United Nations CCPR/C/99/D/1868/2009

International Covenant on Civil and Political Rights

Distr.: Restricted*
14 September 2010

Original: English

Human Rights Committee
Ninety-ninth session
12 – 30 July 2010

Decision

Communication No. 1868/2009

Submitted by:	Fatima Andersen (represented by Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD))
Alleged victim:	The author
State party:	Denmark
Date of communication:	13 January 2009 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 23 February 2009 (not issued in document form)
Date of adoption of decision:	26 July 2010

* Made public by decision of the Human Rights Committee.

Subject matter:	Hate speech against the Muslim community in Denmark
Substantive issues:	Hate speech, discrimination based on religious belief and minority rights
Procedural issues:	Non-substantiation, non-exhaustion of domestic remedies, victim status.
Articles of the Covenant:	2, paragraph 3; 20, paragraph 2; and 27
Articles of the Optional Protocol:	1, 2 and 5, paragraph 2 (b)

[ANNEX]

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political rights (ninety-ninth session)

concerning

Communication No. 1868/2009**

Submitted by:	Fatima Andersen (represented by Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD))
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Date of communication:	13 January 2009 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2010,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ms. Fatima Andersen, a Danish citizen, born in Denmark on 2 September 1960. She claims to be a victim by Denmark of her rights under articles 2; 20, paragraph 2; and 27 of the Covenant. She is represented by Mr. Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD). The Optional Protocol entered into force for the State Party on 6 April 1972.

The facts as presented by the author

2.1 On 29 April 2007, the leader of the Danish People's Party (DPP), Member of Parliament Ms. Pia Kjærsgaard, made a statement on the National Danish Television comparing the Muslim headscarves with the Nazi symbol of the swastika. Another member of the Danish People's Party, Member of Parliament Mr. Søren Krarup, had recently made a similar comparison. The author adheres to the Muslim faith and wears a headscarf for religious reasons. She considers that this statement comparing the use of headscarf with the Nazi swastika is a personal insult to her. Moreover, it creates a hostile environment and

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

concrete discrimination against her. For example, it is difficult for her to find a job because of a double discrimination based on her gender and the fact that she wears a headscarf.

2.2 On 30 April 2007, the author's counsel reported the statement to the Copenhagen Metropolitan police, alleging a violation of section 266 (b) of the Danish Criminal Code. On 20 September 2007, the Copenhagen Metropolitan police notified the counsel that on 7 September 2007 the Public Prosecutor for Copenhagen and Bornholm decided, under section 749, paragraph 2, of the Administration of Justice Act, not to prosecute Ms. Kjærsgaard. The letter also advised about the possibility to appeal this decision to the Public Prosecutor General. On 16 October 2007, the author's counsel appealed the decision to the Public Prosecutor General who, on 28 August 2008, upheld the decision of the Public Prosecutor for Copenhagen and Bornholm, stating that neither the author nor her counsel could be considered legitimate complainants in the case. He added that statements covered by 266 (b) of the Criminal Code are usually of such a general nature that there would be no individuals who are legitimate complainants. There did not seem to be any information that would prove that Fatima Andersen, the author, could be regarded as an injured person under section 749, paragraph 3, of the Administration of Justice Act, because she could not be said to have such a substantial, direct, personal and legal interest in the outcome of the case. As a result, the counsel, as the author's representative, could not be considered as a legitimate complainant either.

2.3 Under section 99, paragraph 3, subsection 2, of the Administration of Justice Act, this decision is final and can not be appealed. According to the author, there are no other administrative remedies available as the public prosecuting authority has a monopoly to bring cases to the courts in relation to section 266 (b) of the Criminal Code.

The complaint

3.1 The author claims that the State party violated articles 2; 20, paragraph 2; and 27 of the Covenant. The author contends that her case is based on a clear pattern of Islamophobic statements amounting to hate propaganda against Muslims in Denmark carried out by a number of leading members of the DPP. The statements made by Kjærsgaard are only an illustration of a long lasting pattern of crimes committed against Muslims in Denmark. As violations of section 266 (b) of the Criminal Code can be raised only by public prosecutors and because freedom of speech is always favoured over the right not to be subject to hate speech, none of the accusations based on article 20, paragraph 2 of the Covenant make it to court.

