ALEXANDER BLADES

THE TREATY OF WAITANGI AND THE NEW ZEALAND BILL OF RIGHTS ACT 1990

Submitted for the LLB (Honours) Degree at the
Victoria University of Wellington

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I INTRODUCTION[1]

Despite its inclusion in the White Paper draft Bill of Rights,[2] an explicit reference to the Treaty of Waitangi (hereafter the "Treaty")[3] was omitted from the New Zealand Bill of Rights Act 1990 (hereafter the "Bill of Rights").[4] This led some to lament that "another opportunity" had been lost "to bring the Treaty more fully into New Zealand's constitutional life".[5] The view was taken that the Treaty remained unenforceable in the courts, except in so far as it had been incorporated in legislation.[6]

However, there is cause for greater optimism. The Bill of Rights gives implicit recognition to the Treaty of Waitangi. This paper establishes that s 20 of the Bill of Rights requires the Treaty of Waitangi to be implemented.

The paper focuses upon the meaning of s 20 of the Bill of Rights, which provides that minorities "shall not be denied" the right to enjoy their culture, religion and language. It identifies the appropriate approach to the interpretation of s 20 of the Bill of Rights. Since s 20 is modelled on Article 27 of the International Covenant on Civil and Political Rights (hereafter the "Covenant"),[7] an analysis of that Article is central to this enquiry. To this end the paper embarks upon a detailed study of international practice under Article 27 of the Covenant, including the practice of the Human Rights Committee under that Article.

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1 I would like to acknowledge the invaluable assistance of Antony Shaw, my supervisor. I also wish to thank Dr Paul McHugh, Tutor of Sidney Sussex College, Cambridge, for his helpful comments. Any errors or inadequacies remain my responsibility.

2 *A Bill of Rights For New Zealand: A White Paper*, New Zealand. Parliament. House of Representatives. 1985. AJHR. A 6. p 74.

3 89 CTS 473.

4 New Zealand Bill of Rights Act 1990, No 109.

5 P McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland, 1991) 57.

6 The rule established in *Hoani Te Heuheu Tukino* v *Aotea District Maori Land Board* [1941] AC 308, 324.

7 999 UNTS 172.

The paper identifies two possible interpretations of Article 27, one negative, emphasising that States need only tolerate minorities, the other positive, requiring States to take positive measures to help minorities enjoy their culture. It establishes that a positive interpretation is the correct interpretation in the light of practice under the Covenant.

The paper then considers whether the implementation of the Treaty of Waitangi is a positive measure required of New Zealand under Article 27. This requires a careful analysis of New Zealand's reports to the Human Rights Committee and of the Committee's consideration of those reports. It emerges that both New Zealand and the Committee perceive that the Treaty's implementation is an integral aspect of New Zealand's obligations under Article 27.

The paper also considers the implications of this interpretation of Article 27 for the meaning of s 20 of the Bill of Rights.

II SECTION 20 OF THE BILL OF RIGHTS

On its face, s 20 does not appear to require the Government to take any measures in favour of minorities, let alone to implement the Treaty of Waitangi. Section 20 provides:

> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

The negative formulation ("shall not be denied") appears to impose only a duty of toleration; the Government must allow minorities to pursue their

cultural activities but need not take positive measures to assist them. This interpretation is supported by the White Paper commentary on the draft Bill of Rights:[8]

> What Article 13[9] is aimed at is oppressive government action which would pursue a policy of cultural conformity by removing the rights of minorities to enjoy those things which go to the heart of their very identity - their language, culture, and religion.

The meaning of s 20 has not yet been tested in the courts. However, the Court of Appeal has indicated the appropriate approach to the interpretation of the Bill of Rights in general. In interpreting the Bill of Rights it is important to consider its "nature and subject matter and special character".[10] Of relevance is the Long Title which identifies the purposes of the Bill of Rights:

> (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

The Long Title has two implications for the interpretation of the Bill of Rights. First, para (a) expresses "a positive commitment to human rights and fundamental freedoms" and reflects the "spirit [in which] interpretation questions are to be resolved".[11] It requires that the provisions of the Bill of Rights "be construed generously" in a manner which is "suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".[12] Accordingly, the starting point for an interpretation of s 20 is to adopt a purposive approach.

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8 Above n 2, p 87.

9 Article 13 of the Bill became s 20 of the New Zealand Bill of Rights Act 1990.

10 *Noort* v *Ministry of Transport*; *Curran* v *Police* Unreported, 30 April 1992, Court of Appeal, CA 369/9 and 378/91, 4 per Richardson J.

11 Above n 10, 4-5 per Richardson J.

12 *Flickinger* v *Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440; above n 10, 13-15 per Cooke P.

Secondly, para (b) of the Long Title recognises that the Bill of Rights was enacted to comply with New Zealand's obligations under the Covenant. This confirms that "[i]n approaching the Bill of Rights it must be of cardinal importance to bear in mind the antecedents".[13] The provisions of the Covenant are of central importance to the interpretation of the Bill of Rights. Furthermore, the practice of other nations in the sphere of human rights is highly relevant, not only because the Bill of Rights reflects a commitment to international human rights standards, but because New Zealand's own practice in this area is still nascent. As Cooke P commented in the context of the *Noort* case, "we in New Zealand may be able to learn from the Supreme Court of Canada. They have had much more experience than the New Zealand Courts in dealing with declarations of rights".[14]

Section 20 of the Bill of Rights has its antecedent in Article 27 of the Covenant.[15] Indeed, in every material respect the wording of s 20 is identical to that of Article 27. Article 27 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 other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 is framed in the same negative terms: minorities "shall not be denied" the right to enjoy their culture. Unlike s 20, however, Article 27 has already generated a wide body of practice under it. The States Parties to the Covenant and the Human Rights Committee have given much attention to the meaning of Article 27. To paraphrase Cooke P, we in New Zealand may be able to learn from that body of practice. Others have had much more experience in dealing with a provision almost identical to s 20 of the Bill of

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13 Above n 10, 17 per Cooke P.

14 Above n 10, 14-15 per Cooke P.

15 Above n 2, p 87.

Rights.[16] That practice under Article 27 is of central importance to the interpretation of s 20.

Accordingly, it is necessary to draw upon that practice for a full exegesis of Article 27's meaning. For the purposes of this paper, there are two issues to be resolved. First, does Article 27 require States to take positive measures to help minorities enjoy their culture? It emerges that Article 27 does require positive measures. Secondly, is the implementation of the Treaty of Waitangi a positive measure required of New Zealand under Article 27? This paper establishes that the Treaty's implementation is required under that Article.

III ARTICLE 27 OF THE COVENANT: POSITIVE OBLIGATIONS

A Two Interpretations

Several writers support a positive interpretation of Article 27. Chief among these is Capotorti, the United Nations Special Rapporteur on Minorities. He considers that a negative interpretation of Article 27 "is too restrictive and does not meet the requirements of the situation".[17] This is because the preservation and development of culture requires resources which usually only governments can provide. In Capotorti's view, "[i]n order to give effect to the rights set forth in article 27 of the Covenant, active and sustained measures are required from States. A purely passive attitude on their part

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16 Above n 10, 14-15 per Cooke P.

17 F Capotorti, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN 4 Sub 2/384/Rev 1 (1979), para 588, pp 98-99.

would render those rights ineffective".[18] Thornberry appears to agree, suggesting that Article 27 can be read to impose positive duties because:[19]

> . . . in order to function, the Article must go beyond the rule of non-discrimination and equality in law towards equality in fact, so that the continued existence of the minority group is not placed in jeopardy in a situation in which it is inherently the weaker party.

The Australian Law Reform Commission, furthermore, has expressed the view that it is unsatisfactory to give Article 27 a "minimal interpretation" which makes it into a "redundant commentary" on the other provisions of the Covenant.[20]

Other writers favour a negative interpretation of Article 27. Modeen argues that Article 27 "merely states the obvious" and is "no real advance on the Universal Declaration of Human Rights".[21] Green considers it "purely negative" and "limited in character".[22] Robinson describes Article 27 as "a classic example of restrictive toleration of minorities",[23] while Dinstein asserts: "patently what we have here is a minimum - rather than a maximum - of rights".[24]

Tomuschat identifies the two arguments which are commonly advanced to support a negative interpretation of Article 27. The first of these is that it would be unrealistic to expect those States which have limited resources and a

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18 Above n 17, p 99.

19 P Thornberry "Self-Determination, Minorities, Human Rights: A Review of International Instruments" [1989] 38 ICLQ 867, 881. See also P Thornberry *International Law and the Rights of Minorities* (Oxford, 1990), 185.

20 Australian law Reform Commission *The Recognition of Aboriginal Customary Laws* (1986) Report No 31, Vol 1, para 175, p 130.

21 T Modeen *The International Protection of National Minorities in Europe* Acta Academiae Aboensis, Ser A, Vol 37, No 1, 1969, 108.

