JUDICIAL PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS:

CASES AND MATERIALS

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CASES AND MATERIALS

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CHAPTER I

INTRODUCTION

The implementation of economic, social and cultural rights is a most pressing item on the international human rights agenda. Millions of people go without food, health, shelter, education, work, social security not because the resources are unavailable to provide for these basic human rights but many times because societies are badly governed, or democracy is lacking, or the rule of law is absent, or simply because there is a failure of understanding about how one could go about the practical implementation of economic, social and cultural rights.

Human rights are indivisible, interdependent and interrelated. The implementation of economic and social rights requires democracy, good governance, the rule of law and respect for civil and political rights. The implementation of civil and political rights likewise requires democracy, good governance, the rule of law and respect for economic, social and cultural rights. For those dying of hunger or stultified because of lack of food, civil and political rights alone ring hollow.

Recognition of the centrality of economic, social and cultural rights has led to a quest for judicial protection of those rights. At the time of writing, the United Nations is engaged in exploration of the idea of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights which would allow for individual petitions in respect of alleged violations of economic, social and cultural rights.

In the discussion of this issue and about the implementation of economic, social and cultural rights generally, it is sometimes heard that economic, social and cultural rights are rights of progressive application not capable of judicial determination.

This work seeks to bring together, for the first time as far as we are aware, a collection of case-law from different parts of the world, which shows the Courts at work in providing judicial protection of economic, social and cultural rights. One conclusion stands out from these cases: the courts do have a role to play in providing judicial protection of economic, social and cultural rights.

In the *Irene Grootboom* case, infra, the South African Constitutional Court declared:

> "20. While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment. During the certification proceedings before this Court, it was contended that they were not justiciable and should therefore not have been included in the text of the new Constitution."

In response to this argument, this Court held:

> "These rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the (constitutional text before this Court for certification in that case) will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion."

In that very case, the South African Constitutional Court accepted the concept of the minimum core obligation enunciated by the Committee on Economic, Social and Cultural Rights and declared:

> "A state party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right." (In this instance, the Court was dealing with the right to housing.)

The South African Constitutional Court, in the *Soobramoney* case,[1] addresses the issue of progressive implementation and offers guidance as to what can realistically be expected from the courts. The Court recognizes that "[i]n all the open and democratic societies based upon dignity, freedom and equality...the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care". In short, there is only so much to go around.

"Courts", the judgment continues, "are not the proper place to resolve the agonizing personal and medical problems that underlie these choices. Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious. Our country's legal system simply 'cannot replace the more intimate struggle that must be borne by the patient, those caring for the patient, and those who care about the patient.' The provisions of the bill of rights should furthermore not be interpreted in a way which results in courts feeling themselves unduly pressurised by the fear of gambling with the lives of claimants into ordering hospitals to furnish the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of other."

The judge in that case concluded as follows:

> "If resources were co-extensive with compassion, I have no doubt as to what my decision would have been. Unfortunately, the resources are limited, and I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonizing choices that had to be made."

[1] *Infra.*

One thing is clear, however: the duty not to discriminate in respect of economic, social and cultural rights is an immediate and binding one. So held the Human Rights Committee in the *Zwaan-de Vries and Broeks* cases.[2]

Several cases in this volume provide guidance on the right to food.

The South African Constitutional Court helped shed guidance on right to health issues in the case of *the Minister of Health and others* v. *Treatment Action Campaign and others*.[3]

The right to work was ventilated in the Finnish case of *Mr. L.* v. *the Municipality of Hollola*.[4] The state's prerogative of dismissal is discussed in cases from the Republic of Guyana.

The South African Constitutional Court ventilated the right to housing in the case of *Irene Grootboom and others*.[5] The Court held that the measures required of the Government must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State's available means. The Court continued:

> "In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review."

The Court ordered the Government "to devise, fund, implement and supervise measures to provide relief to those in desperate need".

From these decisions there can be no doubt that the era of justiciability of economic, social and cultural rights has arrived as the cases reproduced in this volume will show.

[2] *Infra.*
[3] *Infra.*
[4] *Infra.*
[5] *Infra.*

CHAPTER II

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Contents:

International Covenant on Economic, Social and Cultural Rights*

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

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* Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976, in accordance with article 27.

Part I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Part II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Part III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would

prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating

knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and

accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Part IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the *Economic and Social Council* for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each

within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

Part V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 26;

(b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

CHAPTER III

THE CONTENT OF THE LEGAL OBLIGATION TO IMPLEMENT ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Contents:

The *Travaux Preparatoires*[*]

Introduction

The General Assembly of the United Nations has repeatedly emphasized the importance of the "strictest compliance" by States parties with their obligations under the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[1] Through its general comments and its views on cases brought under the Optional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee has helped to clarify the content of the legal obligation to implement civil and political rights. The legal obligation to implement economic social and cultural rights, by contrast, has received little clarification so far, notwithstanding repeated calls for equal attention to be given to the *implementation, promotion and protection* of economic, social and cultural rights and civil and political rights.[2] The establishment of the Committee on Economic, Social and Cultural Rights was intended to improve this situation.[3] The Committee has since issued a number of general comments that are of great value and will be helpful to the Courts in developing judicial protection of economic, social and cultural rights.

I. The premises of legal obligations in the Covenant

The drafting of the Covenant was based on certain premises clearly stated by its authors. The first of these was that the Covenant contains rights which differ in

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[*] Office of the High Commissioner for Human Rights.
[1] See, for example, General Assembly resolution 40/115 of 13 December 1985, para. 8.
[2] See, for example, General Assembly resolution 40/114 of 13 December 1985, para. 1.
[3] See Economic and Social Council resolution 1985/17 establishing the new Committee.

character. Certain rights can be guaranteed immediately while others could only be achieved progressively. Obligations under the different rights might, therefore, differ.[4] Notwithstanding this, however, it was considered that a general article could be placed at the beginning of the Covenant in which "all the rules common to economic, social and cultural rights could be consolidated in a single text".[5] The reasoning was that such a general article would contain what was considered to be "the firmest commitment which could reasonably be undertaken in relation to all the rights treated" in the Covenant, on the understanding, however, that this would not prevent the elaboration of more detailed obligations within particular articles of the Covenant.[6]

Another premise on which the Covenant was drafted was recognition of the difference between obligations of conduct and obligations of result. As the French delegate Mr. Cassin remarked at the 270th meeting of the Commission on Human Rights: "Civil law distinguished between obligations leading to final results and obligations to take action. In the present case civil and political rights and some economic rights, might connote obligations that would produce actual results; most economic and social rights, however, could only give rise to obligations to take action."[7]

A further premise was that a distinction was drawn between obligations undertaken by a State in the economic and social sphere and the enjoyment of inherent human rights by the individual.[8] It was emphatically asserted that the former could not prejudice the latter. As Mrs. Roosevelt, the United States delegate, told the Commission on Human Rights at its 269th meeting: "It would be better if the State undertook not to intervene in certain fields, particularly in cultural rights . . . Individuals must be allowed to enjoy human rights beyond those specifically conceded by the State. Freedom to enjoy such rights must be established, otherwise economic social and cultural rights would be illusory and devoid of real meaning."[9]

Guided by the general premises mentioned above, the drafters proceeded to include the following rights in the Covenant: peoples' right to self-determination and to protection of their means of subsistence;[10] the rights to work;[11] the enjoyment of just and favourable conditions of work;[12] to form and join trade unions of one's choice;[13] social security;[14] an adequate standard of living;[15] the *fundamental* right to

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[4] See E/CN.4/SR.271, p. 7, comments of the Yugoslav delegate.
[5] See comments by Mr. Cassin (France), E/CN.4/SR.270 and Mrs. Roosevelt (USA), E/CN.4/SR.269, p.12.
[6] See A/2929, p. 21, para. 22.
[7] See E/CN.4/SR.270, p. 11.
[8] See E/CN.4/SR.269, p. 8, comments of the delegate of Yugoslavia.
[9] See E/CN.4/SR.269, p. 6.
[10] Article 1.
[11] Article 6.
[12] Article 7.
[13] Article 8.

be free from hunger;[16] the right to enjoyment of the highest attainable standard of physical and mental health;[17] the right to education;[18] the liberty of parents and legal guardians to choose schools for their children;[19] the liberty of individuals and bodies to establish and direct educational institutions;[20] the right to take part in cultural life;[21] the right to enjoy the benefits of scientific progress and its application;[22] the right to benefit from the protection of moral and material interests resulting from one's creations;[23] and the according of protection and assistance to the family and to children.[24]

II. The specific legal obligations undertaken

The key words used in the definitions of obligation in the Covenant are: to "take steps"; to "guarantee"; to "ensure"; to "recognize"; to "respect" or "have respect for"; to "undertake"; and to "promote". It would be helpful to look at the literal meanings of each of these terms. To *undertake* is to bind oneself to perform, make oneself responsible for, engage in, enter upon, accept an obligation, promise to do.[25] To *recognize* is to acknowledge the validity or genuiness or character or claims or existence of; to accord notice or consideration to, discover or realize nature of, treat as, acknowledge for, realize or admit that. To *promote* is to advance, help forward, encourage, support actively. A *step* in this context is a measure taken especially as one of a series in some course of action. To *respect* or *have respect for* is to pay heed to something. To *guarantee* is to answer for the due fulfilment of something, to engage that something has happened or will happen. To *ensure* is to make certain that a thing shall happen, to secure something to or for persons.

The different articles of the Covenant distribute these legal obligations as follows:

1. To take steps (article 2 (1) – umbrella article). Article 15 (2) calls for necessary steps and adds that such steps shall include certain things.
2. To guarantee (article 2 (2) – non-discrimination).
3. To ensure (article 3 – equality between men and women). To take appropriate steps to ensure (article 11).

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[14] Article 9.
[15] Article 11.
[16] Article 11.
[17] Article 12.
[18] Article 13.
[19] Article 13 (3).
[20] Article 13 (3).
[21] Article 15 (1).
[22] Article 15 (1).
[23] Article 15 (1).
[24] Article 10.
[25] These and the subsequent definitions are taken from the *Concise Oxford English Dictionary.*

4. To recognize (articles 6, 7, 8, 9, 10, 11, 12, 13, 15, 16). Article 13 (2) provides that States parties recognize that things "shall be".
5. Undertake to "have respect" (article 13 (3)). Articles 1 (3) and 15 (4) contain an undertaking to "respect". Article 14 provides for an undertaking.
6. To agree (article 23).
7. To submit reports (article 16).
8. To promote (article 1 (3) – self-determination).

III. The general legal obligations under articles 2 and 4

The key for interpreting the legal obligations undertaken by States parties is provided by article 2 of the Covenant, which reads as follows:

> 1. Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> 2. The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

This article was discussed by the Commission on Human Rights at its seventh and eighth sessions[26] and by the General Assembly at its tenth and seventeenth sessions.[27]

Article 4 is also directly relevant. It provides that limitations on the enjoyment of rights provided for under the Covenant may only be such as are determined by law and insofar as this may be compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society.

An examination of the text of the Covenant and of its *travaux préparatoires* leads to the following conclusion regarding the content of the legal obligations of States parties to implement economic, social and cultural rights:

[26] See E/CN.4/SR.203-208, 217-218, 231-234, 236-237, 268-275, 303.
[27] See A/C.3/SR.655-659, 1181-1185, 1202-1207.

(a) whose rights?

The Covenant recognizes rights for *peoples* (article 1); *everyone* (articles 6-9); *individuals* and *bodies* (article 13 (4); the *group* (article 5); the *family*, the natural and fundamental group unit (articles 10 and 11); and the rights of trades unions (article 8 (1) (b) and (c)).

(b) geographical scope

A State which ratifies the Covenant undertakes obligations with respect to matters occurring within its own jurisdiction. However, ratification might also have extraterritorial implications to a certain extent inasmuch as ratification obliges States parties to respect the right of peoples to self-determination and to pursue international cooperation for the realization of the rights recognized in the Covenant, presumably everywhere.

(c) obligations of conduct

The following principal obligations of conduct are to be discharged by States parties under article 2 of the Covenant:

1. To take steps *individually* towards the full realization of the rights recognized in the Covenant to the maximum of its available resources.
2. To adopt all appropriate means,[28] including particularly the adoption of legislation,[29] towards the full realization of the rights recognized in the Covenant, to the maximum of its available resources.
3. To take steps, through international assistance and co-operation, towards the full realization of the rights recognized in the Covenant.[30]

(d) obligations of result

The following main obligations of result are to be discharged by States parties under article 2 of the Covenant.

1. To achieve the fullest possible realization of the rights recognized in the Covenant.
2. To guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind.[31]

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[28] See below.
[29] *Ibid.*
[30] *Ibid.*
[31] See below.

TIMING

The obligations of States Parties *ratione temporis* need to be distinguished in relation to obligations of conduct and obligations of result. With regard to obligations of result, there are things which must be achieved immediately by a State upon becoming party to the Covenant. These include:

1. The obligation to provide for recognition, in domestic law, of the rights enunciated in the Covenant.
2. The obligation to guarantee in law that the rights enunciated in the Covenant will be exercised without discrimination of any kind.

Other obligations of result may be carried out within a reasonable time.[32]

As regards obligations of conduct the criteria of progressive application needs to be seen in the context of the *full* realization of the rights recognized in the Covenant. This means that each State party must ensure, as a minimum, that:

1. The means of subsistence are assured immediately to everyone.[33]
2. There is a steady advance in the upward level of achievement towards full realization of the rights recognized in the Covenant.
3. The States parties must seek to attain the objectives stated in the Covenant as quickly as possible.

(f) all appropriate means

States may in the fulfilment of their commitments under the Covenant, apply all methods they deem appropriate within the bounds of their domestic law and having regard to the provisions of the Covenant. What is of the essence is not the use of a particular procedure but the effective application of the Covenant.

(g) legislative measures

Legislation, though desirable in most cases, is not obligatory in every instance. A State party has some latitude in deciding whether or not to enact legislation or to use other appropriate means. This latitude, however, is subject to review by the Committee on Economic, Social and Cultural Rights.

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[32] See article 14 of the Covenant.

[33] See article 1 (1) which protects a people's means of subsistence. See also E/CN.4/269, p. 8: "no one . . . could live without the means of subsistence" – remark by the delegate of Yugoslavia.

(h) through international co-operation and assistance

International co-operation and assistance is to be undertaken for the benefit of all States parties and is not limited to co-operation and assistance for the benefit of developing countries.[34]

1. What is involved is mutual co-operation, not charity.
2. The primary responsibility for realization of the rights recognized in the Covenant lies with each State party.
3. International co-operation and assistance must be based on the sovereignty of each State.[35]
4. The duty to pursue international co-operation and assistance does not imply a legal duty to provide assistance.[36]

(i) guarantee of non-discrimination

1. *De jure discrimination*: Immediately upon ratifying the Covenant States parties must eliminate all discriminatory laws, regulations and practices affecting the enjoyment of economic, social and cultural rights without further delay.
2. *De facto discrimination* occurring as a result of the unequal enjoyment of economic, social and cultural rights on account of lack of resources, should be brought to an end as quickly as possible.
3. The guarantee of non-discrimination does not preclude affirmative action in favour of disadvantaged groups.

(j) non-nationals

As a matter of principle, nationals and non-nationals must be accorded the same economic, social and cultural rights. The reservation with regard to the according of economic rights to non-nationals of developed countries was meant as a measure of affirmative action in favour of historically underprivileged nationals. It is to be applied only in exceptional situations.

(k) limitations

The limitations provisions in article 4 of the Covenant should be applied taking into account the intention of the drafters according to which the article was meant to be protective rather than limitative. It was not meant to introduce limitations on rights

[34] See article 11 (1): International economic co-operation based upon the principle of mutual benefit and international law.
[35] See article 11 (1): International co-operation based upon free consent.
[36] Means of international action are indicated in articles 11, 22 and 23 of the Covenant.

affecting the subsistence or survival of the individual, such as the right to food or health.

The "Siracusa Principles" relating to the terms "prescribed by law" and "in a democratic society" are applicable *mutatis mutandis* to the interpretation of the equivalent terms in article 4 of the Covenant on Economic, Social and Cultural Rights.[37]

(l) remedies for breach

The "steps" to be taken in accordance with article 2 (1) and the "guarantee" provided for under paragraph 2 include a duty of States parties to provide adequate and effective avenues of recourse for individuals or groups who feel that they have suffered from a breach of the rights recognized in the Covenant.

Conclusion

From the foregoing examination, it may be seen that there is an impressive degree of concreteness in the legal obligations of States parties to the Covenant, much more than is generally appreciated. Courts thus have at their disposal substantial guiding criteria for judicial protection of rights under the Covenant.

One conclusion which could be drawn is that the door of entry which might offer the best prospects in supervising implementation of the Covenant initially, is the guarantee of non-discrimination in article 2 (2). This guarantee is firm as a legal obligation; is of immediate application; raises an issue which is tangible as well as capable of legal supervision; and could be made justiciable at the domestic level (indeed the United States experience proves this[38]). To approach supervision of the implementation of the Covenant through the door of non-discrimination would have the added merit of focusing on the domestic level, where the emphasis must be placed. This should help to ensure that whatever resources are available are distributed fairly among the population as a whole.

While the other programmatic obligations should certainly be pursued, the non-discrimination door of entry would lift supervision of the implementation of the Covenant above the level of generalities and give it a concreteness that is probably not less than equivalent obligations under the Civil and Political Covenant.

Related to the issue of non-discrimination is the issue of remedies for breach of the Covenant, with particular reference to legal obligations of immediate application such as non-discrimination or trade union rights. By focusing on such concrete issues to start with, the Covenant can grow in stature as an instrument containing solid and justiciable legal obligations.

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[37] See *VII Human Rights Quarterly* (1985), No. 1, February 1985, pp. 3-14.

[38] See *Economic and Social Rights in the United States: Proceedings of the General Education Seminar at Columbia University*, Vol. 7, No. 2, Fall 1978.

It might help to introduce greater concreteness in the reporting process were the new Committee on Economic, Social and Cultural Rights to modify the present system so as to require States parties to submit reports on selected *topics* chosen by the Committee. In this way, the Committee can undertake a global examination of a particular topic and call in representatives of States (with advance notification, of course) in order to discuss problems which appear to be encountered, or for a general exchange of views from time to time. In such a manner the implementation of the Covenant could be rendered more meaningful in the future.

CESCR General Comment 3*

The nature of States parties obligations (article 2, para. 1 of the Covenant)

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee 'that relevant rights' will be exercised without discrimination . . .".

2. The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engage à agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the

* 14/12/90, Contained in document E/1991/23.

matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

4. The Committee notes that States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase "by all appropriate means" must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the "appropriateness" of the means chosen will not always be self-evident. It is therefore desirable that States parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realization of the rights recognized in the Covenant have been adopted in legislative form, the Committee would wish to be informed, *inter alia*, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized. In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts). The Committee would also wish to receive specific information as to any instances in which existing constitutional provisions

relating to economic, social and cultural rights have been weakened or significantly changed.

7. Other measures which may also be considered "appropriate" for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures.

8. The Committee notes that the undertaking "to take steps . . . by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laisser-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

9. The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully

justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its General Comment 1 (1989).

12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled "Adjustment with a human face: protecting the vulnerable and promoting growth",[1] the analysis by UNDP in its *Human Development Report 1990*[2] and the analysis by the World Bank in the *World Development Report 1990*.[3]

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[1] G.A. Cornia, R. Jolly and F. Stewart, (eds.), Oxford, Clarendon Press, 1987.
[2] Oxford, Oxford University Press, 1990.
[3] Oxford, Oxford University Press, 1990.

13. A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and cooperation, especially economic and technical . . .". The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in General Comment 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies "the furnishing of technical assistance" as well as other activities, as being among the means of "international action for the achievement of the rights recognized . . .".

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990).

CHAPTER IV

PRINCIPLES OF IMPLEMENTATION

Contents:

The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*

*Question of the Realization in all Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems Which the Developing Countries Face in their Efforts to Achieve These Human Rights***

The Permanent Mission of the Kingdom of The Netherlands to the Office of the United Nations and other International Organizations at Geneva has the honour to submit a paper entitled "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", and kindly requests the Secretary-General to publish this paper in the form of an official document under agenda item 8 of the forty-third session of the Commission on Human Rights.

INTRODUCTION

(i) A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of States parties

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* United Nations, Economic and Social Council, E/CN.4/1987/17, 8 January 1987, Commission on Human Rights, Forty-third session, items 8 and 18 of the provisional agenda.

** Status of the International Covenants on Human Rights, *Note verbale* dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights.

to the International Covenant on Economic, Social and Cultural Rights, the consideration of States parties Reports by the newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international co-operation under Part IV of the Covenant.

(ii) The 29 participants came from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, Netherlands, Norway, Senegal, Spain, United Kingdom, United States of America, Yugoslavia, the United Nations Centre for Human Rights, the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the Commonwealth Secretariat, and the sponsoring organizations. Four of the participants were members of the ECOSOC Committee on Economic, Social and Cultural Rights.

(iii) The participants agreed unanimously upon the following principles which they believe reflect the present state of international law, with the exception of certain recommendations indicated by the use of the verb "should" instead of "shall".

July 1986

THE LIMBURG PRINCIPLES ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

PART I: THE NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS

A. General observations

1. Economic, social and cultural rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the International Covenant on Economic, Social and Cultural Rights.

2. The International Covenant on Economic, Social and Cultural Rights, together with the International Covenant on Civil and Political Rights and the Optional Protocol, entered into force in 1976. The Covenants serve to elaborate the Universal Declaration of Human Rights: these instruments constitute the International Bill of Human Rights.

3. As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation,

promotion and protection of both civil and political, and economic, social and cultural rights.

4. The International Covenant on Economic, Social and Cultural Rights (hereafter the Covenant) should, in accordance with the Vienna Convention on the Law of Treaties (Vienna, 1969), be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the preparatory work and the relevant practice.

5. The experience of the relevant specialized agencies as well as of United Nations bodies and intergovernmental organizations, including the United Nations working groups and special rapporteurs in the field of human rights, should be taken into account in the implementation of the Covenant and in monitoring States parties' achievements.

6. The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.

7. States parties must at all times act in good faith to fulfil the obligations they have accepted under the Covenant.

8. Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.

9. Non-governmental organizations can play an important role in promoting the implementation of the Covenant. This role should accordingly be facilitated at the national as well as the international level.

10. States Parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant.

11. A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.

12. The supervision of compliance with the Covenant should be approached in a spirit of co-operation and dialogue. To this end, in considering the reports of States parties, the Committee on Economic, Social and Cultural Rights, hereinafter called "the Committee", should analyse the causes and factors impeding the realization of the rights covered under the Covenant and, where possible, indicate solutions. This approach should not preclude a finding, where the information available warrants

such a conclusion, that a State party has failed to comply with its obligations under the Covenant.

13. All organs monitoring the Covenant should pay special attention to the principles of non-discrimination and equality before the law when assessing States parties' compliance with the Covenant.

14. Given the significance for development of the progressive realization of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities.

15. Trends in international economic relations should be taken into account in assessing the efforts of the international community to achieve the Covenant's objectives.

B. Interpretative Principles specifically relating to Part II of the Covenant

Article 2 (1):

"to take steps . . . by all appropriate means, including particularly the adoption of legislation"

16. All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant.

17. At the national level States parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant.

18. Legislative measures alone are not sufficient to fulfil the obligations of the Covenant. It should be noted, however, that article 2 (1) would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.

19. States parties shall provide for effective remedies including, where appropriate, judicial remedies.

20. The appropriateness of the means to be applied in a particular State shall be determined by that State party, and shall be subject to review by the United Nations Economic and Social Council, with the assistance of the Committee. Such review

shall be without prejudice to the competence of the other organs established pursuant to the Charter of the United Nations.

"to achieve progressively the full realization of the rights"

21. The obligation "to achieve progressively the full realization of the rights" requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

22. Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2 (2) of the Covenant.

23. The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.

24. Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by everyone of the rights recognized in the Covenant.

"to the maximum of its available resources"

25. States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.

26. "Its available resources" refers to both the resources within a State and those available from the international community through international co-operation and assistance.

27. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources.

28. In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.

"individually and through international assistance and co-operation, especially economic and technical"

29. International co-operation and assistance pursuant to the Charter of the United Nations (arts. 55 and 56) and the Covenant shall have in view as a matter of priority the realization of all human rights and fundamental freedoms, economic, social and cultural as well as civil and political.

30. International co-operation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized (cf. art. 28 Universal Declaration of Human Rights).

31. Irrespective of differences in their political, economic and social systems, States shall co-operate with one another to promote international social, economic and cultural progress, in particular the economic growth of developing countries, free from discrimination based on such differences.

32. States parties shall take steps by international means to assist and co-operate in the realization of the rights recognized by the Covenant.

33. International co-operation and assistance shall be based on the sovereign equality of States and be aimed at the realization of the rights contained in the Covenant.

34. In undertaking international co-operation and assistance pursuant to article 2 (1) the role of international organizations and the contribution of non-governmental organizations shall be kept in mind.

Article 2 (2): Non-discrimination

35. Article 2 (2) calls for immediate application and involves an explicit guarantee on behalf of the States parties. It should, therefore, be made subject to judicial review and other recourse procedures.

36. The grounds of discrimination mentioned in article 2 (2) are not exhaustive.

37. Upon becoming a party to the Covenant States shall eliminate *de jure* discrimination by abolishing without delay any discriminatory laws, regulations and practices (including acts of omission as well as commission) affecting the enjoyment of economic, social and cultural rights.

38. *De facto* discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible.

39. Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different groups and that such measures shall not be continued after their intended objectives have been achieved.

40. Article 2 (2) demands from States parties that they prohibit private persons and bodies from practising discrimination in any field of public life.

41. In the application of article 2 (2) due regard should be paid to all relevant international instruments including the Declaration and Convention on the Elimination of all Forms of Racial Discrimination as well as to the activities of the supervisory committee (CERD) under the said Convention.

Article 2 (3): Non-nationals in developing countries

42. As a general rule the Covenant applies equally to nationals and non-nationals.

43. The purpose of article 2 (3) was to end the domination of certain economic groups of non-nationals during colonial times. In the light of this the exception in article 2 (3) should be interpreted narrowly.

44. This narrow interpretation of article 2 (3) refers in particular to the notion of economic rights and to the notion of developing countries. The latter notion refers to those countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries.

Article 3: Equal rights for men and women

45. In the application of article 3 due regard should be paid to the Declaration and Convention on the Elimination of All Forms of Discrimination against Women and other relevant instruments and the activities of the supervisory committee (CEDAW) under the said Convention.

Article 4: Limitations

46. Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.

47. The article was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.

"determined by law"[1]

48. No limitation on the exercise of economic, social and cultural rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

49. Laws imposing limitations on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory.

50. Legal rules limiting the exercise of economic, social and cultural rights shall be clear and accessible to everyone.

51. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition on application of limitations on economic, social and cultural rights.

"promoting the general welfare"

52. This term shall be construed to mean furthering the well-being of the people as a whole.

"in a democratic society"[2]

53. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the application of limitations.

54. The burden is upon a State imposing limitations to demonstrate that the limitations do not impair the democratic functioning of the society.

55. While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.

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[1] The Limburg Principles 48-51 are derived from the Siracusa Principles 15-18, United Nations Doc. E/CN.4/1984/4, 28 September 1984 and 7 *Human Rights Quarterly* 3 (1985), at p. 5.

[2] Compare Siracusa Principles 19-21, *ibid.*, at p. 5.

"compatible with the nature of these rights"

56. The restriction "compatible with the nature of these rights" requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned.

Article 5

57. Article 5 (1) underlines the fact that there is no general, implied or residual right for a State to impose limitations beyond those which are specifically provided for in the law. None of the provisions in the law may be interpreted in such a way as to destroy "any of the rights or freedoms recognized". In addition article 5 is intended to ensure that nothing in the Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

58. The purpose of article 5 (2) is to ensure that no provision in the Covenant shall be interpreted to prejudice the provisions of domestic law or any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected. Neither shall article 5 (2) be interpreted to restrict the exercise of any human right protected to a greater extent by national or international obligations accepted by the State party.

C. Interpretative Principles specifically relating to Part III of the Covenant

Article 8:

"Prescribed by law"[3]

59. See the interpretative principles under the synonymous term "determined by law" in art. 4.

"necessary in a democratic society"

60. In addition to the interpretative principles listed under article 4 concerning the phrase "in a democratic society", article 8 imposes a greater restraint upon a State Party which is exercising limitations on trade union rights. It requires that such a limitation is indeed necessary. The term necessary implies that the limitation:

(a) responds to a pressing public or social need;

[3] The Limburg Principles 59-69 are derived from the Siracusa Principles 10, 15-26, 29-32 and 35-37, *ibid.*, at pp. 4-7.

(b) pursues a legitimate aim; and

(c) is proportional to that aim.

61. Any assessment as to the necessity of a limitation shall be based upon objective considerations.

"national security"

62. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

63. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

64. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may be invoked only when there exist adequate safeguards and effective remedies against abuse.

65. The systematic violation of economic, social and cultural rights undermines true national security and may jeopardize international peace and security. A State responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

"public order (ordre public)"

66. The expression "public order *(ordre public)*" as used in the Covenant may be defined as the sum of rules which ensures the functioning of society or the set of fundamental principles on which a society is founded. Respect for economic, social and cultural rights is part of public order *(ordre public)*.

67. Public order *(ordre public)* shall be interpreted in the context of the purpose of the particular economic, social and cultural rights which are limited on this ground.

68. State organs or agents responsible for the maintenance of public order *(ordre public)* shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

"rights and freedoms of others"

69. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.

D. Violations of Economic, Social and Cultural Rights

70. A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.

71. In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.

72. A State party will be in violation of the Covenant, *inter alia*, if:

- it fails to take a step which it is required to take by the Covenant;

- it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;

- it fails to implement without delay a right which it is required by the Covenant to provide immediately;

- it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

- it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;

- it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*;

- it fails to submit reports as required under the Covenant.

73. In accordance with international law each State party to the Covenant has the right to express the view that another State party is not complying with its obligations under the Covenant and to bring this to the attention of that State party. Any dispute that may thus arise shall be settled in accordance with the relevant rules of international law relating to the peaceful settlement of disputes.