3.2 The types of statements such as those of some members of the DPP form part of the overall ongoing campaign stirring up hatred against Danish Muslims. In the author's opinion, those politicians influence the public opinion, and some of them then take action in the form of hate crimes against innocent Muslims living in Denmark. According to section 266 (b) (2) of the Criminal Code, hate speech, which is part of a systematic propaganda by political parties against racial, ethnic or religious groups, is an aggravated factor. The author compares such campaigns to the ones which led to the Holocaust or the genocide in Rwanda. By authorizing such speeches, the Danish authorities allegedly failed to acknowledge the need to protect Muslims against hate speech and thus prevent future hate crimes against members of this religious group. The State party has therefore allegedly violated both articles 20, paragraph 2; and 27 of the Covenant.

3.3 With regard to the exhaustion of domestic remedies, the author refers to the Opinion of the Committee on the Elimination Racial Discrimination in its communication No. 34/2004, Gelle v. Denmark, stressing that in matters related to violations of section 266 (b) of the Criminal Code, the prosecution in Denmark has the final word and can obstruct any attempt of exhaustion of domestic remedies against racist propaganda. By denying the author the right to appeal the case, the State party has further denied her the possibility to

exhaust domestic remedies. The author claims, therefore, that all available domestic remedies have been exhausted.

3.4 With regard to her status as a victim, the author quotes the Committee on the Elimination of Racial Discrimination's communication No. 30/2003, The Jewish community of Oslo et al. v. Norway, whereby the State party argued that the authors (including the Jewish community) did not have a victim status. The Committee on the Elimination of Racial Discrimination adopted an approach to the concept of "victim" status similar to the one taken by the Human Rights Committee in the case of Toonen v. Australia and by the European Court of Human Rights in Open Door and Dublin Well Women v. Ireland. In the latter, the Court found certain authors to be "victims" because they belonged to a class/group of persons which might in the future be adversely affected by the acts complained of. The author argues, therefore, that as a member of such a group, she is also a victim. As a Muslim, the ongoing statements against her community directly affect her daily life in Denmark. These statements not only hurt her but put her at risk of attacks by some Danes who believe that Muslims are responsible for crimes they have in fact not committed. Finally, those statements directly reduce her chances to find employment because of the stereotypes related to Muslims.

3.5 Contrary to the prosecutor general's opinion, DACoRD has a right, as the author's legal representative, to file a petition against hate speech on her behalf. By trying to undermine the protection guaranteed by the Covenant, leaving victims of Islamophobic hate speech without effective remedy, the State party has also allegedly violated article 2 of the Covenant.

The State party's observations on the admissibility and merits of the communication

4.1 On 23 April 2009, the State party submitted its observations on the admissibility and merits of the communication.

4.2 The State party contests the admissibility of the communication on the ground that article 2 can be invoked only by individuals in conjunction with other articles of the Covenant as confirmed by the Human Rights Committee.[1] Furthermore, article 2, paragraph 3 (b), obliges States parties to ensure determination of the right to such remedy "by a competent judicial, administrative or legislative authority", but a State Party cannot reasonably be required, on the basis of that article, to make such procedures available no matter how unmeritorious the claims may be. Article 2, paragraph 3, only provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant.[2]

4.3 The State party further submits that the incriminated statement cannot be considered as falling within the scope of application of article 20, paragraph 2, of the Covenant. For statements to be comprised by article 20, paragraph 2, the wording of the provision requires them to imply advocacy of national, racial or religious hatred. In addition, such advocacy must constitute incitement to discrimination, hostility or violence. Advocacy of national, racial or religious hatred is not sufficient. The advocacy must be particularly qualified as it must have the intention of inciting to discrimination, hostility or violence. The State party rejects that the relevant statement by some members of the DPP in any way advocated religious hatred. The statement in which they compared the scarf with the swastika had its

[1] The State party cites communications No. 268/1987, *H.G.B. and S.P. v. Trinidad and Tobago*, decision on inadmissibility adopted on 3 November 1989, para. 6.2; and No. 275/1988 *S.E. v. Argentina*, decision on inadmissibility adopted on 26 March 1990, para. 5.3.