22 L Green "Human Rights and Canada's Indians" (1971) 1 Israel Yrbk Hum Rts 156, 188.

23 J Robinson "International Protection of Minorities. A Global View" (1971) 1 Israel Yrbk Hum Rts 61, 89.

24 Y Dinstein "Collective Human Rights of People and Minorities" [1976] 25 ICLQ 102, 118.

vast number of minority groups to provide assistance to all those groups.[25] Tomuschat warns that:[26]

> Stretching the scope of Art.27 to encompass positive obligations could lead in the last analysis to an outright breakdown of its guiding value and hence to a total loss of credibility. Art.27 will be more effective if it is restricted to a hard core of obligations easily to be complied with.

The problem with this approach is that it confuses the existence of an obligation with the standard of obligation. How much or what kind of assistance minorities should receive is a separate question from whether they should receive assistance. In any case, even if Tomuchat's approach is correct, there is no reason why the practical difficulties created by a positive obligation should be so great as to destroy Article 27's "guiding value". As Thornberry suggests:[27]

> The standard of obligation is necessarily a relative one, sufficient perhaps to criticize or support the general direction of States' efforts, though insufficient to provide a ready answer to questions of detail.

Tomuschat's second reason for objecting to a positive interpretation is that Article 27's drafting history does not allow for it.[28] The drafting history confirms that a negative formulation was chosen deliberately.[29] That formulation "seemed to imply that the obligations of States would be limited

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25 C Tomuschat "Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights" in H Mosler et al (eds) *Volkerrecht als Rechtordnung, Internationale Gerichtsbarkeit, Mensrechten: Festchrift für Hermann Mosler* (Berlin, 1983) 949, 969.

26 Above n 25, 969-970.

27 Above n 18, *International Law and the Rights of Minorities* 186. A positive interpretation of Article 27 implies a nexus between "civil and political rights" and "economic, social and cultural rights": see generally C Scott "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 Osg Hall LJ 769.

28 Above n 25. See also L Sohn "The Rights of Minorities" in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, 1981) 270, 284-285:

> It has been widely held that by rejecting all amendments and texts which would have broadened the rights of the minorities, the Commission made clear that it favoured only the more limited right of members of a minority to enjoy their own culture, to profess and practice [sic] their own religion, or to use their own language. There was then, no obligation on the part of the government, to finance their institutions, to provide special institutions for them, or to take legislative or administrative action to assist them. According to this view, Article 27 is not like the special minority treaties of the two postwar periods.

29 M Bossyut *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht, 1987) 493-496.

to permitting the free exercise of the rights of minorities".[30] However, the importance of the drafting history should not be exaggerated. Article 31(1) of the Vienna Convention on the Law of Treaties[31] states that a treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[32] The context supports a positive interpretation of Article 27. Other provisions in the Covenant already guarantee the freedoms of religion[33] and expression[34] and the right not to be subjected to discrimination.[35] A negative interpretation of Article 27 would add nothing to these provisions. Furthermore, Article 2(2) of the Covenant requires States Parties to adopt measures which "give effect" to the rights contained in the Covenant.[36] This implies that States must take positive steps to implement those rights.[37]

Most importantly, Article 32 of the Vienna Convention provides that the drafting history is to be only a supplementary means of interpretation.[38] This

30 Above n 29, 496. This was despite an earlier agreement that while other provisions of the Covenant "contained a general prohibition of discrimination, differential treatment might be granted to minorities in order to ensure them real equality of status with the other elements of the population": *id*, 493.

31 1155 UNTS 331.

32 Article 31(1) of the Vienna Convention provides:

> A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object purpose.

33 Article 18 of the Covenant.

34 Article 19 of the Covenant.

35 Articles 2(1) and 26 of the Covenant.

36 Article 2(2) of the Covenant provides:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

37 See below n 96 and accompanying text for the Human Rights Committee's General Comment on Article 2. See also W Hastings *The Right to an Education in Maori: the Case from International Law* (Wellington, 1988) 19. Hastings draws the following distinction: ". . . the undertakings in Article 2 apply to rights *recognised* in the Covenant. The right recognised in Article 27 is *not* the right not to be denied use of a minority language. The right recognised in Article 27 is the right to use a minority language."

38 Article 32 of the Vienna Convention provides:

> Recourse may be had to *supplementary* means of interpretation, *including the preparatory work of the treaty* and the circumstances of its inclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning where the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

relegates the drafting history to a position of secondary importance. Tomuschat, writing in 1983, acknowledged that he was forced to rely upon the drafting history because no other information was available to him at the time; and he foresaw that the practice of the Human Rights Committee would "acquire an even greater weight" in the future.

Article 28 of the Covenant establishes a Human Rights Committee to which States Parties must periodically report "on the measures they have adopted which give effect to the rights [contained in the Covenant] and on the progress made in the enjoyment of those rights".[39] The Committee discusses the reports with the Representatives of the State Party concerned. These discussions are documented in summary meeting records. This reporting system is the primary means by which the Covenant is implemented.[40] Under Article 40(4) of the Covenant the Committee is empowered to make such "general comments as it deems appropriate".[41] The Committee's powers have been further extended by the Optional Protocol to the Covenant.[42] Where a State Party ratifies the Protocol, the Committee is competent to receive and consider individual communications alleging violations of the Covenant by that State Party.

The practice of the Human Rights Committee and States Parties under the Covenant is of central importance to the interpretation of Article 27. Cholewinski's research shows that this practice supports a positive

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(Emphasis added.)

39 Article 40(1) of the Covenant.

40 See M Shaw *International Law* (3ed, Cambridge, 1991) 209. See generally D McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford, 1991).

41 General comments of the Committee are intended to promote co-operation between States Parties in the implementation of the Covenant, summarise the experience of the Committee in examining States Parties' reports and draw the attention of States Parties to matters relating to the improvement of the reporting procedure and the implementation of the Covenant: UN Doc CCPR/C/18; and see above n 40, 209-210.

42 999 UNTS 302.

interpretation of Article 27.[43] His research is based on the State reports submitted under the Covenant and on the summary meeting records of the Human Rights Committee up to and including the Thirtieth Session of the Committee in 1987.

This paper updates Cholewinski's research up to and including the Forty-third Session of the Committee held at the end of 1991.[44] It establishes that the

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43 R Cholewinski "State Duty Towards Ethnic Minorities: Positive or Negative?" (1988) 10 HRQ 344.

44 The reports considered were the following initial reports: UN Doc CCPR/C/62/Add 1 (1991) (Algeria); UN Doc CCPR/C/45/Add 2 (1989) (Argentina); UN Doc CCPR/C/31/Add 3 (1988) (Belgium); UN Doc CCPR/C/26/Add 2 (1989) (Bolivia); UN Doc CCPR/C/36/Add 4 (1988) (Cameroon); UN Doc CCPR/C/22/Add 6 (1987) (Central African Rep); UN Doc CCPR/C/50/Add 2 (1989) (Democratic Yemen); UN Doc CCPR/C/50/Add 2/Corr 1 (1989) (Democratic Yemen); UN Doc CCPR/C/6/Add 11 (1987) Guinea; UN Doc CCPR/C/45/Add 4 (1991) (Niger); UN Doc CCPR/C/50/Add 1/Rev 1 (1989) (Philippines); UN Doc CCPR/C/50/Add 1/Rev 1/Corr 1 (1989) (Philippines); UN Doc CCPR/C/68/Add 1 (1991) (Republic of Korea); UN Doc CCPR/C/26/Add 4 (1989) (St Vincent & the Grenadines); Un Doc CCPR/C/45/Add 1 (1989) (San Marino); UN Doc CCPR/C/45/Add 3 (1991) (Sudan); UN Doc CCPR/C/36/Add 5 (1988) (Togo); UN Doc CCPR/C/4/Add 10 (1987) (Zaire); UN Doc CCPR/C/4/Add 11 (1988) (Zaire).

And the second periodic reports of: UN Doc CCPR/C/42/Add 2 (1987) (Australia); UN Doc CCPR/C/51/Add 2 (1990) (Austria); UN Doc CCPR/C/42/Add 3 (1987) (Barbados); UN Doc CCPR/C/57/Add 3 (1991) (Belgium); UN Doc CCPR/C/51/Add 1 (1989) (Canada); UN Doc CCPR/C/37/Add 6/Rev 1 (1987) (Colombia); UN Doc CCPR/C/37/Add 10 (1989) (Costa Rica); UN Doc CCPR/C/32/Add 16 (1988) (Dominican Republic); UN Doc CCPR/C/28/Add 9 (1988) (Ecuador); UN Doc CCPR/C/46/Add 2 (1987) (France); UN Doc CCPR/C/51/Add 3 (1991) (Guinea - Note by the Secretary-General); UN Doc CCPR/C/57/Add 2 (1991) (Guinea); UN Doc CCPR/C/37/Add 13 (1989) (India); UN Doc CCPR/C/37/Add 9 (1988) (Italy); UN Doc CCPR/C/42/Add 4 and Corr 1 & 2 (1988) (Japan); UN Doc CCPR/C/46/Add 4 (1990) (Jordan); UN Doc CCPR/C/57/Add 4 (1991) (Luxembourg); UN Doc CCPR/C/28/Add 13 (1990) (Madagascar); UN Doc CCPR/C/28/Add 12 (1988) (Mauritius); UN Doc CCPR/C/46/Add 3 (1988) (Mexico); UN Doc CCPR/C/42/Add 10 (1990) (Morocco); UN Doc CCPR/C/42/Add 6 (1988) (Netherlands); UN Doc CCPR/C/37/Add 8 (1988) (New Zealand); UN Doc CCPR/C/37/Add 11 (1989) (New Zealand - concerning Niue); UN Doc CCPR/C/37/Add 12 (1989) (New Zealand - concerning Tokelau); UN Doc CCPR/C/42/Add 8 (1989) (Nicaragua); UN Doc CCPR/C/42/Add 5 (1988) (Norway); UN Doc CCPR/C/42/Add 7 (1988) (Panama); UN Doc CCPR/C/28/Add 11 (1988) (Panama - Note by the Secretary-General); UN Doc CCPR/C/42/Add 11 (1990) (Panama); UN Doc CCPR/C/51/Add 4 (1991) (Peru); UN Doc CCPR/C/42/Add 1 (1988) (Portugal); UN Doc CCPR/C/42/Add 9 (1990) (Sri Lanka); UN Doc CCPR/C/42/Add 12 (1991) (Tanzania); UN Doc CCPR/C/32/Add 14 (1988) (United Kingdom - dependent territories); UN Doc CCPR/C/32/Add 15 (1988) (United Kingdom - dependent territories); UN Doc CCPR/C/28/Add 10 (1988) (Uruguay); UN Doc CCPR/C/57/Add 1 (1989) (Zaire).