PART II. CONSIDERATION OF STATES PARTIES' REPORTS AND INTERNATIONAL CO-OPERATION UNDER PART IV OF THE COVENANT

A. Preparation and submission of reports by States parties

74. The effectiveness of the supervisory machinery provided in Part IV of the Covenant depends largely upon the quality and timeliness of reports by States parties. Governments are therefore urged to make their reports as meaningful as possible. For this purpose they should develop adequate internal procedures for consultations with the competent government departments and agencies, compilation of relevant data, training of staff, acquisition of background documentation, and consultation with relevant non-governmental and international institutions.

75. The preparation of reports under article 16 of the Covenant could be facilitated by the implementation of elements of the programme of advisory services and technical assistance as proposed by the chairmen of the main human rights supervisory organs in their 1984 report to the General Assembly (United Nations Doc. A39/484).

76. States parties should view their reporting obligations as an opportunity for broad public discussion on goals and policies designed to realize economic, social and cultural rights. For this purpose wide publicity should be given to the reports, if possible in draft. The preparation of reports should also be an occasion to review the extent to which relevant national policies adequately reflect the scope and content of each right, and to specify the means by which it is to be realized.

77. States parties are encouraged to examine the possibility of involving non-governmental organizations in the preparation of their reports.

78. In reporting on legal steps taken to give effect to the Covenant, States parties should not merely describe any relevant legislative provisions. They should specify, as appropriate, the judicial remedies, administrative procedures and other measures they have adopted for enforcing those rights and the practice under those remedies and procedures.

79. Quantitative information should be included in the reports of States parties in order to indicate the extent to which the rights are protected in fact. Statistical information and information on budgetary allocations and expenditures should be presented in such a way as to facilitate the assessment of the compliance with Covenant obligations. States parties should, where possible, adopt clearly defined targets and indicators in implementing the Covenant. Such targets and indicators should, as appropriate, be based on criteria established through international co-

operation in order to increase the relevance and comparability of data submitted by States parties in their reports.

80. Where necessary, governments should conduct or commission studies to enable them to fill gaps in information regarding progress made and difficulties encountered in achieving the observance of the Covenant rights.

81. Reports by States parties should indicate the areas where more progress could be achieved through international co-operation and suggest economic and technical co-operation programmes that might be helpful toward that end.

82. In order to ensure a meaningful dialogue between the States parties and the organs assessing their compliance with the provisions of the Covenant, States parties should designate representatives who are fully familiar with the issues raised in the report.

B. Role of the Committee on Economic, Social and Cultural Rights

83. The Committee has been entrusted with assisting the Economic and Social Council in the substantive tasks assigned to it by the Covenant. In particular, its role is to consider States parties reports and to make suggestions and recommendations of a general nature, including suggestions and recommendations as to fuller compliance with the Covenant by States parties. The decision of the Economic and Social Council to replace its sessional Working Group by a Committee of independent experts should lead to a more effective supervision of the implementation by States parties.

84. In order to enable it to discharge fully its responsibilities the Economic and Social Council should ensure that sufficient sessions are provided to the Committee. It is imperative that the necessary staff and facilities for the effective performance of the Committee's functions be provided, in accordance with ECOSOC resolution 1985/17.

85. In order to address the complexity of the substantive issues covered by the Covenant, the Committee might consider delegating certain tasks to its members. For example, drafting groups could be established to prepare preliminary formulations or recommendations of a general nature or summaries of the information received. Rapporteurs could be appointed to assist the work of the Committee in particular to prepare reports on specific topics and for that purpose consult States parties, specialized agencies and relevant experts and to draw up proposals regarding economic and technical assistance projects that could help overcome difficulties States parties have encountered in fulfilling their Covenant obligations.

86. The Committee should, pursuant to articles 22 and 23 of the Covenant, explore with other organs of the United Nations, specialized agencies and other concerned organizations, the possibilities of taking additional international measures likely to contribute to the progressive implementation of the Covenant.

87. The Committee should reconsider the current six-year cycle of reporting in view of the delays which have led to simultaneous consideration of reports submitted under different phases of the cycle. The Committee should also review the guidelines for States parties to assist them in preparing reports and propose any necessary modifications.

88. The Committee should consider inviting States parties to comment on selected topics leading to a direct and sustained dialogue with the Committee.

89. The Committee should devote adequate attention to the methodological issues involved in assessing compliance with the obligations contained in the Covenant. Reference to indicators, in so far as they may help measure progress made in the achievement of certain rights, may be useful in evaluating reports submitted under the Covenant. The Committee should take due account of the indicators selected by or in the framework of the specialized agencies and draw upon or promote additional research, in consultation with the specialized agencies concerned, where gaps have been identified.

90. Whenever the Committee is not satisfied that the information provided by a State party is adequate for a meaningful assessment of progress achieved and difficulties encountered it should request supplementary information, specifying as necessary the precise issues or questions it would like the State party to address.

91. In preparing its reports under ECOSOC resolution 1985/17, the Committee should consider, in addition to the "summary of its consideration of the reports", highlighting thematic issues raised during its deliberations.

C. Relations between the Committee and Specialized Agencies, and other international organs

92. The establishment of the Committee should be seen as an opportunity to develop a positive and mutually beneficial relationship between the Committee and the specialized agencies and other international organs.

93. New arrangements under article 18 of the Covenant should be considered where they could enhance the contribution of the specialized agencies to the work of the Committee. Given that the working methods with regard to the implementation of economic, social and cultural rights vary from one specialized agency to another, flexibility is appropriate in making such arrangements under article 18.

94. It is essential for the proper supervision of the implementation of the Covenant under Part IV that a dialogue be developed between the specialized agencies and the Committee with respect to matters of common interest. In particular consultations should address the need for developing indicators for assessing compliance with the Covenant; drafting guidelines for the submission of reports by States parties; making arrangements for submission of reports by the specialized agencies under article 18. Consideration should also be given to any relevant procedures adopted in the agencies. Participation of their representatives in meetings of the Committee would be very valuable.

95. It would be useful if Committee members could visit specialized agencies concerned, learn through personal contact about programmes of the agencies relevant to the realization of the rights contained in the Covenant and discuss the possible areas of collaboration with those agencies.

96. Consultations should be initiated between the Committee and international financial institutions and development agencies to exchange information and share ideas on the distribution of available resources in relation to the realization of the rights recognized in the Covenant. These exchanges should consider the impact of international economic assistance on efforts by States parties to implement the Covenant and possibilities of technical and economic co-operation under article 22 of the Covenant.

97. The Commission on Human Rights, in addition to its responsibilities under article 19 of the Covenant, should take into account the work of the Committee in its consideration of items on its agenda relating to economic, social and cultural rights.

98. The Covenant on Economic, Social and Cultural Rights is related to the Covenant on Civil and Political Rights. Although most rights can clearly be delineated as falling within the framework of one or other Covenant, there are several rights and provisions referred to in both instruments which are not susceptible to clear differentiation. Both Covenants moreover share common provisions and articles. It is important that consultative arrangements be established between the Economic, Social and Cultural Rights Committee and the Human Rights Committee.

99. Given the relevance of other international legal instruments to the Covenant, early consideration should be given by the Economic and Social Council to the need for developing effective consultative arrangements between the various supervisory bodies.

100. International and regional intergovernmental organizations concerned with the realization of economic, social and cultural rights are urged to develop measures, as appropriate, to promote the implementation of the Covenant.

101. As the Committee is a subsidiary organ of the Economic and Social Council, non-governmental organizations enjoying consultative status with the Economic and Social Council are urged to attend and follow the meetings of the Committee and, when appropriate, to submit information in accordance with ECOSOC resolution 1296 (XLIV).

102. The Committee should develop, in co-operation with intergovernmental organizations and non-governmental organizations as well as research institutes an agreed system for recording, storing and making accessible case law and other interpretative material relating to international instruments on economic, social and cultural rights.

103. As one of the measures recommended in article 23 it is recommended that seminars be held periodically to review the work of the Committee and the progress made in the realization of economic, social and cultural rights by States parties.

CHAPTER V

PROGRESSIVE IMPLEMENTATION

Contents:

Thiagraj Soobramoney (Appellant) v. *Minster of Health (Kwazulu-Natal) (Respondent)*

(Case CCT 32/97)

Constitutional Court of South Africa

Heard on: 11 November 1997
Decided on: 27 November 1997

JUDGEMENT

CHASKALSON P:

1. The appellant, a 41 year old unemployed man, is a diabetic who suffers from ischaemic heart disease and cerebro-vascular disease which caused him to have a stroke during 1996. In 1996 his kidneys also failed. Sadly his condition is irreversible and he is now in the final stages of chronic renal failure. His life could be prolonged by means of regular renal dialysis. He has sought such treatment from the renal unit of the Addington state hospital in Durban. The hospital can, however, only provide dialysis treatment to a limited number of patients. The renal unit has 20 dialysis machines available to it, and some of these machines are in poor condition. Each treatment takes four hours and a further two hours have to be allowed for the cleaning of a machine, before it can be used again for other treatment. Because of the limited facilities that are available for kidney dialysis the hospital has been unable to provide the appellant with the treatment he has requested.

2. The reasons given by the hospital for this are set out in the respondent's answering affidavit deposed to by Doctor Saraladevi Naicker, a specialist physician

and nephrologist in the field of renal medicine who has worked at Addington Hospital for 18 years and who is currently the President of the South African Renal Society. In her affidavit Dr Naicker says that Addington Hospital does not have enough resources to provide dialysis treatment for all patients suffering from chronic renal failure. Additional dialysis machines and more trained nursing staff are required to enable it to do this, but the hospital budget does not make provision for such expenditure. The hospital would like to have its budget increased but it has been told by the provincial health department that funds are not available for this purpose.

3. Because of the shortage of resources the hospital follows a set policy in regard to the use of the dialysis resources. Only patients who suffer from acute renal failure, which can be treated and remedied[1] by renal dialysis are given automatic access to renal dialysis at the hospital. Those patients who, like the appellant, suffer from chronic renal failure which is irreversible are not admitted automatically to the renal programme. A set of guidelines has been drawn up and adopted to determine which applicants who have chronic renal failure will be given dialysis treatment. According to the guidelines the primary requirement for admission of such persons to the dialysis programme is that the patient must be eligible for a kidney transplant. A patient who is eligible for a transplant will be provided with dialysis treatment until an organ donor is found and a kidney transplant has been completed.

4. The guidelines provide that an applicant is not eligible for a transplant unless he or she is "free of significant vascular or cardiac disease". The medical criteria set out in the guidelines also provide that an applicant must be:

> "Free of significant disease elsewhere e.g. ischaemic heart disease, cerebro-vascular disease, peripheral vascular disease, chronic liver disease, chronic lung disease."

The appellant suffers from ischaemic heart disease and cerebro-vascular disease and he is therefore not eligible for a kidney transplant.

5. The appellant has made arrangements to receive dialysis treatment from private hospitals and doctors, but his finances have been depleted and he avers that he is no longer able to afford such treatment. In July 1997 he made an urgent application to the Durban and Coast Local Division of the High Court for an order directing the Addington Hospital to provide him with ongoing dialysis treatment and interdicting the Respondent from refusing him admission to the renal unit of the hospital. The appellant claimed that in terms of the 1996 Constitution the Addington Hospital is

[1] Where the renal failure can be cured by dialysis this is usually achieved within a period of four to six weeks from the commencement of the treatment.

obliged to make dialysis treatment available to him. The respondent opposed the application. The matter came before Combrinck J who dismissed the applications.[2]

6. The appellant applied to the High Court for a certificate in terms of rule 18(e) of the Constitutional Court Rules. The certificate was granted and he applied to this Court in terms of Rule 18 for leave to appeal against the judgment of the High Court. The application for leave to appeal was set down for hearing as a matter of urgency. The respondent did not oppose the application and correctly acknowledged that the matter raised issues of importance on which a decision on the merits of the appeal should be given by this Court. The matter was dealt with on this basis, and counsel were required to deal only with the merits of the appeal, it being accepted by the parties and this Court that the appeal should be heard and decided.

7. The appellant based his claim on section 27(3) of the 1996 Constitution which provides:

> "No one may be refused emergency medical treatment"

and section 11 which stipulates:

> "Everyone has the right to life."

8. We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

9. The constitutional commitment to address these conditions is expressed in the preamble which, after giving recognition to the injustices of the past, states:

> "We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -
>
> – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights
>
> – . . .

[2] *Thiagraj Soobramoney* v. *Minister of Health: Province of KwaZulu-Natal* D&CLD 5846/97, 21 August 1997, unreported.

> – Improve the quality of life of all citizens and free the potential of each person."

This commitment is also reflected in various provisions of the bill of rights[3] and in particular in sections 26 and 27 which deal with housing, health care, food, water and social security.

10. Sections 26 and 27 contain the following provisions:

> "26. Housing
>
> (1) Everyone has the right to have access to adequate housing;
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right;
>
> (3) . . .
>
> 27. Health care, food, water and social security
>
> (1) Everyone has the right to have access to -
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
>
> (3) No one may be refused emergency medical treatment."

11. What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.

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[3] For instance in section 7 where the bill of rights is described as the cornerstone of democracy in South Africa and as affirming "the democratic values of human dignity, equality and freedom", section 28 which deals with childrens' rights, and section 29 which deals with education.

12. The appellant urges us to hold that patients who suffer from terminal illnesses and require treatment such as renal dialysis to prolong their lives are entitled in terms of section 27(3) to be provided with such treatment by the state, and that the state is required to provide funding and resources necessary for the discharge of this obligation.

13. The words "emergency medical treatment" may possibly be open to a broad construction which would include ongoing treatment of chronic illnesses for the purpose of prolonging life. But this is not their ordinary meaning, and if this had been the purpose which section 27(3) was intended to serve, one would have expected that to have been expressed in positive and specific terms.

14. Counsel for the appellant argued that section 27(3) should be construed consistently with the right to life entrenched in section 11 of the Constitution and that everyone requiring life-saving treatment who is unable to pay for such treatment herself or himself is entitled to have the treatment provided at a state hospital without charge.

15. This Court has dealt with the right to life in the context of capital punishment but it has not yet been called upon to decide upon the parameters of the right to life or its relevance to the positive obligations imposed on the state under various provisions of the bill of rights. In India the Supreme Court has developed a jurisprudence around the right to life so as to impose positive obligations on the state in respect of the basic needs of its inhabitants.[4] Whilst the Indian jurisprudence on this subject contains valuable insights it is important to bear in mind that our Constitution is structured differently to the Indian Constitution. Unlike the Indian Constitution ours deals specifically in the bill of rights with certain positive obligations imposed on the state, and where it does so, it is our duty to apply the obligations as formulated in the Constitution and not to draw inferences that would be inconsistent therewith.

16. This should be done in accordance with the purposive approach to the interpretation of the Constitution which has been adopted by this Court.[5] Consistently with this approach the rights which are in issue in the present case must not be construed in isolation.

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[4] Basing itself on the right to life the Supreme Court of India has made orders requiring the state to provide medical treatment to those needing it, to provide legal aid to those who cannot afford it themselves, and to provide access between isolated areas and more developed areas. See generally in this regard VD Mahajan *Constitutional Law of India* 7 ed. (Eastern Book Company, Lucknow 1991) at 230 – 234, and BL Hansaria *Right to Life and Liberty under the Constitution (A Critical Analysis of Article 21)* (NM Tripathi Private Ltd, Bombay 1993) at 24 – 40.

[5] *S* v. *Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (4) BCLR 665 (CC) at para 9.

> ". . . but in [their] context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of [the bill of rights] of which [they are] part."[6]

17. The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision "a narrower or specific meaning" should be given to it.[7]

18. In developing his argument on the right to life counsel for the appellant relied upon a decision of a two-judge bench of the Supreme Court of India in *Paschim Banga Khet Mazdoor Samity and others v State of West Bengal and another,*[8] where it was said:

> "The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21."[9]

These comments must be seen in the context of the facts of that case which are materially different to those of the present case. It was a case in which constitutional damages were claimed. The claimant had suffered serious head injuries and brain haemorrhage as a result of having fallen off a train. He was taken to various hospitals and turned away, either because the hospital did not have the necessary facilities for treatment, or on the grounds that it did not have room to accommodate him. As a result he had been obliged to secure the necessary treatment at a private

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[6] Id at para 10.
[7] Id at para 325. See also the analysis of the right to freedom and security of the person by the majority of the Court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC), and Hogg *Constitutional Law of Canada* 3 ed (Carswell, Scarborough 1992) at para 33.7(c).
[8] (1996) AIR SC 2426.
[9] Id at 2429.

hospital. It appeared from the judgment that the claimant could in fact have been accommodated in more than one of the hospitals which turned him away and that the persons responsible for that decision had been guilty of misconduct. This is precisely the sort of case which would fall within section 27(3). It is one in which emergency treatment was clearly necessary. The occurrence was sudden, the patient had no opportunity of making arrangements in advance for the treatment that was required, and there was urgency in securing the treatment in order to stabilise his condition. The treatment was available but denied.

19. In our Constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27. If section 27(3) were to be construed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfill its primary obligations under sections 27(l) and (2) to provide health care services to "everyone" within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. In my view much clearer language than that used in section 27(3) would be required to justify such a conclusion.

20. Section 27(3) itself is couched in negative terms - it is a right not to be refused emergency treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate medical attention, such as the injured person in *Paschim Banga Khet Mazdoor Samity v State of West Bengal,* should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment.[10] What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.

21. The applicant suffers from chronic renal failure. To be kept alive by dialysis he would require such treatment two to three times a week. This is not an emergency which calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant's renal function which is incurable. In my view section 27(3) does not apply to these facts.

22. The appellant's demand to receive dialysis treatment at a state hospital must be determined in accordance with the provisions of sections 27(l) and (2) and not

[10] We have only recently emerged from a system of government in which the provision of health services depended on race. On occasions seriously injured persons were refused access to ambulance services or admission to the nearest or best equipped hospital on racial grounds.

section 27(3). These sections entitle everyone to have access to health care services provided by the state "within its available resources".

23. In the Court a quo Combrinck J held that in this case the respondent has conclusively proved that there are no funds available to provide patients such as the applicant with the necessary treatment.[11] This finding was not disputed by the appellant, but it was argued that the state could make additional funds available to the renal clinic and that it was obliged to do so to enable the clinic to provide life saving treatment to the appellant and others suffering from chronic renal failure.

24. At present the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public. In 1996-1997 it overspent its budget by R152 million, and in the current year it is anticipated that the overspending will be R700 million rand unless a serious cutback is made in the services which it provides. The renal unit at the Addington Hospital has to serve the whole of KwaZulu-Natal and also takes patients from parts of the Eastern Cape. There are many more patients suffering from chronic renal failure than there are dialysis machines to treat such patients. This is a nation-wide problem and resources are stretched in all renal clinics throughout the land. Guidelines have therefore been established to assist the persons working in these clinics to make the agonising choices which have to be made in deciding who should receive treatment, and who not. These guidelines were applied in the present case.

25. By using the available dialysis machines in accordance with the guidelines more patients are benefited than would be the case if they were used to keep alive persons with chronic renal failure, and the outcome of the treatment is also likely to be more beneficial because it is directed to curing patients, and not simply to maintaining them in a chronically ill condition. It has not been suggested that these guidelines are unreasonable or that they were not applied fairly and rationally when the decision was taken by the Addington Hospital that the appellant did not qualify for dialysis.

26. Ideally the dialysis machines available at the Addington Hospital should handle no more than about 60 patients. At present they are being used to treat 85 patients and the hospital can barely accommodate those who meet its guidelines. The nurse-patient ratio in the renal unit is 1:4.5 instead of the recommended ratio of 1:2.5. According to Dr Naicker, if the hospital were required to treat all persons who, like the appellant, are suffering from chronic renal failure, it would be unable to do so. She says that if the appellant were to be admitted to the programme it would result in other patients who comply with the guidelines being put at risk. Only about 30% of the patients suffering from chronic renal failure meet the guidelines for admission

[11] Above n 2 at 17.

to the dialysis programme. If everyone in the same condition as the appellant were to be admitted the carefully tailored programme would collapse and no one would benefit from that.

27. The appellant avers in his affidavits that better use could be made of the dialysis machines at the Addington Hospital by keeping the clinic open for longer hours. He says that some of the nurses "moonlight" at other hospitals after their normal working hours in order to earn extra income, and that if they were given overtime opportunities at the Addington Hospital more people could be treated.

28. The appellant's case must be seen in the context of the needs which the health services have to meet, for if treatment has to be provided to the appellant it would also have to be provided to all other persons similarly placed. Although the renal clinic could be kept open for longer hours, it would involve additional expense in having to pay the clinic personnel at overtime rates, or in having to employ additional personnel working on a shift basis. It would also put a great strain on the existing dialysis machines which are already showing signs of wear. It is estimated that the cost to the state of treating one chronically ill patient by means of renal dialysis provided twice a week at a state hospital is approximately R60 000 per annum. If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment - and many of them, as the appellant does, would require treatment three times a week - the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the state has to meet.

29. The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.

30. Although the problem of scarce resources is particularly acute in South Africa this is not a peculiarly South African problem. It is a problem which hospital administrators and doctors have had to confront in other parts of the world, and in which they have had to take similar decisions. In his judgment in this case Combrinck J refers to decisions of the English courts in which it has been held to be undesirable for a court to make an order as to how scarce medical resources should be applied, and to the danger of making any order that the resources be used for a particular patient, which might have the effect of denying those resources to other

patients to whom they might more advantageously be devoted.[12] The dilemma confronting health authorities faced with such cases was described by Sir Thomas Bingham MR in a passage cited by Combrinck J from the judgment in *R v Cambridge Health Authority, ex parte B*:[13]

> "I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make."

31. One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life. The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the state to provide him with the treatment. But the state's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security. These too are aspects of the right to:

> ". . . human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity."[14]

The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

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[12] *Re J (a minor)* [1992] 4 All ER 614 (CA) at 625g; *Airedale NHS Trust v Bland* [1993] 1 All ER 821 (CA) at 857b.
[13] [1995] 2 All ER 129 (CA) at 137d–f.
[14] Per O'Regan J in *S* v. *Makwanyane* above n 5 at para 326.

32. In his concurring judgment in this matter Madala J refers to the possibility of the appellant being treated by Continuing Ambulatory Peritoneal Dialysis (CAPD). This treatment is dealt with fully by Dr. Naicker in a supplementary affidavit lodged by her in response to an averment made by the appellant in his replying affidavit that there is treatment, other than renal dialysis, which would be of benefit to him, but had not been offered to him by the Addington Hospital.

33. Dr. Naicker explains that CAPD treatment makes patients vulnerable to infections and leads to patients having to be put on dialysis for two to three months when such infections occur. If an infection occurs frequently or is severe the patient has to be put onto dialysis permanently. A study undertaken at the hospital shows that over 60% of the patients treated at the hospital by CAPD have had to be placed on dialysis permanently. The cost of the treatment is high -- the fluids used in the treatment call for an expenditure of approximately R4000 per month -- and there is the additional cost of having to accommodate the patient at the hospital and treat him or her in the surgery. Because of the high cost of the treatment and the demands that it makes on hospital resources including dialysis facilities, the hospital has also set criteria for treating patients by CAPD. Only patients who are candidates for transplant are placed on CAPD and approximately 130 such patients are being treated in this way at the hospital. The appellant is not a candidate for a transplant and accordingly does not meet the criteria for CAPD treatment.

34. Counsel for the appellant, correctly in my view, appreciated that there was no material difference between the appellant's claim to be placed on dialysis (which is his preferred option) and the alternative of being treated by CAPD. Neither form of treatment is "emergency treatment", neither is accessible to all patients suffering from chronic renal failure and because of the limited resources both are subject to criteria which the appellant does not meet.

35. I should add that I do not consider it appropriate to comment on the attitude of the private medical sector to CAPD treatment. No evidence was placed before us in that regard and there is nothing on the papers to show that patients treated privately do not receive proper advice in regard to the availability, risks and costs of such treatment.

36. The state has a constitutional duty to comply with the obligations imposed on it by section 27 of the Constitution. It has not been shown in the present case, however, that the state's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations. In the circumstances the appellant is not entitled to the relief that he seeks in these proceedings and his appeal against the decision of Combrinck J must fail. This is not an appropriate case for an order for costs to be made and the respondent correctly does not seek such an order.

37. The following order is made. The appeal against the order made by Combrinck J is dismissed. No order is made as to costs.

Langa DP, Ackermann J, Didcoft J, Goldstone J, Kriegier J, Mokgoro J, O'Regan J, and Sachs J concur in the judgment of Chaskalson P

MADALA J:

38. I have had the benefit of reading the judgment prepared by Chaskalson P and the concurring judgment of Sachs J in this matter. I am in agreement with Chaskalson P's very incisive analysis of the provisions of section 27 and in particular his conclusion that section 27(3) envisages a dramatic, sudden situation or event which is of a passing nature in terms of time. There is some suddenness and at times even an element of unexpectedness in the concept "emergency medical treatment". I accordingly also agree that on that score the appellant's case must fail since he has not persuaded us that section 27(3) applies. I, however, seek to make my own further observations about this case and now do so briefly. It is not necessary for me to restate the facts of the case as they have been set out succinctly in the judgment of Chaskalson P. Nor do I see the need to repeat in any detail the arguments that were advanced in the appeal.

39. In the oral submissions addressed to us, Mr Jacobs, who appeared on behalf of the appellant, placed reliance, among others, on the provisions of section 11 of the Constitution – the right to life. In this case life is indeed potentially at stake and this Court is enjoined therefore not only to find a humane and morally justified solution to the problem at hand, but also to examine assiduously the process by which the solution is reached and the legal foundation on which it rests. The state undoubtedly has a strong interest in protecting and preserving the life and health of its citizens and to that end must do all in its power to protect and preserve life.

40. In another sense the appeal before us brings into sharp focus the dichotomy in which a changing society finds itself and in particular the problems attendant upon trying to distribute scarce resources on the one hand, and satisfying the designs of the Constitution with regard to the provision of health services on the other. It puts us in the very painful situation in which medical practitioners must find themselves daily when the question arises: "Should a doctor ever allow a patient to die when that patient has a treatable condition?" In the context of this case, the question to be answered is whether everybody has the right of access to kidney dialysis machines even where resources are scarce or limited.

41. Chapter 2 of the Constitution sets out the fundamental rights to which every person is entitled and also contains provisions dealing with the manner in which the chapter is to be interpreted by the courts. Kentridge AJ, who delivered the judgment

of the Court in *S v Zuma and Others,*[1] referred with approval[2] to the judgment of Dickson J (later CJC) in *R v Big M Drug Mart Ltd*[3] and to the following passage in particular:

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."

42. The Constitution is forward-looking and guarantees to every citizen fundamental rights in such a manner that the ordinary person-in-the-street, who is aware of these guarantees, immediately claims them without further ado – and assumes that every right so guaranteed is available to him or her on demand. Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.

43. However, the guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources "to achieve the progressive realisation of each of these rights."[4] In its language, the Constitution accepts that it cannot solve all of our society's woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution's guarantees is that of limited or scarce resources. In the present case the limited haemodialysis facilities, inclusive of haemodialysis machines, beds and trained staff constitute the limited or scarce facilities.

44. The applicant, aware of his rights under the Constitution, sought to claim in the court a quo, his right to emergency medical treatment under section 27(3). He

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[1] *S* v. *Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).
[2] Id at para 15.
[3] (1985) 18 DLR (4th) 321 at 359–60.
[4] Section 27(2). See also sections 25, 26, 29 and 32.

averred that with haemodialysis he could live for a long time, without it his life would be brief. The application was turned down by Combrink J. It is that refusal to grant an order directing the respondent to cause the rendering of on-going dialysis which has precipitated this appeal. The appellant contended that the refusal by the renal unit to give him the dialysis treatment he requires in order to keep alive was unreasonable, unjust and not equitable in a just and open democratic society and was a flagrant violation of his rights. He also averred in his papers that by refusing him this treatment, the respondent was discriminating against him. This latter averment was not followed up in argument at the hearing, and I accordingly take it no further. Suffice to observe that in the light of this Court's approach to equality, the appellant's argument in that regard could not stand.[5]

45. The fundamental issue is whether this Court, as the guardian of the Constitution, as the protector of human rights and as the upholder of democracy, should in this case require a health authority, acting through its authorised medical practitioner, to adopt a course of treatment which in the bona fide clinical and incisive judgment of the practitioner will not cure the patient but merely prolong his life for some time. Dr Naicker's qualifications as head of the Renal Unit at Addington Hospital are undoubted and her 18 years experience as a specialist physician in the field of renal medicine puts her in a singular position when it comes to the exercise by her of her own professional judgment on renal matters. She states in her affidavit in the present matter that patients who suffer from chronic renal failure, the condition which has afflicted the appellant, have as their only hope, either an organ transplant or long-term dialysis. It is always envisaged when such patients are put on the dialysis programme, that in due course a suitable cadaver transplant may be carried out or that organ donation may be made by a suitable living person. The appellant is not a suitable candidate for renal transplant; also he does not qualify for long-term dialysis because of the scarcity of facilities and his state of health.

46. It appears that because the appellant is suffering from, *inter alia*, coronary artery disease, ischaemic heart disease which caused him to have a stroke in 1996, hypertension and diabetes, he is not a suitable candidate for kidney transplant. The results of the angiogram indicated that he has to be excluded from the dialysis programme. It appears that barring a kidney transplant, haemodialysis is the most efficacious treatment of end-stage renal failure. It appears also that the renal unit at the said hospital cannot render treatment to all end-stage renal failure patients, including the appellant, unless they satisfy the guidelines which are accepted throughout South Africa as the minimum standards to be met for admission to the dialysis programme, the main criterion of which is the patient's suitability for a renal transplant. It was not suggested on the papers before us nor in argument at the

[5] *Harksen v Lane NO and Others* CCT 9/97, 7 October 1997, as yet unreported; *President of the Republic of South Africa and another* v. *Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); *Prinsloo* v. *Van der Linde and another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC); and *Brink* v. *Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

hearing that the applicant has ever considered seeking the less expensive treatment known as Continuing Ambulatory Peritoneal Dialysis (CAPD) or indeed that he was not eligible for that treatment as well. It appears that this form of treatment has been resorted to by many patients as a result of the lack of haemodialysis facilities and that while it cannot be equated to renal transplant or haemodialysis, it nonetheless prolongs life expectancy to some extent. In countries like the United Kingdom the prevalence of renal failure and the scarcity of resources has resulted in an increase in the number of patients who resort to CAPD.