[2] The State party cites communication No. 972/2001, *Kazantzis v. Cyprus*, decision on inadmissibility adopted on 7 August 2003, para. 6.6.

background in a public debate on how Members of Parliament should appear when speaking from the rostrum of Parliament. In that connection, one of the members of the DPP stated that in his view it would be comparable to allowing obvious Nazi symbols in the Chamber of Parliament to allow a member of Parliament to wear a Muslim scarf on the rostrum of Parliament. According to the travaux préparatoires of section 266 (b) of the Criminal Code, it was never intended to lay down narrow limits on the topics that can become the subject of political debate, nor details on the way in which the topics are discussed. It is particularly during a political debate that statements that may appear offending to some occur, but in such situations importance should be attached to the fact that they occur during a debate in which, by tradition, there are quite wide limits to the use of simplified allegations. The State party therefore contends that it must be considered incompatible with the founding principles of the Covenant if the Covenant were to be interpreted as imposing a positive duty of action on the State to intervene in a debate on a current topic which has been raised by Parliament and the press unless it advocates national, racial or religious hatred or constitutes an incitement to discrimination, hostility or violence.

4.4 The State party further claims that the author has not exhausted all domestic remedies. The State party opposes section 266 (b) of the Criminal Code on racially discriminating statements,[3] which is subject to public prosecution and for which only persons with a personal interest can appeal the Prosecutor's decision to discontinue the investigation, to sections 267 and 268[4] on defamatory statements which are applicable to racist statements. Contrary to the former provision, section 267 allows for private prosecution. This implies that the victim or offended party has to institute proceedings. Under sections 267 and 275(1) of the Criminal Code, the author could have instituted criminal proceedings against Ms. Kjærsgaard. By choosing not to do so, she has failed to exhaust all available domestic remedies. The State party refers to the Human Rights Committee's jurisprudence, where it declared a communication inadmissible as the authors who had filed a criminal complaint for defamation under section 267 had submitted the communication to the Committee before the High Court had issued its final decision on the matter,[5] In the State party's opinion, such jurisprudence implies that criminal proceedings under section 267 are required to exhaust domestic remedies in issues related to allegations of incitement to religious hatred. It cannot be considered to be contrary to the Covenant to

[3] The provision of the Criminal Code on racially discriminating statements is worded as follows:
"Section 266b.
(1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.
(2) When the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance."

[4] The provision of the Criminal Code on defamatory statement is worded as follows:
"Section 267.
Any person who violates the personal honour of another by offensive words or conduct, or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, shall be liable to a fine or to imprisonment for any term not exceeding four months." This provision is furthermore supplemented by section 268, which provides:
"Section 268.
If an allegation has been made or disseminated in bad faith, or if the author has had no reasonable ground to regard it as true, he shall be guilty of defamation, and the punishment mentioned in section 267 may then be increased to imprisonment for two years."

[5] Communication No. 1487/2006, *Ahmad and Abdol-Hamid v. Denmark*, decision on inadmissibility adopted on 18 April 2009.

require the author to exhaust the remedy according to section 267, even after the public prosecutors have refused to institute proceedings under section 266 (b), as the requirements for prosecution under the former provision are not identical to those for prosecution under the latter one.

