heidelberg, Springer-Verlag: 2008)

[43] See Painter supra n2 at 54 and Charlesworth and Chinkin supra n2 at 218-220

[44] Oberleitner supra n6 at 97-98

purpose of the complaints mechanism is to reinforce and give effect to norms set out in the Convention, and to an extent this is met by greater consistency, but that is not necessarily the case, particularly in the realm of procedure.

Further, the Committee is governed by international law, and "there is no hierarchical system ensuring any uniformity of decisions on the international field".[45] Each decision is, generally speaking, only binding between the parties. At international law, every tribunal is said to be a self contained system.[46] It is also relevant that the observation of international law is not dependant on the potential for sanctions being applied in the same way it is in domestic legal systems,[47] thus inconsistencies in procedure are not as normatively harmful.

Conclusion

The lack of engagement by the CEDAW Committee with the jurisprudence of other bodies is lamentable to the goals of consistency and harmonization of human rights law. However, given the Committee's role in the international sphere, this criticism may not have as much force as it would in a domestic legal system. The lesson is thus perhaps more of a practical one: those arguing cases should consider drawing more fully on the decisions of other bodies to aid argument through their discursive power, while recognizing that the Committee is not bound to follow them.

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[45] Gernot Biehler, *Procedures in International Law* (Berlin Heidelberg: Springer-Verlag, 2008) at 293.
[46] *Prosecutor v Tadic* (Jurisdiction) 35 I.L.M. 32, 39 (1996), a decision of the ICTY which took a different approach to state responsibility to that which was taken by the ICJ in Nicaragua v USA [1986] I.C.J. Rep. 14, 65. Cited in ibid. at 293 . The same can be said for the various committees that consider individual petitions.
[47] Ibid. at 5

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