And the third periodic reports of: UN Doc CCPR/C/52/Add 8 (1990) (Byelorussian SSR); UN Doc CCPR/C/64/Add 1 (1990); UN Doc CCPR/C/64/Add 1 (1990) (Canada); UN Doc CCPR/C/58/Add 2 (1989) (Chile); UN Doc CCPR/C/64/Add 3 (1991) (Colombia); UN Doc CCPR/C/52/Add 4 (1989) (Czechoslovakia); UN Doc CCPR/C/58/Add 9 (1990) (Ecuador); UN Doc CCPR/C/52/Add 3 (1989) (Fed Rep of Germany); UN Doc CCPR/C/58/Add 5 (1989) (Finland); UN Doc CCPR/C/52/Add 1 (1988) (German Democratic Rep); UN Doc CCPR/C/64/Add 7 (1991) (Hungary); UN Doc CCPR/C/64/Add 6 (1991) (Iraq); UN Doc CCPR/C/70/Add 1 (1992) (Japan); UN Doc CCPR/C/64/Add 2 (1990) (Mongolia); UN Doc CCPR/C/70/Add 2 (1992) (Norway); UN Doc CCPR/C/58/Add 10 (1990) (Poland); UN Doc CCPR/C/64/Add 5 (1991) (Senegal); UN Doc CCPR/C/58/Add 1 & 3 (1989) (Spain); UN Doc CCPR/C/58/Add 7 (1990) (Sweden); UN Doc CCPR/C/52/Add 5 (1989) (Tunisia); UN Doc

practice of the Human Rights Committee and States Parties under the Covenant continues to support a positive interpretation of Article 27. Indeed, in recent years this support has become more explicit.

B State Reports

In their periodic reports to the Human Rights Committee many States Parties to the Covenant have recognised that Article 27 requires positive measures to help minorities enjoy their culture. To date, Norway's second periodic report represents the most explicit recognition of this duty. The report referred to government policy concerning the Sami minority in Norway:[45]

> . . . the Sami culture must be maintained and *further developed*. This entails a departure from the previous policy of assimilation. *Active initiatives* are required to ensure the continued survival of Sami culture. It is a national responsibility for the authorities to ensure that the Sami people are *given the means* to perpetuate and further develop their culture so that they can continue to live as a separate ethnic group.
>
> Protecting the Sami is not only a national responsibility. Norway also has an international responsibility based on commitments undertaken in relation to international law. The Bill[46] *supports the interpretation of the Covenant which implies that States accept the responsibility to contribute positively* to enabling ethnic minorities to maintain and advance their language and culture.

Norway explicitly recognised that it was not enough under Article 27 merely to tolerate minorities; Article 27 imposed a duty to take positive action to help minorities enjoy their culture. In its third report, Norway notified the Human Rights Committee that the following provision had been inserted in the Norwegian Constitution:[47]

CCPR/C/58/Add 6 (1990) (United Kingdom); UN Doc CCPR/C/58/Add 8 (1990) (Ukrainian SSR); UN Doc CCPR/C/58/Add 11 (1991) (United Kingdom - supplementary information); UN Doc CCPR/C/64/Add 4 (1991) (Uruguay); UN Doc CCPR/C/52/Add 2 (1988) (USSR).

45 UN Doc CCPR/C/42/Add 5 (1988) (Norway), paras 140-141, pp 30-31 (emphasis added).

46 An Act relating to the Sameting (Sami Assembly) and other Sami legal matters, Ot prp no 33 (1986-1987). See above n 45, paras 138-145, pp 30-31.

47 UN Doc CCPR/C/70/Add 2 (1992) (Norway), para 206, p 40 (emphasis added). The report referred to measures adopted to benefit minorities in the areas of education, broadcasting, cultural activities and public administration: *id*, paras 207-220, pp 40-42.

> It is the *responsibility* of the authorities of the State to *create conditions* enabling the Sami people to preserve and develop its language, culture and way of life.

Hungary in its third report joined Norway in explicitly recognising a duty of positive action under Article 27. Hungary's report informed the Human Rights Committee that a law on the rights of ethnic minorities was under preparation and that it would comply with the provisions of the Covenant. Significantly, the "main thrust" of the new law was described as:[48]

> (a) *Active protection* of minorities with the aim of not merely tolerating them but *promoting* the preservation of their identities;
>
> (b) *Positive discrimination* to ensure equal opportunity;
>
> (c) The principle of cultural autonomy manifested in self-governments.

Other States Parties to the Covenant have also given constitutional or legislative recognition to a duty of positive action under Article 27. Peru's second report drew attention to the relevant provisions in the Peruvian Constitution which required that the State "*preserve* and *encourage* manifestations of autonomous culture"[49] and "*encourage* the study and knowledge of aboriginal languages".[50] Similarly, Czechoslovakia's third report stated that the government was constitutionally bound to "*secure* to the Hungarian, German, Polish and Ukrainian nationalities the *possibility* of and *facilities* for their all-round *development* . . .".[51] According to Sweden's third report, furthermore, the Swedish Constitution provided that "the opportunities for ethnic, linguistic and religious minorities to maintain and develop a cultural and community life of their own shall be *promoted*".[52]

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48 UN Doc CCPR/C/64/Add 7 (1991) (Hungary), para 137, p 22 (emphasis added).

49 UN Doc CCPR/C/51/Add 4 (1991) (Peru), para 111, p 16 (emphasis added) (with reference to Article 34 of the Peruvian Constitution).

50 Above n 49, para 112, p 16 (emphasis added) (with reference to Article 35 of the Peruvian Constitution).

51 UN Doc CCPR/C/52/Add 4 (1989) (Czechoslovakia), para 210, p 34 (emphasis added) (with reference to Constitutional Act No 144 of 27 October 1968).

52 UN Doc CCPR/C/58/Add 7 (1990) (Sweden), para 285, p 43 (emphasis added). The report stated that "*special provisions* had been made for the education of the Sami population": *id*, para 286, p 43 (emphasis added).

Argentina's first report continued this trend. Argentina notified the Human Rights Committee of legislative measures to ensure positive action in favour of indigenous peoples:[53]

> This law points out in its objectives that *care* and *support* for the aborigines and aborigine communities is of national interest and that their protection and *advancement* is necessary . . . .
>
> . . . .
>
> The Act also provides for plans of education which must safeguard and *restore* the historical and cultural identity of each aboriginal community, *ensuring* at the same time its integration on an equal basis in Argentine society.

Poland's third report acknowledged that "[a]lthough there were no formal restrictions in the Polish legal system on the rights of minorities, in practice there were many, and these irregularities have not yet been fully eliminated".[54] This implied that Poland considered Article 27 to require positive measures. If Poland had thought otherwise, it would have been enough simply to assert that there existed no legal restriction on the rights of minorities.

The State reports mentioned thus far represent those States which have given constitutional or legislative recognition to a duty of positive action under Article 27. Many States have not given such recognition but still refer in their reports to an established policy of helping minorities to enjoy their culture. For example, Australia's second report stated that, "[i]ncreasingly, Governments in Australia have *taken special measures* to *provide for the needs* of ethnic minorities".[55] The report then referred to an array of government-funded schemes to protect and promote culture and development, including

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53 UN Doc CCPR/C/45/Add 2 (1989) (Argentina), para 236, p 55; para 238, p 56 (emphasis added) (with reference to Act 23.362, Argentine Congress, 30 September 1985). The report referred to health programmes: *id*, para 238, p 56; and to a National Institute of Indigenous Affairs which was responsible for awarding land and giving technical advice to indigenous groups: *id*, para 237, p 56.