4.5 On the merits, the State party contends that the requirement of access to an effective remedy has been fully complied with in the present case, as the Danish authorities, i.e. the Prosecution Service, handled the author's complaint of alleged racial discrimination in a prompt, thorough and effective manner, fully consistent with the requirements of the Covenant. According to article 2, paragraph 3 (a) and (b), of the Covenant, access to an effective remedy implies that any victim of a violation of the Covenant must have the possibility of having a claim determined by, inter alia, a competent "administrative authority" provided for by the legal system of the State. This provision of the Covenant does not require access to the courts if a victim has had access to a competent administrative authority. Otherwise, the courts would be overburdened with cases where persons allege that something is a violation of the Covenant and must be determined by the courts regardless of how thoroughly the competent administrative authority provided for by the legal system of the State Party has investigated their allegations. Under such circumstances there would be no point in having an administrative authority assessing allegations at all. The fact that the author's criminal complaint did not lead to the result desired by the author, namely prosecution of Ms. Kjærsgaard, is irrelevant as the Covenant does not guarantee a specific outcome of cases on allegedly racially insulting statements. Hence, State parties are under no obligation to bring charges against a person when no violations of Covenant rights have been revealed. In this connection, it should be emphasized that the issue in the present case was solely whether there was a basis for presuming that the statement of Ms. Kjærsgaard would fall within the scope of application of section 266 (b) of the Criminal Code. The assessment to be made by the Prosecution Service was therefore a strictly legal test, which did not require the assessment of evidence (the statement in question was made on national television).

4.6 The State party refers to the jurisprudence of the European Court of Human Rights, which clearly confirms that the right to freedom of expression is especially important for an elected representative of the people.[6] The Court has considered that interferences with the freedom of expression of an opposition member of Parliament call for the closest scrutiny. In the present case, the State party considers that the national authorities' handling of the author's complaint fully satisfied the requirements that can be inferred from article 2, paragraph 3 (a) and (b), of the Covenant.

4.7 Concerning the possibility of appealing the decision, the Commissioner of the Copenhagen Police referred to an enclosed copy of the Danish Prosecution Service's guidelines on appeal, which state, inter alia, that any person who considers himself the victim of a criminal offence can appeal. Others can appeal only if they have a special interest in the outcome of the case other than having a sentence imposed on the offender. In determining whether a person is a party to a case and thereby entitled to appeal, the questions of particular relevance are how essential the person's interest in the case is, and how closely such interest is related to the outcome of the case. Hence, persons reporting a violation, witnesses and similar persons only have a position as parties to a criminal case if they have locus standi, i.e. an essential, direct, individual and legal interest in the outcome of the case. The statements comprised by section 266 (b) are usually of such general nature that no individuals will ordinarily be entitled to appeal. The Commissioner therefore noted

[6] The State party refers to the cases submitted to the European Court of Human Rights: *Roseiro Bento v. Portugal*, judgment of 18 April 2006, *Mamere v. France*, judgment of 7 November 2006, and *Jerusalem v. Austria*, judgment of 27 February 2001.

that there was no indication of circumstances showing that the author or her legal representative, DACoRD, was entitled to appeal. The State party finds that the decision of the Director of Public Prosecutions, which was well reasoned and in accordance with the Danish rules, cannot be considered contrary to the Covenant.

4.8 The State party adds that the Commissioners of Police must notify the Director of Public Prosecutions of all cases in which a report concerning violation of section 266 (b) is dismissed. This reporting scheme builds on the ability of the Director of Public Prosecutions, as part of his general power of supervision, to take a matter up for re-consideration to ensure proper and uniform enforcement of section 266 (b). In that connection, reference is also made to the case mentioned above concerning publication of the article "The Face of Muhammad" and the accompanying 12 drawings of Muhammad,[7] in which the Director of Public Prosecutions decided, due to the public interest about the matter, to consider the appeal without determining whether the organizations and persons who had appealed the decision of the Regional Public Prosecutor could be considered entitled to appeal. In the present case, however, the Director of Public Prosecutions found no basis for exceptionally disregarding the fact that neither the DACoRD nor the author was entitled to appeal the decision.