47. The appellant was initially dialysed in the private sector at the rate of approximately Rl 000 per treatment and required two or three treatments per week but could not continue with this treatment when his funds ran out and he found himself owing the private clinic approximately R25 000.

48. Private hospitals and clinics which offer haemodialysis programmes play an important role in cases such as the present. They do afford end-stage renal failure patients with haemodialysis treatment where the public sector cannot. The private sector criteria for acceptance onto a dialysis programme are not as strict, but naturally the patient must have the funds in order to sustain treatment. It seems to me that it would alleviate the problem of the public sector if more patients were given by the private sector alternative possible treatment of providing catheters and bags which go with CAPD. The appellant in this case alleges that he was never advised about this option. If this were so, it would, in my view, be a serious indictment for the private sector which offers private renal dialysis programmes. However, the private sector is not before us and we cannot condemn it without hearing it.

49. Perhaps a solution might be to embark upon a massive education campaign to inform the citizens generally about the causes of renal failure, hypertension and diabetes and the diet which persons afflicted by renal failure could resort to in order to prolong their life expectancy.

SACHS J:

50. I am in full agreement with the eloquent-, forceful and well-focused judgment of Chaskalson P and wish merely to add certain considerations which I regard as relevant.

51. The special attention given by section 27(3) to non-refusal of emergency medical treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with the unforeseeable catastrophes which could befall any

person, anywhere and at any time.[1] The values protected by section 27(3) would, accordingly, be undermined rather than reinforced by any unwarranted conflation of emergency and non-emergency treatment such as that argued for by the appellant.

52. In a case such as the present which engages our compassion to the full, I feel it necessary to underline the fact that Chaskalson P's judgment, as I understand it, does not merely "toll the bell of lack of resources".[2] In all the open and democratic societies based upon dignity, freedom and equality with which I am familiar,[3] the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care.

53. Indeed, while each claimant seeking access to public medical resources is entitled to individualised consideration, the lack of principled criteria for regulating such access could be more open to challenge than the existence and application of such criteria. As a UNESCO publication put it:

> "Even in the industrialized nations where public tax-supported research has made a private biomedical technology industry possible, the literal provision of equal access to high-technology care, utilized most often by the elderly, would inevitably raise the level of spending to a point which would preclude investment in preventive care for the young, and maintenance care for working adults. That is why most national health systems do not offer, or severely ration (under a variety of disguises), expensive technological care such as renal dialysis or organ transplants."[4]

The inescapable fact is that if governments were unable to confer any benefit on any person unless it conferred an identical benefit on all, the only viable option would be to confer no benefit on anybody.[5]

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[1] See B New *The Rationing Agenda in the NHS* (King's Fund Policy Institute, London 1996) at 9.

[2] Quoted in *R v Cambridge Health Authority, ex parte B* [1995] 2 All ER 129 (CA) at 137c–d. In that case the judge in the Court a quo quashed the decision of a local health authority refusing to provide expensive treatment for a seriously ill child saying that ". . . the responsible authority . . . must do more than toll the bell of tight resources". The appeal Court overturned his decision.

[3] Section 39(1)(a) of the Constitution requires us, when interpreting the bill of rights, to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

[4] Brody *Biomedical Technology and Human Rights* (UNESCO, Paris 1993) at 233. South Africa is a middle income country where "despite their high profile, modern lifesaving medical treatments are only available on a limited scale", Benatar 'History of Medical Ethics: Africa' *Encyclopaedia of Bioethics Vol 3* Revised ed (Macmillan, New York 1995) 1465 at 1467.

[5] See *Brown v British Columbia (Minister of Health)* (1990) 48 CRR 137 at 157–8.

54. Health care rights by their very nature have to be considered not only in a traditional legal context structured around the ideas of human autonomy but in a new analytical framework based on the notion of human interdependence. A healthy life depends upon social interdependence: the quality of air, water, and sanitation which the state maintains for the public good; the quality of one's caring relationships, which are highly correlated to health; as well as the quality of health care and support furnished officially by medical institutions and provided informally by family, friends, and the community.[6] As Minow put it:

> "Interdependence is not a social ideal, but an inescapable fact; the scarcity of resources forces it on us. Who gets to use dialysis equipment? Who goes to the front of the line for the kidney transplant?"[7]

Traditional rights analyses accordingly have to be adapted so as to take account of the special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers. When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of section 36), but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.

55. I conclude with some observations on the questions raised relating to section 11 of the Constitution which states that "everyone has the right to life". The present case does not necessitate any attempt to give a definitive answer to all these questions. Yet it does point to the need to establish what Dworkin has in his book *Life's Dominion,* called the "relative importance of the natural and human contributions to the sanctity of life".[8] He concludes his study with the eloquent reminder that if people are to

> "retain the self consciousness and self respect that is the greatest achievement of our species, they will let neither science nor nature simply take its course, but will struggle to express, in the laws they make as citizens and the choices they make as people, the best understanding they can reach of why human life is sacred, and of the proper place of freedom in its dominion."[9]

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[6] Minow, participating in an interdisciplinary discussion held at Harvard Law School in 1993, 'Session I: Applying Rights Rhetoric to Economic and Social Claims' *Economic and Social Rights and the Right to Health* (Harvard Law School Human Rights Program, Cambridge MA 1995) 1 at 3.
[7] Id.
[8] Dworkin Life's Dominion: An Argument about Abortion and Euthanasia (Harper Collins, London 1993) at 240.
[9] Id at 241.

56. "The timing of death – once solely a matter of fate – is now increasingly becoming a matter of human choice."[10] In the United States, eighty percent of the two million people who die each year, die in hospitals and long term care institutions, and approximately seventy percent of those after a decision to forego life sustaining treatment has been made.[11] The words of Brennan J of the US Supreme Court, writing in a different context, have resonance:

> "Nearly every death involves a decision whether to undertake some medical procedure that could prolong the process of dying. Such decisions are difficult and personal. They must be made on the basis of individual values, informed by medical realities, yet within a framework governed by law. *The role of the courts is confined to defining that framework, delineating the ways in which government may and may not participate in such decisions.*"[12] (My emphasis.)

57. However the right to life may come to be defined in South Africa, there is in reality no meaningful way in which it can constitutionally be extended to encompass the right indefinitely to evade death. As Stevens J put it: dying is part of life, its completion rather than its opposite.[13] We can, however, influence the manner in which we come to terms with our mortality. It is precisely here, where scarce artificial life-prolonging resources have to be called upon, that tragic medical choices have to be made.

58. Courts are not the proper place to resolve the agonising personal and medical problems that underlie these choices. Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious. Our country's legal system simply "cannot replace the more intimate struggle that must be borne by the patient, those caring for the patient, and those who care about the patient".[14] The provisions of the bill of rights should furthermore not be interpreted in a way which results in courts feeling themselves unduly pressurised by the fear of gambling with the lives of claimants into ordering hospitals to furnish the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of others.[15]

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[10] Office of Technology Assessment Task Force, Life Sustaining Technologies and the Elderly 41 (1988), quoted by Brennan J (dissenting) in *Cruzan v Director, Missouri Department of Health, et al* 497 US 261, 302 (1990). That case involved terminating rather than having access to expensive equipment.
[11] Id at 302–3.
[12] Id at 303.
[13] Id at 343.
[14] *In re Jobes* 529 A2d 434 at 451 (NJ SCt, 1987). And see Lo et al 'Family Decision-making on Trial: Who Decides for Incompetent Patients?' (1990) 322 *New England Journal of Medicine* 1228 at 1231.
[15] Gostin commenting in 'Session II Defining the Right to Adequate Health' *Economic and Social Rights and the Right to Health: An Interdisciplinary Discussion Held at Harvard Law*

59. The applicant in this case presented his claim in a most dignified manner and showed manifest appreciation for the situation of the many other persons in the same harsh circumstances as himself. If resources were co-extensive with compassion, I have no doubt as to what my decision would have been. Unfortunately, the resources are limited, and I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonising choices that had to be made.

Counsel for the Appellant: MA Jacobs instructed by Vijay Kooblal and Associates.
Counsel for the Respondent: CJ Pammenter SC and JS Moodley instructed by the State Attorney, KwaZulu-Natal.

School in September, 1993 (Harvard Law School Human Rights Program, Cambridge MA 1995) 17 at 20.

CHAPTER VI

NON-DISCRIMINATION

Contents:

F. H. Zwaan-de Vries v. *the Netherlands*

(Communication No.182/1984)*

Human Rights Committee

Views adopted on 9 April 1987 at the twenty-ninth session.

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

Meeting on 9 April 1987;

Having concluded its consideration of communication No. 182/1984 submitted to the Committee by F. H. Zwaan-de Vries under the Optional Protocol to the International Covenant on Civil and Political Rights;

Having taken into account all written information made available to it by the author of the communication and by the State party concerned;

adopts the following:

VIEWS UNDER ARTICLE 5, PARAGRAPH 4, OF OPTIONAL PROTOCOL

1. The author of the communication (initial letter dated 28 September 1984 and subsequent letters of 2 July 1985, 4 and 23 April 1986) is Mrs. F. H. Zwaan-de Vries, a Netherlands national residing in Amsterdam, the Netherlands, who is

* The Covenant and the Optional Protocol entered into force on 11 March 1979 in respect of the Netherlands.

represented before the Committee by Mr. D. J. van der Vos, head of the Legal Aid Department (Rechtskundige Dienst FNV), Amsterdam.

2.1 The author was born in 1943 and is married to Mr. C. Zwaan. She was employed from early 1977 to 9 February 1979 as a computer operator. Since then she has been unemployed. Under the Unemployment Act she was granted unemployment benefits until 10 October 1979. She subsequently applied for continued support on the basis of the Unemployment Benefits Act (WWV). The Municipality of Amsterdam rejected her application on the ground that she did not meet the requirements because she was a married woman; the refusal was based on section 13, subsection 1 (1), of WWV, which did not apply to married men.

2.2 Thus the author claims to be a victim of a violation by the State party of article 26 of the International Covenant on Civil and Political Rights, which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The author claims that the only reason why she was denied unemployment benefits is because of her sex and marital status and contends that this constitutes discrimination within the scope of article 26 of the Covenant.

2.3 The author pursued the matter before the competent domestic instances. By decision of 9 May 1980 the Municipality of Amsterdam confirmed its earlier decision of 12 November 1979. The author appealed against the decision of 9 May 1980 to the Board of Appeal in Amsterdam, which, by an undated decision sent to her on 27 November 1981, declared her appeal to be unfounded. The author then appealed to the Central Board of Appeal, which confirmed the decision of the Board of Appeal on 1 November 1983. Thus, it is claimed that the author has exhausted all national legal remedies.

2.4 The same matter has not been submitted for examination to any other procedure of international investigation or settlement.

3. By its decision of 16 October 1984, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

4.1 In its submission dated 29 May 1985 the State party underlined, *inter alia*, that:

(a) “The principle that elements of discrimination in the realization of the right to social security are to be eliminated is embodied in article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights;

(b) "The Government of the Kingdom of the Netherlands has accepted to implement this principle under the terms of the International Covenant on Economic, Social and Cultural Rights. Under these terms, States parties have undertaken to take steps to the maximum of their available resources with a view to achieving progressively the full realization of the rights recognized in that Covenant (art. 2, para. 1);

(c) "The process of gradual realization to the maximum of available resources is well on its way in the Netherlands. Remaining elements of discrimination in the realization of the rights are being and will be gradually eliminated;

(d) "The International Covenant on Economic, Social and Cultural Rights has established its own system for international control of the way in which States parties are fulfilling their obligations. To this end States parties have undertaken to submit to the Economic and Social Council reports on the measures they have adopted and the progress they are making. The Government of the Kingdom of the Netherlands to this end submitted its first report in 1983;"

4.2 The State party then posed the question whether the way in which the Netherlands was fulfilling its obligations under article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights could become, by way of article 26 of the International Covenant on Civil and Political Rights, the object of an examination by the Human Rights Committee. The State party submitted that that question was relevant for the decision whether the communication was admissible.

4.3 The State party stressed that it would greatly benefit from receiving an answer from the Human Rights Committee to the question mentioned in paragraph 4.2 above. "Since such an answer could hardly be given without going into one aspect of the merits of the case – i.e. the question of the scope of article 26 of the International Covenant on Civil and Political Rights – the Government would respectfully request the Committee to join the question of admissibility to an examination of the merits of the case."

4.4 In case the Committee did not grant the request and declared the communication admissible, the State party reserved the right to submit, in the course of the proceedings, observations which might have an effect on the question of admissibility.

4.5 The State party also indicated that a change of legislation had been adopted recently in the Netherlands, eliminating section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV), which was the subject of the author's claim. This is the Act of 29 April 1985, S 230, having a retroactive effect to 23 December 1984.

4.6 The State party confirmed that the author had exhausted domestic remedies.

5.1 Commenting on the State party's submission under rule 91, the author, in a letter dated 2 July 1985, contended that the State party's question to the Committee as well as the answer to it were completely irrelevant with regard to the admissibility of the communication, because the author's complaint "pertains to the failure of the Netherlands to respect article 26 of the International Covenant on Civil and Political Rights. As the Netherlands signed and ratified the Optional Protocol to that Covenant, the complainant is by virtue of articles 1 and 2 of the Optional Protocol, entitled to file a complaint with your Committee pertaining to the non-respect of article 26. Therefore her complaint is admissible."

5.2 The author further pointed out that, although section 13, subsection 1 (1), of WWV had been eliminated, her complaint concerned legislation in force in 1979.

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 Article 5, paragraph 2 (a) of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection the Committee observes that the examination of State reports, submitted under article 16 of the International Covenant on Economic, Social and Cultural Rights, does not, within the meaning of article 5, paragraph 2 (a), constitute an examination of the "same matter" as a claim by an individual submitted to the Human Rights Committee under the Optional Protocol.

6.3 The Committee further observes that a claim submitted under the Optional Protocol concerning an alleged breach of a provision of the International Covenant on Civil and Political Rights is not necessarily incompatible with the provisions of that Covenant (see art. 3 of the Optional Protocol), because the facts also relate to a right protected by the International Covenant on Economic, Social and Cultural Rights or any other international instrument. It still had to be tested whether the alleged breach of a right protected by the International Covenant on Civil and Political Rights was borne out by the facts.

6.4 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. The parties to the present communication agree that domestic remedies have been exhausted.

6.5 With regard to the State party's inquiry concerning the scope of article 26 of the International Covenant on Civil and Political Rights, the Committee did not consider

it necessary to pronounce on its scope prior to deciding on the admissibility of the communication. However, having regard to the State party's statement (para. 4.4 above) that it reserved the right to submit further observations which might have an effect on the question of the admissibility of the case, the Committee pointed out that it would take into account any further observations received on the matter.

7. On 23 July 1984, the Human Rights Committee therefore decided that the Communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures, if any, that might have been taken by it.

8.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 14 January 1986, the State party again objected to the admissibility of the communication, reiterating the arguments advanced in its submission of 29 May 1985.

8.2 In discussing the merits of the case, the State party elucidates first the factual background as follows:

> "When Mrs. Zwaan applied for WWV benefits in October 1979, section 13, subsection 1 (1), was still applicable. This section laid down that WWV benefits could not be claimed by those married women who were neither breadwinners nor permanently separated from their husbands. The concept of 'breadwinner' as referred to in section 13, subsection 1 (1), of WWV was of particular significance, and was further amplified in statutory instruments based on the Act (the last relevant instrument being the ministerial decree of 5 April 1976, Netherlands Government Gazette 1976, 72). Whether a married woman was deemed to be a breadwinner depended, inter alia, on the absolute amount of the family's total income and on what proportion of it was contributed by the wife. That the conditions for granting benefits laid down in section 13, subsection 1 (1), of WWV applied solely to married women and not to married men is due to the fact that the provision in question corresponded to the then prevailing views in society in general concerning the roles of men and women within marriage and society. Virtually all married men who had jobs could be regarded as their family's breadwinner, so that it was unnecessary to check whether they met this criterion for the granting of benefits upon becoming unemployed. These views have gradually changed in later years. This aspect will be further discussed below (see para. 8.4).
>
> The Netherlands is a member State of the European Economic Community (EEC). On 19 December 1978 the Council of the European Communities issued a directive on the progressive implementation of the principle of equal treatment for men and women in matters of social

security (79/7/EEC), giving member States a period of six years, until 23 December 1984, within which to make any amendments to legislation which might be necessary in order to bring it into line with the directive. Pursuant to this directive the Netherlands Government examined the criterion for the granting of benefits laid down in section 13, subsection 1 (1), of WWV in the light of the principle of equal treatment of men and women and in the light of the changing role patterns of sexes in the years since about 1960.

"Since it could no longer be assumed as a matter of course in the early 1980s that married men with jobs should always be regarded as breadwinners', the Netherlands amended section 13, subsection 1 (1}, of WWV to meet its obligations under the EEC directive. The amendment consisted of the deletion of section 13, subsection 1 (1), with the result that it became possible for married women who were not breadwinners to claim WWV benefits, while the duration of the benefits, which had previously been two years, was reduced for people aged under 35.

"In view of changes in the status of women – and particularly married women – in recent decades, the failure to award Mrs. Zwaan WWV benefits in 1979 is explicable in historical terms. If she were to apply for such benefits now, the result would be different."

8.3 With regard to the scope of article 26 of the Covenant, the State party argues *inter alia* as follows:

"The Netherlands Government takes the view that article 26 of the Covenant does entail an obligation to avoid discrimination, but that this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights. Civil and political rights are to be distinguished from economic, social and cultural rights, which are the object of a separate United Nations Covenant, the International Covenant on Economic, Social and Cultural Rights.

"The complaint made in the present case relates to obligations in the sphere of social security, which fall under the International Covenant on Economic, Social and Cultural Rights. Articles 2, 3 and 9 of that Covenant are of particular relevance here. That Covenant has its own specific system and its own specific organ for international monitoring of how States parties meet their obligations and deliberately does not provide for an individual complaints procedure.

"The Government considers it incompatible with the aims of both the Covenants and the Optional Protocol that an individual complaint with respect to the right of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights, could be dealt with by the Human Rights Committee by way of an individual complaint under the Optional Protocol based on article 26 of the International Covenant on Civil and Political Rights.

> "The Netherlands Government reports to the Economic and Social Council on matters concerning the way it is fulfilling its obligations with respect to the right to social security, in accordance with the relevant rules of the International Covenant on Economic, Social and Cultural Rights . . .
>
> "Should the Human Rights Committee take the view that article 26 of the International Covenant on Civil and Political Rights ought to be interpreted more broadly, thus that this article is applicable to complaints concerning discrimination in the field of social security, the Government would observe that in that case article 26 must also be interpreted in the light of other comparable United Nations conventions laying down obligations to combat and eliminate discrimination in the field of economic, social and cultural rights. The Government would particularly point to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.
>
> "If article 26 of the International Covenant on Civil and Political Rights were deemed applicable to complaints concerning discriminatory elements in national legislation in the field of those conventions, this could surely not be taken to mean that a State party would be required to have eliminated all possible discriminatory elements from its legislation in those fields at the time of ratification of the Covenant. Years of work are required in order to examine the whole complex of national legislation in search of discriminatory elements. The search can never be completed, either, as distinctions in legislation which are justifiable in the light of social views and conditions prevailing when they are first made may become disputable as changes occur in the views held in society . . .
>
> "If the Human Rights Committee should decide that article 26 of the International Covenant on Civil and Political Rights entails obligations with regard to legislation in the economic, social and cultural field, such obligations could, in the Government's view, not comprise more than an obligation of States to subject national legislation to periodic examination after ratification of the Covenant with a view to seeking out discriminatory elements and, if they are found, to progressively taking measures to eliminate them to the maxims of the State's available resources. Such examinations are under way in the Netherlands with regard to various aspects of discrimination, including discrimination between men and women."

8.4 With regard to the principle of equality laid down in article 26 of the Covenant in relation to section 13, subsection 1 (1), of WWV in its unamended form, the State party explains the legislative history of WWV and in particular the social justification of the "breadwinner" concept at the time the law was drafted. The State party contends that with the "breadwinner" concept "a proper balance was achieved' between the limited availability of public funds (which makes it necessary to put them to limited, well-considered and selective use) on the one hand and the

Government's obligation to provide social security on the other. The Government does not accept that the 'breadwinner' concept as such was 'discriminatory' in the sense that equal cases were treated in an unequal way by law." Moreover, it is argued that the provisions of WWV "are based on reasonable social and economic considerations which are not discriminatory in origin. The restriction making the provision in question inapplicable to men was inspired not by any desire to discriminate in favour of men and against women but by the de facto social and economic situation which existed at the time when the Act was passed and which would have made it pointless to declare the provision applicable to men. At the time when Mrs. Zwaan applied for unemployment benefits the de facto situation was not essentially different. There was therefore no violation of article 26 of the Covenant. This is not altered by the fact that a new social trend has been growing in recent years, which has made it undesirable for the provision to remain in force in the present social context."

8.5 With reference to the decision of the Central Board of Appeal of 1 November 1983, which the author criticizes, the State party contends that "[t]he observation of the Central Board of Appeal that the Covenants employ different international control systems is highly relevant. Not only do parties to the Covenants report to different United Nations agencies but, above all, there is a major difference between the Covenants as regards the possibility of complaints by States or individuals, which exists only under the International Covenant on Civil and Political Rights. The contracting parties deliberately chose to make this difference in international monitoring systems, because the nature and substance of social, economic and cultural rights make them unsuitable for judicial review of a complaint lodged by a State party or an individual."

9.1 In her comments, dated 4 and 23 April 1986, the author reiterates that "article 13, subsection 1 (1) contains the requirement of being breadwinner for married women only, and not for married men. This distinction runs counter to article 26 of the Covenant . . . The observations of the Netherlands Government on views in society concerning traditional roles of men and women are completely irrelevant to the present case. The question . . . is in fact not whether those roles could justify the existence of article 13, subsection 1 (1), of WWV, but . . . whether this article in 1979 constituted an infraction of article 26 of the Covenant . . . The State of the Netherlands is wrong when it takes the view that the complainant's view could imply that all discriminatory elements ought to have been eliminated from its national legislation at the time of ratification of the Covenant . . . The complainant's view does imply, however, that ratification enables all Netherlands citizens to invoke article 26 of the Covenant directly . . . if they believe that they are being discriminated against. This does not imply that the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women have become meaningless. Those treaties

in fact compel the Netherlands to eliminate discriminatory provisions from more specific parts of national legislation."

9.2 With respect to the State party's contention that article 26 of the Covenant can only be invoked in the sphere of civil and political rights, the author claims that this view is not shared by Netherlands courts and that it also "runs counter to the stand taken by the Government itself during parliamentary approval. It then stated that article 26 – as opposed to article 2, paragraph 1 – 'also applied to areas otherwise not covered by the Covenant'."

9.3 The author also disputes the State party's contention that applicability of article 26 with regard to the right of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights, would be incompatible with the aims of both Covenants. The author claims that article 26 would apply "to one well-defined aspect of article 9 only, which is equal treatment before the law, leaving other important aspects such as the level of social security aside".

9.4 With regard to the State party's argument that, even if article 26 were to be considered applicable, the State party would have a delay of several years from the time of ratification of the Covenant to adjust its legislation, the author contends that this argument runs counter to the observations made by the Government at the time of [parliamentary] approval with regard to article 2, paragraph 2, of the International Covenant on Civil and Political Rights stating that such a *terme de grace* would be applicable only with respect to provisions that are not self-executing, whereas article 26 is in fact recognized by the Government and court rulings as self-executing. The author adds that it can, in fact, be concluded from the travaux preparatoires of the International Covenant on Civil and Political Rights that according to the majority of the delegates "it was essential to permit a certain degree of elasticity to the obligations imposed on States by the covenant, since all States would not be in a position immediately to take the necessary legislative or other measures for the implementation of its provisions".[1]

10. The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol. The facts of the case are not in dispute.

11. Article 26 of the International Covenant on Civil and Political Rights provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and

[1] *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (Part II), document A/2929, chap. V, para. 8.

> effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

12.1 The State party contends that there is considerable overlapping of the provisions of article 26 with the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, for example the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.

12.2 The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant travaux preparatoires of the International Covenant on Civil and Political Rights, namely the summary records of the discussions that took place in the Commission on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, which provide a "supplementary means of interpretation" (art. 32 of the Vienna Convention on the Law of Treaties.[2] The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3 For the purpose of determining the scope of article 26, the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus

[2] United Nations, *Juridical Yearbook 1969* (United Nations publication, Sales No. E.71.V.4), p. 140.

concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4 Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

12.5 The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

13. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

14. It therefore remains for the Committee to determine whether the differentiation in Netherlands law at the time in question and as applied to Mrs. Zwaan-de Vries constituted discrimination within the meaning of article 26. The Committee notes that in Netherlands law the provisions of articles 84 and 85 of the Netherlands Civil Code imposes equal rights and obligations on both spouses with regard to their joint income. Under section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV) a married woman, in order to receive WWV benefits, had to prove that she was a "breadwinner" – a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable, and this seems to have been effectively acknowledged even by the State party by the enactment of a change in the law on 29 April 1985, with retroactive effect to 23 December 1984 (see para. 4.5 above).

15. The circumstances in which Mrs. Zwaan-de Vries found herself at the material time and the application of the then valid Netherlands law made her a victim of a violation, based on sex, of article 26 of the International Covenant on Civil and Political Rights, because she was denied a social security benefit on an equal footing with men.

16. The Committee notes that the State party had not intended to discriminate against women and further notes with appreciation that the discriminatory provisions

in the law applied to Mrs. Zwaan-de Vries have, subsequently, been eliminated. Although the State party has thus taken the necessary measures to put an end to the kind of discrimination suffered by Mrs. Zwaan-de Vries at the time complained of, the Committee is of the view that the State party should offer Mrs. Zwaan-de Vries an appropriate remedy.

S. W. M. Broeks v. *the Netherlands*

(Communication No.172/1984)

Human Rights Committee

Views adopted on 9 April 1987 at the twenty-ninth session.

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

Meeting on 9 April 1987;

Having concluded its consideration of communication No. 172/1984 submitted to the Committee by S. W. M. Broeks under the Optional Protocol to the International Covenant on Civil and Political Rights;

Having taken into account all written information made available to it by the author of the communication and by the State party concerned;

adopts the following:

VIEWS UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL

1. The author of the communication (initial letter dated 1 June 1984 and subsequent letters dated 17 December 1984, 5 July 1985 and 20 June 1986) is Mrs. S. W. M. Broeks, a Netherlands citizen born on 14 March 1951 and living in the Netherlands. She is represented by legal counsel.

2.1 Mrs. Broeks, who was married at the time when the dispute in question arose (she has since divorced and not remarried), was employed as a nurse from 7 August 1972 to 1 February 1979, when she was dismissed for reasons of disability. She had become ill in 1975, and from that time she benefited from the Netherlands social security system until 1 June 1980 (as regards disability and as regards unemployment), when unemployment payments were terminated in accordance with Netherlands law.

2.2 Mrs. Broeks contested the decision of the relevant Netherlands authorities to discontinue unemployment payments to her and in the course of exhausting domestic remedies invoked article 26 of the International Covenant on Civil and Political Rights, claiming that the relevant Netherlands legal provisions were

contrary "to the right to equality before the law and equal protection of the law without discrimination" guaranteed by article 26 of the International Covenant on Civil and Political Rights. Legal counsel submits that domestic remedies were exhausted on 26 November 1983, when the appropriate administrative authority, the Central Board of Appeal, confirmed a decision of a lower municipal authority not to continue unemployment payments to Mrs. Broeks.

2.3 Mrs. Brooks claims that, under existing law (Unemployment Benefits Act (WWV), sect. 13, subsect. 1 (1), and Decree No. 61 452/IIIa of 5 April 1976, to give effect to sect. 13, subsect. 1 (1), of the Unemployment Benefits Act) an unacceptable distinction has been made on the grounds of sex and status. She bases her claim on the following: if she were a man, married or unmarried, the law in question would not deprive her of unemployment benefits. Because she is a woman, and was married at the time in question, the law excludes her from continued unemployment benefits. This, she claims, makes her a victim of a violation of article 26 of the Covenant on the grounds of sex and status. She claims that article 26 of the International Covenant on Civil and Political Rights was meant to give protection to individuals beyond the specific civil and political rights enumerated in the Covenant.

2.4 The author states that she has not submitted the matter to other international procedures.

3. By its decision of 26 October 1984, the Human Rights Committee transmitted the communication, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

4.1 In its submission dated 29 May 1985 the State party underlined, *inter alia*, that:

> (a) "The principle that elements of discrimination in the realization of the right to social security are to be eliminated is embodied in article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights;
>
> (b) "The Government of the Kingdom of the Netherlands has accepted to implement this principle under the terms of the International Covenant on Economic, Social and Cultural Rights. Under these terms, States parties have undertaken to take steps to the maximum of their available resources with a view to achieving progressively the full realization of the rights recognized in that Covenant (art. 2, para. 1);
>
> (c) "The process of gradual realization to the maximum of available resources is well on its way in the Netherlands. Remaining elements of discrimination in the realization of the rights are being and will be gradually eliminated;

> (d) "The International Covenant on Economic, Social and Cultural Rights has established its own system for international control of the way in which States parties are fulfilling their obligations. To this end States parties have undertaken to submit to the Economic and Social Council reports on the measures they have adopted and the progress they are making. The Government of the Kingdom of the Netherlands to this end submitted its first report in 1983."

4.2 The State party then posed the question whether the way in which the Netherlands was fulfilling its obligations Under article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights could become, by way of article 26 of the International Covenant on Civil and Political Rights, the object of an examination by the Human Rights Committee. The State party submitted that the question was relevant for the decision whether the communication was admissible.

4.3 The State party stressed that it would greatly benefit from receiving an answer from the Human Rights Committee to the question mentioned in paragraph 4.2 above. "Since such an answer could hardly be given without going into one aspect of the merits of the case – i.e. the question of the scope of article 26 of the International Covenant on Civil and Political Rights - the Government would respectfully request the Committee to join the question of admissibility to an examination of the merits of the case."

4.4 In case the Committee did not grant that request and declared the communication admissible, the State party reserved the right to submit, in the course of the proceedings, observations which might have an effect on the question of admissibility.

4.5 The State party also indicated that a change of legislation had been adopted recently in the Netherlands, eliminating article 13, paragraph 1, of WWV, which was the subject of the author's claim. This is the Act of 29 April 1985, S 230, having a retroactive effect to 23 December 1984.