54 UN Doc CCPR/C/58/Add 10 (1990) (Poland), para 174, p 33.

55 UN Doc CCPR/C/42/Add 2 (1987) (Australia), para 661, p 144 (emphasis added).

special services to ensure equality of access and provision, and language programmes to meet the needs of minorities.[56]

Mexico's second report asserted that ". . . the Government of Mexico is *actively promoting* the preservation of the Indian peoples' cultures and traditions . . .".[57] The National Indigenous Institute in Mexico had undertaken "to *preserve* and *promote* indigenous cultures and their various ethnic and cultural characteristics".[58] Referring to its Berber minority, Algeria's first report stated that "Berber culture and language are increasingly *fostered* as constituent elements of the national cultural heritage".[59]

The second report of the Netherlands also made reference to a policy of positive action:[60]

> Government policy is primarily geared to according minorities equal opportunities and an equal place in Netherlands society. Accordingly, *measures are being taken* to *improve* the situation of members of minority groups in such fields as housing, employment, education and welfare services.

This policy extended to support for minority cultural activities:[61]

> In recent years, through financial and other forms of *assistance*, the Government has *encouraged* and *supported* the formation of new ethnic minority organisations and the strengthening of existing ones.

Panama's second report referred to the Government's policy concerning the indigenous population as "a formal undertaking to be implemented through the various offices and institutions forming part of the Panamanian State and the instruments of government action".[62] The report specified some of the

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56 Above n 55, paras 662-696, pp 144-153.

57 UN Doc CCPR/C/46/Add 3 (1988) (Mexico), para 462, p 64 (emphasis added).

58 Above n 57, para 450, p 62 (emphasis added). Mexico reaffirmed its policy in discussions with the Human Rights Committee: *Summary Record of the Human rights Committee*, 34th Session, UN Doc CCPR/C/SR 849, paras 12-14, pp 3-4 (1988).

59 UN Doc CCPR/C/62/Add 1 (1991) (Algeria), para 220, p 73 (emphasis added).

60 UN Doc CCPR/C/42/Add 6 (1988) (Netherlands), para 201, p 41 (emphasis added).

61 Above n 60, para 209, p 43 (emphasis added).

62 UN Doc CCPR/C/42/Add 7 (1991) (Panama), para 57, p 11.

special measures adopted to help the indigenous population, including health, education and land reforms.[63]

In its third report under Article 27, Iraq stated that it "not only does not deny" minorities their rights under Article 27, "but also *pursues positive measures* in order to enable minorities to exercise their rights without discrimination".[64] The first report of the Central African Republic referred to a similar policy. It explained that "pygmies, who are generally isolated in their strictly tribal way of life . . . retain their right to be different while *benefiting* from the *special measures* taken by the national authorities".[65]

Positive measures to help minorities maintain their own language is one of the most common practical ways in which States try to fulfil their obligations under Article 27.[66] There are numerous examples. The second report of Mauritius informed the Human Rights Committee that a radio channel had been operating "[i]n order to *better meet the needs and wishes* of many religious and cultural groups . . .".[67] Mexico's second report referred to language programmes offering bilingual education.[68] In its second report New Zealand made reference to the establishment of a Maori Language Commission to "*promote* the Maori language as an official language of New Zealand",[69] of *Kohanga Reo* (Maori language nests)[70] and of a Maori Radio Board.[71] Poland's third report stated:[72]

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63 Above n 62, paras 65-80, pp 12-14.

64 UN Doc CCPR/C/64/Add 6 (1991) (Iraq), para 76, p 26 (emphasis added). When pressed by the Human Rights Committee to give details of these "positive measures", however, the Iraqi delegation was unable to give a convincing reply: *Summary Record of the Human Rights Committee*, 42nd Session, UN Doc CCPR/C/SR 1082, paras 12-13, p 4 (1991).

65 UN Doc CCPR/C/22/Add 6 (1987) (Central African Rep), p 12 (emphasis added).

66 See above n 43, 349-350.

67 UN Doc CCPR/C/28/Add 12 (1988) (Mauritius), para 48, p 12 (emphasis added).

68 Above n 57, paras 459-461, p 64.

69 UN Doc CCPR/C/37/Add 8 (1988) (New Zealand), para 149, p 29 (emphasis added).

70 Above n 69, para 150, p 29.

71 Above n 69, para 151, p 29.

> It is necessary in particular to *pursue activities* aimed at *developing* the system of education for national minorities. . . . . [I]nstruction in their mother tongue is *provided free of charge* for children and young people of non-Polish nationality.

The second report of Portugal referred to attempts to preserve the Mirandês language.[73] In its third report Colombia stated that it recognised the right to a bilingual and bicultural education[74] and that it was formulating a policy to protect and promote indigenous languages.[75] Czechoslovakia's third report referred to provision which had been made for children to be educated in their native language.[76] Finland's third report mentioned an Advisory Council for Sami Educational Affairs which was working towards the preservation and development of the Sami language and culture.[77] Furthermore, the third report of the German Democratic Republic made reference to measures which assisted the Sorb minority to maintain its language.[78] Mongolia's third report referred to the Kazakh minority which benefited from a national theatre, schools with instruction in Kazakh, a folklore ensemble and their own newspapers and radio programme.[79] In its third report Spain mentioned that television and radio stations were promoting the use of various vernacular

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72 Above n 54, para 175, p 33 (emphasis added).

73 UN Doc CCPR/C/42/Add 1 (1988) (Portugal), para 822, p 136. The report also mentioned efforts to ensure that Gypsy children attended school: *id*, para 818, p 136.

74 UN Doc CCPR/C/64/Add 3 (1991) (Colombia), para 217, p 65.

75 Above n 74, para 218, pp 65-66. The report also referred to the creation of reserves and protected areas for indigenous communities: *id*, para 214, p 65; the protection of natural resources: *id*, para 215, p 65; and the development of health-care programmes with the active participation of indigenous communities: *id*, para 219, p 66. In discussions with the Human Rights Committee mention was also made of land grants: *Summary Record of the Human Rights Committee*, 33rd Session, UN Doc CCPR/C/SR 820, para 46, p 9 (1988).

76 Above n 51, para 212, p 34.

77 UN Doc CCPR/C/58/Add 5 (1989) (Finland), para 138, p 25. The report also stated that support in the form of land, special rights, loans and subsidies was available for primary occupations such as farming, fishing and hunting: *id*, para 40, p 25; and that efforts were being made to produce teaching material to meet the needs of the Romany population: *id*, para 42, p 26.

78 UN Doc CCPR/C/52/Add 1 (1988) (German Democratic Rep), para 84, p 19:

> In the bilingual area children and youths have both the right and the opportunity to learn and use the Sorb language. . . . . Each year some 1 million marks are spent to subsidize textbooks, teaching aids and similar materials for Sorb schools, schools where the Sorb language is taught and Sorb kindergartens. Pupils attending Sorb language classes get the texts needed for the purpose free of charge.

79 UN Doc CCPR/C/64/Add 2 (1990) (Mongolia), para 98, p 20. The report made reference to the establishment of "public organizations and national, cultural and religious movements" which assisted minorities: *id*.

languages.[80] Italy's second report stated that "[s]pecial régimes [had] been established for . . . linguistic minorities comprising protective measures closely geared to the requirements of safeguarding them".[81] The Ukrainian Soviet Socialist Republic's third report referred to cultural organisations, newspapers, radio and television, and language-teaching in schools, all of which assisted minorities.[82]

It is as well to remember that, quite apart from measures designed to aid language maintenance, a State can take a wide range of practical measures to benefit minorities. In some cases the need for assistance is of a more desperate nature: Ecuador's third report, for example, referred to action taken to rectify ecological deterioration of the Amazon region, which was adversely affecting the social and cultural organisation of indigenous communities living there.[83]

Measures such as these require substantial resources which, realistically, only the State can provide. Several State reports mention the allocation of funds to minorities. Italy's second report recognised the existence of linguistic minorities which required "particular protection and the allocation of more substantial autonomous resources".[84] In its second report, Austria stated that "in 1989 more than S14 million were spent on subsidies to . . . ethnic minorities . . .".[85] Sweden's third report informed the Committee that

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80 UN Doc CCPR/C/58/Add 1 & 3 (1989) (Spain), para 197, p 38. The report also referred to the approval of a National Gypsy Development Plan: *id*, para 95, p 38; and of measures to integrate the Gypsy minority: *id*, para 196, p 38. During discussions with the Human Rights Committee Spain gave further details of financial assistance to the Gypsies: *Summary Record of the Human Rights Committee*, 40th Session, UN Doc CCPR/C/SR 1021, para 19, pp 5-6 (1990).

81 UN Doc CCPR/C/37/Add 9 (1988) (Italy), para 214, p 30.

82 UN Doc CCPR/C/58/Add 8 (1990) (Ukrainian SSR), paras 132-133, pp 26-27.

83 UN Doc CCPR/C/58/Add 9 (1990) (Ecuador), para 192, p 26. See also the discussion during the consideration of Ecuador's report: *Summary Record of the Human Rights Committee*, 43rd Session, UN Doc CCPR/C/SR 118, para 29, p 8; para 44, p 12 (1991).