4.9 The State party strongly rejects the author's claim that, by not prosecuting Ms. Kjærsgaard for her statement, the Danish authorities have given the Danish People's Party a carte blanche to conduct a "systematic Islamophobic and racist campaign against Muslims and other minority groups living in Denmark" and thereby failed its positive obligations under the Covenant. There have been several prosecutions for violation of section 266 (b) of the Criminal Code in connection with politicians' statements relating to Muslims and/or Islam, including for propaganda activities under section 266 (b) (2) of the Criminal Code. The author's evidence proving the risk of attacks consists solely in a reference to a study from 1999 from which it appears that people from Turkey, Lebanon and Somalia living in Denmark suffer from racist attacks in the streets. In the State party's view, such study cannot be considered sufficient evidence to prove that the author has a real reason to fear attacks or assaults, and in fact she has not stated anything about any actual attacks – whether verbal or physical – to which she has been subjected due to Ms. Kjærsgaard's statement even though almost two years had passed after the television broadcast containing the statement when the communication was filed with the Committee.

4.10 The State party therefore requests the Committee to declare the communication inadmissible for failing to establish a prima facie case under article 20, paragraph 2, of the Covenant and for failing to exhaust domestic remedies. Should the Committee declare the communication admissible, it is requested to conclude that no violation of the Covenant has occurred.

Author's comments

5.1 On 29 June 2009, the author noted that in the response of the State party, no reference had been made to article 27 of the Covenant. She therefore presumed that it must be taken for granted that the author had not been protected in her right to the peaceful enjoyment of her culture and religion and its symbols. According to article 27, members of minority groups have a right to their identity, and should not be forced to "disappear" or to submit to forced assimilation. This right should be absolute. As to the State party's observations that the incriminated statements fall outside article 20, paragraph 2, of the Covenant, the State party has not addressed the question whether limits on statements fall within the positive duty of State parties under article 27 of the Covenant to protect the right

[7] *Ahmad and Abdol-Hamid v. Denmark* (see note 5 above).

of minorities in their enjoyment of their culture and its symbols and the right to profess and practice their religion.

5.2 With regard to accessible and effective remedies, the author pointed out that it took the authorities more than 16 months not to conduct the investigation thoroughly. The principle of objectiveness seems here to have been violated as well. Given the repeated pattern of degrading and offensive statements from the political grouping of Ms. Kjærsgaard, it would have been appropriate to examine the question whether her statements did fit into a propaganda type activity, which has been deemed an aggravating circumstance in section 266 (b) (2) of the Criminal Code. In the Glistrup case,[8] the Prosecution did document and argue that the statements in that case were put forward as a part of a systematic and continuing activity, and that the conditions for the use of section 266 (b) (2) on propaganda were met. However, in the present case, the Prosecution did not deem it necessary to make an investigation and interview the concerned politician. Accordingly, the requirements of a prompt, thorough and effective investigation have not been met. This behaviour is particularly unjustified since the perpetrator was identified. The author recalls that statements fall outside the functional area of parliamentary immunity. By protecting those statements without conducting an investigation, the Prosecution failed to make an equal application of the ordinary "strictly legal test" mentioned by the State party. The author also recalls that according to the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, failure to bring perpetrators to justice could give rise to a separate breach of the Covenant.[9] Referring specifically to gross violations of human rights, the Committee has considered that impunity may be an important contributing element in the recurrence of the violations. No official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. The author further considers that for such violations, purely administrative remedies without the possibility to go to court are inadequate and do not satisfy the requirements of article 2 of the Covenant.

5.3 The author refers to the travaux préparatoires of section 266 (b) of the Criminal Code as well as to the Glistrup case to affirm that there has been an intention to include acts of politicians or political statements in the scope of section 266 (b) contrary to what the State party argued in its observations. A legislative amendment of 1996 inserted paragraph 2 of section 266 (b) to counteract propaganda activities. The background of the bill was to be seen in "the ever more prominent tendencies towards intolerance, xenophobia and racism both in Denmark and abroad".[10] Propaganda acts, understood as a systematic dissemination of discriminatory statements with a view to influencing public opinion, were seen as an aggravating circumstance, allowing only for a penalty of imprisonment and not a simple fine. The explanatory report further contained a directive for the prosecution authorities that it should not show the same restraints as in the past in bringing charges if the acts were in the nature of propaganda. In the Glistrup case, the Supreme Court found that section 266 (b) was applicable as the defendant, who was a politician, "had subjected a population group to hate on account of its creed or origin". The Court further noted that freedom of expression must be exercised "with necessary respect for other human rights, including the right to protection against insulting and degrading discrimination on the basis of religious belief".