4.6 The State party confirmed that the author had exhausted domestic remedies.

5.1 In a memorandum dated 5 July 1985, the author commented on the State party's submission under rule 91. The main issues dealt with in the comments are set out in paragraphs 5.2 to 5.10 below.

5.2 Firstly, the author stated that in the preambles to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights an explicit connection was made between an individual's exercise of his civil and political rights and his economic, social and cultural rights. The fact that those different kinds of rights had been incorporated into two different

covenants did not detract from their interdependence. It was striking, the author submitted, that in the International Covenant on Civil and Political Rights, apart from in article 26, there were specific references on numerous occasions to the principle of equality or non-discrimination. She listed them as follows:

article 2, paragraph 1:	non-discrimination with reference to the rights recognized in the Covenant;
article 3:	non-discrimination on the grounds of sex with reference to the rights recognized in the Covenant;
article 14:	equality before the courts;
article 23, paragraph 4:	equal rights of spouses;
article 24, paragraph 1:	equal rights of children to protective measures;
article 25 and under (c):	equal right to vote and equal access to government service.

5.3 Further, the author stated that article 26 of the Covenant was explicitly not confined to equal treatment with reference to certain rights, but stipulated a general principle of equality. It was even regarded as of such importance that under article 4, paragraph 1, of the Covenant, in a time of public emergency, the prohibition of discrimination on the grounds of race, colour, sex, religion or social origin must be observed. In other words, even in time of public emergency, the equal treatment of men and women should remain intact. In the procedure to approve the Covenant it had been assumed by the Netherlands legislative authority, as the Netherlands Government wrote in the explanatory memorandum to the Bill of Approval, that "the provision of article 26 is also applicable to areas otherwise not covered by the Covenant". That (undisputed) conclusion was based on the difference in formulation between article 2, paragraph 1, of the Covenant and of article 14 of the European Convention on Human Rights on the one hand and article 26 of the Covenant on the other.

5.4 The author recalled that during the discussion by the Human Rights Committee, at its fourteenth session, of the Netherlands report submitted in compliance with article 40 of the Covenant (CCPR/C/10/Add.3, CCPR/C/SR.321, SR.322, SR.325, SR.326), it had been assumed by the Netherlands Government that article 26 of the Covenant also applied in the field of economic, social and cultural rights. Mr. Olde Kalter had stated, on behalf of the Netherlands Government, that by virtue of national, constitutional law "direct application of article 26 in the area of social, economic and cultural rights depended on the character of the regulations or policy for which that direct application was requested" (see CCPR/C/SR.325, para. 50). In other words, in his opinion, article 26 of the Covenant was applicable to those rights and the only relevant question in terms of internal, constitutional law in the Netherlands (sects. 93 and 94 of the Constitution) was whether in such instances article 26 was self-executing and could be applied by the courts. He had regarded it

as self-evident that the Netherlands in its legislation, among other things, was bound by article 26 of the Covenant. "In that connection he [Mr. Olde Kalter] noted that the Government of the Netherlands was currently analysing national legislation concerning discrimination on grounds of sex or race." In the observations of the State party in the present case, the author adds, this last point is confirmed.

5.5 The author further stated that in various national constitutional systems of countries which have acceded to the Covenant, generally formulated principles of equality could be found which were also regarded as being applicable in the field of economic, social and cultural rights. Thus, in the Netherlands Constitution, partly inspired, the author submitted, by article 26 of the Covenant, a generally formulated prohibition of discrimination (sect. 1) was laid down which was irrefutably regarded in the Netherlands as being applicable to economic, social and cultural rights as well. The only reason, she submitted, why the present issue had not been settled at a national level by virtue of section 1 of the Constitution was because the courts were forbidden to test legislation, such as that being dealt with currently, against the Constitution (sect. 120 of the Constitution). The courts, she stated, were allowed to test legislation against self-executing provisions of international conventions.

5.6 The author submitted that judicial practice in the Netherlands had been consistent in applying article 26 of the Covenant also in cases where economic, social and cultural rights had been at stake, for example:

> (a) Afdeling Rechtspraak van de Raad van State (Judicial Division of the Council of State), 29-1-1981 GS81 P441-442. This case involved discrimination on the grounds of sex with reference to housing. An appeal under article 26 of the Covenant in conjunction with article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights was founded.
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> (b) Gerechtshof's Gravenhage (Court of Appeal at the Hague), 17 June 1982 NJ 1983, 345 appendix 3. Again with regard to housing, an appeal was made under article 26 of the Covenant and was granted.
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> (c) Centrale Raad van Beroep (Central Board of Appeal), 1 November 1983, NJCM-Bulletin.
>
> (d) Centrale Raad van Beroep (Central Board of Appeal), 1 November 1983, NJCM-Bulletin 9-1 (1984) appendix 4. In this case, which constitutes the basis for the petition to the Human Rights Committee, the Central Board of Appeal considered "that article 26 is not applicable only to the civil and political rights which are recognized by the Covenant". The appeal under article 26 was subsequently rejected for other reasons.

(e) Board of Appeal, Groningen, 2 May 1985, reg. No. AAW 181-1095 appendix 5. On the basis of article 26 of the Covenant among other things a discriminatory provision in the General Disablement Benefits Act was declared null and void.

5.7 The author further submitted that the question of equal treatment in the field of economic, social and cultural rights was not fundamentally different from the problem of equality with regard to freedom to express one's opinion or the freedom of association, in other words with regard to civil and political rights. The fact was, she argued, that in both cases it was not a question of the level at which social security had been set or the degree to which freedom of opinion was guaranteed, but purely and simply whether equal treatment or the prohibition of discrimination was respected. The level of social security did not come within the scope of the International Covenant on Civil and Political Rights nor was it relevant in a case of unequal treatment. The only relevant question, she submitted, was whether unequal treatment was compatible with article 26 of the Covenant. A contrary interpretation of article 26, the author argued, would turn that article into a completely superfluous provision, for then it would not differ from article 2, paragraph 1, of the Covenant. Consequently, she submitted, such an interpretation would be incompatible with the text of article 26 of the Covenant and with the object and purpose of the Covenant as laid down in article 26 of the preamble.

5.8 The author recalled that in its observations the State party had put forward the question whether the way in which the Netherlands was meeting its commitments under the International Covenant on Economic, Social and Cultural Rights (via article 26 of the International Covenant on Civil and Political Rights), might be judged by the Human Rights Committee. The question, she submitted, was based on a wrong point of departure, and therefore required no answer. The fact was, the author argued, that the only question that the Human Rights Committee was required to answer in that case was whether, *ratione materiae*, the alleged violation came under article 26 of the International Covenant on Civil and Political Rights. The author submitted that that question must be answered in the affirmative.

5.9 The author further recalled that the State party was of the opinion that the alleged violation could also fall under article 9 of the International Covenant on Economic, Social and Cultural Rights in conjunction with articles 2 and 3 of the same Covenant. Although that question was not relevant in the case in point, the author submitted, it was obvious that certain issues were related to provisions in both Covenants. Although civil and political rights on the one hand and economic and social and cultural rights on the other had been incorporated for technical reasons into two different Covenants, it was a fact, the author submitted, that those rights were highly interdependent. That interdependence, she argued, had not only emerged in the preamble to both Covenants, but was also once again underlined in General Assembly resolution 543 (VI), in which it had been decided to draw up two

covenants: "The enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent." The State party, too, she submitted, had explicitly recognized that interdependence earlier in the Explanatory Memorandum to the Act of Approval, appendix 1, page 8: "The drafters of the two Covenants wanted to underline the parallel nature of the present international conventions by formulating the preambles in almost entirely identical words. The point is that they have expressed in the preambles that, although civil rights and political rights on the one hand and economic, social and cultural rights on the other, have been incorporated into two separate documents, the enjoyment of all these rights is essential." If the State party was intending to imply that the subject-matter covered by the one covenant did not come under the other, that was demonstrably incorrect: even a summary comparison of the opening articles of the two covenants bore witness to the contrary, the author argued.

5.10 In her opinion, the author added, the State party seemed to wish to say that the Human Rights Committee was not competent to take note of the present complaint because the matter could also be brought up as part of the supervisory procedure under the International Covenant on Economic, Social and Cultural Rights (see art. 16-22). That assertion, the author contended, was not valid because the reporting procedure under the International Covenant on Economic, Social and Cultural Rights could not be regarded as "another procedure of international investigation or settlement" in the sense of article 5, paragraph 2 (a) of the Optional Protocol.

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 Article 5, paragraph 2 (a), of the Optional Protocol precludes. the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection the Committee observes that the examination of State reports, submitted under article 16 of the International Covenant on Economic, Social and Cultural Rights, does not, within the meaning of article 5, paragraph 2 (a), constitute an examination of the "same matter" as a claim by an individual submitted to the Human Rights Committee under the Optional Protocol.

6.3 The Committee further observes that a claim submitted under the Optional Protocol concerning an alleged breach of a provision of the International Covenant on Civil and Political Rights, cannot be declared inadmissible solely because the facts also relate to a right protected by the International Covenant on Economic, Social and Cultural Rights or any other international instrument. The Committee need only test whether the allegation relates to a breach of a right protected by the International Covenant on Civil and Political Rights.

6.4 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. The parties to the present communication agree that domestic remedies have been exhausted.

6.5 With regard to the State party's inquiry concerning the scope of article 26 of the International Covenant on Civil and Political Rights, the Committee did not consider it necessary to pronounce on its scope prior to deciding on the admissibility of the communication. However, having regard to the State party's statement (para. 4.4 above) that it reserved the right to submit further observations which might have an effect on the question of the admissibility of the case, the Committee pointed out that it would take into account any further observations received on the matter.

7. On 25 October 1985, the Human Rights Committee therefore decided that the communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures, if any, that might have been taken by it.

8.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 22 May 1986, the State party again objected to the admissibility of the communication, reiterating the arguments advanced in its submission of 29 May 1985.

8.2 In discussing the merits of the case, the State party elucidates first the factual background as follows:

> "When Mrs. Brooks applied for WWV benefits in February 1980, section 13, subsection 1 (1), was still applicable. This section laid down that WWV benefits could not be claimed by those married women who were neither breadwinners nor permanently separated from their husbands. The concept of 'breadwinner' as referred to in section 13, subsection 1 (1), of WWV was of particular significance, and was further amplified in statutory instruments based on the Act (the last relevant instrument being the ministerial decree of 5 April 1976, Netherlands Government Gazette 1976, 72). Whether a married woman was deemed to be a breadwinner depended, *inter alia*, on the absolute amount of the family's total income and on what proportion of it was contributed by the wife. That the conditions for granting benefits laid down in section 13, subsection 1 (1), of WWV applied solely to married women and not to married men is due to the fact that the provision in question corresponded to the then prevailing views in society in general concerning the roles of men and women within marriage and society. Virtually all married men who had jobs could be regarded as their family's breadwinner, so that it was unnecessary to check whether they met this criterion for the granting of benefits upon becoming unemployed. These views have gradually

changed in later years. This aspect will be further discussed below (see para. 8.4).

"The Netherlands is a member State of the European Economic Community (EEC). On 19 December 1978 the Council of the European Communities issued a directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), giving member States a period of six years, until 23 December 1984, within which to make any amendments to legislation which might be necessary in order to bring it into line with the directive. Pursuant to this directive the Netherlands Government examined the criterion for the granting of benefits laid down in section 13, subsection 1 (1), of WWV in the light of the principle of equal treatment of men and women and in the light of the changing role patterns of the sexes in the years since about 1960.

"Since it could no longer be assumed as a matter of course in the early 1980s that married men with jobs should always be regarded as 'breadwinners', the Netherlands amended section 13, subsection 1 (1), of WWV to meet its obligations under the EEC directive. The amendment consisted of the deletion of section 13, subsection 1 (1), with the result that it became possible for married women who were not breadwinners to claim WWV benefits, while the duration of the benefits was reduced for people aged under 35.

In view of changes in the status of women - and particularly married women - in recent decades, the failure to award Mrs. Broeks WWV benefits in 1979 is explicable in historical terms. If she were to apply for such benefits now, the result would be different."

8.3 With regard to the scope of article 26 of the Covenant, the State party argues, *inter alia*, as follows:

"The Netherlands Government takes the view that article 26 of the Covenant does entail an obligation to avoid discrimination, but that this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights. Civil and political rights are to be distinguished from economic, social and cultural rights, which are the object of a separate United Nations Covenant, the International Covenant on Economic, Social and Cultural Rights.

"The complaint made in the present case relates to obligations in the sphere of social security, which fall under the International Covenant on Economic, Social and Cultural Rights. Articles 2, 3 and 9 of that Covenant are of particular relevance here. That Covenant has its own specific system and its own specific organ for international monitoring of how States parties meet their obligations and deliberately does not provide for an individual complaints procedure.

"The Government considers it incompatible with the aims of both the Covenants and the Optional Protocol that an individual complaint with respect to the right of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights, could be dealt with by the Human Rights Committee by way of an individual complaint under the Optional Protocol based on article 26 of the International Covenant on Civil and Political Rights.

"The Netherlands Government reports to the Economic and Social Council on matters concerning the way it is fulfilling its obligations with respect to the right to social security, in accordance with the relevant rules of the International Covenant on Economic, Social and Cultural Rights . . .

"Should the Human Rights Committee take the view that article 26 of the International Covenant on Civil and Political Rights ought to be interpreted more broadly, thus that this article is applicable to complaints concerning discrimination in the field of social security, the Government would observe that in that case article 26 must also be interpreted in the light of other comparable United Nations conventions laying down obligations to combat and eliminate discrimination in the field of economic, social and cultural rights. The Government would particularly point to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

"If article 26 of the International Covenant on Civil and Political Rights were deemed applicable to complaints concerning discriminatory elements in national legislation in the field of those conventions, this could surely not be taken to mean that a State party would be required to have eliminated all possible discriminatory elements from its legislation in those fields at the time of ratification of the Covenant. Years of work are required in order to examine the whole complex of national legislation in search of discriminatory elements. The search can never be completed, either, as distinctions in legislation which are justifiable in the light of social views and conditions prevailing when they are first made may become disputable as changes occur in the views held in society . . .

"If the Human Rights Committee should decide that article 26 of the International Covenant on Civil and Political Rights entails obligations with regard to legislation in the economic, social and cultural field, such obligations could, in the Government's view, not comprise more than an obligation of States to subject national legislation to periodic examination after ratification of the Covenant with a view to seeking out discriminatory elements and, if they are found, to progressively taking measures to eliminate them to the maximum of the State's available resources. Such examinations are under way in the Netherlands with regard to various aspects of discrimination, including discrimination between men and women."

8.4 With regard to the principle of equality laid down in article 26 of the Covenant in relation to section 13, subsection 1 (1), of WWV in its unamended form, the State party explains the legislative history of WWV and in particular the social justification of the "breadwinner" concept at the time the law was drafted. The State party contends that, with the "breadwinner" concept, "a proper balance was achieved between the limited availability of public funds (which makes it necessary to put them to limited, well-considered and selective use) on the one hand and the Government's obligation to provide social security on the other. The Government does not accept that the 'breadwinner' concept as such was 'discriminatory' in the sense that equal cases were treated in an unequal way by law." Moreover, it is argued that the provisions of WWV "are based on reasonable social and economic considerations which are not discriminatory in origin. The restriction making the provision in question inapplicable to men was inspired not by any desire to discriminate in favour of men and against women but by the *de facto* social and economic situation which existed at the time when the Act was passed and which would have made it pointless to declare the provision applicable to men. At the time when Mrs. Broeks applied for unemployment benefits the *de facto* situation was not essentially different. There was therefore no violation of article 26 of the Covenant. This is not altered by the fact that a new social trend has been growing in recent years, which has made it undesirable for the provision to remain in force in the present social context."

8.5 With reference to the decision of the Central Board of Appeal of 26 November 1983, which the author criticizes, the State party contends that:

> "The observation of the Central Board of Appeal that the Covenants employ different international control systems is highly relevant. Not only do parties to the Covenants report to different United Nations bodies but, above all, there is a major difference between the Covenants as regards the possibility of complaints by States or individuals, which exists only under the International Covenant on Civil and Political Rights. The contracting parties deliberately chose to make this difference in international monitoring systems, because the nature and substance of social, economic and cultural rights make them unsuitable for judicial review of a complaint lodged by a State party or an individual."

9.1 In her comments, dated 19 June 1986, the author reiterates that "article 26 if the Covenant is explicitly not confined to equal treatment with reference to certain rights, but stipulates a general principle of equality".

9.2 With regard to the State party's argument that it would be incompatible with the aims of both the Covenants and the Optional Protocol if an individual complaint with respect to the rights of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights could be dealt with by the Human Rights Committee, the author contends that this argument is ill-rounded, because she is not complaining about the level of social security or other

issues relating to article 9 of the International Covenant on Economic, Social and Cultural Rights, but rather she claims to be a victim of unequal treatment prohibited by article 26 of the International Covenant on Civil and Political Rights.

9.3 The author further notes that the State party "seems to admit implicitly that the provisions of the Unemployment Benefits Act were contrary to article 26 at the time when [she] applied for unemployment benefits, by stating that the provisions in question in the meantime have been amended in a way compatible with article 26 of the International Covenant on Civil and Political Rights".

10. The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

11. Article 26 of the Covenant on Civil and Political Rights provides:

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

12.1 The State party contends that there is considerable overlapping of the provisions of article 26 with the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.

12.2 The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant travaux preparatoires of the International Covenant on Civil and Political Rights, namely, the summary records of the discussions that took place in the Commission

on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, which provide a "supplementary means of interpretation" (art. 32 of the Vienna Convention on the Law of Treaties.[1] The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3 For the purpose of determining the scope of article 26, the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4 Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

12.5 The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

13. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

14. It therefore remains for the Committee to determine whether the differentiation in Netherlands law at the time in question and as applied to Mrs. Brooks constituted discrimination within the meaning of article 26. The Committee notes that in

[1] United Nations, *Juridical Yearbook 1969* (United Nations publication, Sales No. E.71.V.4), p. 140.

Netherlands law the provisions of articles 84 and 85 of the Netherlands Civil Code impose equal rights and obligations on both spouses with regard to their joint income. Under section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV), a married woman, in order to receive WWV benefits, had to prove that she was a "breadwinner" - a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable; and this seems to have been effectively acknowledged even by the State party by the enactment of a change in the law on 29 April 1985, with retroactive effect to 23 December 1984 (see para. 4.5 above).

15. The circumstances in which Mrs. Brooks found herself at the material time and the application of the then valid Netherlands law made her a victim of a violation, based on sex, of article 26 of the International Covenant on Civil and Political Rights, because she was denied a social security benefit on an equal footing with men.

16. The Committee notes that the State party had not intended to discriminate against women and further notes with appreciation that the discriminatory provisions in the law applied to Mrs. Brooks have, subsequently, been eliminated. Although the State party has thus taken the necessary measures to put an end to the kind of discrimination suffered by Mrs. Brooks at the time complained of, the Committee is of the view that the State party should offer Mrs. Brooks an appropriate remedy.

CHAPTER VII

THE RIGHT TO ADEQUATE FOOD

Contents:

CESCR General Comment No. 12*

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The right to adequate food (art. 11)

Introduction and basic premises

1. The human right to adequate food is recognized in several instruments under international law. The International Covenant on Economic, Social and Cultural Rights deals more comprehensively than any other instrument with this right. Pursuant to article 11.1 of the Covenant, States parties recognize "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions", while pursuant to article 11.2 they recognize that more immediate and urgent steps may be needed to ensure "the fundamental right to freedom from hunger and malnutrition". The human right to adequate food is of crucial importance for the enjoyment of all rights. It applies to everyone; thus the reference in Article 11.1 to "himself and his family" does not imply any limitation upon the applicability of this right to individuals or to female-headed households.

2. The Committee has accumulated significant information pertaining to the right to adequate food through examination of State parties' reports over the years since 1979. The Committee has noted that while reporting guidelines are available relating

* Committee on Economic, Social and Cultural Rights, Twentieth session, Geneva, 26 April-14 May 1999, Agenda item 7.

to the right to adequate food, only few States parties have provided information sufficient and precise enough to enable the Committee to determine the prevailing situation in the countries concerned with respect to this right and to identify the obstacles to its realization. This General Comment aims to identify some of the principal issues which the Committee considers to be important in relation to the right to adequate food. Its preparation was triggered by the request of Member States during the 1996 World Food Summit, for a better definition of the rights relating to food in article 11 of the Covenant, and by a special request to the Committee to give particular attention to the Summit Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the Covenant.

3. In response to these requests, the Committee reviewed the relevant reports and documentation of the Commission on Human Rights and of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to adequate food as a human right; devoted a day of general discussion to this issue at its seventh session in 1997, taking into consideration the draft international code of conduct on the human right to adequate food prepared by international non-governmental organizations; participated in two expert consultations on the right to adequate food as a human right organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR), in Geneva in December 1997, and in Rome in November 1998 co-hosted by the Food and Agriculture Organization of the United Nations (FAO), and noted their final reports. In April 1999 the Committee participated in a symposium on "The substance and politics of a human rights approach to food and nutrition policies and programmes", organized by the Administrative Committee on Co-ordination/Sub-Committee on Nutrition of the United Nations at its twenty-sixth session in Geneva and hosted by OHCHR.

4. The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.

5. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate food, a disturbing gap still exists between the standards set in article 11 of the Covenant and the situation prevailing in many parts of the world. More than 840 million people throughout the world, most of them in developing countries, are chronically hungry; millions of people are suffering from famine as the result of natural disasters, the increasing incidence of civil strife and wars in some regions and the use of food as a political weapon. The Committee observes that while the problems of hunger and malnutrition are often particularly acute in developing countries, malnutrition, under-nutrition and other problems which relate to the right to adequate food and the right to freedom from

hunger, also exist in some of the most economically developed countries. Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of *access to* available food, *inter alia* because of poverty, by large segments of the world's population.

Normative content of article 11, paragraphs 1 and 2

6. The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The *right to adequate food* will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.

Adequacy and sustainability of food availability and access

7. The concept of *adequacy* is particularly significant in relation to the right to food since it serves to underline a number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances for the purposes of article 11 of the Covenant. The notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*, implying food being accessible for both present and future generations. The precise meaning of "adequacy" is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while "sustainability" incorporates the notion of long-term availability and accessibility.

8. The Committee considers that the core content of the right to adequate food implies:

> The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
>
> The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

9. *Dietary needs* implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breast-feeding, while ensuring that

changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake.

10. *Free from adverse substances* sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.

11. *Cultural or consumer acceptability* implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

12. *Availability* refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.

13. *Accessibility* encompasses both economic and physical accessibility:

> Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.
>
> Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

Obligations and violations

14. The nature of the legal obligations of States parties are set out in article 2 of the Covenant and has been dealt with in the Committee's General Comment No. 3 (1990). The principal obligation is to take steps to achieve *progressively* the full

realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.

15. The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*.[1] The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil* (*facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.

16. Some measures at these different levels of obligations of States parties are of a more immediate nature, while other measures are more of a long-term character, to achieve progressively the full realization of the right to food.

17. Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from Article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment No. 3, paragraph 10. A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.

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[1] Originally three levels of obligations were proposed: to respect, protect and assist/fulfil. (See *Right to adequate food as a human right*, Study Series No. 1, New York, 1989 (United Nations publication, Sales No. E.89.XIV.2)). The intermediate level of "to facilitate" has been proposed as a Committee category, but the Committee decided to maintain the three levels of obligation.

18. Furthermore, any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

19. Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.

20. While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector – national and transnational – should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.

Implementation at the national level

21. The most appropriate ways and means of implementing the right to adequate food will inevitably vary significantly from one State party to another. Every State will have a margin of discretion in choosing its own approaches, but the Covenant clearly requires that each State party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. This will require the adoption of a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks. It should also identify the resources available to meet the objectives and the most cost-effective way of using them.

22. The strategy should be based on a systematic identification of policy measures and activities relevant to the situation and context, as derived from the normative content of the right to adequate food and spelled out in relation to the levels and nature of State parties' obligations referred to in paragraph 15 of the present general comment. This will facilitate coordination between ministries and regional and local authorities and ensure that related policies and administrative decisions are in compliance with the obligations under article 11 of the Covenant.

23. The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

24. Appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition. The strategy should set out the responsibilities and time-frame for the implementation of the necessary measures.

25. The strategy should address critical issues and measures in regard to *all* aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security. Care should be taken to ensure the most sustainable management and use of natural and other resources for food at the national, regional, local and household levels.

26. The strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families (as stipulated in article 7 (a) (ii) of the Covenant); maintaining registries on rights in land (including forests).

27. As part of their obligations to protect people's resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.

28. Even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.

Benchmarks and framework legislation

29. In implementing the country-specific strategies referred to above, States should set verifiable benchmarks for subsequent national and international monitoring. In this connection, States should consider the adoption of a *framework law* as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations.

30. Appropriate United Nations programmes and agencies should assist, upon request, in drafting the framework legislation and in reviewing the sectoral legislation. FAO, for example, has considerable expertise and accumulated knowledge concerning legislation in the field of food and agriculture. The United Nations Children's Fund (UNICEF) has equivalent expertise concerning legislation with regard to the right to adequate food for infants and young children through maternal and child protection including legislation to enable breast-feeding, and with regard to the regulation of marketing of breast milk substitutes.

Monitoring

31. States parties shall develop and maintain mechanisms to monitor progress towards the realization of the right to adequate food for all, to identify the factors and difficulties affecting the degree of implementation of their obligations, and to facilitate the adoption of corrective legislation and administrative measures, including measures to implement their obligations under articles 2.1 and 23 of the Covenant.

Remedies and accountability

32. Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National Ombudsmen and human rights commissions should address violations of the right to food.

33. The incorporation in the domestic legal order of international instruments recognizing the right to food, or recognition of their applicability, can significantly

enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Courts would then be empowered to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant.

34. Judges and other members of the legal profession are invited to pay greater attention to violations of the right to food in the exercise of their functions.

35. States parties should respect and protect the work of human rights advocates and other members of civil society who assist vulnerable groups in the realization of their right to adequate food.

International obligations

States parties

36. In the spirit of article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.

37. States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in its General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

States and international organizations

38. States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability. The role of the World Food Programme (WFP) and the Office of the United Nations High Commissioner for Refugees (UNHCR), and increasingly that of UNICEF and FAO is of particular importance in this respect and should be

strengthened. Priority in food aid should be given to the most vulnerable populations.

39. Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.

The United Nations and other international organizations

40. The role of the United Nations agencies, including through the United Nations Development Assistance Framework (UNDAF) at the country level, in promoting the realization of the right to food is of special importance. Coordinated efforts for the realization of the right to food should be maintained to enhance coherence and interaction among all the actors concerned, including the various components of civil society. The food organizations, FAO, WFP and the International Fund for Agricultural Development (IFAD) in conjunction with the United Nations Development Programme (UNDP), UNICEF, the World Bank and the regional development banks, should cooperate more effectively, building on their respective expertise, on the implementation of the right to food at the national level, with due respect to their individual mandates.

41. The international financial institutions, notably the International Monetary Fund (IMF) and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the debt crisis. Care should be taken, in line with the Committee's General Comment No. 2, paragraph 9, in any structural adjustment programme to ensure that the right to food is protected.

World Food Summit: Five Years Later*

The Right to Food: Achievements and Challenges

Report by Mary Robinson,
United Nations High Commissioner for Human Rights

Introduction

1. On 17 November 1996 the World Food Summit adopted by consensus the Rome Declaration on World Food Security and the World Food Summit Plan of Action, which outlined ways to achieve universal food security. In the Plan of Action, the States attending the Rome Summit made a number of commitments. Under objective 7.4(e), Governments, in partnership with all actors of civil society, invited

> the United Nations High Commissioner for Human Rights, in consultation with relevant treaty bodies, and in collaboration with relevant specialized agencies and programmes of the United Nations system and appropriate intergovernmental mechanisms, to define better the rights related to food in article 11 of the [International] Covenant [on Economic, Social and Cultural Rights] and to propose ways to implement and realize these rights as a means of achieving the commitments and objectives of the World Food Summit, taking into account the possibility of formulating voluntary guidelines for food security for all.

2. Significant progress has been made in the implementation of that request, as illustrated in section I of this report. The right to food has been much better defined, and ways to implement and realize it have been proposed. Unfortunately, however, insufficient steps towards implementation have been taken at the national and international levels, and the right to food is therefore far from being realized for all. Section II of the report identifies the main challenges ahead. Section III contains some concluding remarks.

I. The achievements

I.1 Developments in the international human rights system

3. This section summarizes progress by the international human rights system towards producing a better definition of the right to food. Progress has been made through initiatives by the Office of the High Commissioner for Human Rights (OHCHR), normative work by the Committee on Economic Social and Cultural Rights and action by Commission on Human Rights mechanisms.

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* Rome Italy 10-13 June 2002.

I.1.1 Expert consultations

4. Acting on its mandate under the World Food Summit Plan of Action, the OHCHR held three expert consultations on the right to food. They were organized in close collaboration with relevant treaty bodies, specialized agencies and programmes of the United Nations system, Governments, interested non-governmental organizations and the Special Rapporteur of the Commission on Human Rights on the right to food.

The 1997 consultation

5. The first consultation was held in Geneva on 1 and 2 December 1997.[1] It concluded that the human right to adequate food is firmly established in international law but its operational content and means of application are generally little understood. The right thus remains scarcely implemented.

6. The consultation clarified a basic misconception regarding State obligations in respect of the human right to adequate food. It was agreed that implementation of the right does not imply that it must be realized immediately by the State concerned (obligation to *fulfil/provide*). States' primary obligations are to *respect* and *protect* the right to food and to *fulfil/facilitate* its enjoyment by ensuring adequate conditions for that purpose. The obligation to *fulfil (fulfil/provide*) the right directly exists only when individuals or groups are unable, for reasons beyond their control, to enjoy the right to adequate food through the means at their disposal.

7. The consultation also recommended that the Committee on Economic, Social and Cultural Rights contribute to the clarification of the content of the right to adequate food through the adoption of a general comment.

The 1998 consultation

8. The second consultation - co-hosted by FAO - was convened in Rome on 18 and 19 November 1998 in order to develop further the discussion of the content and means of implementation of those rights related to adequate food, drawing on the experience of food organizations as well as of the Governments attending the event.[2] Some recommendations dealt with the implementation of the right to food during emergency situations. It was noted that States have specific obligations under humanitarian law such as the duty to receive food aid in times of critical need, to grant access to impartial humanitarian organizations so that they can distribute food aid, and to prohibit the use of starvation as a method of warfare.