84 Above n 81, para 220, p 30.

85 UN Doc CCPR/C/51/Add 2 (1990) (Austria), para 263, p 51.

"[r]eligious communities may receive funding to help finance their religious activities and to help pay for premises".[86] Tunisia's third report noted that Jewish cultural associations were subsidised by local authorities.[87] Hungary's third report stated that "[i]n 1991 the Parliament earmarked 200 million forints in budgetary support for minority organisations".[88] Japan's third report advised that financial assistance had been given to improve the welfare of the Ainu minority in Japan.[89]

It is clear that practice under the Covenant supports a positive interpretation of Article 27. However, it is important to recognise that there are States Parties which explicitly or implicitly reject that interpretation. Several States concluded their reports without even mentioning Article 27;[90] others considered it enough simply to assert their compliance with the other Articles of the Covenant and, in particular, with Articles 2 and 26 which prohibit discrimination.[91] This implies a perception that Article 27 adds nothing to the Covenant except an emphatic guarantee that members of minorities may exercise their rights collectively without interference or discrimination. Belgium's first report reflected this perception. With reference to the relationship between Article 27 and its Constitution, Belgium stated:

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86 Above n 52, para 291, p 44.

87 UN Doc CCPR/C/52/Add 5 (1989) (Tunisia), para 160, p 158.

88 Above n 48, para 135, p 22.

89 UN Doc CCPR/C/70/Add 1 (1992) (Japan), paras 234-235, p 49. In discussions with the Committee the Japanese Representative gave further details of these measures: *Summary Record of the Human Rights Committee*, 33rd Session, UN Doc CCPR/C/SR 830, para 54, pp 11-12 (1988).

90 See UN Doc CCPR/C/50/Add 2 (1989) (Democratic Yemen); UN Doc CCPR/C/45/Add 4 (1991) (Niger); UN Doc CCPR/C/45/Add 1 (1989) (San Marino); UN Doc CCPR/C/45/Add 3 (1991) (Sudan); UN Doc CCPR/C/42/Add 3 (1987) (Barbados); UN Doc CCPR/C/37/Add 6/Rev 1 (1987) (Colombia); UN Doc CCPR/C/57/Add 2 (1991) (Guinea); UN Doc CCPR/C/46/Add 4 (1990) (Jordan); UN Doc CCPR/C/42/Add 10 (1990) (Morocco); UN Doc CCPR/C/42/Add 12 (199) (Tanzania); UN Doc CCPR/C/28/Add 10 (1988) (Uruguay); UN Doc CCPR/C/52/Add 3 (1989) (Fed Rep of Germany); UN Doc CCPR/C/58/Add 11 (1991) (United Kingdom - supplementary information); UN Doc CCPR/C/64/Add 4 (1991) (Uruguay).

91 See UN Doc CCPR/C/6/Add 11 (1987) (Guinea), p 28; UN Doc CCPR/C/36/Add 4 (1988) (Cameroon), para 118, p 26; UN Doc CCPR/C/37/Add 10 (1989) (Costa Rica), para 87, p 19; UN Doc CCPR/C/32/Add 16 (1988) (Dominican Republic), paras 52-53, p 19; UN Doc CCPR/C/42/Add 4 and Corr 1 & 2 (1988) (Japan), p 25; UN Doc CCPR/C/28/Add 13 (1990) (Madagascar), para 242, p 50; UN Doc CCPR/C/58/Add 6 (1990) (United Kingdom), para 81, p 127.

"Fundamentally, the substance of [Article 27] corresponds, like Article 26 of the Covenant, to the [non-discrimination provisions of] the Constitution".[92] In its second report on its dependent territories, the United Kingdom clearly favoured a negative interpretation of Article 27. Referring to the Falkland Islands, the report stated:[93]

> There are religious minorities and the *non-discrimination provisions* of the Constitution mentioned in relation to foregoing articles guarantee their freedom to profess and practise their own religion. By reason of the provisions of the Constitution mentioned in relation to foregoing articles, minorities are *in no way restricted* in their rights to enjoy their own culture or to use their own language. Thus the requirements of article 27 of the Covenant are satisfied in relation to the Falkland Islands.

The United Kingdom equated its obligations under Article 27 with a duty of non-discrimination. In its second report Canada drew a sharp distinction between what Article 27 required and what was being done in practice:[94]

> There are many minority groups in Canada, and the Government of Canada has not taken any steps to deny them their rights as set forth in Article 27. Indeed, *although not in its view required to do so by this Article*, the Government has taken . . . positive steps to enhance their status within Canada.

Canada's explicit rejection of a positive interpretation shows that State practice alone cannot conclusively determine the meaning of Article 27. State practice supports a positive interpretation, but it represents a subjective perspective. Furthermore, Canada's approach highlights a further difficulty: although States may take positive measures to assist minorities, that does not necessarily mean they consider themselves bound to do so by Article 27.

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92 UN Doc CCPR/C/31/Add 3 (1988) (Belgium), para 407, p 82. For the same approach see UN Doc CCPR/C/42/Add 8 (1989) (Nicaragua), para 401, p 87; and UN Doc CCPR/C/52/Add 8 (1990) (Byelorussian SSR), paras 89-91, p 17.

93 UN Doc CCPR/C/36/Add 14 (1988) (UK - dependent territories), Annex D, para 41, p 38 (emphasis added).

94 UN Doc CCPR/C/51/Add 1 (1989) (Canada), para 142, p 25 (emphasis added). In its third report, however, Canada made no such reservation and referred to a wide range of measures adopted to assist minorities: UN Doc CCPR/C/64/Add 1 (1990) (Canada), paras 61-70, pp 9-10.

As Cholewinski suggests, the practice of the Human Rights Committee provides a more objective guide to the meaning of Article 27.[95] It emerges that the Committee supports a positive interpretation of Article 27. States Parties to the Covenant must take positive measures to help minorities enjoy their culture.

C Approach of the Human Rights Committee

1 General Comments of the Committee

The Committee has not yet produced a General Comment on Article 27,[96] but has indicated in its General Comments on other Articles that States Parties must take positive measures to give effect to the rights contained in the Covenant. In its General Comment on Article 2, which requires States Parties to take measures "to give effect" to the rights contained in the Covenant,[97] the Committee stated:[98]

> [Article 2] recognizes, in particular, that implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that *the obligation under the Covenant is not confined to respect of human rights*, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. *This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.* This is obvious in a number of articles . . . but in principle this undertaking relates to all rights set forth in the Covenant.

This general approach to the implementation of the Covenant is reflected in the Committee's approach to the implementation of Article 27.

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95 Above n 43, 352.

96 In the Twenty-sixth Session the Committee attempted to formulate a General Comment on Article 27 but could not reach a consensus: *Summary Records of the Human Rights Committee*, 26th Session, UN Docs CCPR/C/SR 607, paras 4-50, pp 2-9; SR 618, paras 9-65, pp 2-9; SR 625, para 2, p 5 (1985); see above n 43, 346-348. The Committee has decided to make a further attempt: see *Summary Record of the Human Rights Committee*, 39th Session, UN Doc CCPR/C/SR 1002, paras 20-22, pp 3-4 (1990). See below n 122.

97 Above n 36.

98 UN Doc CCPR/C/21/Rev 1 (1989), para 1, p 3 (emphasis added).

2 *Consideration of State reports by the Committee*

The summary meeting records show that many Members of the Human Rights Committee consider positive measures to be a requirement of Article 27. Some Members have made explicit statements to that effect. For example, during the Thirty-first Session of the Committee's work Mrs Higgins made the following comment in relation to Denmark's report:[99]

> . . . the Danish Government recognized the existence of minorities in the country and that those minorities were not subjected to any discrimination. However, *article 27 did not simply consist of a general non-discrimination clause*: it required States parties to ensure that ethnic, religious or linguistic minorities were not denied the right to their own culture, to practise their own religion or to use their own language. In other words, *the State should not simply play a passive role, but must take positive measures*.

During the Thirty-fifth Session, Mr Ndiaye interpreted Article 27 in the same way. In response to the statement by Mr Semino, the Uruguayan Representative, that "the question of ethnic, religious and linguistic rights was not a meaningful one for Uruguay" because all were free to exercise their rights in their own homes,[100] Mr Ndiaye commented:[101]

> Mr Semino seemed to have too negative and restrictive a conception of Article 27: it was not enough for a State not to restrict minority rights; it must *actively foster* them through *positive discriminatory measures* in favour of minorities.

These statements by Mrs Higgins and Mr Ndiaye could not be more explicit. Both considered Article 27 to require positive measures. Certainly, Mrs Higgins and Mr Ndiaye constitute only two Members of the Committee, but it is significant that no Committee Member has challenged their interpretation of Article 27. Indeed, many of the questions put to State Representatives by the Committee imply that Article 27 requires positive measures. For

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99 *Summary Record of the Human Rights Committee*, 33rd Session, UN Doc CCPR/C/SR 781, para 17, p 5 (1987) (emphasis added).

100 *Summary Record of the Human Rights Committee*, 35th Session, UN Doc CCPR/C/SR 879, para 29, p 6 (1989).