[8] Judgement of the Danish Supreme Court on 23 August 2000 (Danish Weekly Law Reports, cited as UfR 2000. 2234), also known as the Glistrup case.

[9] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 18.

[10] The Glistrup case (note 8 above).

5.4 On the legal test the Prosecutor should have carried out, the author contends that the balance between all elements at stake was not performed. The incriminated statement did not take place during a debate involving an exchange between contending parties but emanated from a unilateral attack against a vulnerable group with no possibility to defend itself. By not carrying out an investigation, despite the existence of the Supreme Court's jurisprudence which has recognized limitations to the freedom of expression of politicians, the prosecuting authorities have given no opportunity for the author, and the minority group she belongs to, to have her case adjudicated by a court of law. The author recalls that the Danish Prosecution authorities made a series of similar decisions not to investigate and prosecute complaints regarding statements made by politicians using a similar approach of misrepresenting the Supreme Court judgement in the Glistrup case. Some of these have reached the international level, such as communication No. 34/2004, Gelle v. Denmark, where the Committee on the Elimination of Racial Discrimination found a violation of article 6 of the Convention on the Elimination of All Forms of Racial Discrimination.

5.5 The author maintains that she should be considered a victim of the incriminated statement since she has been directly affected by being singled out as a member of a minority group, distinguished by a cultural and religious symbol. She was exposed to the effects of the dissemination of ideas encouraging cultural and religious hatred, without being afforded adequate protection due to an unwarranted change in investigation and prosecution practice. To support her argumentation, the author quotes the jurisprudence of the Human Rights Committee, which recognized in a particular case that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of administrative practices and the public opinion had affected the author and continued to affect him personally.[11] The author also refers to the position of the Committee on the Elimination of Racial Discrimination that potential victims of a violation are to be considered victims.[12] The author further points out the incoherence of the argument of the State party, which denies her the right to appeal the prosecutor's decision to discontinue the investigation while at the same time it recognizes her right to file a complaint about a violation of human rights to the Danish Police (which she did), and to receive information about the outcome of the proceedings. The author wonders how, at one stage of the proceeding she can be considered a victim and at a later stage be barred from exercising her rights.

5.6 As for the exhaustion of domestic remedies, the author reiterates that in Denmark, the administrative decision of the Director of the Public Prosecution is final and cannot be challenged before the Court. The author strongly rejects the argument of the State party whereby she should have instituted proceedings under section 267 for defamation. Section 266 refers to a public or general societal interest and is protective of a group (collective aspect) whereas sections 267 and 268 derive from a traditional concept of injury to personal honour or reputation and refers to an individual person's moral act or qualities (individual aspect). Contrary to the requirement of section 267, an insulting or degrading statement under section 266 needs not be false to fall within the scope of that provision. According to the author, private litigation is therefore not by definition a remedy to secure the implementation by the State party of its international obligations. In the case Gelle v. Denmark, the Committee on the Elimination of Racial Discrimination considered it unreasonable to expect the petitioner to initiate separate proceedings under the general provisions of section 267, after having unsuccessfully invoked section 266 (b) of the Criminal Code in respect of circumstances directly implicating the language and object of

[11] Communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 5.1.

[12] Communication No. 30/2003, *The Jewish community of Oslo et al. v. Norway*, Views adopted on 15 August 2005, para. 7.3.

that provision.[13] As for the inadmissibility decision of the Human Rights Committee in Ahmad and Abdol-Hamid v. Denmark, the author notes that the facts in that case were different from the present one, since it involved two different sets of proceedings, one with the second applicant under section 266 (b) and the other with the first applicant under section 267. Since the communication was submitted jointly and one of the two procedures was still pending at the time of examination by the Committee, the Committee declared the whole communication inadmissible. The State party can therefore not use this example as a reason to reject the admissibility of the present communication on that ground.