[1] E/CN.4/1998/21.
[2] E/CN.4/1999/45.

9. The consultation also recommended that States adopt a framework law as part of a national strategy on the right to food. In this regard, it proposed that the Rome-based agencies – FAO, the World Food Programme (WFP) and the International Fund for Agricultural Development (IFAD) – should play a supportive role by providing technical expertise.

The 2001 consultation

10. The third consultation was convened in Bonn from 12 to 14 March 2001 and hosted by the Government of the Federal Republic of Germany.[3] While the first two consultations were held prior to the adoption by the Committee on Economic, Social and Cultural Rights of its General Comment No. 12 (see below, para. 13), this third consultation took place after its adoption. It focused on implementation at the national and international levels and was guided by the general comment as the authoritative legal interpretation clarifying the normative content of the right to food and State obligations.

11. The consultation recommended that States review existing impediments to full implementation of the right to adequate food, develop a legislative agenda to strengthen implementation and repeal incompatible laws.

12. The consultation identified areas that required further policy development such as facilitating access to productive resources for the food-insecure and the vulnerable, including land tenure and access to water. Noting that fulfilment of the right to food is closely linked to the adoption of appropriate economic, environmental and social policies and in particular efforts to eradicate poverty, it concluded that poverty reduction should be guided by strategies to implement the right to food and related human rights.

I.1.2 General Comment No. 12 of the Committee on Economic, Social and Cultural Rights

13. The Committee on Economic, Social and Cultural Rights (CESCR) is the body established by the International Covenant on Economic, Social and Cultural Rights to monitor compliance by States parties with its provisions. In carrying out this task, the Committee formulates general comments, which are authoritative interpretations of rights under the Covenant. Their purpose is to assist States parties in fulfilling their reporting obligations and to provide greater interpretative clarity as to the intent, meaning and content of the Covenant.

[3] E/CN.4/2001/148.

14. General Comment No. 12 on the right to adequate food[4] was adopted by the Committee in 1999 in response to objective 7.4 of the World Food Summit Plan of Action. It includes in its definition of the right to adequate food a requirement that there be physical and economic access at all times to adequate food or means for its procurement. Furthermore, the Committee considers that the core content of the right to food implies: (a) the *availability* of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances and acceptable within a given culture; and (b) the *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

15. While acknowledging that the right to food should be realized progressively, General Comment No. 12 points out that States have a core obligation to take action to ensure that, at the very least, people under their jurisdiction have access to the minimum essential food that is needed to ensure their freedom from hunger. The general comment also interprets progressive realization to mean that States should move as expeditiously as possible towards that goal.

16. The Committee considers that the right to adequate food imposes three levels of obligation on States parties. In the first place, States must refrain from taking measures liable to deprive anyone of access to food (the obligation to *respect*). This obligation would be violated, for example, if the State arbitrarily deprived an individual of his/her land in a case where the land was the individual's physical means of securing the right to food. Secondly, States must ensure, by adopting legislative or other measures, that third parties, whether other individuals or companies, do not interfere with the right of access to adequate and sufficient food (the obligation to *protect*). The obligation to *fulfil* (*facilitate*) means that States must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood. And it is only when individuals or groups are unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, that States have the obligation to *fulfil* (*provide*) that right directly.

17. General Comment No. 12 also refers to violations of the right to food, which occur when the State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. While recognizing that a distinction has to be made between the unwillingness and the inability of States to take action, the Committee considers that a State which claims that it is unable to fulfil its obligation for reasons beyond its control (e.g. resource constraints) has to demonstrate that it has done everything in its power to ensure access to food, including appealing for support from the international community.

[4] CESCR, "General Comment No. 12: The Right to Adequate Food" (E/C.12/1999/5).

18. While recognizing that means of implementing the right to food at the national level inevitably vary from one State party to another, the Committee considers that States parties should develop a national strategy to ensure food and nutrition security for all, based on human rights principles. At the international level, States are required to recognize the essential role of international cooperation and to comply with their commitment to take joint and separate action to achieve the full realization of the right to food.

I.1.3 Studies by the Special Rapporteur of the Sub-Commission

19. In 1999, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mr. Asbjørn Eide, updated his pioneering study on the right to food and to be free from hunger.[5] The Special Rapporteur recognized the role played by the World Food Summit Plan of Action in changing attitudes and acknowledged the important contribution of General Comment No. 12 in clarifying the content of the right and of corresponding State obligations. He noted that international institutions were increasingly endorsing a human rights approach to food and nutrition issues and called on States, international organizations, NGOs and civil society to act in a concerted way to eliminate the scourge of hunger from humanity.

I.1.4 The Special Rapporteur on the right to food

20. In 2000, the Commission on Human Rights appointed Mr. Jean Ziegler (Switzerland) as its first Special Rapporteur on the right to food.[6] He has since submitted two reports[7] and one mission report[8] to the Commission on Human Rights

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[5] "The right to adequate food and to be free from hunger", updated study on the right to food submitted by Mr. Asbjørn Eide pursuant to Sub-Commission decision 1998/106 (E/CN.4/Sub.2/1999/12). The initial study by Mr. Eide, which introduced for the first time the analytical framework of State obligations, was published by the United Nations Centre for Human Rights in 1989 as item No. 1 in the Study Series.

[6] In resolution 2000/10, the Commission on Human Rights defined the Special Rapporteur's mandate as follows:

> "(a) To seek, receive and respond to information on all aspects of the realization of the right to food, including the urgent necessity of eradicating hunger;
>
> (b) To establish cooperation with Governments, intergovernmental organizations (in particular, FAO) and non-governmental organizations, on the promotion and effective implementation of the right to food, and to make appropriate recommendations on the realization thereof, taking into consideration the work already done in this field throughout the United Nations system; and
>
> (c) To identify emerging issues related to the right to food worldwide."

[7] "Report by the Special Rapporteur on the right to food" submitted pursuant to Commission on Human Rights resolution 2000/10 (E/CN.4/2001/53). "Report by the Special Rapporteur

and one preliminary report to the General Assembly.[9] In his reports, the Special Rapporteur has focused on the following priority issues for implementation of the right to adequate food:

21. *Water as a human right*. The Special Rapporteur stressed that the term "food" covers not only solid foods but also the nutritional aspects of drinking water. He also pointed out that water – like food – is vital for life. Clean drinking water is an essential part of healthy nutrition and also a necessary condition for the enjoyment of other human rights (such as the right to life and to health). In his reports, the Special Rapporteur stated that, as a component of the right to food, access to safe, clean drinking water and basic irrigation water must be protected, including through international cooperation.

22. *Justiciability*. The Special Rapporteur considered that justiciability is essential for the implementation of the right to food to enable people to seek a remedy and accountability if their right to food is violated. He analysed the reasons why, historically, economic, social and cultural rights have not been considered justiciable and provides examples to show that today the right to food is indeed justiciable and can be adjudicated by a court of law. He stressed, however, that notwithstanding these encouraging developments at the national and international levels, a great deal remains to be done to ensure the justiciability of the right to food.

23. *Right to food in international humanitarian law*. In his analysis, the Special Rapporteur refers to the fact that the right to food applies both in peacetime and during armed conflict. During armed conflict the protection afforded by human rights law is supplemented by international humanitarian law, especially the provisions aimed at ensuring that persons or groups not taking or no longer taking part in hostilities are not denied access to food. These provisions include the prohibition of starvation of civilians as a method of warfare, the prohibition of forcible transfers of civilians in situations of occupation, and the obligation to respect rules on relief and humanitarian assistance so that relief is not blocked, diverted or delayed. The Special Rapporteur noted that despite important developments in respect of enforcement mechanisms, including in particular the recent establishment of the International Criminal Court (ICC), violations of the right to food during armed conflicts still occur. He calls on the international community to renew its efforts to ensure compliance with the rules and principles of international humanitarian law.

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on the right to food" submitted pursuant to Commission on Human Rights resolution 2001/25 (E/CN.4/2002/58).

[8] "Report by the Special Rapporteur on the right to food" submitted pursuant to Commission on Human Rights resolution 2001/25; "Addendum: Mission to Niger" (E/CN.4/2002/58/Add.1).

[9] "Preliminary report of the Special Rapporteur of the Commission on Human Rights on the right to food" (A/56/210).

24. *Right to food and international trade*. The Special Rapporteur has urged the international community to review international trade obligations so as to ensure that they do not conflict with the right to food and food security. He considers that a market economy cannot per se guarantee the basic needs of the whole of society. Efforts should be made, as a matter of urgency, to incorporate respect for human rights, particularly the right to food, in the new trade agreements. The Special Rapporteur also recommends investigating the effects of economic sanctions on respect for the right to food.

I.1.5 Enforcing the right to food: the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

25. In 1997, the Committee on Economic, Social and Cultural Rights submitted a draft optional protocol to the Covenant to the Commission on Human Rights. The draft protocol would enable individual complaints to be considered. This would contribute to the better definition of economic, social and cultural rights and would also reinforce compliance with the Covenant.[10] OHCHR organized in February 2001 a Workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the Covenant. The Workshop concluded, inter alia, that economic, social and cultural rights are justiciable not only in theory but also in practice, and pointed to recent case law at the international and national levels.

26. Subsequently, the Commission on Human Rights decided in 2001 to appoint an independent expert (Mr. H. Kotrane, Tunisia) to examine the question of a draft optional protocol to the Covenant. In his report, the independent expert expressed the belief that it is necessary to move towards the possible adoption of the draft optional protocol through the establishment of an open-ended working group of the Commission.[11] His mandate has been extended for a further year.

I.2 Other developments

27. The efforts of the international human rights system to implement objective 7.4 of the World Food Summit Plan of Action have been complemented by many initiatives, at the national and international levels, of civil society, States and international organizations. These have played a critical role in achieving progress.

[10] It also stressed that as a matter of fact many elements of various Covenant rights are described with sufficient precision and clarity to be justiciable.
[11] E/CN.4/2002/24, para. 9(f).

I.2.1 Developments at the national level

28. Some twenty countries have adopted constitutions that more or less explicitly refer to the right to food or a related norm.[12] However, only a few have developed and implemented a framework law on the right to food or national legislation and policies to ensure its enjoyment.

29. Countries such as Brazil, Mali, Nepal, South Africa, Senegal and Uganda have started a dialogue on ways of operationalizing the right to food at the national level. Norway leads the field in terms of comprehensive action. In 1999 it approved a Human Rights Act[13] under which the main human rights instruments, including the International Covenant on Economic, Social and Cultural Rights, enjoy the force of law in Norway. Subsequently, the Ministry of Agriculture presented to Parliament *White Paper No. 19 on Agricultural Food Production*, which adopts a rights-based approach to agricultural policy. The needs of the consumer are a basic premise and the importance of the consumer's influence on and participation in food and agricultural policy development is stressed. The *White Paper* expressly refers to the right to food and to General Comment No. 12. Reference to the Covenant is also made in the Budget Bill (2001-2002), which requires the Government to ensure that people have physical and economic access at all times to sufficient, safe and nutritious food to meet their dietary needs and food preferences so that they can lead an active and healthy life.

30. Although enforcement mechanisms are generally weak, there has been some encouraging progress. An expanding body of national jurisprudence makes the right to food justiciable.[14] The decisions of India's Supreme Court, one example of which is cited below, are of particular relevance.

31. In April 2001 a human rights NGO, the People's Union for Civil Liberties, filed a complaint with the Indian Supreme Court, arguing that several federal institutions and local state Governments should, *inter alia*, be responsible for mass malnutrition among the people living in the states concerned.[15] In one of its interim orders relating to the case, the Supreme Court affirmed that where people are unable to feed themselves adequately, Governments have an obligation to provide for them,

[12] One of the most explicit references is in the South African Constitution, which states in section 27: "Everyone has the right to have access to . . . sufficient food and water."
[13] Human Rights Act of 21 May 1999, No. 30.
[14] Some interesting cases regarding South Africa, India and Switzerland are referred to in the "Report by the Special Rapporteur on the right to food" submitted pursuant to Commission on Human Rights resolution 2001/25 (E/CN.4/2002/58), paras. 53-58.
[15] Writ Petition (Civil) No. 196 of 2001 (People's Union of Civil Liberties v. Union of India and Ors.).

ensuring, at the very least, that they are not exposed to malnourishment, starvation and other related problems.[16]

I.2.2 Developments at the international level

32. In the World Food Summit Plan of Action, Heads of State and Government committed themselves to cooperate actively with one another and with United Nations organizations, financial institutions, intergovernmental and non-governmental organizations, and the public and private sectors on programmes directed towards the achievement of food security for all.

33. The international development summits and conferences held since the World Food Summit have reaffirmed the international community's commitments to achieve global rights and goals. These commitments were reaffirmed at the Millennium Summit[17] and encapsulated in the eight Millennium Development Goals (MDGs), which represent a new global agenda for development. The first goal reaffirms the international community's commitment to reduce the number of people suffering from hunger to half its 1996 level by 2015 at the latest.

34. As a follow-up to the Millennium Summit, the Secretary-General has issued a "roadmap" containing an integrated and comprehensive overview of the issues outlined in the Declaration and identifying potential strategies for action.[18] The roadmap specifically calls for a human rights approach to the MDGs.

35. Today, some 145 countries have ratified the International Covenant on Economic, Social and Cultural Rights and each year the Committee monitors progress towards the realization of those rights, including the right to food, in approximately 12 countries. Significantly, in recent years it has also begun to monitor legislation and policies adopted by developed countries, States parties to the Covenant, to cooperate with developing countries for the full realization of economic, social and cultural rights, including the right to food.

I.2.3 Mainstreaming human rights in the United Nations system

36. The Secretary-General's 1997 Programme for Reform called for the integration of human rights into all United Nations activities and programmes.[19] Several United

[16] Order of the Supreme Court of India of 23 July 2001.
[17] General Assembly resolution 55/2 of 8 September 2000.
[18] General Assembly resolution 56/95 of 14 December 2001.
[19] "Renewing the United Nations: A Programme for Reform", Report of the Secretary General, 14 July 1997 (A/51/950).

Nations agencies have now formulated policies and developed strategies and methodologies to incorporate human rights in their activities and programmes.[20]

37. Under the Programme for Reform, OHCHR was mandated to facilitate the mainstreaming of human rights in United Nations development activities. Accordingly, the Office is promoting awareness of the norms and standards of the United Nations human rights system among development agencies. Its active participation in United Nations development coordination mechanisms such as the (former) Administrative Committee on Coordination (ACC)[21] and the United Nations Development Group (UNDG) has resulted in the incorporation of human rights in the guidelines for the elaboration of Common Country Assessments (CCAs) and United Nations Development Assistance Frameworks (UNDAFs) and in the publication of guidelines for the integration of human rights into the work of Resident Coordinators.

38. OHCHR has also established cooperative relationships with United Nations programmes, departments and agencies such as the United Nations Development Programme (UNDP), the United Nations Department of Peacekeeping Operations (DPKO), the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the United Nations Human Settlements Programme (UN-HABITAT) through the signing of memoranda of understanding (MOUs) and the development of joint programmes. The purpose of these agreements is to assist in mainstreaming human rights into the activities of the department or agency concerned and to cooperate in the effective implementation of human rights.

39. In particular, OHCHR and FAO concluded an MOU in 1997 to ensure the effective implementation of the right to food.[22] FAO has taken several initiatives in this regard, including the publication of a booklet on the right to food,[23] the collection of international instruments relating to the right to food[24] and the setting up of a web site entirely dedicated to the right to food.[25] In April 1999, OHCHR hosted a session of the inter-agency mechanism for harmonizing nutrition policy, the Sub-Committee on Nutrition of the Administrative Committee on Coordination (ACC/SCN).[26] During the session, a symposium was held on the substance and

[20] For example, the United Nations Children's Fund's "Guidelines for a Human Rights-Based Programming Approach" (1998) and the United Nations Development Fund's policy on "Integrating human rights with sustainable human development" (1997).
[21] Now the High-Level Programme Committee (HLPC).
[22] Memorandum of Understanding between the High Commissioner for Human Rights and the Director-General of the Food and Agriculture Organization of the United Nations, 29 May 1997.
[23] FAO, The Right to Food in Theory and Practice, Rome 1998.
[24] FAO, Legislative Study No. 68, Rome 1999.
[25] http://www.fao.org/Legal/rtf-e.htm.
[26] Twenty-sixth session of the ACC/SCN, 8-15 April 1999.

politics of a human rights approach to food and nutrition policies and programmes. In the keynote address, the High Commissioner for Human Rights stated that the realization of the right to food was inseparable from appropriate economic, environmental and social policies oriented towards the eradication of poverty and the satisfaction of basic needs.

I.2.4 The role of civil society

40. Less would have been achieved without the substantive commitment and dedicated action of civil society. The International Code of Conduct on the Human Right to Adequate Food was drafted in 1997 by the NGO community as a follow-up to the World Food Summit and deserves special mention.[27] The Code of Conduct, developed under the leadership of organizations such as the International Jacques Maritain Institute, the Food First Information and Action Network (FIAN) and the World Alliance for Nutrition and Human Rights (WANAHR), is now an important reference document and has had a major impact on the work of international organizations and NGOs operating in the fields of human rights and food security.[28]

41. The leadership of the academic world has also been of valuable assistance in developing a conceptual understanding of the right to food and promoting its implementation. The research and promotional activities of the International Project on the Right to Food in Development (IPRFD) have been particularly significant.[29]

II. THE CHALLENGES

42. Objective 7.4 of the World Food Summit Plan of Action has been largely fulfilled. A new agenda is now needed to transform legal concepts and political commitments into actions that lead to practical progress towards full realization of the right to food. The goal is to liberate humanity from the scourge of hunger. It is a goal that is now within reach since the world has sufficient food resources to feed the whole population of the planet. This section explores the challenges that this task presents to national and international communities.

II.1 National implementation

43. National strategies based on human rights principles to ensure food and nutritional security for all remain the exception rather than the rule. States are urged to review their policies in the areas of agriculture, nutrition, social development,

[27] International Code of Conduct on the Human Right to Adequate Food, draft endorsed by the Food First Information and Action Network (FIAN), the World Alliance for Nutrition and Human Rights (WANAHR) and the International Jacques Maritain Institute, September 1997.
[28] Some 800 NGOs have adopted the Code of Conduct.
[29] A collaborative undertaking established in 2000 between two departments of the University of Oslo and Akershus University College in Norway.

environment, trade and international development in order to define a coherent policy framework that is conducive to the elimination of hunger and the realization of the right to food at the national level. States are also encouraged to increase the number of programmes designed to implement pro-right-to-food strategies and to develop new programmes addressing unresolved dimensions of the hunger problem.

44. States are encouraged to seek guidance from General Comment No. 12 in developing their national strategies, which should be firmly based on the principles of accountability, transparency, popular participation, decentralization, legislative capacity and the independence of the judiciary. States should consider the adoption of a framework law as a strategic instrument. The law should specify goals and institutional responsibilities and contain an estimate of the resources required. Verifiable benchmarks for national and international monitoring and effective remedies for violations of the right to food should be core components of any national strategy.

II.2 International implementation

45. Notwithstanding the commitments made by the World Food Summit and the Millennium Assembly through the MDGs to reduce the number of hungry people to 400 million by 2015, current data show that the number of undernourished people is falling at an average rate far below the 22 million per year needed to reach the World Food Summit target. Should this slow pace continue, the World Food Summit target will not be reached until 2030. This is unacceptable in a world which has sufficient resources to feed its entire population. The elimination of hunger through full enjoyment of the right to food should be at the centre of international cooperation policies.

46. In this context, the OHCHR welcomes the initiative of an increasing number of Member States and civil society organizations in adopting a voluntary code of conduct on the right to adequate food. Such a code would assist in identifying substantive measures to make the right to food a reality, thereby contributing to its implementation.

47. The international human rights system plays a central role in the realization of the right to food and the elimination of hunger. It must be further strengthened. All States should ratify the International Covenant on Economic, Social and Cultural Rights and other international instruments relating to the right to food, and States parties should review and withdraw their reservations, and implement concluding observations by the Committee. OHCHR encourages States parties to implement its suggestions and recommendations in their domestic legal systems. It also calls on States to continue their efforts to develop a mechanism that provides international protection for individual victims.

48. Although most United Nations agencies are developing policies to mainstream human rights into their activities, the policy implications of mainstreaming human rights need to be more clearly understood. Best practices must be developed and lessons learned about the underpinnings of successful rights-based approaches and programmes. A greater effort must be made to develop methodologies, indicators, benchmarks, training packages and accountability systems that empower development practitioners to implement rights-based approaches.

49. OHCHR notes the influence of transnational corporations on food security, especially through international trade and investment, and highlights the responsibility of the private sector to ensure that companies in particular act to promote the right to food.

II.3 Research and policy development

II.3.1 Right to food and the right to development

50. The 1993 World Conference on Human Rights recognized in the Vienna Declaration and Programme of Action that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.[30] It also reaffirmed the right to development, established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. The human person is thus at the core of the development process.

51. In his third report, the independent expert on the right to development, Mr. Sengupta (India), underlined that access to food, access to primary health care and access to primary education are fundamental for the implementation of the right to development and the alleviation of poverty.[31] The realization of basic rights such as the right to food should be at the centre of a country's overall development programme. He suggested that, on the basis of this programme, development compacts establishing reciprocal obligations for implementation of the right to development should be agreed between the developing country concerned and the international community.

52. The independent expert's study is of considerable value in clarifying the relationship between the right to food and the right to development. However, there is a need for further analysis of the role of the right to food in ensuring the realization of the right to development.

[30] A/CONF.157/23.
[31] E/CN.4/WG.18/2001/2.

II.3.2 Right to food and poverty reduction strategies

53. Poverty is a multifaceted phenomenon involving the violation or even denial of most human rights, including the right to food. At the same time, people are reduced to poverty and maintained in poverty by human rights violations. The vicious cycle is now increasingly recognized. As the Committee on Economic, Social and Cultural Rights observed in General Comment No. 12, "the roots of the problem of hunger and malnutrition are not lack of food but lack of *access* to available food, inter alia because of poverty, by large segments of the world's population."[32]

54. In the last decade, the goals of poverty reduction and the elimination of hunger have at times come into conflict with other macroeconomic goals. Human rights, including the right to food, could be a useful operational tool for designing and implementing poverty reduction strategies. OHCHR is now elaborating guidelines to integrate human rights, including the right to food, into poverty reduction strategies. Other initiatives include the Social Forum to be held in July 2002, which will examine the relationship between poverty reduction and the realization of the right to food. A fourth consultation on the right to food will be held in early 2003 and will focus on the realization of the right to food as part of strategies and policies for the eradication of poverty.

II.3.3 Right to food and humanitarian assistance

55. For millions of people around the world, access to food is threatened by armed conflict and natural disasters. In recent decades, the international community has been increasingly called upon to respond to complex emergencies, defined as humanitarian crises within a country or region involving a total or considerable breakdown in authority as a result of external or internal conflict. In these emergency situations, humanitarian assistance is often the only way of ensuring the right to food for populations affected by war or natural disasters.

56. In conflict situations, the protection afforded by human rights law is supplemented by international humanitarian law. As the Special Rapporteur on the right to food pointed out in his last report to the Commission on Human Rights, much needs to be done to ensure that international humanitarian law is respected and civilian populations protected from starvation.[33] In particular, it is important to investigate how the principles and rules governing humanitarian assistance, particularly food assistance, should be applied in order to ensure consistency and coherence with human rights law. This is especially true of modern conflicts, which can no longer be characterized as inter-State conflicts. Furthermore, human rights-

[32] General Comment No. 12, para. 5.
[33] "Report by the Special Rapporteur on the right to food" submitted pursuant to Commission on Human Rights resolution 2001/25 (E/CN.4/2002/58).

based strategies should be developed to strengthen current disaster preparedness and prevention practices.

II.3.4 Right to food and international trade

57. The connection between the right to food and international trade is apparent in a number of fields, most notably agricultural trade, but also in trade-related aspects of intellectual property protection. Agricultural trade offers enormous potential for development and food security, above all for developing countries. However, developing countries still have difficulty in obtaining access for their products to the markets of member countries of the Organization for Economic Cooperation and Development (OECD). At the same time, the liberalization of agricultural trade in developing countries, especially net food-importing developing countries, has increased the vulnerability of local markets to international price fluctuations and has failed to take sufficient account of the food security of the poor and vulnerable such as poor farmers and farm workers.

58. In her report on globalization to the Commission on Human Rights this year, the High Commissioner for Human Rights proposed a right-to-food approach to agricultural trade in the framework of the WTO's Agreement on Agriculture.[34] While noting that the Agreement on Agriculture is only a first step to more openness in developed country markets, the report highlighted the fact that the Agreement does not sufficiently take into account the concerns of the poor and vulnerable or of net food-importing developing countries. A right-to-food approach to the Agreement would stress the human rights principle of non-discrimination and consequently encourage affirmative action for the poor, allowing certain special trade rules for the protection of vulnerable people.

59. The report's recommendations underlined the need for targeted food aid, the importance of operationalizing special and differential treatment for developing countries, the need for greater openness in wealthy countries to agricultural products from developing countries and the need for assistance to developing countries in negotiations at the WTO. In this connection, the report welcomed the commitments at the Fourth WTO Ministerial Conference in Doha to substantial improvements in market access and reductions in all forms of export subsidies with a view to phasing them out, as well as the commitment to make special and differential treatment an integral part of the rules and disciplines of the Agreement on Agriculture.

III. CONCLUSIONS

60. This report shows that the mandate entrusted to the High Commissioner under objective 7.4 of the World Food Summit Plan of Action has been largely

[34] E/CN.4/2002/54.

accomplished. The international legal framework to respect, protect and fulfil the right to food is more fully in place. Progress in understanding the right to food and in clarifying its content has been made possible by the efforts of the international human rights system, Governments, organizations of the United Nations system and NGOs. The Committee on Economic, Social and Cultural Rights has made a significant contribution through General Comment No. 12.

61. Fewer people are undernourished today than a decade ago. However, current data indicate that the decline in the number of people suffering from hunger has slowed. Should this trend persist, the World Food Summit and MDG targets will take 15 years longer to reach than originally agreed and that would still leave more than 400 million people hungry and malnourished. This is morally and legally unacceptable.

62. The World Food Summit should give a fresh impetus to international action and enable the international community to agree new steps to implement the right to adequate food. National implementation of the right to food, strengthening of the international human rights system, active participation by civil society, and United Nations engagement in an ambitious research and operational agenda are crucial elements in a multi-track strategy for implementation of the right to food.

CHAPTER VIII

THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

Contents:

CESCR General Comment No. 14*

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Right to the Highest Attainable Standard of Health (article 12)

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realisation of the right to health may be pursued by numerous, complementary approaches, such as the formulation of health policies or the implementation of health programmes[1] developed by the World Health Organisation (WHO), or the adoption of specific

* Committee on Economic, Social and Cultural Rights, Twenty-second session, Geneva, 25 April-12 May 2000, Item 3 of the agenda. E/C.12/2000/4, 11 May 2000. Unedited Version.
[1] [Global Strategy for Health for All by the Year 2000; Primary Health Care].

legal instruments. Moreover, the right to health includes components which are legally enforceable.[2]

2. The human right to health is recognized in numerous international instruments. Article 25(1) of the Universal Declaration of Human Rights affirms: "Everyone has a right to a standard of living adequate for the health of himself and his family, including food, clothing, housing, and medical care and necessary social services". The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. According to article 12(1) of the Covenant, States Parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12(2) enumerates, by way of illustration, a number of "steps to be taken by the States Parties . . . to achieve the full realization of this right". Additionally, the right to health is recognized, *inter alia*, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11 (1) (f) and 12 of the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognise the right to health, such as the European Social Charter of 1961 as revised (articles 11, 13 and 15), the African Charter on Human and Peoples' Rights of 1981 (article 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (article 10)[3]. Similarly, the right to health has been proclaimed by the Commission on Human Rights,[4] as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments.[5]

3. The right to health is closely related to and dependent upon the realisation of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.[6]

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[2] For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.

[3] [The Protocol entered into force in 1999].

[4] In its resolution 1989/11.

[5] [CHR Res. 1989/11]. The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 (resolution 46/119) and the Committee's General Comment No. 5 on persons with disabilities apply to persons with mental illness; the Programme of Action of the International Conference on Population and Development held at Cairo in 1994, as well as the Declaration and Programme for Action of the Fourth World Conference on Women held in Beijing in 1995 contain definitions of reproductive health and women's health, respectively.

[6] [Articles citations from UDHR (arts. 1, 2, 3, 5, 12, 13, 20, 25, 26), ICESCR (arts. 2(2), 3, 6, 8, 11, 13), ICCPR (arts. 2(1), 3, 6(1), 7, 10(1), 12, 17, 19, 21, 22), CAT (art. 2), (CEDAW

4. In drafting article 12 of the Covenant, the General Assembly's Third Committee did not adopt the definition of health contained in the preamble to the Constitution of WHO which conceptualizes health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". However, the reference in article 12 (1) of the Covenant to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and express wording of article 12 (2) acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions whereby people can lead a healthy life, and extends to the underlying determinants of health such as food and nutrition, housing, access to safe and potable water and sanitation, safe and healthy working conditions, and a healthy environment.

5. The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The Committee recognises the formidable structural and other obstacles that result from international and other factors beyond the control of States, and impeding the full realisation of article 12 in many States parties.

6. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this General Comment focuses on the normative content of article 12 (Part I), States parties' obligations (Part II), violations (Part III), and implementation at the national level (Part IV), while Part V deals with the obligations of actors other than States parties. The General Comment is based on the Committee's experience in examining States parties' reports over many years.

I. NORMATIVE CONTENT OF ARTICLE 12

7. Article 12 (1) provides a definition of the right to health, while article 12 (2) enumerates illustrative, non-exhaustive examples of States parties' obligations.

8. The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. Freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of protections for health, which provides equality of opportunity for people to enjoy the highest attainable level of health.

(arts. 2, 10, 11), CERD arts. 2, 5 (d)(e)), CRC (arts. 2, 6, 15, 16, 17, 19, 25, 27, 28, 29, 32, 37, 39)].

9. The notion of "the highest attainable standard of health" in article 12 (1) takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals, in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.