101 Above n 100, para 37, p 8 (emphasis added).

example, during the Forty-second Session the Committee submitted a written question to Sri Lanka, asking for information on the "*measures taken* to guarantee the rights of ethnic and religious minority groups and *assistance given to them* to preserve their cultural identities, languages and religion".[102] During the Forty-second Session Mr Herndl asked the Representative of Madagascar "how . . . the Government *guaranteed the preservation* of the linguistic and cultural identity of members of minorities who had Malagasy nationality".[103] In the Thirty-third Session, furthermore, the Committee asked Australia for "additional information concerning *affirmative action measures* in the economic and cultural spheres adopted in favour of Aborigines . . .".[104]

In the Thirty-seventh Session the Committee submitted the following written question to Portugal: "Please provide information on the *practical measures* that have been taken to protect the rights of gypsies and to preserve the Mirandês dialect in north-eastern Portugal . . .".[105] Similarly, during discussion of the Philippines' report in the Thirty-fifth Session, Mr Ndiaye "wondered whether the ethnic communities had their own press and other *means of promoting* their cultures";[106] and Mr Cooray, referring to tribal populations in the Philippines, asked:[107]

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102 *Summary Record of the Human Rights Committee*, 42nd Session, UN Doc CCPR/C/SR 1059, para 53, p 12 (1991) (emphasis added).

103 *Summary Record of the Human Rights Committee*, 42nd Session, UN Doc CCPR/C/SR 1075, para 36, p 9 (1991) (emphasis added).

104 *Summary Record of the Human Rights Committee*, 33rd Session, UN Doc CCPR/C/SR 809, para 24, p 5 (1988) (emphasis added).

105 *Summary Record of the Human Rights Committee*, 37th Session, UN Doc CCPR/C/SR 937, para 32, p 8 (1989) (emphasis added). The Portuguese Representative referred in response to a series of affirmative action measures: *id*, paras 35-36, pp 8-9. See also the question put by the Committee to the Representative of the Ukrainian SSR:

> Are any *institutional measures* envisaged by the Government of the Ukrainian SSR to deal on a systematic and long-term basis with the problems of minorities and the *promotion of progress* and reconciliation among the various national groups?

Summary Record of the Human Rights Committee, 40th Session, CCPR/C/SR 1031, para 44, p 10 (1991) (emphasis added).

106 *Summary Record of the Human Rights Committee*, 35th Session, UN Doc CCPR/C/SR 885, para 61, p 12 (1989) (emphasis added).

107 *Summary Record of the Human Rights Committee*, 35th Session, UN Doc CCPR/C/SR 884, para 15, p 8 (1989) (emphasis added).

> . . . what *opportunities* those peoples were given to preserve their culture, to profess and practice their religion, or to use their language and to maintain their ancestral lands.

Questions concerning financial assistance to minorities clearly imply a positive interpretation of Article 27. During the Thirtieth Session, for example, Mr Cooray asked the Representative of Zaire for information "on the *resources available* to [minorities] to preserve their cultures, to use their language and to profess their religions".[108]

In his research Cholewinski draws a distinction between indigenous and other minorities under Article 27. He suggests that, with respect to indigenous minorities, the issue of whether the duty is negative or positive is "effectively settled" because "[i]t is generally recognized that special measures are required to protect and preserve aboriginal culture and language".[109] However, it is difficult to identify any distinction between indigenous and other minorities in the practice of the Committee. It is true that indigenous minorities are often socio-economically disadvantaged and are more likely to require State assistance, both to improve their living standards and to maintain their culture, and the Committee has recognised this on several occasions.[110] But the Committee does not appear to have set a lower standard of assistance in the case of non-indigenous minorities. For example, during the discussion of Romania's report in the Thirtieth Session Mrs Higgins commented that, while "it was important for minorities to have a good working knowledge of the national language", at the same time their "minority

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108 *Summary Record of the Human Rights Committee*, 30th Session, UN Doc CCPR/C/SR 734, para 32, p 9 (1987) (emphasis added).

109 Above n 43, 361.

110 See, for example, *Summary Record of the Human Rights Committee*, 40th Session, UN Doc CCPR/C/SR 1012, para 34, p 8 (1990); *Summary Record of the Human Rights Committee*, 40th Session, UN Doc CCPR/C/SR 1021, para 24, p 6 (1990); *Summary Record of the Human Rights Committee*, 37th Session, UN Doc CCPR/C/SR 945, para 36, p 9 (1989).

rights as specified in article 27 should be guaranteed . . .".[111] Mrs Higgins made this comment in a context which did not involve indigenous minorities.

Questions put by the Committee should not be the sole focus of the inquiry, however. It is important to observe how State Representatives respond to those questions. Reciprocal exchanges between the Committee and State Representatives are a valuable guide to the meaning of Article 27, because they indicate whether there is a common perception of that meaning.[112] The summary meeting records show that many of the reciprocal exchanges, as set forth below, support a positive interpretation of Article 27.

During the Thirty-Fourth Session, for example, the Norwegian Representative Mr Willie stated that Norway supported the interpretation of Article 27 which required "a positive contribution" to minorities and that "[t]hat was the main objective of the Act relating to the Sameting".[113] In response, Mr Ando congratulated the Norwegian delegation and commented:[114]

> The ultimate goal of all efforts in the area of human rights was to achieve multiplicity in uniformity. The Act relating to the Sameting was a *model piece of legislation* in that regard, since it was aimed at *providing* the members of that ethnic minority with the *necessary means* for preserving and developing their culture themselves. *That was an ideal approach which might serve as an example to other countries.*

Mr Ando's comment indicates that the Sameting Act was ideal *because* it guaranteed State assistance to an ethnic minority. This implicitly supports a positive interpretation of Article 27.

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111 *Summary Record of the Human Rights Committee*, 30th Session, UN Doc CCPR/C/SR 743, para 39, p 10 (1987).

112 Above n 43, 356.

113 *Summary Record of the Human Rights Committee*, 34th Session, UN Doc CCPR/C/SR 847, para 17, p 4 (1988) (with reference to the Act relating to the Sameting of 12 June 1987). See above n 46 and accompanying text.

114 Above n 113, para 29, p 6 (emphasis added).

In the Forty-third Session the Human Rights Committee asked Poland to provide information on "*measures taken* to guarantee [minority] rights under article 27 of the Covenant".[115] Mr Skozewska-Losiak, the Polish Representative, clearly understood this question to refer to positive measures in favour of minorities, and assumed that such measures were required under Article 27: "The authorities were fully aware that the protection of minorities required not only an adequate legal framework, but also *affirmative action* by the State".[116]

The question-and-answer session between the Committee and the Finnish delegation in the Fortieth Session also reflected a common perception of what Article 27 required. In a written question the Committee asked Finland to "comment on progress achieved in *improving the status and conditions* of the Finnish Romanies . . .".[117] Mr Gronberg, the Representative of Finland, replied that a new programme to improve housing conditions and grants for adult education in the Romany language had been introduced.[118] Mr Fodor then asked whether "minority groups *enjoyed special treatment* regarding the use of their own languages" and, further, "what measures other than measures in the area of education and language had been taken to *preserve the culture* of minority groups".[119] Mr Lehtimaja, the other Finnish Representative, replied that there were "numerous" measures, including the promotion of traditional crafts and livelihoods.[120] The discussion between the Committee Members and Finnish Representatives clearly proceeded on the basis of a positive interpretation of Article 27.

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115 *Summary Record of the Human Rights Committee*, 43rd Session, UN Doc CCPR/C/SR 1105, para 4, p 2 (1991) (emphasis added).

116 Above n 115, para 10, p 3 (emphasis added).

117 *Summary Record of the Human Rights Committee*, 40th Session, UN Doc CCPR/C/SR 1016, para 2, p 2 (1990) (emphasis added).

118 Above n 117, paras 3-4, pp 2-3.

119 Above n 117, para 7, p 8 (emphasis added).

120 Above n 117, para 14, p 5.

Exchanges between Committee Members and State Representatives sometimes lead to the disapproval of a State's policy. During the discussion of Morocco's report in the Forty-third Session, it was clear that the Committee was not satisfied with Morocco's interpretation of Article 27 as a mere non-discrimination clause. Mr Atmani, the Moroccan Representative, asserted that "[t]here were no problems in Morocco regarding ethnic, religious and linguistic minorities" because "[a]ll Moroccans enjoyed equality under the law".[121] Mr Herndl accepted that Morocco experienced no ethnic friction, but still asked "what *facilities* such minorities as existed, for example European residents, enjoyed with respect to the use of their own language and access by their children to schools where instruction was given in that language".[122] Mr Herndl's question indicated that the mere absence of ethnic friction was not enough in his view to satisfy Article 27; he wanted to know whether the Moroccan government was taking positive measures to assist minorities.

Morocco's interpretation of Article 27 provides a reminder that not all States perceive their obligations under Article 27 in positive terms. There are further examples. In the Thirty-first Session, the Representative of Trinidad and Tobago Mr Henry stated that "[e]thnic and religious plurality was a fact, and no majority could oppress a minority",[123] clearly implying that Article 27 was viewed as a mere non-discrimination clause. In the Forty-first Session Mr

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121 *Summary Record of the Human Rights Committee*, 43rd Session, UN Doc CCPR/C/SR 1096, para 20, p 5 (1991).