5.7 Basing its argument mainly on the extensive jurisprudence of the European Court of Human Rights, the author relates to the balance between the freedom of expression that public persons, including politicians and civil servants, enjoy and the duty of the State to limit this freedom when it contravenes other fundamental rights.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee notes the State party's argument that the author did not exhaust domestic remedies, by failing to institute proceedings for defamatory statements, which are applicable to racist statements (sections 267 and 275(1) of the Criminal Code). The Committee also notes that according to the author, both provisions (section 266 (b) on the one hand and sections 267 and 268 on the other) do not protect the same interests (collective interest vs. private interest) and that contrary to the requirement of section 267, an insulting or degrading statement under section 266 needs not to be false to fall within the scope of that provision. It takes note of the author's argument that private litigation is not by definition a remedy to secure the implementation by the State party of its international obligations. The Committee considers that it would be unreasonable to expect the author to initiate separate proceedings under the general provisions of section 267, after having unsuccessfully invoked section 266 (b) of the Criminal Code in respect of circumstances directly implicating the language and object of that provision.[14] Accordingly, the Committee concludes that domestic remedies have been exhausted.

6.4 With regard to the author's allegations under articles 20, paragraph 2, and 27 of the Covenant, the Committee observes that no person may, in theoretical terms and by actio popularis, object to a law or practice which he holds to be at variance with the Covenant.[15] Any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his argument for example on

[13] Communication No. 34/2004, *Gelle v. Denmark*, Opinion adopted on 6 March 2006, para. 6.5.

[14] Ibid.; Committee on the Elimination of Racial Discrimination, communication No. 41/2008, *Jama v. Denmark*, Opinion adopted on 21 August 2009, para. 6.5.

[15] Communications No. 318/1988, *E.P. et al. v. Colombia*, decision on inadmissibility adopted on 25 July 1990, para. 8.2; and No. 1453/2006, *Brun v. France*, decision on inadmissibility adopted on 18 October 2006, para. 6.3.

legislation in force or on a judicial or administrative decision or practice.[16] In the Committee's decision regarding Toonen v. Australia, the Committee had considered that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of the incriminated facts on administrative practices and public opinion had affected him and continued to affect him personally.[17] In the present case, the Committee considers that the author has failed to establish that the statement made by Ms. Kjærsgaard had specific consequence for her or that the specific consequences of the statements were imminent and would personally affect the author. The Committee therefore considers that the author has failed to demonstrate that she was a victim for purposes of the Covenant. This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

6.5 The Committee points out that article 2 may be invoked by individuals only in relation to other provisions of the Covenant.[18] A State party cannot reasonably be required, on the basis of article 2, paragraph 3 (b), to make such procedures available in respect of complaints which are insufficiently founded and where the author has not been able to prove that she was a direct victim of such violations. Since the author has failed to demonstrate that she was a victim for purposes of admissibility in relation to articles 20, paragraph 2, and 27 of the Covenant, her allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides that:

(a) The communication is inadmissible pursuant to articles 1 and 2 of the Optional Protocol;

(b) This decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[16] Communications No. 1400/2005, *Beydon et al. v. France*, decision on inadmissibility adopted on 31 October 2005, para. 4.3; No. 1440/005, *Aalbersberg et al. v. The Netherlands*, decision on inadmissibility adopted on 12 July 2006, para. 6.3; and *Brun v. France* (note 15 above), para. 6.3.

[17] *Toonen v. Australia* (note 11 above), para. 5.1.

[18] Communications No. 972/2001, *Kazantzis v. Cyprus*, decision on inadmissibility adopted on 7 August 2003, para. 6.6; No. 1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, para. 7.2; and *S.E. v. Argentina* (note 1 above), para. 5.3.