10. Since the adoption of the two UN Covenants in 1966 the world health situation has changed dramatically and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences. A wider definition of health also takes into account such socially-related concerns as violence and armed conflict.[7] Moreover, formerly unknown diseases, such as Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (HIV/AIDS), and others that have become more widespread, such as cancer, as well as the rapid growth of the world population, have created new obstacles for the realization of the right to health, which need to be taken into account when interpreting article 12.

11. The Committee interprets the right to health, as defined in article 12 (1), as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

12. The right to health in all its forms and at all levels contains the following interrelated and essential terms, the precise application of which will depend on the conditions prevailing in a particular State party:

> (a) Availability. Functioning public health and health care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary according to numerous factors, including the State party's

[7] Common article 3 of the Geneva Conventions for the protection of war victims (1949); Additional Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts, art. 75 (2) (a); Additional Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts, art. 4 (a).

developmental level. They will include, however, the underlying determinants of health, sanitation facilities, safe and potable drinking water, hospitals, clinics and other health-related buildings, trained medical and professional personnel, receiving domestically competitive salaries, and essential drugs, as defined by WHO's Action Programme on Essential Drugs.[8]

(b) Accessibility. Health facilities, goods and services[9] have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

> (i) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalised sections of the population, in law and fact, without discrimination on any of the prohibited grounds.[10]
> (ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all parts of the population, especially for vulnerable or marginalised groups such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities, and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitary facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.
> (iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health care services, as well as services related to the underlying determinants of health, have to be based on the principle of equity ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should pay a smaller proportion of their income for health care services compared to richer households.
> (iv) Information accessibility: Accessibility includes the right "to seek, receive and impart information and ideas [11] concerning

[8] See WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information, vol. 13, No. 4, 1999.
[9] Unless expressly provided otherwise, any reference in this General Comment to health facilities, goods and services includes the underlying determinants of health outlined in paras. 11 and 12 (a) of this General Comment.
[10] See paras. 18 and 19 of this General Comment.
[11] See article 19.2 of the International Covenant on Civil and Political Rights. This General Comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.

health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

(c) Acceptability. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.
(d) Quality. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.[12]

13. The non-exhaustive catalogue of examples in article 12 (2) provides guidance in defining the action to be taken by States. It gives specific generic examples of measures arising from the broad definition of the right to health contained in paragraph 1, thereby illustrating the content of that right, as exemplified in the following paragraphs.[13]

[12.] In this General Comment, the feature of "quality" is given particular emphasis because of its special importance in the field of health and the work of WHO.

[13] The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments such as article 10 of the San Salvador Protocol to the American Convention on Human Rights. [In the literature and practice concerning the right to health, three levels of health care are frequently referred to*:* *Primary health care* typically deals with common and relatively minor illnesses and is provided by health professionals and/or generally trained doctors working within the community at relatively low costs; *secondary health care* is provided in centres, usually hospitals, and typically deals with relatively common minor or serious illnesses that cannot be managed in the community, using specialty trained health professionals and doctors, special equipment, and sometimes in-patient care at relatively higher costs; *tertiary health care* is provided in relatively few centres, usually deals with small numbers of minor or serious illnesses requiring specialty trained health professionals and doctors and special equipment, and is often relatively expensive.
Since forms of primary, secondary and tertiary health care frequently overlap and often interact, the use of this typology does not always provide sufficient distinguishing criteria to be helpful for assessing which levels of health care States parties must provide, and is therefore of limited assistance in relation to the normative understanding of art. 12].

Article 12 (2) a: The right to maternal, child and reproductive health

14. "The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child" (art. 12 (2) a)[14] may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care,[15] emergency obstetric services and access to information, as well as to resources necessary to act on that information.[16]

Article 12 (2) b: The right to healthy natural and workplace environments

15. "The improvement of all aspects of environmental and industrial hygiene" (art. 12 (2) b) includes, *inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; to prevent and reduce the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.[17] Furthermore, industrial hygiene refers to the minimisation, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment.[18] Article 12 (2) (b) also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition, and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.[19]

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[14] According to WHO, the stillbirth rate is no longer commonly used, infant and under-five mortality rates being measured instead.

[15] *Prenatal* denotes existing or occurring before birth; *perinatal* refers to the period shortly before and after birth (in medical statistics the period begins with the completion of 28 weeks of gestation and is variously defined as ending one to four weeks after birth); *neonatal*, by contrast, covers the period pertaining to the first four weeks after birth; while *post-natal* denotes occurrence after birth. In this General Comment, the more generic terms pre- and post-natal are exclusively employed.

[16] Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.

[17] The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments such as article 10 of the San Salvador Protocol to the American Convention on Human Rights.

[18] ILO Convention 155, art. 4 (2).

[19] Cf. ILO Convention 155 (1981), arts. 4 and 5; ILO Convention 161 (1985), art. 2 and 5; Global Strategy on Occupational Health for All: The Way to Health at Work,

Article 12 (2) (c): The right to prevention, treatment and control of diseases

16. "The prevention, treatment and control of epidemic, endemic, occupational and other diseases" (art. 12 (2) c) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics, and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to States' individual and joint efforts to, *inter alia*, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

Article 12 (2) (d): The right to health facilities, goods and services[20]

17. "The creation of conditions which would assure to all medical service and medical attention in the event of sickness" (art. 12 (2) d), both physical and mental, includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services, and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organization of the health sector, the insurance system and especially in political decisions relating to the right to health taken at both the national and community levels.

Article 12: Special topics of broad application

Non-discrimination and equal treatment

18. By virtue of articles 2 (2) and 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, civil,

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WHO/OCH.95.1, 1995; and the World Declaration and Plan of Action for Nutrition, Rome 1992.

[20] See para. 12 (b) and note 8 above. [See article 19.2 of the International Covenant on Civil and Political Rights. This General Comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.]

political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications, through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls General Comment No. 3, paragraph 12, which states that even in times of severe resource limitations, the vulnerable or marginalised members of society must be protected by the adoption of relatively low-cost targeted programmes.

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health.[21] Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

Gender perspective

20. The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognises that biological and socio-cultural factors play a significant role in influencing the health of men and women.[22] The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.

Women and the right to health

21. To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span.[23] Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality[24] and protecting women from

[21] For the core obligations, see paras. 43 and 44 of the present General Comments.
[22] [CEDAW General Recommendation no. 24 (1999), para. 6].
[23] [CEDAW General Recommendation no. 24 (1999), para. 29].
[24] Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, A/CONF.171/13/Rev.1, para. 7 (2).

domestic violence[25]. The realisation of women's right to health requires the removal of all barriers interfering with access to health services, education, and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive, and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny full reproductive rights to women.

Children and adolescents

22. Article 12 (2) (a) outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children. Subsequent international human rights instruments recognize that children and adolescents have the right to the enjoyment of the highest standard of health and access to facilities for the treatment of illness.[26] The Convention on the Rights of the Child directs states to ensure access to essential health services for the child and his or her family, including pre- and post-natal care for mothers. The Convention links these goals with ensuring access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices.[27] Implementation of the principle of non-discrimination requires that girls, as well as boys, have access to adequate nutrition, safe environments, and physical and mental health services.[28] There is a need to undertake effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls,[29] including early marriage, female genital mutilation, preferential feeding and care of male children.[30] Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.

23. States parties should provide a safe and supportive environment which adolescents require, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling, and to negotiate the health-behaviour choices they make.[31] The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy, and includes appropriate sexual and reproductive health services.

[25.] CEDAW General Recommendation 24, para. 12 (b).
[26] Article 24.1 of the Convention on the Rights of the Child.
[27] [Cf. art. 24 (2) (a)-(f) of the CRC].
[28] [The Platform for Action of the Fourth World Conference on Women, Beijing, 1995, para. 266].
[29] [Art. 24 (3) of the CRC].
[30] See World Health Assembly resolution WHA47.10, 1994, entitled "Maternal and child health and family planning: traditional practices harmful to the health of women and children".
[31] [Art. 5 of CRC].

24. In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration.[32]

Older persons

25. With regard to the realisation of the right to health of older persons, the Committee, in accordance with paragraphs 34 and 35 of General Comment No. 6 (1995), reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.

Persons with disabilities

26. The Committee reaffirms paragraph 34 of its General Comment No. 5, which addresses the issue of persons with disabilities in the context of the right to physical and mental health. Moreover, the Committee stresses the need to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.[33]

Indigenous peoples

27. In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples,[34] the Committee deems it useful to identify elements that would help to define indigenous peoples' right to health as a

[32] [Art. 3(1) of the CRC].

[33] [Taken from General Comment Comment 5, para. 11].

[34] Recent emerging international norms relevant to indigenous peoples include the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); articles 29 (c) and (d) and 30 of the Convention on the Rights of the Child (1989); article 8 (j) of the Convention on Biological Diversity (1992), recommending that States respect, preserve and maintain knowledge, innovation and practices of indigenous communities; Agenda 21 of the United Nations Conference on Environment and Development (1992), in particular chapter 26; and Part I, paragraph 20, of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive steps to ensure respect for all human rights of indigenous people, on the basis of non-discrimination. See also the preamble and article 3 of the United Nations Framework Convention on Climate Change (1992); and article 10 (2) (e) of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994). During recent years an increasing number of States have changed their constitutions and introduced legislation recognizing specific rights of indigenous peoples.

basis of which States with indigenous peoples would be better able to implement the provisions contained in Article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care.[35] These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines.[36] States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health.[37] The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

Limitations

28. Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasize that the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by the State.[38] Consequently a State party which, for example, restricts the movements of, or incarcerates, persons with transmissible diseases like HIV/AIDS, refuses to allow doctors to treat persons believed to be opposed to a government or fails to provide immunisation against the community's major infectious diseases, on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.

29. In line with article 5 (1), such limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review.

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[35] [Art. 25, ILO Convention No. 169. The WHO workshop on indigenous health in November 1999 noted that life expectancy at birth of indigenous people is ten to twenty years less than for the rest of the population underlining the need for specific and appropriate measures].
[36] [Art. 25 (2), ILO Convention 169].
[37] [Art. 25 (1), ILO Convention 169].
[38] [See General Comment 13, para. 42].

II. STATES PARTIES' OBLIGATIONS

General legal obligations

30. While the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect.[39] States parties have immediate obligations in relation to the right to health, such as the "guarantee" that the right "will be exercised without discrimination of any kind" (article 2(2)) and the obligation "to take steps" (article 2(1)) towards the full realisation of article 12.[40] Such steps must be "deliberate, concrete and targeted" towards the full realisation of the right to health.[41]

31. The progressive realisation of the right to health over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather, progressive realisation means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realisation of article 12.[42]

32. As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are impermissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.[43]

33. The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote.[44] The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative,

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[39] [See General Comment 13, para. 43; General Comment 3, para. 1].
[40] [See General Comment 3, para. 2].
[41] See General Comment No. 13, para. 43.
[42] See General Comment No. 3, para. 9; General Comment No. 13, para. 44.
[43] See General Comment No. 3, para. 9; General Comment No. 13, para. 45.
[44] According to General Comments Nos. 12 and 13, the obligation to fulfil incorporates an obligation to *facilitate* and an obligation to *provide*. In the present General Comment, the obligation to fulfil also incorporates an obligation to *promote* because of the critical importance of health promotion in the work of WHO and elsewhere.

budgetary, judicial, promotional and other measures towards the full realization of the right to health.

Specific legal obligations

34. In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a state policy; and abstaining from imposing discriminatory practices related to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines and from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.[45] In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water, and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.

35. Obligations to *protect* include, *inter alia*, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill, and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalised groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence.

[45] General Assembly resolution 46/119 (1991).

States should also ensure that third parties do not limit people's access to health-related information and services.

36. The obligation to *fulfil* requires States parties, *inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation, and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, and the abuse of alcohol, and the use of cigarettes, drugs and other harmful substances. States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required to formulate, implement and periodically review a coherent national policy on occupational accidents and diseases, by minimising risks, as well as to provide a coherent national policy on occupational safety and health services.[46]

37. The obligation to *fulfil* (*facilitate*) requires States, *inter alia*, to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to *fulfil* (*provide*) a specific right contained in

[46] Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions. See ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161).

the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. The obligation to *fulfil (promote)* health requires States to undertake actions that create, maintain and restore the health of the population. Such obligations include:

> (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information;
>
> (ii) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalised groups;
>
> (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services;
>
> (iiii) supporting people in making informed choices about their health.

International obligations

38. In its General Comment 3, the Committee drew attention to the obligation of all States parties to take steps, "individually and through international assistance and cooperation, especially economic and technical" towards the full realization of the rights recognized in the Covenant, such as the right to health.[47] In the spirit of article 56 of the Charter of the United Nations, the specific provisions of the Covenant (articles 12, 2 (1), 22 and 23) and the Alma-Ata Declaration on Primary Health Care, States parties should recognise the essential role of international co-operation and comply with their commitment to take joint and separate action to achieve the full realisation of the right to health. In this regard, States parties are referred to the Declaration of Alma-Ata which proclaims that the "existing gross inequality in the health status of the people particularly between developed and developing countries as well as within countries is politically, socially and economically unacceptable and is, therefore, of common concern to all countries".[48]

39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health

[47] [See General Comment 3, paras. 13-14].
[48] Article II, Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in: World Health Organization, "Health for All" Series, No. 1, WHO, Geneva, 1978.

facilities, goods and services in other countries, wherever possible and provide the necessary aid when required.[49] States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.

40. States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the UN General Assembly and of the World Health Assembly, to co-operate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalised groups of the population. Moreover, given that some diseases are easily transmissible beyond the frontiers of various States, there is a collective responsibility on the international community to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

41. States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.[50]

42. While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society – individuals, including health professionals, families, local communities, inter-governmental and non-governmental organisations, civil society organisations, as well as the private business sector – have responsibilities regarding the realization of the right to health. State parties should therefore provide for an environment which facilitates the discharge of these responsibilities.

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[49] See para. 45 of this General Comment.
[50] [General Comment 12, para. 37, in relation to the right to food].

Core obligations

43. In General Comment 3, the Committee confirms that States parties have a "core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of each of the rights enunciated in the Covenant, including essential primary health care.[51] Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development,[52] the Declaration of Alma-Ata[53] provides compelling guidance on the core obligations arising from article 12. Accordingly, in the Committee's view, this core includes at least the following obligations:

> (a) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
>
> (b) to ensure for everyone access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger;[54]
>
> (c) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
>
> (d) to provide essential drugs, as from time to time defined by WHO's Action Programme on Essential Drugs;[55]
>
> (e) to ensure equitable distribution of all health facilities, goods and services;
>
> (f) to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include mechanisms, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action is devised, as well as their content, shall give particular attention to all vulnerable or marginalised groups.

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[51] [See General Comment 3, para. 10].
[52] Report of the International Conference on Population and Development, Cairo, 5-13 September 1994 (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex, chaps. VII and VIII.
[53] [Based on the Declaration of Alma-Ata adopted by the International Conference on Primary Health Care jointly sponsored by WHO and UNICEF in 1978, see *supra*, principle XX].
[54] [See General Comment 12, para 14].
[55] [WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information Vol. 13, No. 4, 1999].

44. The Committee also confirms that obligations of comparable priority include the following:

> (1) to ensure reproductive, maternal (pre-natal and post-natal) and child health care;[56]
>
> (2) to provide immunisation against the community's major infectious diseases;
>
> (3) to take measures to prevent, treat and control epidemic and endemic diseases;
>
> (4) to provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
>
> (5) to provide appropriate training for health personnel, including education on health and human rights.

45. For the avoidance of any doubt, the Committee wishes to emphasise that it is "particularly incumbent" on States parties and others "which are in a position to assist others"[57], to provide "international assistance and cooperation, especially economic and technical"[58] which enables developing countries to fulfil their core and other obligations indicated in paragraphs 43 and 44 above.

III. VIOLATIONS

46. When the normative content of article 12 (Part I) is applied to the obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to health. The following paragraphs provide illustrations of violations of article 12.

47. In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 12. This follows from article 12 (1) which speaks of the "highest attainable" standard of health, as well as from article 2 (1) of the Covenant, which obliges each State party to take the necessary steps "to the maximum of its available resources". A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in

[56] [Chapter VII, Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, A/CONF.171/13/Rev.1, Annex].
[57] [See General Comment 3, para. 14].
[58] Covenant, art. 2.1.

violation of its obligations under article 12. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations as outlined above.[59] It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 which are non-derogable.

48. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. The adoption of any retrogressive measures incompatible with the core obligations under the right to health, as outlined in paragraph 43 above, constitutes a violation of the right to health. Violations through *acts of commission* include the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health.

49. Violations of the right to health can also occur through the omission or failure of States to take necessary measures arising from legal obligations. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to the enjoyment of the highest attainable standard of physical and mental health, the failure to have a national policy on occupational safety and health and occupational and health services[60], as well as the failure to enforce relevant laws.

Violations of the obligation to respect

50. Violations of the obligation to respect are those state actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Examples include the denial of access to health facilities, goods and services to particular individuals or groups as a result of *de jure* or *de facto* discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment; the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health; and the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations.

[59] [See General Comment 3, para. 10].
[60] [Cf. ILO Convention Nos. 155 and 161, note 44 above].

Violations of the obligation to protect

51. Violations of the obligation to protect follow from the failure of the State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups, or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers, manufacturers of medicines or food; the failure to discourage production, marketing, and consumption of tobacco, narcotics, and other harmful substances; the failure to protect women against violence or prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.

Violations of the obligation to fulfil

52. Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realisation of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalised; the failure to monitor the realization of the right to health at the national level, for example, by identifying right to health indicators and benchmarks; the failure to take measures to reduce the inequitable distribution of health facilities, goods and services; the failure to adopt a gender-sensitive approach to health; and the failure to reduce infant and maternal mortality rates.

IV. IMPLEMENTATION AT THE NATIONAL LEVEL

Framework legislation

53. The most appropriate feasible measures to implement the right to health will vary significantly from one State to another. Every State has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. This requires the adoption of a national strategy to ensure the enjoyment of the right to health to all, based on human rights principles which define the objectives of that strategy, and the formulation of policies and corresponding right to health indicators and benchmarks. The national health

strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.

54. The formulation and implementation of national health strategies and plans of action should respect, *inter alia*, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States.[61]

55. The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary since good governance is essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.

56. States should consider the adoption of a framework law to operationalise their right to health national strategy. The framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. It should include provisions on the targets to be achieved and the time-frame for their achievement; the means by which right to health benchmarks could be achieved; the intended collaboration with civil society, including health experts, the private sector and international organisations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring progress towards the realization of the right to health, States parties should identify the factors and difficulties affecting implementation of their obligations.[62]

Right to health indicators and benchmarks

57. National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the state party's obligations under article 12. States may obtain guidance on appropriate right to health indicators, which should address different aspects of the right to health, from the on-going work of WHO and UNICEF in this

[61] [This includes consultations with the organisations of employers and workers required by ILO Conventions Nos. 155 and 161, note 44 above].
[62] [Cf. similar provisions in General Comment 12, The right to adequate food, paras. 29 and 31].

field.[63] Right to health indicators require disaggregation on the prohibited grounds of discrimination.

58. Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of scoping with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of article 12. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered.

Remedies and accountability

59. Any person or group who is a victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.[64] All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.

60. The incorporation in the domestic legal order of international instruments recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.[65] Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.

61. Judges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions.

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[63] In identifying such indicators, guidance can be obtained from the WHO's Global Strategy for Health for All by the Year 2000 (Health for All Series, No. 3, 1981, Chapter I, para. 16 and Chapter VII, para. 6), and the experience arising from the Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s, agreed to at the World Summit for Children in 1990.

[64] Regardless of whether groups as such can seek remedies as distinct holders of rights, States parties are bound by both the collective and individual dimensions of article 12. Collective rights are critical in the field of health; modern public health policy relies heavily on prevention and promotion which are approaches directed primarily to groups.

[65] See General Comment No. 2, para. 9.

62. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalised groups in the realization of their right to health.

V. OBLIGATIONS OF ACTORS OTHER THAN STATES PARTIES

63. The role of the United Nations agencies and programmes, and in particular the key function assigned to WHO in realising the right to health at the international, regional and country levels, is of particular importance, as is the function of UNICEF in relation to the right to health of children. When formulating and implementing their right to health national strategies, States parties should avail themselves of WHO's technical assistance and cooperation. Further, when preparing their reports, States parties should utilise the extensive information and advisory services of WHO as regards data collection, disaggregation, and the development of right to health indicators and benchmarks.

64. Moreover, co-ordinated efforts for the realization of the right to health should be maintained to enhance the interaction among all the actors concerned, including the various components of civil society. In conformity with articles 22 and 23 of the Covenant, WHO, ILO, UNDP, UNICEF, UNFPA, the World Bank, regional development banks, the International Monetary Fund, WTO and other relevant bodies within the UN system, should co-operate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to health at national levels, with due respect to their individual mandates. In particular, the international financial institutions, notably the World Bank and IMF, should pay greater attention to the protection of the right to health in their lending policies, credit agreements, and structural adjustment programmes.[66] When examining the reports of States parties, and their ability to meet their obligations under article 12, the Committee will consider the effects of the assistance provided by all other actors. The adoption of a human rights-based approach by United Nations specialised agencies, programmes and bodies will greatly facilitate implementation of the right to health. In the course of its examination of States parties' reports, the Committee will also consider the role of health professional associations and other NGOs in relation to the States' obligations under Art. 12.

65. The role of WHO, the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross/Red Crescent and UNICEF, as well as non-governmental organisations and national medical associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies, including assistance to refugees

[66] [See General Comment 2, para. 9].

and internally displaced persons. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalised groups of the population.

Adopted 11 May 2000.

Minister of Health and others (Appellants) v. *Treatment Action Campaign and others (Respondents)*

(Case CCT 9/02)

Constitutional Court of South Africa

Heard on: 3 April 2002
Decided on: 4 April 2002
Reasons delivered on: 5 July 2002

JUDGEMENT

THE COURT:

1. This judgment concerns interlocutory proceedings that were dealt with urgently in this Court pending an appeal against an order in the High Court. The appeal itself has since been heard and the judgment in that matter[1] is being handed down together with this judgment. The terminology and context have been outlined in that main judgment.

2. An issue arose between the TAC and the government as to whether the latter had to give effect, pending the appeal, to paragraph 2 of the order of the High Court, which directed it to make nevirapine available to mothers and their newborn babies in public health facilities in certain stated circumstances and under certain stated conditions. The ruling on the interim application was as follows:

> "1. Pending the appeal in this matter the first to fourth and the sixth to ninth respondents are ordered to give effect to paragraph 2 of the order of court granted in this matter on 14 December 2001.
>
> 2. The costs of this application shall be costs in the appeal."

Government, wishing to appeal this interim execution order, then applied for the necessary certificate[2] in respect of this interim order. The judge refused that certificate on three grounds. First, the order of execution was not appealable because it was a "purely interlocutory ruling based on a weighing up of the balance of convenience"; second, it did not dispose of any of the issues in the main application; and, third, it was not a matter which warranted the attention of this Court.

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[1] Headed The Minister of Health and Others v Treatment Action Campaign and Others, CCT 08/02.
[2] In terms of rule 18 of the Constitutional Court Rules.

3. The government then asked this Court for leave to appeal to it against the interim order of execution. The TAC opposed the application and the matter was set down as a matter of urgency for hearing on 3 April 2002. At the hearing the appellants argued that the interim execution order (a) was appealable, (b) that it should be set aside because it was vague and uncertain, and (c) that the balance of convenience favoured setting the order aside. The TAC argued that the interim order was not appealable but that even if it were, it would not be appropriate to overturn the order made by the High Court. The following morning this Court handed down the following order and explanatory note:

> "[1] This is an application for leave to appeal against an interim execution order. It was heard as a matter of urgency. The applicants are referred to as 'the government' and the respondents as 'the TAC'.
>
> [2] On 14 December 2001, the High Court in Pretoria made an order relating to the programme of national and provincial governments in respect of the supply of Nevirapine to pregnant women with HIV, and to their babies, in public health facilities. Paragraph 2 of that order reads as follows:
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> > 'The first to ninth respondents are ordered to make Nevirapine available to pregnant women with HIV who give birth in the public sector, and to their babies, in public health facilities to which the respondents' present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, where in the opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled.'
>
> An application for leave to appeal against the order of the High Court of 14 December 2001 is due to be heard in this Court on 2 and 3 May, 2002. At that hearing the merits of the main application will be considered. The record and written argument in that application have not yet been lodged in this Court. Accordingly, this Court makes no decision today on any of the issues in those proceedings.
>
> [3] The legal effect of noting the application for leave to appeal was automatically to suspend the order of the High Court. On 11 March 2002, upon application by the TAC, the High Court ordered that pending the final determination of the appeal the provisions of paragraph 2 of the order be implemented (the execution order).
>
> [4] On 25 March 2002, the government applied to the High Court for the certificate needed to apply to this Court for leave to appeal against the execution order. That application was refused. On the same date, the High Court granted the TAC's counter-application for immediate implementation of the execution order.

> [5] On 27 March 2002, the government applied to this Court for leave to appeal against the orders of both 11 March and 25 March 2002. The TAC has launched a counter-application in this Court once again seeking the immediate implementation of the execution order. Argument in both these applications was heard yesterday 3 April 2002. The parties were agreed that should the application for leave to appeal be dismissed, the counter-application should also be dismissed.
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> [6] Special considerations apply to applications for leave to appeal of this sort. Having deliberated overnight the Court herewith unanimously makes the following order:
>
> 1. The application for leave to appeal is dismissed, costs reserved.
>
> 2. The counter-application is dismissed.
>
> Reasons for this order will be furnished in the Court's judgment in the main proceedings.
>
> [7] While this order obliges government immediately to comply with paragraph 2 of the order made by the High Court on 14 December 2001, this is a temporary order only. It will apply until this Court gives judgment in the main proceedings to be heard on 2 and 3 May 2002. As Botha J made clear in his judgments, this order does not require the wholesale extension of the prescription of Nevirapine outside the pilot sites established by the government. It requires only that government make Nevirapine available in public health facilities where in the opinion of the attending medical practitioner in consultation with the medical superintendent of a clinic or hospital, it is medically indicated and the preconditions for its prescription already exist.
>
> [8] Nothing in the order made today prejudges the issues to be determined in the case to be heard on 2 and 3 May."

4. We now provide our reasons for this interim order and dispose of the question of costs, which was reserved.

5. The first question that arises is whether the interim execution order is appealable at all. In terms of both the common law and the Supreme Court Act 59 of 1959, an order granting leave to execute pending an appeal is considered to be purely interlocutory and not appealable.[3] There are important reasons of policy why this is so. In particular, the effect of granting leave to appeal against an order of interim

[3] See *South Cape Corporation (Pty) Ltd* v. *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 551G-552H; *Tuckers Land and Development Corporation (Pty) Ltd* v. *Soja (Pty) Ltd* 1980 (1) SA 691 (W) at 699C; *South African Druggists Ltd* v. *Beecham Group plc* 1987 (4) SA 876 (T) at 880A-B; and *Livanos* v. *Absa Bank Ltd* [1999] 3 All SA 221 (W) at 225B-C.

execution will defeat the very purpose of that order.[4] The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be the subject of an appeal, that, in turn, would suspend the order.

6. Of course, the question whether a matter is appealable to this Court is governed by the Constitution itself.[5] Section 167(6) of the Constitution provides that:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court –
>
> (a) . . . ; or
> (b) to appeal directly to the Constitutional Court from any other court."

The relevant rule is Constitutional Court rule 18(1), which prescribes the procedure

> "in an application for leave to appeal directly to the Constitutional Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court other than the Supreme Court of Appeal . . ."

Once it is clear that an application for leave to appeal concerns a "decision on a constitutional matter", the criterion by which the Court then determines whether it shall grant leave to appeal or not, is prescribed by section 167(6) of the Constitution, namely whether it is in the interests of justice to do so. The first question then is whether the interim execution order is a decision on a constitutional matter as contemplated by rule 18.

7. Section 38 of the Constitution empowers a court to grant appropriate relief when it concludes that a breach or threatened breach of a person's rights under the Bill of Rights has been established. This provision is mirrored in section 172 of the Constitution which similarly empowers a court when deciding a constitutional matter within its jurisdiction to grant "just and equitable" relief. The interim execution order required the government to implement paragraph 2 of the original order. In making the original order, the judge clearly considered it to constitute both appropriate relief as contemplated by section 38 of the Constitution and a "just and equitable" order as contemplated by section 172 of the Constitution. This flowed from his conclusion that government was in breach of its obligations in terms of section 27(2) of the Constitution. The decision that order 2 should be implemented

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[4] See Tuckers Land and Development Corporation id at 699E.
[5] See the recent judgment of this Court in *Khumalo and Others* v. *Holomisa* CCT 53/01, an as yet unreported judgment of this Court dated 14 June 2002 at paras 6-16.

immediately and pending the appeal was once again relief the judge considered to be "appropriate relief" within the meaning of section 38 of the Constitution. In the circumstances, it cannot be denied that the interim execution order flowed directly from the judge's powers under the Constitution to grant appropriate relief and constituted "a decision on a constitutional matter" as contemplated by rule 18. Similarly, an appeal against that order raises a constitutional matter.

8. The next question that arises is whether it was in the interests of justice for the application for leave to appeal to be granted. What is in the interests of justice must be determined in each case in the light of its own facts.[6] The policy considerations that underlie the non-appealability of interim execution orders in terms of section 20 of the Supreme Court Act,[7] are also relevant to the decision whether it is in the interests of justice to grant an application for leave to appeal to this Court against an interim execution order. In particular, this Court will bear in mind that the effect of granting leave to appeal in such a case will generally defeat the effect of the interim execution order.

9. This Court has already identified a range of general considerations relevant to determining the interests of justice for the purposes of applications for leave to appeal to it. First, it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance.[8] Second, the Court has held that a reasonable prospect of success will often,[9] but not always,[10] be a determinative consideration relevant to the interests of justice.

10. In our view, this is another case where prospects of success will not necessarily be determinative of the interests of justice. The appellants sought leave to appeal against an interim execution order. Such orders are discretionary orders. In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545C-G, Corbett JA identified the considerations relevant to the grant of an application for leave to execute pending appeal in the following manner:

> "The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see *Voet,* 49.7.3; *Ruby's Cash Store (Pty) Ltd v Estate Marks and Another* [1961 (2) SA 118 (T)] at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own

[6] See *MEC for Development Planning and Local Government, Gauten*g v. *Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.
[7] See para 5 above.
[8] See, for example, *S* v. *Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59 (per Kentridge AJ).
[9] See, for example, *S* v. *Boesa*k 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.
[10] See *Fraser* v. *Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10.