122 Above n 121, para 22, p 5 (emphasis added). Mr Atmani evaded Mr Herndl's question by asserting that Moroccan society was "a melting pot . . . without political minorities": above n 121, para 28, pp 6-7. Mr Fodor criticized the Moroccan position, stating that the existence of minorities was a question of fact and not of policy: above n 121, para 56, p 13. Note that, during discussions on the formulation of a General Comment on Article 27, Mrs Higgins referred to the need for "comments which would make States parties refrain from declaring, as they frequently did, that there was no need for them to describe the situation of minorities as all their citizens were equal": *Summary Record of the Human Rights Committee*, 39th Session, UN Doc CCPR/C/SR 1002, para 21, pp 3-4 (1990). See further, above n 96.

123 *Summary Record of the Human Rights Committee*, 31st Session, UN Doc CCPR/C/SR 767, para 20, p 5 (1987).

Ramaswamy, the Indian Representative, told the Committee that "all human and fundamental rights and mechanisms for redress were equally available to minorities",[124] and made no mention of positive measures. Furthermore, during the Thirty-second session, the Committee asked France in a written question whether it had adopted any "*measures to assist in maintaining* native cultural traditions or languages in various regions of the Republic where such traditions existed".[125] The Representative of France Mr Vienot replied that "State intervention was generally considered unlawful and even dangerous" and that "[t]he Community bore the main responsibility for maintaining regional cultures".[126]

There clearly are States which perceive Article 27 in negative terms. But it is also clear that these States are out of step with the practice of the Human Rights Committee under Article 27. The summary records show that the Human Rights Committee favours a positive interpretation of Article 27. The explicit support which Mrs Higgins and Mr Ndiaye give to a positive interpretation is highly persuasive. Furthermore, the general pattern of the Committee's practice is consistent with that interpretation. This is confirmed by the views adopted by the Committee in response to individual communications under the Optional Protocol.

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124 *Summary Record of the Human Rights Committee*, 41st Session, UN Doc CCPR/C/SR 1041, para 57, p 13 (1991).

125 *Summary Record of the Human Rights Committee*, 32nd Session, UN Doc CCPR/C/SR 803, para 35, p 8 (1988) (emphasis added).

126 Above n 125, para 36, p 8. However, Mr Vienot did refer - curiously, given his assertion that the French Government did not intervene in cultural matters - to "regional cultural associations and activity centres, which receive subsidies from the State and regional councils": *id*.

3 *Views adopted under the Optional Protocol*

To date, the Human Rights Committee has received five communications alleging breaches of Article 27.[127] The Committee has not been required directly to consider whether Article 27 requires positive measures to help minorities enjoy their culture. But with respect to two of these communications the Committee has adopted final views which give implicit support to a positive interpretation of Article 27. In *Kitok* v *Sweden*,[128] Kitok was of Sami ethnic origin but was prevented by the Reindeer Husbandry Act from breeding reindeer, a traditional Sami activity. The Act permitted only members of Sami villages to breed reindeer, and Kitok did not live in a village. One of the objectives of the Act was "to secure the preservation and well-being of the Sami minority".[129] The Committee was satisfied that there was no breach of Article 27 because the objective of the Act and the régime it introduced were reasonable and consistent with Article 27.[130] Implicit in the Committee's view is that Article 27 does require positive measures - such as legislation to control reindeer breeding - in order to help minorities enjoy their culture.

The communication of *Ominayak and The Lubicon Lake Band* v *Canada*[131] gives a strong indication that Article 27 requires positive measures. In *Ominayak*, the Canadian Government had allowed the provincial government of Alberta to expropriate territory of the Lubicon Lake Band for the benefit

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127 *Lovelace* v *Canada* Comm No 24/1977, UN Doc A/36/40 (1981); *Ominayak and The Lubicon Lake Band* v *Canada* Comm No 167/1984, UN Doc A/45/40 (1990); *Kitok* v *Sweden* Comm No 197/1985, UN Doc A/43/40 (1988); *S R v France* Comm No 243/1987, UN Doc A/43/40 (1988) (inadmissible); *E P* v *Colombia* Comm No 318/1988, UN Doc A/45/40 (1990) (inadmissible).

128 Above n 127, *Kitok*.

129 Above n 127, *Kitok*, para 9.5, p 229.

130 Above n 127, *Kitok*, para 9.5, p 229. The Committee "none the less had grave doubts as to whether certain provision of the Reindeer Husbandry Act, and their application to the author, are compatible with article 27 of the Covenant": above n 127, *Kitok*, para 9.6, p 229.

131 Above n 127, *Ominayak*.

of private corporate interests. The expropriation involved leases for oil and gas exploration. Ominayak, the Band's chieftain, claimed that the Band had undergone a transition from a way of life marked by trapping and hunting to a sedentary existence, leading to a marked deterioration in the health of Band members. The Human Rights Committee considered that:[132]

> Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.

The remedy proposed by Canada was an offer to the Band of a package worth approximately C$45 million in benefits and programmes, and a 95-square-mile reserve in which the Band would have mineral rights over 79 miles.[133] The implication is that Article 27 requires positive measures. Due to difficulties experienced over several decades, the Band had reached the point where its survival as a minority group was under threat. The Canadian Government was accordingly obliged, not merely to adopt a hands-off approach, but actively to promote the Band's development with financial and other assistance.[134]

The Committee's final views on the *Kitok* and *Ominayak* communications confirm that Article 27 imposes positive obligations upon States Parties to help minorities enjoy their culture. It remains now to determine whether the implementation of the Treaty of Waitangi is an integral aspect of New Zealand's obligations under Article 27.

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132 Above n 127, *Ominayak*, para 33, p 27.

133 See D McGoldrick "Canadian Indians, Cultural Rights and the Human Rights Committee" [1991] 40 ICLQ 658, 667.

134 Mr Ando submitted an individual opinion, expressing his "reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27" because "outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole": above n 127, *Ominayak*, App I, p 28.

IV THE IMPLEMENTATION OF THE TREATY OF WAITANGI AS AN ASPECT OF NEW ZEALAND'S OBLIGATIONS UNDER ARTICLE 27

The practice of the Human Rights Committee shows that treaties between States and indigenous peoples will be a starting point for the implementation of Article 27 of the Covenant. In its final views on the *Ominayak* communication, for example, the Committee referred to "historical inequities" which constituted "a violation of Article 27 so long as they continue".[135] These "historical inequities" included the failure of the Canadian Government to grant the Lubicon Lake Band a reserve as required by a treaty signed in 1899.[136] The failure to implement that treaty constituted a continuing breach of Article 27 of the Covenant. The Committee clearly considered the implementation of that treaty to be one of Canada's obligations under Article 27. Furthermore, in its consideration of Canada's second and third periodic reports, the Committee confirmed the importance of treaties with indigenous peoples.[137]

The practice of New Zealand and the Human Rights Committee under the Covenant indicates that the implementation of the Treaty of Waitangi is an integral aspect of New Zealand's obligations under Article 27.

New Zealand's first report to the Committee in 1982 made several references to Maori under Article 27 but none to the Treaty except a brief mention of the Treaty of Waitangi Act 1975.[138] However, during the discussion of the

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135 See above n 132 and accompanying text.

136 See above n 133, 666.

137 See Mr Wako's question, *Summary Record of the Human Rights Committee*, 40th Session, UN Doc CCPR/C/SR 1012, para 39, p 9 (1990):

> [he] asked whether there was any relationship between indigenous treaty rights and the self-government proposals and settlement of land claims. Would the self-government proposals or settlement of land claims abolish certain rights belonging to indigenous peoples under the treaty? And if so, was there any guarantee that the indigenous communities would have the same bargaining power as the Federal Government in negotiating a new arrangement? Would a new arrangement affect indigenous treaty rights?

138 UN Doc CCPR/C/10/Add 6 (1982) (New Zealand), para 338, p 100.

report in the Twentieth Session, Sir Vincent Evans mentioned the Treaty in a question to the New Zealand Representatives. Referring to problems arising in other countries where indigenous peoples had been deprived of their lands, "he asked whether there had been any such problems in New Zealand and, if so, how they were being settled, *having regard, in particular, to the Treaty of Waitangi of 1840*".[139] The implication is that the Treaty's implementation is relevant to New Zealand's obligations under Article 27. Mr Beeby, the New Zealand Representative, simply replied that "the Treaty of Waitangi of 1840 had confirmed and guaranteed to the Maori people the possession of their lands, estates, forests and fisheries" and that the Treaty of Waitangi Act had established a mechanism to ensure compliance with the Treaty.[140]

New Zealand's second report to the Committee in 1988 gave far more emphasis to the Treaty. Indeed, the section of the report dealing with Article 27 focused almost exclusively on the Treaty. It began:[141]

> The Treaty of Waitangi was signed in 1840 between representative Maori chiefs of different tribes and the British Crown. In recent years, a positive and dynamic view of the Treaty has emerged whereby it is seen as a living social contract and the corner-stone of a positive bicultural relationship between the Maori people and other New Zealanders. Accordingly, the Treaty has been given an enhanced status which has in turn led, amongst other things, to a greater awareness of Maori cultural values.

This represents a remarkable change in approach. Whereas in the first report the Treaty was barely mentioned, in the second it was designated a "corner-stone" of race relations and a basis for the recognition of "Maori cultural values". The Treaty's "enhanced status" derived from a policy that all proposed legislation should be scrutinized for inconsistency with the Treaty,[142]

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139 *Summary Record of the Human Rights Committee*, 20th Session, UN Doc CCPR/C/SR 481, para 18, p 5 (1983) (emphasis added).