> judgments (cf. *Fismer v Thornton* 1929 AD 17 at p.19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:
>
> > (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
> > (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
> > (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
> > (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

Before making an order to execute pending appeal, therefore, a court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties, as the judge clearly did in this case. Having granted leave to execute, permitting an aggrieved litigant to appeal that execution order pending the final appeal would generally result not only in the piecemeal determination of the appeal, but would "stultify the very order . . . made".[11]

11. Moreover, as has been indicated above, an order to execute pending appeal is an interlocutory order. As such, it is an order which may be varied by the court which granted it in the light of changed circumstances.[12] To the extent, therefore, that a litigant considers that new circumstances have arisen which would impact upon the court's decision to order execution pending appeal, the litigant may approach that court once again to seek a variation or, where appropriate, clarification of the order.

12. All these considerations make it plain that it will generally not be in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution. Ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim

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[11] See *Tuckers Land and Development Corporation* v. *Soja*, above n 3, at 699E.
[12] See, for example, *Blaauwbosch Diamonds, Ltd* v. *Union Government (Minister of Finance)* 1915 AD 599 at 601; and *Wellington Court Shareblock* v. *Johannesburg City Council*; *Agar Properties (Pty) Ltd* v. *Johannesburg City Council* 1995 (3) SA 827 (A) at 832H.

appeal were not to be granted – a matter which would, by definition, have been considered by the court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail. If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned.

13. In this case, the government argued that leave to appeal against the interim order of execution should be granted for the following reasons. First, they argued that the effect of the interim execution order was irreversible and that its making rendered a substantial portion of the appeal academic. Second, government argued that the order was vague and uncertain; third, that it was dangerously prescriptive; fourth, that it undermined the principles of good governance in the public health sector; and finally, that it invalidly made a policy choice for the appellants.

14. In our view, these arguments were largely based on a misreading of the terms of the order. Paragraph 2 of the order, which had to be implemented, required government

> "to make Nevirapine available to pregnant women with HIV who give birth in the public sector, and to their babies, in public health facilities to which the respondents' present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, *where in the opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled.*" (Italics added.)

15. In our view, this order requires government to make nevirapine available in public health facilities:

* not yet covered by the comprehensive prevention of mother-to-child transmission programme introduced at two sites per province from May 2001 onwards; and
* where the attending doctor, acting in consultation with the superintendent of the health facility –
* considers that it is medically indicated;
* in circumstances where the mother concerned has been appropriately tested and counselled.

We cannot accept that the interim implementation of such an order would result in irreversible harm to government. It may possibly cause inconvenience, but there can be no doubt that requiring government to provide nevirapine where attending doctors consider it medically indicated, superintendents consider it appropriate and

where facilities for testing and counselling already exist can cause no serious harm to the public health services. It was common cause that the cost of nevirapine itself was not an issue, the main harm for the appellants, they argued, resulted from the implications caused to good governance in the public health sector by permitting attending doctors and superintendents to decide when nevirapine could be administered, which we deal with below. Whatever the scale of this harm, it cannot be irreparable.

16. Although counsel for the government argued that the terms of the order are vague, in our view they are not. Counsel relied in particular on the phrase "medically indicated" which he submitted was not capable of clear definition. We disagree. Indeed, it is a term which government itself used in the affidavits filed on its behalf in this Court. A medication is "medically indicated" where a consulting medical practitioner considers that a patient he or she is treating would in all the circumstances of health and social circumstances benefit from the administration of the medication. In the case of nevirapine, this would involve the medical practitioner familiarising himself or herself with the risks and benefits associated with administering the drug to pregnant mothers and their babies. These risks and benefits are set out in some detail in the package insert as required by the Medicines Control Council. It is also clear from the High Court judgment that the medical practitioner concerned must take into account in deciding whether nevirapine is medically indicated or not, the question whether the pregnant mother has been appropriately tested for HIV, and counselled thereupon and upon the benefits and risks of nevirapine.

17. Government also suggested that on its interpretation of the order it would immediately have to make nevirapine available in every public health facility in the country regardless of the availability of counselling or testing at that facility. This interpretation is wrong, as appears above. All the order requires is that nevirapine be made available at those public health facilities where testing and counselling for pregnant mothers already exist. We therefore cannot agree that the terms of the order are too vague to be capable of implementation.

18. What is clear from the order, is that the decision whether nevirapine should or should not be administered to a particular pregnant mother is a decision to be taken by the attending medical practitioner in the circumstances of each particular case and not a sweeping and general decision by the Department of Health at national or provincial level. Accordingly, once a superintendent of a medical facility where facilities for testing and counselling already exist requests government to provide nevirapine to a particular facility for prescription, government cannot refuse.

19. Government accepted that the effect of the order was to remove the decision concerning the prescription of nevirapine from government health-authorities at national or provincial level, and place that decision in the hands of superintendents

and doctors. It was this effect that is said to be destructive of good governance in public health services. Although there can be no doubt that it is important that good governance requires broad policy decisions to be taken concerning the provision of health services by provincial and national governments, we do not accept that this order undermines such practice. The precise medication to be prescribed for any individual patient will always be a matter of on-the-spot medical decision-making. The range of medications to be prescribed may, indeed will be, curtailed by broad policy-making, but the final decision in any case will require the exercise of professional judgment by the attending practitioner. All order 2 achieves, is to make it clear that nevirapine is an option for medical doctors in the public sector outside the government test sites where it is medically indicated and where appropriate counselling and testing are available to the pregnant mother. In our view, therefore, the argument on behalf of government that the effect of order 2 will be to undermine seriously good governance in the provision of public health services is without foundation.

20. The appellants also argued that the order was a nullity in that it was in breach of the separation of powers. This argument has been fully dealt with in the judgment on the main appeal and does not require repetition here. Suffice it to say that it has no merit. The Constitution requires government to comply with the obligations imposed upon it. Should a court find the government to be in breach of these obligations, the court is required to provide effective relief to remedy that breach.[13] In formulating that relief, the Court will be alert both to the proper functions of the legislature or executive under our Constitution, and to the need to ensure that constitutional rights are vindicated. There can be no argument that order 2 improperly trespasses on the exclusive domain of the legislature or executive. There was no basis, therefore, for attacking order 2 as being in breach of the separation of powers.

21. In the circumstances, government failed to show any cogent reason why it should not commence implementing the order of the High Court while pursuing its appeal against that order. It can do so and will suffer no irreparable harm by having to do so. This Court therefore refused the application for leave to appeal.

Costs

22. In the order of 4 April 2002 the question of costs was reserved. The time has now come to resolve this question. There can be little doubt that the corresponding order as to costs in the main case (paragraph 5 of that order) should be echoed here. Government failed no less comprehensively in its attempt to stay its interim obligation to comply with the implementation order than it did in the main appeal. The application to stay the execution order precipitated the opposing counter-

[13] *Fose* v. *Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

application and the costs of the latter should accordingly be dealt with in the same way.

Order

23. It is therefore ordered that government pays the costs of the application for leave to appeal to this Court against the interim execution order of the High Court and of the counter-application, such costs to include the costs of two counsel.

Chaskalson CJ, Langa DCJ, Ackermann J, Du Plessis AJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, O'Regan J, Sachs J, Skweyiya AJ

For the Appellants: MTK Moerane SC, P Coppin and B Vally instructed by the State Attorney.

For the Respondents: GJ Marcus SC and B Majola instructed by the Legal Resources Centre.

C.E.S.C. Limited v. *Subbash Chandra Bose*
(1992 (1) SCC 441)

Supreme Court of India

Excerpts from the judgement:

28) . . . From the above backdrop of statutory operation, the scope of Section 2(9) is to be gauged which reads thus:-

> "2(9) – 'employee' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-
>
> > (i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or
> >
> > (ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
> >
> > (iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service."

29. It encompasses employees employed for wages in or in connection with the work of a factory or establishment to which the Act applies (i) who are directly employed by the principal employer or (ii) employed by or through "an immediate employer"; and whose services are temporarily lent or let on hire to the principal employer by the person with whom the person has entered into a contract of service. Clause 2(9)(ii) (applicable to the facts on hand) in turn attracts a person employed by or through an immediate employer as an employee of the principal employer provide the following conditions are satisfies, namely, (1) the immediate employer employs an employee on the premises of the factory or establishment of the principal employer; (2) "under the supervision of the principal employer"; (3) "his agent" on work which is ordinarily part of the work of the factory or establishment

or which is preliminary to the work carried out in or incidental to the purpose of the factory or establishment. Clauses (i) and (iii) of Section 2(9) are inapplicable to the facts.

30. Article 25(2) of Universal Declaration of Human Rights, 1948 assures that everyone has the right to a standard of living adequate for the health and well being of himself and of his family . . . including medical care, sickness, disability . . . Article 7(b) of the International Convention on Economic, Social and Cultural Rights, 1966 recognises the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, safe and healthy working conditions. Article 39(e) of the Constitution enjoins the State to direct its policies to secure the health and strength of workers. The right to social justice is a fundamental right. Right to livelihood springs from the right to life guaranteed under Article 21. The health and strength of a worker is an integral facet of right to life. The aim of fundamental rights is to create an egalitarian society to free all citizens from coercion or restrictions by society and to make liberty available for all. Right to human dignity, development of personality, social protection, right to rest and leisure as fundamental human rights to common man mean nothing more than the status without means. To the tillers of the soil, wage earners, labourers, wood cutters, rickshaw pullers, scavengers and hut dwellers, the civil and political rights are "mere cosmetic" rights. Socio-economic and cultural rights are their means and relevant to them to realise the basic aspirations of meaningful right to life. The Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights recognise their needs which include right to food, clothing, housing, education, right to work, leisure, fair wages, decent working conditions, social security, right to physical or mental health, protection of their families as integral part of the right to life. Our Constitution in the Preamble and Part IV reinforces them compendiously as socio-economic justice, a bedrock to an egalitarian social order. The right to social and economic justice is thus a fundamental right.

In World Labour Report-2, at Chapter 9 (Safety and Health) it is stated that "in every three minutes somewhere in the world one worker dies and in every second that passes at least three workers are injured". In India on an average every day 1100 workers are injured and three are killed "in industrial establishments" vide (Lawyer October 1987 page 5). In 26th ILO Convention held in Philadelphia in April 1944, recommendation No. 69 laid down norms for medical care for workers. In October 1943, the Government of India appointed Health Survey and Development Committee known as Sir Joseph Bhore Committee which laid emphasis on "Preventive Schemes". ILO Asian Regional Conference held in Delhi in 1947, resolved that "in every scheme for medical care in any Asian country the need for the prevention of disease and the improvement of the general standard of health must be considered as of utmost importance". The Act had culminated in its birth of

these recommendations providing in a limited area social security to the employees form health and occupational hazards.

31. The term health implies more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensures stable manpower for economic development. Facilities of health and medical care generate devotion and dedication to give the worker's best, physically as well as mentally, in productivity. It enables the worker to enjoy the fruit of his labour, to keep him physically fit and mentally alert for leading a successful, economic, social and cultural life. The medical facilities are, therefore, part of social security and like gilt-edged security, it would yield immediate return in the increased production of at any rate reduce absenteeism on grounds of sickness, etc. Health is thus a state of complete physical, mental and social well being and not merely the absence of disease or infirmity. In the light of Articles 22 to 25 of the Universal Declaration of Human Rights, International Convention of Economic, Social and Cultural Rights, and in the light of socio-economic justice assured in our Constitution, right to health is a fundamental human right to workmen. The maintenance of health is a most imperative constitutional goal whose realisation requires interaction by many social and economic factors. Just and favourable condition of work implies to ensure safe and healthy working conditions to the workmen. The periodical medical treatment invigorates the health of the workmen and harnesses their human resources. Prevention of occupational disabilities generates devotion and dedication to duty and enthuse the workmen to render efficient service which is a valuable asset for greater productivity to the employer and national production to the State. Yet in the report of the Committee on Labour Welfare, 1969 in paragraph 5.77 of Chapter 5, reveals that, "private employers generally feel that this burden shall not be cast upon them."

Consumer Education and Research Centre And Others (Petitioners) v. *Union of India and Others (Respondents)*[*]

Supreme Court of India

Excerpts from the judgement:

K. Ramaswamy, J. – Occupational accidents and diseases remain the most appalling human tragedy of modern industry and one of its most serious forms of economic waste. Occupational health hazards and diseases to the workmen employed in asbestos industries are our concern in this writ petition filed under Article 32 of the Constitution by way of public interest litigation at the behest of the petitioner, an accredited organisation. At the inception of filing the writ petition in the year 1986, though it highlighted the lacuna in diverse provisions of law applicable to the asbestos industry, due to orders of this Court passed from time to time though wide gaps have been bridged by subordinate legislation, yet lot more needs to be done. So the petitioner seeks to fill in the yearning gaps and remedial measures for the protection of the health of the workers engaged in mines and asbestos industries with adequate mechanism for and diagnosis and control of the silent killer disease "asbestosis", with amended prayers as under:

(a) Directions to all the industries and the official-respondents to maintain compulsorily and keep preserved health records of each workman for a period of 40 years from the date of beginning of the employment or 10 years after the cessation of the employment, whichever is later;

(b) To direct all the factories to adopt "The membranous filter test";

(c) To direct all industries to compulsorily insure the employees working in their respective industries, excluding those already covered by the Employees' State Insurance Act and the Workmen's Compensation Act so as to entitle the workmen to get adequate compensation for occupational hazards or diseases or death;

(d) To direct the authorities to appoint a committee of experts to determine the standard of permissible exposure limit value of 2-fibre/cc and to reduce to 1-fibre/cc for Chrystolite type of asbestos, 0.5-fibre/cc for Amosite type of asbestos and for the time being 0.2-fibre/cc for Crocidolite type of asbestos on a par with the international standards;

[*] Writ Petition (C9 No. 206 of 1986 (Under Article 32 of the Constitution of India), decided on 27 January 1995, Date 27-01-1995.

(e) To direct the appropriate governments to cover the workmen and to extend them provisions of Factories Act or by suitable regulatory provisions contained therein to all small-scale sectors which are not covered under the Factories Act;

(f) To direct re-examination of such of the those persons who are found suffering from Asbestosis by National Institute of Occupational Health but not the ESI hospitals; and in particular the Inspector of Factories, Gujarat, be directed to have re-examined all those workmen, examined by ESI by NGDH and toward compensation; and

(g) To direct the Central Government to appoint a committee to recommend whether dry process can be completely replaced by wet process.

3. In Convention 162 of the international Labour Conference (ICL) held in June 1986, it had adopted on 24-6-1986 the Convention called "the Asbestos Convention, 1986", India is one of the signatories to the Convention and it played a commendable role suggesting suitable amendments in the preparatory conference. It has come into force from 16-6-1989 after its ratification by the member-States. Article 2(a) defines "asbestos" to mean the "fibrous form of mineral silicates belonging to rock-forming minerals of the serpentine group, i.e., chrysotile (white asbestos) and of the amphibole group, i.e., actinolite, amosite (brown asbestos, cummingtonite-grunerite), anthophyllite, crocidolite (blue asbestos), tremolite, or any mixture containing one or more of these". "Asbestos dust" is defined as "airborne particles of asbestos or settled particles of asbestos" which may become airborne in the working environment. "Respirable asbestos fibre" is defined as a particle of asbestos with a diameter of less than 3 um and of which the length is at least three times the diameter; "Workers" cover all employed persons; "Workplace" covers all places where workers need to be or need to go by reasons for their work and which are under the direct or indirect control of the employer.

4. Article 5(2) provides that: "National laws or regulations shall provide for the necessary measures, including appropriate penalties, to ensure effective enforcement of and compliance with the provisions of the Convention." Article 8 provides that "employers and workers or their representatives shall cooperate as closely as possible at all levels in the undertaking in the application of the measures prescribed pursuant to this Convention". Article 9 in Part III prescribes protective and preventive measures, regulating that "the national laws or regulations shall provide that exposure to asbestos shall be prevented or controlled by one or more of the following measures – (a) making work in which exposure to asbestos may occur subject to regulations prescribing adequate engineering controls and work practices, including workplace hygiene; (b) prescribing special rules and procedures including authorisation, for the use of asbestos or of certain types of asbestos or products containing asbestos or for certain work processes". Article 15 postulates that –

> "(1) the competent authority shall prescribe limits for the exposure of workers to asbestos or other exposure criteria for the evaluation of the working environment, (2) the exposure limits or other exposure criteria shall be fixed and periodically reviewed and updated in the light of technological progress and advances in technological and scientific knowledge, (3) in all workplaces where workers are exposed to asbestos, the employer shall take all appropriate measures to prevent or control the release of asbestos dust into the air, to ensure that the exposure limits or other exposure criteria are complied with and also to reduce exposure to as low a level as is reasonably practicable."

Clause (4) provides that on its failure to carry out the above direction to the industry to maintain and replace, as necessary, at no cost to the workers, adequate respiratory protective equipment and special protective clothing as appropriate. Respiratory protective equipment should comply with standards set by the competent authority and be used only as a supplementary, temporary, emergency or exceptional measure and not as an alternative to technical control.

5. Article 16 mandates that "each employer shall be made responsible for the establishment and implementation of practical measures for the prevention and control of the exposure of the workers he employs so (sic) asbestos and for their protection against the hazards due to asbestos". Article 17 provides demolition of plants or structures containing friable asbestos insulation, etc., the details whereof are not necessary. Article 18 obligates the employer to provide clothing to the workers, maintenance, handling and cleaning thereof etc. etc. Article 19 deals with the disposal of the waste containing asbestos. Part IV consisting of Articles 20 and 21 deals with surveillance of the working environment and workers' health. Article 20(1) provides that "where it is necessary for the protection of the health of workers, the employer shall measure the concentrations of airborne asbestos dust in workplaces and shall monitor the exposure of workers to asbestos at intervals and using methods specified by the competent authority". Sub-article (2) of Article 20 envisages maintenance of the records: ". . . the records of the monitoring of the working environment and of the exposure of workers to asbestos shall be kept for a period prescribed by the competent authority." Clause (3) – "the workers concerned, their representatives and the inspection services shall have access to these records". Clause (4) – "the workers or their representatives shall have the right to request the monitoring of the working environment and to appeal to the competent authority concerning the results of the monitoring". Article 21(1) envisages that "workers who are or have been exposed to asbestos shall be provided, in accordance with national law and practice, with such medical examinations as are necessary to supervise their health in relation to the occupational hazard and to diagnose occupational diseases caused by exposure to asbestos". Clause (2) adumbrates that such monitoring shall be free of the charge of the workers and shall take place as far as possible during the working hours. Clause (3) accords to the workers the right to information, in the behalf of the results of their medical examination and that they "shall be informed in

an adequate and appropriate manner of the results of their medical examination and receive individual advice concerning their health in relation to their work" Clause (4) is not material for the purpose of this case, hence omitted. Clause (5) postulates that the competent authority shall develop a system of notification of occupational diseases cause by asbestos.

6. Article 22 in Part V relating to information and education is not relevant for the purpose of this case, hence omitted. In Part VI-Final Provisions, Article 24 is relevant for the purpose of this case and clause (1) thereof states that "this Convention shall be binding only upon those members of the international Labour Organisation whose ratifications have been registered with the Director General". The other Articles 23, 25 to 30 are not relevant.

7. International Labour Office, Geneva, has provided the rules regarding "safety in the use of asbestos". In Rule 1.1.2 (possible health consequences of exposure to asbestos dust), it is stated that there are three main health consequences associated with exposure to airborne asbestos – (a) asbestosis; fibrosis (thickening and scarring) of the lung tissue; (b) lung cancer: cancer of the bronchial tubes; (c) mesothelioma: cancer of the pleura or peritoneum. In asbestos workers, other consequences of asbestos exposure can be the development of diffuse pleural thickening and circumscribed pleural plaques which may become calcified. These are regarded as no more than evidence of exposure to asbestos dust. Other types of cancer (e.g. of the gastrointestinal tract) have been attributed to asbestos exposure though the evidence at present is inconclusive. In Rule 1.3, definitions of asbestos, asbestos dust, respirable asbestos fibre have been defined thus:

(a) asbestos is defined as the fibrous form of mineral silicates belonging to the serpentine and amphibole groups of rock-forming minerals, including: actinolite, amosite (brown asbestos, cummingtonite, grunnerite), anthophyllite, chrysotile (white asbestos), crocidolite (blue asbestos), tremolite, or any mixture containing one or more of these;

(b) asbestos dust is defined as airborne particles of asbestos or settled particles of asbestos which may become airborne in the working environment;

(c) respirable asbestos fibre is defined as a particle of asbestos with a diameter of less than 3 um and of which the length is at least three times the diameter;

20. The Preamble and Article 38 of the Constitution of India – the supreme law – envisions social justice as its arch to ensure life to be meaningful and livable with human dignity. Jurisprudence is the eye of law giving an insight into the environment of which it is the expression. It related the law to the spirit of the time and makes it richer. Law is the ultimate aim of every civilised society, as a key system in a given era, to meet the needs and demands of its time. Justice, according

to law, comprehends social urge and commitment. The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are cornerstones of social democracy. The concept "social justice", which the Constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice" is thus an integral part of "justice" in the generic sense. Justice is the genus of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribal and deprived sections of the society and to elevate them to the level of equality of live with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury to ward off distress and to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation. Social security, just and humane conditions of work and leisure to workman are part of this meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity; the State should provide facilities and opportunities to enable them to reach at least minimum standard of health, economic security and civilised living while sharing according to their capacity, social and cultural heritage.

21. In a developing society like ours steeped with unbridgeable and everwidening gaps of inequality in status and of opportunity, law is catalyst, rubicon to the poor etc. to reach the ladder of social justice. Justice K. Subba Rao, the former Chief Justice of this Court, in his Social Justice and Law at page 2, had stated that: "Social justice is one of the disciplines of justice and the discipline of justice relates to the society." What is due cannot be ascertained by absolute standard which keeps changing depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc. are languishing and to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facts of human activity. The concept of social justice embeds equality to flavour and enliven practical content of "life". Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results.

22. Article 1 of the Universal Declaration of Human Rights asserts human sensitivity and moral responsibility of every State that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The Charter of the United Nations thus reinforces the faith in fundamental human rights and in the dignity and worth of human person envisaged in the Directive principles of State

Policy as part of the Constitution. The jurisprudence of personhood or philosophy of the right to life envisages under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live life with dignity and equality.

23. Article 38(1) lays down the foundation for human right and enjoins the State to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Article 46 directs the State to protect the poor from social injustice and all forms of exploitation. Article 39(e) charges that the policy of the State shall be to secure "the health and strength of the workers". Article 42 directs that the States shall make provisions, statutory or executive "to secure just and human conditions of works". Article 43 directs that the State shall "endeavour to secure to all workers, by suitable legislation or economic organisation or any other way to ensure decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workers." Article 48-A enjoins the State to protect and improve the environment. As human resources are valuable national assets for peace, industrial or material production, national wealth, progress, social stability, decent standard of life of workers is an input. Article 25(2) of the Universal Declaration of Human Rights ensures right to standard of adequate living for health and well-being of the individual including medical care, sickness and disability, Article 2(b) of the International Convention on Economic, Social and Cultural Rights protects the right of worker to enjoy just and favourable conditions of work ensuring sage and healthy working conditions.

24. The expression "life" assured in Article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure. In *Olga Tellis* v. *Bombay Municipal Corp.* this Court held that no person can live without the means of living i.e. means of livelihood. If the right to livelihood is not treated as a part of the constitutional right of life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content of meaningfulness but it would make life impossible to live, leave aside what makes life liveable. The right to life with human dignity encompasses within its fold, some of the finer facets of human civilisation which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned. In *State of H.P.* v. *Umed Ram Sharma* this Court held that the right to life includes the quality of life as understood in its richness and fullness by the ambit of the Constitution. Access to road was held to be an access to life itself in that State.

26. The right to health to a worker is an integral facet of meaningful right to life, to have not only a meaningful existence but also robust health and vigour without which worker woul1d led life of misery. Lack of health denudes him of his livelihood. Compelling economic necessity to work in an industry exposed to health hazard due to indigence to bread-winning for himself and his dependents, should not be at the cost of the health and vigour of the workman. Facilities and opportunities, as enjoined in Article 38, should be provided to protect the health of the workman. Provision for medical test and treatment invigorates the health of the worker for higher production or efficient service. Continued treatment, while in service or after retirement is a moral, legal and constitutional concomitant duty of the employer and the State. Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39(e), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker and is a minimum requirement to enable a person to live with human dignity. The State, be it Union or State Government or an industry, public or private, is enjoined to take all such actions which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health happiness. The health and strength of the worker is an integral facet of right to life. Denial thereof denudes the workman the finer facets of life violating Article 21. The right to human dignity, development of personality, social protection, right to rest and leisure are fundamental human rights to a workman assured by the Charter of Human Rights, in the Preamble and Article 38 and 39 of the Constitution. Facilities for medical care and health to prevent sickness ensures stable manpower for economic development and would generate devotion to duty and dedication to give the workers' best physically as well as mentally in production of good or services. Health of the worker enables him to enjoy the fruits of his labour, keeping him physically fit and mentally alert for leading a successful life, economically, socially and culturally. Medical facilities to protect the health of the workers are, therefore, the fundamental and human rights to the workman.

27. Therefore, we hold that right to health, medical aid to protect the health and vigour to a worker while in service or post-retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48-A and all related articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person.

33. The writ petition is, therefore, allowed. All the industries are directed (1) to maintain and keep maintaining the health cord of every worker up to a minimum period of 40 years from the beginning of the employment or 15 years after retirement or cessation of the employment whichever is later; (2) the Membranes Filter test to detect asbestos fibre should be adopted by all the factories or establishments on a part with the Metalliferrous Mines Regulations, 1961 and

Vienna Convention and rules issued thereunder; (3) all the factories whether covered by the Employees' State Insurance Act or Workmen's Compensation Act or otherwise are directed to compulsorily insure health coverage to every worker (4) the Union and the State Governments are directed to review the standards of permissible exposure limit value of fibre/cc in tune with the international standards reducing the permissible content as prayed in the writ petition referred to at the beginning. Te review shall be continued after every 10 years and also as and when the ILO gives directions in this behalf consistent with its recommendations or any convention; (5) the Union and all the State Governments are directed to consider inclusion of such of those small-scale factory or factories or industries to protect health hazards of the workers engaged in the manufacture of asbestos or its ancillary products; (6) the appropriate Inspector of Factories in particular of the State of Gujarat, is directed to send all the workers, examined by the ESI hospital concerned, for re-examination by the National Institute of Occupational Health to detect whether all or any of them are suffering from a asbestosis. In case of the positive finding that all or any of them are suffering form the occupational health hazards, each such workers shall be entitled to compensation in a sum of rupees one lakh payable by the factory or industry or establishment concerned within a period of three months from the date of certification by the National Institute of Occupational Health.

34. The writ petitions are accordingly allowed. No costs.

Decision Regarding Communication 155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*

Rapporteur: 20–30th Sessions: Commissioner Dankwa

Summary of Facts:

1. The Communication alleges that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.

2. The Communication alleges that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.

3. The Communication alleges that the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies. The Communication contains a memo from the Rivers State Internal Security Task Force, calling for "ruthless military operations".

4. The Communication alleges that the Government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The Government has withheld from Ogoni Communities information on the dangers created by oil activities. Ogoni Communities have not been involved in the decisions affecting the development of Ogoniland.

5. The Government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and

* Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13th to 27th October 2001. (African Commission on Human and Peoples' Rights –ed.)

materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni Communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders.

6. The Communication alleges that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.

7. The Communication alleges that in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air-force, and the navy, armed with armoured tanks and other sophisticated weapons. In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-type methods and the calibre of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces. The complete failure of the Government of Nigeria to investigate these attacks, let alone punish the perpetrators, further implicates the Nigerian authorities.

8. The Nigerian Army has admitted its role in the ruthless operations which have left thousands of villagers homeless. The admission is recorded in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which has devoted itself to the suppression of the Ogoni campaign. One such memo calls for "ruthless military operations" and "wasting operations coupled with psychological tactics of displacement". At a public meeting recorded on video, Major Okuntimo, head of the Task Force, described the repeated invasion of Ogoni villages by his troops, how unarmed villagers running from the troops were shot from behind, and the homes of suspected MOSOP activists were ransacked and destroyed. He stated his commitment to rid the communities of members and supporters of MOSOP.

9. The Communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of

farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni Communities.

Complaint:

10. The communication alleges violations of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter.

Procedure:

11. The communication was received by the Commission on 14th March 1996. The documents were sent with a video.

12. On 13th August 1996 letters acknowledging receipt of the Communication were sent to both Complainants.

13. On 13th August 1996, a copy of the Communication was sent to the Government of Nigeria.

14. At the 20th Ordinary Session held in Grand Bay, Mauritius in October 1996, the Commission declared the Communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria.

15. On 10th December 1996, the Secretariat sent a Note Verbale and letters to this effect to the government and the Complainants respectively.

16. At its 21st Ordinary Session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the receipt of written submissions from the Complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.

17. On 22nd May 1997, the Complainants were informed of the Commission's decision, while the State was informed on 28th May 1997.

18. At the 22nd Ordinary Session, the Commission postponed taking a decision on the case pending the discussion of the Nigerian Mission report.

19. At the 23rd Ordinary Session held in Banjul, The Gambia, the Commission postponed consideration of the case to the next session due to lack of time.

20. On 25th June 1998, the Secretariat of the Commission sent letters to all parties concerned informing them of the status of the Communication.

21. At the 24th Ordinary Session, the Commission postponed consideration of the above Communication to the next session.
22. On 26th November 1998, the parties were informed of the Commission's decision.

23. At the 25th Ordinary Session of the Commission held in Bujumbura, Burundi, the Commission further postponed consideration of this communication to the 26th Ordinary Session.

24. The above decision was conveyed through separate letters of 11th May 1999 to the parties.

25. At its 26th Ordinary Session held in Kigali, Rwanda, the Commission deferred taking a decision on the merits of the case to the next session.

26. This decision was communicated to the parties on 24th January 2000.

27. Following the request of the Nigerian authorities through a Note Verbale of 16th February 2000 on the status of pending communications, the Secretariat, among other things, informed the government that this communication was set down for a decision on the merits at the next session.