140 *Summary Record of the Human Rights Committee*, 20th Session, UN Doc CCPR/C/SR 487, para 64, p 16 (1983).

141 Above n 69, para 143, p 28.

142 Above n 69, para 144, p 28.

the Waitangi Tribunal's extended jurisdiction,[143] and the landmark *New Zealand Maori Council*[144] case.[145] The report asserted: "These developments all reflect a new awareness of the importance of the Treaty. At the heart of these changes lies a cultural and political resurgence in the Maori community".[146] The report then specified changes in government machinery catering for Maori needs[147] and measures to preserve and develop the Maori language.[148] The report established a strong connection between the implementation of the Treaty, the enjoyment of Maori culture and Article 27 of the Covenant.

During the discussion of New Zealand's second report in the Thirty-fifth Session that connection was made even more explicit. In introducing the report, the New Zealand Representative Mr Beeby "outlined a number of important developments . . . in the field of human rights" which included the extension of the Waitangi Tribunal's jurisdiction and the passage of the Maori Language Act 1987.[149] Mr Beeby's introductory remarks clearly linked the implementation of the Treaty with New Zealand's implementation of the Covenant.

In response, Mr Ando stressed "the importance" of the extension of the Waitangi Tribunal's jurisdiction.[150] He thought "it would be useful to know the status of the Treaty within the legal structure of New Zealand" and commented that "[t]he adoption of a provision[151] stipulating that the Crown

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143 Above n 69, para 145, p 28.

144 *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641.

145 Above n 69, para 146, p 28.

146 Above n 69, para 147, p 28.

147 Above n 69, paras 147-148, pp 28-29.

148 Above nn 69-71 and accompanying text.

149 *Summary Record of the Human Rights Committee*, 35th Session, UN Doc CCPR/C/SR 888, para 2, p 2 (1989). Mr Beeby also asserted that "[t]he Government was devoting more attention to the needs and aspirations of the Maori people": *id*, para 9, p 4.

150 Above n 149, para 41, p 9.

151 Mr Ando was apparently referring to s 9 of the State Owned Enterprises Act 1986, which provides:

was not authorized to act in violation of the principles of the Treaty constituted a very positive step".[152] He further suggested:[153]

> It would be interesting to know also what means were available to the Maori for ensuring full compliance with the provisions of the Treaty and exercising their rights with regard to the Crown, represented by the Parliament.

Mr Ando encouraged New Zealand to give the Treaty the status of supreme law:[154]

> He felt that the bill of rights should take precedence within the legal structure of New Zealand and suggested that incorporating the provisions of the Treaty of Waitangi could serve as an example in that regard.

These comments are of great significance. It is clear that Mr Ando strongly approved of any measures which helped to ensure "full compliance" with the Treaty. In particular, he was concerned to see that the Treaty was given legal status. Implicit in his comments is the view that the implementation of the Treaty is an integral aspect of New Zealand's obligations under the Covenant.

The other New Zealand Representative Ms Higgie informed the Committee that "some of the most radical [Maori] claims had not been included in the comments on article 27 . . . because most of the claims had no bearing on matters covered by article 27, namely, language, culture and religion".[155] It is unclear what Ms Higgie meant by this. If she was dismissing the relevance to Article 27 of large land claims under the Treaty, Mrs Higgins clearly did not agree with her. Mrs Higgins asked for "opinions on the return of sizeable pieces of land in the context of the enjoyment of Maori culture and *whether*

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

See above n 144; *New Zealand Maori Council* v *Attorney-General* Unreported, 30 April 1992, Court of Appeal, CA 206/91.

152 Above n 149, para 41, p 9.

153 Above n 149, para 41, p 9.

154 Above n 149, para 41, p 9.

155 Above n 149, para 61, p 11.

that was an indispensable requirement of the Treaty of Waitangi".[156] Mr Beeby replied that "land was indeed a very important aspect of Maori tradition and culture" and that "[t]he resolution of Maori land grievances would have a significant bearing on the successful implementation of the concept of partnership under the Treaty of Waitangi".[157] This exchange confirmed the link between the Treaty and Article 27. Mrs Higgins and Mr Beeby agreed that access to land was important for the enjoyment of Maori culture.[158] The implementation of the Treaty was accordingly relevant because it constituted a régime under which confiscated land could be returned to Maori.

It emerges that the implementation of the Treaty of Waitangi is an integral aspect of New Zealand's obligations under Article 27 of the Covenant. That the New Zealand Government considers the Treaty to be relevant is implicit in its reports to the Human Rights Committee. In reporting to the Committee on the measures taken to "give effect"[159] to Article 27, New Zealand focuses almost exclusively on the measures it has taken to give effect to the Treaty of Waitangi. The Committee itself has indicated that treaties with indigenous peoples are relevant under Article 27. In considering New Zealand's reports, the Committee has approved strongly of any measures taken to implement the Treaty of Waitangi; and has clearly linked those measures with New Zealand's obligations under Article 27. This interpretation of Article 27 has implications for the meaning of s 20 of the Bill of Rights.

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156 *Summary Record of the Human Rights Committee*, 35th Session, UN Doc CCPR/C/SR 890, para 81, p 14 (1989) (emphasis added).

157 *Summary Record of the Human Rights Committee*, 35th Session, UN Doc CCPR/C/SR 891, para 3, p 2 (1989).

158 See also Mr Wennergren's comment during the discussion of Canada's third report, above n 137, para 42, p 10: ". . . quite clearly, access to land lay at the core of aboriginal rights, since without land the aboriginals could not enjoy their own culture."

159 Above n 39.

V CONCLUSION

Article 27 of the International Covenant on Civil and Political Rights requires New Zealand to take positive measures to help minorities enjoy their culture. With respect to Maori, one of those measures must be to implement the Treaty of Waitangi.

This has direct consequences for the interpretation of s 20 of the Bill of Rights. Section 20 requires positive measures to help minorities enjoy their culture; and, with respect to Maori, one of the measures required is the implementation of the Treaty of Waitangi.

Viewed in this light, s 20 has far-reaching implications. One implication is that every statute will need to be interpreted consistently with the Treaty of Waitangi.[160] Section 20 is likely to have its greatest impact in the area of decision-making. It creates a presumption, rebuttable only by a clear indication to the contrary, that the Treaty of Waitangi is applicable.[161]

A second implication is that the Attorney-General has a statutory duty under s 7 of the Bill of Rights to report to the House of Representatives where a Bill introduced appears to be inconsistent with the Treaty of Waitangi.[162]

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160 Section 6 of the Bill of Rights provides:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

161 In *Attorney-General* v *New Zealand Maori Council (No 2)* [1991] 2 NZLR 147, 149, Casey and Hardie Boys JJ expressed a reservation as to the Treaty's application:

> Without accepting that the principles of the Treaty necessarily apply in the areas of decision making where there is no statutory provision requiring them to be taken into account . . . .

In view of s 20 of the Bill of Rights, this reservation will need to be abandoned.

162 Section 7 of the Bill of Rights provides:

> Where any Bill is introduced into the House of Representatives, the Attorney-General shall,-
>
> (a) In the case of a Government Bill, on the introduction of that Bill; or
>
> (b) In any other case, as soon as practicable after the introduction of the Bill,-
>
> bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

Inconsistency arises not only where a Bill contains measures which abridge rights under the Treaty of Waitangi. It may arise where a Bill contains no measures at all. If the Bill affects Maori interests, s 20 requires that it contain measures aimed at implementing the Treaty of Waitangi. Silence as to the Treaty of Waitangi - a passive approach - is inconsistent with s 20. The formal reporting mechanism under s 7 of the Bill of Rights must have the potential to encourage fuller and more systematic debate in the House on Treaty issues.[163]

Section 20 does not give the Treaty of Waitangi the status of supreme law. Parliament retains the power to legislate in breach of s 20,[164] but that would be a clear breach of New Zealand's obligations under Article 27 of the Covenant.[165]

There is great significance in the Treaty of Waitangi's implicit inclusion in the Bill of Rights. Section 20 provides Maori with a new and more effective means of enforcing their rights under the Treaty of Waitangi. Far from failing "to bring the Treaty more fully into New Zealand's constitutional life",[166] the Bill of Rights gives fresh impetus to the Treaty of Waitangi's resurgence.

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163 See generally P Fitzgerald "Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well-intentioned nonsense" (1992) 22 VUWLR 135.

164 Section 4 of the Bill of Rights provides:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),-
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment-
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

165 When New Zealand's ratification of the Covenant was before Cabinet for final decision in 1978, Foreign Affairs briefing papers advised the Cabinet of the consequences of ratification. One consequence was the obligation to legislate consistently with the Covenant:

> . . . future legislation . . . will need to be vetted for consistency with the Covenants. Any legislation enacted which may be shown subsequently to be in breach will need to be amended or repealed.

Memorandum for Cabinet from Minister of Foreign Affairs, "Ratification of the International Covenants on Human Rights", 29 November 1978, para 11, p 3.

166 Above n 5.

Blades, Alexander
The Treaty of Waitangi and the New Zealand Bill of Rights Act 1990