28. At the 27th Ordinary Session of the Commission held in Algeria from 27th April to 11th May 2000, the Commission deferred further consideration of the case to the 28th Ordinary Session.

29. The above decision was communicated to the parties on 12th July 2000.

30. At the 28th Ordinary Session of the Commission held in Cotonou, Benin from 26th October to 6th November 2000, the Commission deferred further consideration of the case to the next session. During that session, the Respondent State submitted a Note Verbale stating the actions taken by the Government of the Federal Republic of Nigeria in respect of all the communications filed against it, including the present one. In respect of the instant communication, the note verbale admitted the gravamen of the complaints but went on to state the remedial measures being taken by the new civilian administration and they included-:

- Establishing for the first time in the history of Nigeria, a Federal Ministry of Environment with adequate resources to address environmental related issues prevalent in Nigeria and as a matter of priority in the Niger delta area
- Enacting into law the establishment of the Niger Delta Development Commission (NDDC) with adequate funding to address the environmental and social related problems of the Niger delta area and other oil producing areas of Nigeria

- Inaugurating the Judicial Commission of Inquiry to investigate the issues of human rights violations. In addition, the representatives of the Ogoni people have submitted petitions to the Commission of Inquiry on these issues and these are presently being reviewed in Nigeria as a top priority matter

31. The above decision was communicated to the parties on 14th November 2000.

32. At the 29th Ordinary Session held in Tripoli, Libya from 23rd April to 7th May 2001, the Commission decided to defer the final consideration of the case to the next session to be held in Banjul, the Gambia in October 2001.

33. The above decision was communicated to the parties on 6th June 2001.

34. At it 30th session held in Banjul, the Gambia from 13th to 27th October 2001, the African Commission reached a decision on the merits of this communication.

LAW

Admissibility:

35. Article 56 of the African Charter governs admissibility. All of the conditions of this Article are met by the present communication. Only the exhaustion of local remedies requires close scrutiny.

36. Article 56(5) requires that local remedies, if any, be exhausted, unless these are unduly prolonged.

37. One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels. Where a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not arise. Similarly, if the right is not well provided for, there cannot be effective remedies, or any remedies at all.

38. Another rationale for the exhaustion requirement is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. ***(See the Commission's decision on Communications 25/89, 47/90, 56/91 and 100/93 World Organisation Against Torture et al./Zaire: 53).*** The exhaustion of domestic remedies requirement should be properly understood as ensuring that the State concerned has ample opportunity to remedy the situation of which applicants

complain. It is not necessary here to recount the international attention that Ogoniland has received to argue that the Nigerian government has had ample notice and, over the past several decades, more than sufficient opportunity to give domestic remedies.

39. Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists.

40. The present communication does not contain any information on domestic court actions brought by the Complainants to halt the violations alleged. However, the Commission on numerous occasions brought this complaint to the attention of the government at the time but no response was made to the Commission's requests. In such cases the Commission has held that in the absence of a substantive response from the Respondent State it must decide on the facts provided by the Complainants and treat them as given. ***(See Communications 25/89, 47/90, 56/91, 100/93, World Organisation Against Torture et al. /Zaire, Communication 60/91 Constitutional Right Project/Nigeria and Communication 101/93 Civil Liberties Organisation/Nigeria).***

41. The Commission takes cognisance of the fact that the Federal Republic of Nigeria has incorporated the African Charter on Human and Peoples' Rights into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including those violations alleged by the Complainants. However, the Commission is aware that at the time of submitting this communication, the then Military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts and thus depriving the people in Nigeria of the right to seek redress in the courts for acts of government that violate their fundamental human rights[1]. In such instances, and as in the instant communication, the Commission is of the view that no adequate domestic remedies are existent ***(See Communication 129/94 Civil Liberties Organisation/Nigeria).***

42. It should also be noted that the new government in their Note Verbale referenced 127/2000 submitted at the 28th session of the Commission held in Cotonou, Benin, admitted to the violations committed then by stating, "there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area".

The Commission therefore declared the communication admissible.

[1] See The Constitution (Suspension and Modification) Decree 1993.

Merits:

43. The present Communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter for Human and Peoples' Rights. Before we venture into the inquiry whether the Government of Nigeria has violated the said rights as alleged in the Complaint, it would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves.

44. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to **respect, protect, promote, and fulfil these rights**. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.[2]

45. At a primary level, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.[3] With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

46. At a secondary level, the State is obliged to **protect** right-holders against other subjects by legislation and provision of effective remedies.[4] This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to **promote** the enjoyment of all human rights. The State should make sure that

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[2] See generally, Asbjørn Eide "Economic, Social and Cultural Rights As Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (Eds.) *Economic, Social, and Cultural Rights: A Textbook* (1995) pp. 21-40.

[3] Krzysztof Drzewicki, "Internationalization of Human Rights and Their Juridization" in Raija Hanski and Markku Suksi (Eds.), Second Revised Edition, *An Introduction to the International Protection of Human Rights: A Textbook* (1999), p. 31.

[4] Drzewicki, *ibid.*

individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

47. The last layer of obligation requires the State to **fulfil** the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).[5]

48. Thus States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights, for instance, under Article 2(1), stipulates exemplarily that States "*undertake to take steps . . . by all appropriate means, including particularly the adoption of legislative measures.*" Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties. Whether the government of Nigeria has, by its conduct, violated the provisions of the African Charter as claimed by the Complainants is examined here below.

49. In accordance with Articles 60 and 61 of the African Charter, this communication is examined in the light of the provisions of the African Charter and the relevant international and regional human rights instruments and principles. The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter. It is a matter of regret that the only written response from the government of Nigeria is an admission of the gravamen of the complaints which is contained in a note verbale and which we have reproduced above at paragraph 30. In the circumstances, the Commission is compelled to proceed with the examination of the matter on the basis of the uncontested allegations of the Complainants, which are consequently accepted by the Commission.

50. The Complainants allege that the Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfill the minimum duties required by these rights. This, the Complainants allege, the government has done by:

[5] See Eide, in Eide, Krause and Rosas, op cit., p. 38.

- Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population,
- Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage;
- Failing to provide or permit studies of potential or actual environmental and health the oil operations

Article 16 of the African Charter reads:

> "(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
>
> (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

Article 24 of the African Charter reads:

> "All peoples shall have the right to a general satisfactory environment favourable to their development."

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.[6] As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."[7]

52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the

[6] See also General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural rights.

[7] *Human Rights in the Twenty first Century: A Global Challeng*e Edited by Kathleen E. Mahoney and Paul Mahoney. Article by Alexander Kiss 'Concept and Possible Implications of the Right to Environment' at p. 553.

right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual[8].

53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

54. We now examine the conduct of the government of Nigeria in relation to Articles 16 and 24 of the African Charter. Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

55. The Complainants also allege a violation of Article 21 of the African Charter by the government of Nigeria. The Complainants allege that the Military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland. The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population[9], may well be said to constitute a violation of Article 21.

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[8] See Scott Leckie 'The Right to Housing' in *Economic, social and cultural rights* (ed) Eide, Krause and Rosas, Martinus Nijhoff Publishers 1995.

[9] See a report by the Industry and Energy Operations Division West Central Africa Department 'Defining an Environmental Development Strategy for the Niger Delta' Volume 1 – Paragraph B(1.6–1.7) at pp.e 2-3.

Article 21 provides

> "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
>
> 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
>
> 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
>
> 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
>
> 5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."

56. The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.

57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties ***(See Union des Jeunes Avocats /Chad***[10]**). This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velàsquez Rodríguez v. Honduras***[11]**.** In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this

[10] Communication 74/92

[11] See, Inter-American Court of Human Rights, Velàsquez Rodrígeuz Case, Judgment of July 19, 1988, Series C, No. 4.

obligation of the State is further emphasised in the practice of the European Court of Human Rights, in ***X and Y v. Netherlands***[12]. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

58. The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.

59.The Complainants also assert that the Military government of Nigeria massively and systematically violated the right to adequate housing of members of the Ogoni community under Article 14 and implicitly recognised by Articles 16 and 18(1) of the African Charter.

Article 14 of the Charter reads:

> "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

Article 18(1) provides:

> "The family shall be the natural unit and basis of society. It shall be protected by the State . . ."

60. Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.

61. At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity

[12] 91 ECHR (1985) (Ser. A) at 32.

of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs.[13] Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.[14] The right to shelter even goes further than a roof over ones head. It extends to embody the individual's right to be let alone and to live in peace- whether under a roof or not.

62. The protection of the rights guaranteed in Articles 14, 16 and 18 (1) leads to the same conclusion. As regards the earlier right, and in the case of the Ogoni People, the Government of Nigeria has failed to fulfil these two minimum obligations. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.

63. The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term "forced evictions" by the Committee on Economic Social and Cultural Rights which defines this term as "the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection"[15]. Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths . . . Evictions break up families and increase existing levels of homelessness.[16] In this regard, **General Comment No. 4 (1991)** of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats" (E/1992/23, annex III. Paragraph 8(a)). The conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.

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[13] Scott Leckie, 'The Right to Housing' in Eide, Krause and Rosas, op cit., pp. 107-123, at p. 113.
[14] *Ibid.* pp. 113-114.
[15] See General Comment No.7 (1997) on the right to adequate housing (Article 11.1): Forced Evictions.
[16] *Ibid.* p. 113.

64. The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22). By its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.

65. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.

66. The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.

67. The Complainants also allege that the Nigerian Government has violated Article 4 of the Charter which guarantees the inviolability of human beings and everyone's right to life and integrity of the person respected. Given the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole. The Commission conducted a mission to Nigeria from the 7th – 14th March 1997 and witnessed first hand the deplorable situation in Ogoni land including the environmental degradation.

68. The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African

circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter.

69. The Commission does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people. The situation of the people of Ogoniland, however, requires, in the view of the Commission, a reconsideration of the Government's attitude to the allegations contained in the instant communication. The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities. The Commission however takes note of the efforts of the present civilian administration to redress the atrocities that were committed by the previous military administration as illustrated in the Note Verbale referred to in paragraph 30 of this decision.

For the above reasons, the Commission

Finds the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights;

Appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

- Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;

- Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;

- Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;

- Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any

further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and

- Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

Urges the government of the Federal Republic of Nigeria to keep the African Commission informed of the out come of the work of:

- The Federal Ministry of Environment which was established to address environmental and environment related issues prevalent in Nigeria, and as a matter of priority, in the Niger Delta area including the Ogoni land;

- The Niger Delta Development Commission (NDDC) enacted into law to address the environmental and other social related problems in the Niger Delta area and other oil producing areas of Nigeria; and

- The Judicial Commission of Inquiry inaugurated to investigate the issues of human rights violations.

- ANNEX -

COMMUNICATION

pursuant to Articles 55, 56 and 58 of the African Charter on Human and Peoples Rights;

regarding actions of the Federal Military Government of Nigeria, a member state of the Organization of African Unity and a state party to the African Charter on Human and Peoples Rights, having ratified the Charter on 22nd July 1983;

involving the widespread contamination of soil, water and air; the destruction of homes; the burning of crops and killing of farm animals; and the climate of terror that has been visited upon the Ogoni communities in violation of their rights to health, a healthy environment, housing and food;

alleging violations of Articles 2, 4, 14, 16, 18, 21, and 24 of the African Charter, in addition to violations of corresponding provisions of the:

* Universal Declaration of Human Rights (UDHR) U.N. Doc. A/810, 71 (1948)

* International Covenant on Economic, Social and Cultural Rights (ICESCR), UN Doc. A/6316 (1966) (*ratified by Nigeria Oct. 1993)*
* the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), UNTS 195 (1966) (*ratified by Nigeria, Oct. 1967*)
* Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc. A/RES./34/180 (1980) (*ratified by Nigeria, June 1985*)
* International Convention on the Rights of the Child (CRC), U.N. Doc. A/RES/44/25, 1989 (*ratified by Nigeria, Apr. 1991);*

seeking consideration of the Complaint by the African Commission under Articles 55 and 56, and special attention by the Assembly of Heads of State and Government of the O.A.U. and an in-depth study by the African Commission pursuant to Article 58, based on the "series of serious" and "massive" violations alleged;

noting that domestic remedies do not bar the communication because of the futility of legal action in Nigeria resulting from the operation of ouster clauses contained in military decrees removing jurisdiction of the courts from entertaining human rights cases (see e.g. Federal Military Government of Nigeria, Decree No. 114, 18th November, 1993, art. 13(1):

> "Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria, 1979, as amended, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act or any other enactment, no proceeding shall lie or be instituted in any court for or on account of any act, matter or thing done or purported to be done in respect of this Decree");

brought by **The Social and Economic Rights Action Center** (SERAC), a non-governmental, nonpartisan and voluntary initiative concerned with the promotion of economic and social rights in Nigeria, and **The Center for Economic and Social Rights** (CESR), a New York-based, non-governmental organization devoted to the promotion of economic and social rights on a global scale.

Signed, Felix Morka, Director, SERAC,
Christof Jochnick, Legal Director, CESR

I. BACKGROUND

Nigeria has an estimated population of 88.5 million, comprising several hundred ethnic groups. One such group, the Ogoni, numbering approximately 500,000, are situated in the Niger Delta, in the Southeastern part of the country. Predominantly farmers and fisherfolk, their livelihood and welfare is intricately bound to the health of surrounding rivers, streams and soil. Over the past two decades, the environment and welfare of Ogoni communities have been seriously damaged by irresponsible oil development. The government has contributed to this harm through its dominant role in the oil industry and its violent response to Ogoni protests.

Ogoniland was the site of the first oil discovery in Nigeria, in 1958, and has remained at the center of the country's oil production ever since. Over the course of two decades, oil has generated $210 billion and currently accounts for 90% of the country's foreign reserves. A joint venture between the Nigerian National Petroleum Corporation (NNPC), the majority partner with a 55% stake, and Shell Petroleum Development Corporation, has been responsible for developing oil in Ogoniland.

The NNPC-Shell consortium, with Shell as the operator, has caused massive and systematic environmental and social problems as a result of irresponsible operations and faulty infrastructure. According to the Economist Intelligence Unit, "infrastructure and facilities in the area are possibly the worst in the country and the environmental damage is widespread".

The soil and waterways in Ogoniland have been widely polluted by chronic oil spills and unlined toxic waste pits. From 1976 to 1991, 2,976 oil spills were reported in the Niger Delta, almost an average of 4 per week. Forty percent of Shell's recorded spills worldwide occurred in Nigeria, including 1.6 million gallons spilled in 27 separate incidents from 1982 to 1992. In one such spill in Ogoni, oil leaked from a Shell flow line for 40 days without repair. These extremely high spill rates are largely caused by corrosion, equipment failure, and poor maintenance. Pipelines have been laid with no regard for local communities, passing above ground through villages and crisscrossing lands was once used for growing food. This placement of pipes in such sensitive areas and the oil spills that have followed have rendered such lands infertile and economically useless.

Rather than treating or reinjecting oil production wastes, the NNPC-Shell consortium has simply dumped them into unlined pits from which they regularly flow into nearby lands and streams. In a rare, recent inspection of the Niger Delta, the World Bank estimates that contamination levels greatly exceed international averages: "Lumps from oil spillage can be directly observed and oil films cover the water surface. Concentrations of dissolved petroleum hydrocarbons have been found to be elevated near refineries in the region, which supports the inference that little or no wastewater treatment is performed".(I World Bank, at 35).

Oil companies have also contaminated the air near communities through excessive gas-flaring. The NNPC-Shell consortium has been flaring gas at some sites 24 hours a day for more than 30 years. As measured in 1993, Nigeria flares more gas than any other country in the world, 76% of total production as opposed to a world-wide average of 4.8% (I World Bank, at 59) This flaring has destroyed

wildlife and plant life in the surrounding areas and the resulting acidic rain has further contaminated waterways and soil. These problems have been particularly harmful because of the placement of the flares as close as a hundred meters from Ogoni homes.

The water, soil and air contamination caused by oil production in Ogoniland has endangered the life of plants, fish, crops and the local population. Local communities are exposed to a variety of water and air-born contaminants linked to serious health problems. While few studies have been done of the region, communities report a range of illnesses associated with the pollution, including gastrointestinal problems, skin diseases, cancers and respiratory ailments. Contamination has also caused the death of most aquatic organisms and rendered much of the agricultural land infertile. Accordingly, communities that have long relied on fishing and farming have been deprived of their principal food sources.

The Nigerian government has contributed to these problems by failing to monitor or regulate oil companies. This neglect is hardly surprising given the government's direct role in oil operations. A recent World Bank study found that "there is no enforcement of environmental sanitation, pollution, forest reserve, or environmental impact assessment regulations". (I World Bank, at xiv).

In explaining this failure, the World Bank pointed to the following problems:

(i) the conflict of interest for the federal government -- being both a partner in oil activities and the regulatory body;
(ii) no requirement for community participation in planning and development of oil activities;
(iii) very limited ability of regulatory institutions to monitor pollution;
(iv) low compensation rates for damage to property; and
(v) lack of enforcement of environmental regulations (I World Bank at 53).

Rather than focus on these problems, the government has responded to complaints about the oil industry with brutal repression. At the oil industry's request, the Rivers State Internal Security Task Force has routinely entered local communities to burn houses and crops, kill animals and terrorize the inhabitants. A memo signed by Lieutenant-Colonel Paul Okuntimo, commander of the Task Force, dated May 12, 1994, declares: "Shell operations still impossible unless ruthless military operations are undertaken for smooth economic activities to commence".) The memo recommends "wasting operations during MOSOP and other gatherings making constant military presence justifiable; wasting operations coupled with psychological tactics of displacement; restriction of unauthorised visitors especially those from Europe to the Ogoni". (Government House Facts Sheet, at 1,2)

In line with these directives, the security forces have looted and destroyed whole villages -- houses, schools and farms -- in the area. During the month of October, 1993, government forces razed 27 villages, displacing 80,000 people. Over the summer of 1994, the military terrorized villages on a nightly basis, reportedly

raiding at least 60 of them. These activities have spawned a wave of Ogoni refugees, too scared to return to their former communities. Ogoniland remains heavily militarized and access is restricted to outside environmental or human rights monitors.

II. VIOLATION OF THE RIGHT TO HEALTH AND THE RIGHT TO A HEALTHY ENVIRONMENT

A. Summary of Violation

The Government of Nigeria has violated the right to health and the right to a healthy environment recognized under articles 16 and 24 of the African Charter on Human and Peoples' Rights.

B. Facts

The military government of Nigeria has been directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC). The operations of this consortium have caused severe contamination of the environment and related health problems among the Ogoni people. The consortium exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing of toxic wastes into the air and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems. These negative health impacts could have been avoided with minimal and standard precautions.

The Nigerian government has condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies. The memo from the Rivers State Internal Security Task Force, calling for "ruthless military operations . . . for smooth economic activities to commence", is indicative. (Government House Facts Sheet, at 1) The government has allowed oil companies to operate with virtual impunity in the country, neither monitoring operations nor requiring safety measures that are standard procedure within the industry.

The government has also kept the Ogoni communities uninformed about the dangers created by oil activities and uninvolved in the decisions regarding the development of Ogoniland. The government has neither required the oil companies nor its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production and has even

refused entry into the area by scientists and environmental organizations trying to do such studies. Despite the obvious health and environmental crisis in Ogoniland, no significant studies of the problem have been undertaken by the government or made public by oil companies.

The government has also ignored the concerns of Ogoni communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders. The Nigerian government makes no requirement of the oil companies to dialogue with communities before beginning operations, even if the operations pose direct threats to community or individual lands. After their study of oil operations in Ogoniland, the World Bank recently concluded that "local concerns and initiatives rarely filter up to decision-makers of their own accord... This policy failure is endemic in the Niger Delta; oil companies, parastatals, governments, development organizations have all succumbed to it". (I World Bank at 97)

C. Legal Foundation

The right to health and the right to a healthy environment are well established in international law, and, in particular, under the African Charter. Both rights recognize the importance of a clean and safe environment to a person's well-being. As declared by unanimous vote of the U.N. General Assembly, 24 years ago, "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being." The African Charter grants individuals both "the right to enjoy the best attainable state of physical and mental health" (art. 16) and "the right to a generally satisfactory environment favourable to their development" (art. 24).

These rights impose clear obligations upon a government. Article 16 of the Charter requires governments to "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." As provided in other treaties to which Nigeria is a signatory, the right to health is more specific: the ICESCR obliges governments to take necessary steps for "the improvement of all aspects of environmental and industrial hygiene" (art. 12); the CRC obliges governments to provide all children with "adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution" (art. 24); CEDAW obliges governments to "ensure to women the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply . . ." (art. 14(2)(h)).

At their most basic level, the rights to health and a healthy environment serve to prohibit governments from directly threatening the health and environment of their citizens. Governments must also ensure that private parties, like corporations, do not pose such threats to their citizenry. Towards that end, international treaties and courts have insisted upon appropriate legislation and effective enforcement. (African Charter, art. 1) According to the Inter-American Court, a state violates the rights of its citizens "when the State allows private persons or groups to act freely and with

impunity to the detriment of the rights recognized . . .” (Velasquez Rodriguez Case, Inter-Am Ct. H.R. OEA/Ser. L/V/III.19, doc 13, §164 (Aug. 31, 1988)). The African Charter takes this requirement one step further by obliging governments “to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies” (art. 25).

Governments must also give effect to the rights to health and a healthy environment by providing citizens with necessary information about risks and the ability to participate in the development process. As made clear by the Rio Declaration on Environment and Development:

> “each individual shall have appropriate access to information concerning the environment . . . including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process.” (Rio Declaration, 31 I.L.M. 874 U.N. (1992) princ. 10)

Compliance with this obligation must begin with the following duties: (a) allowing independent scientific monitoring of threatened environments, (b) requiring and making public environmental and social impact studies prior to any major industrial development, and (c) undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and, (d) providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

At a minimum, the rights to health and a healthy environment require the Nigerian government:

* to take reasonable precautions to avoid contaminating the environment in a manner that threatens the physical, mental and environmental health of its citizens;
* to ensure that private parties do not systematically threaten peoples’ health and environment;
* to provide citizens with information regarding environmental health risks, and with meaningful opportunities to participate in development decisions.

D. Legal Conclusions

The military government of Nigeria has violated articles 16 and 24 of the African Charter by failing to fulfill all three minimum duties required by these rights: 1. the government has directly participated in the contamination of air, water and soil thereby harming the health of the Ogoni population; 2. the government has not protected the Ogoni population from harms done by the NNPC-Shell consortium, but has instead used its security forces to facilitate and compound the damages; and 3. the government has not provided nor permitted studies of potential or actual

environmental and health risks caused by oil operations and has ignored the concerns of Ogoni communities.

III. VIOLATION OF THE RIGHT TO HOUSING

A. Summary of Violation

The military government of Nigeria has massively and systematically violated the right to adequate housing of members of the Ogoni community guaranteed under article 14 (the right to property) and implicitly recognized by articles 16 (right to health) and 18 (right to family) of the African Charter on Human and Peoples' Rights, by destroying their houses and other structures.

B. Facts

In the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response of MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air-force, and the navy, armed with armored tanks and other sophisticated weapons. In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-type methods and the caliber of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces. Moreover, the complete failure of the Government of Nigeria to investigate these attacks, let alone punish the perpetrators, further implicates the Nigerian authorities in the attacks.

Indeed, the Nigerian Army has admitted its role in the ruthless operations which have left thousands of villagers homeless. The admission is recorded in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which has devoted itself to the suppression of the Ogoni campaign. One such memo calls for "ruthless military operations" and "wasting operations coupled with psychological tactics of displacement". (Government House Facts Sheet at 1,2) At a public meeting recorded on video, Major Okuntimo, head of the Task Force, gave a vivid narrative of the repeated invasion of Ogoni villages by his troops -- he described how unarmed villagers running from the troops were shot from behind; how the homes of suspected MOSOP activists were ransacked and destroyed -- and restated his commitment to rid the communities of members and supporters of MOSOP. (see Catma Films, video "The Drilling Fields" shown on B.B.C., May 23, 1994).

C. Legal Foundation

The right to adequate housing is widely recognized as a human right under international law. According to the UN General Assembly:

> "the right to adequate housing is universally recognized by the community of nations . . . All citizens of all states, poor as they may be, have a right to expect their Governments . . . to accept a fundamental obligation to protect and improve houses and neighborhoods, rather than damage or destroy them." (The Global Strategy of Shelter to the Year 2000, Point 13, adopted by resolution 43/81 of December 20, 1988).

The African Charter supports the right to housing through article 14, guaranteeing the right to property; article 16, guaranteeing the right to physical and mental health; and article 18, guaranteeing the physical and moral health of the family. Rights to individual and family health are meaningless without the right to adequate housing.

This link is firmly established by all the major human rights treaties to which Nigeria is a signatory, including the UDHR (art. 25), the ICESCR (art. 11), the ICERD (art. 5(e)(iii)), and the CRC (art. 27(3)). Housing rights are further supported by the Vancouver Declaration on Human Settlements (sec. III (8)); the Declaration on the Right to Development (art. 8(1)); the Draft Declaration on the Rights of Indigenous Peoples (arts. 10, 11(c), 22,23,25,26,27 & 31); and the UN Sub-Commission on prevention of Discrimination and Protection of Minorities resolution 1994/8.

At a very minimum, the right to housing obliges the Nigerian government:

* not to destroy the housing of its citizens; and
* not to obstruct efforts by individuals or communities to rebuild lost homes.

D. Legal Conclusions

In the case of the Ogoni people, the Government of Nigeria has failed to fulfill these two minimum obligations. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to housing.

IV. VIOLATION OF RIGHT TO FOOD

A. Summary of Violation

The government Nigeria has engaged in a massive violation of the right to food of the Ogonis, as recognized implicitly by article 4 (right to life) and article 16 (right to health) of the African Charter. The government has violated this right by destroying food sources, facilitating the destruction of food sources by private companies, and obstructing efforts of the Ogonis to feed themselves.

B. Facts

The Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. As described in section II.A, the government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. Moreover, Nigerian security forces have conducted raids upon Ogoni villages, destroying crops and killing farm animals. The security forces have also created a continuing state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and outright starvation among certain Ogoni communities.

C. Legal Foundation

While the right to food is not specifically enumerated in the African Charter, it is implicit in such provisions as the right to life (art.4), the right to health (art. 16) and the right to economic, social and cultural development (art. 22). The right to food enjoys a privileged status among economic, social and cultural rights and is the only right labeled "fundamental" under the ICESCR. The Universal Declaration on the Eradication of Hunger and Malnutrition, adopted by the U.N. General Assembly, holds that "every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties." (General Assembly, RES 3348 (XXIX, Dec. 17, 1974)). It is undeniable that food is central to the enjoyment of such other rights as health, education, work and political participation.

Nigeria is bound by the African Charter and international law to protect and improve existing food sources and to ensure access to adequate food for all citizens. According to the ICESCR, "State Parties, recognizing the fundamental right of everyone to be free from hunger, shall take [necessary measures] to improve methods of production, conservation and distribution of food . . ." (art. 11(2)). The CRC reinforces this right by obliging states to provide all children with "adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution". (art. 24) Without touching on the duty to improve food production and to guarantee access, the right to food requires that the Nigerian government:

* not destroy or contaminate food sources;
* not allow private parties to destroy or contaminate food sources; and
* not prevent peoples' efforts to feed themselves.

D. Legal Conclusions

The Nigerian government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has directly destroyed food sources

through its security forces and state oil company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves.

V. REQUESTED RELIEF

Petitioners (SERAC and CESR) urge the Commission to place the violations described in this and other communications, in particular those relating to articles 16, 18 and 24 of the African Charter, before the Assembly of Heads of State and Government for consideration under article 58. Petitioners further request that the Commission, with the approval of the Assembly, undertake an in-depth study of the situation and make a factual report with findings and recommendations as mandated by Article 58(2).

Towards a finding of "a series of serious or massive violations" as required by Article 58(1), it should be noted that the government of Nigeria has been directly involved in the contamination of Ogoniland by the NNPC and Shell consortium for [over 20 years] and has yet to investigate the environmental and health problems or to begin compensating affected communities. In addition, the government has made no effort to investigate or remedy the destruction of houses, crops and farm animals by state security forces, and has kept Ogoniland militarized and largely inaccessible to outsiders.

VI. RECOMMENDATIONS

Petitioners make the following recommendations to the Nigerian government to begin addressing the serious and massive violations of the rights to health, a healthy environment, housing and food:

1. lift the military siege of Ogoniland and stop all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force;
2. make Ogoniland freely accessible to citizens and independent investigators;
3. help convene a serious, independent investigation of the human rights violations described above;
4. prosecute officials of the security forces, NNPC and relevant agencies involved in human rights violations;
5. ensure adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government-sponsored raids;
6. undertake comprehensive remediation measures for lands and rivers damaged by oil operations;
8. ensure that appropriate environmental and social impact statements are prepared for any future oil development;
9. ensure the safe operation of any further oil development through effective and independent oversight bodies for the petroleum industry;

10. provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

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CHAPTER IX

THE RIGHT TO EDUCATION

Contents:

CESCR General Comment No. 13*

IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS[1]

The right to education (article 13 of the Covenant)

1. Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

2. The International Covenant on Economic, Social and Cultural Rights (ICESCR) devotes two articles to the right to education, articles 13 and 14. Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human rights law. The Committee has already adopted General Comment 11 on article 14 (plans of action for primary

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* Committee on Economic, Social and Cultural Rights, Twenty-first session, 15 November – 3 December 1999.

[1] Contained in document E/C.12/1999/10.

education); General Comment 11 and the present general comment are complementary and should be considered together. The Committee is aware that for millions of people throughout the world, the enjoyment of the right to education remains a distant goal. Moreover, in many cases, this goal is becoming increasingly remote. The Committee is also conscious of the formidable structural and other obstacles impeding the full implementation of article 13 in many States parties.

3. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this general comment focuses on the normative content of article 13 (Part I, paras. 4-42), some of the obligations arising from it (Part II, paras. 43-57), and some illustrative violations (Part II, paras. 58-59). Part III briefly remarks upon the obligations of actors other than States parties. The general comment is based upon the Committee's experience in examining States parties, reports over many years.

I. NORMATIVE CONTENT OF ARTICLE 13

Article 13 (1): Aims and objectives of education

4. States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1). The Committee notes that these educational objectives reflect the fundamental purposes and principles of the United Nations as enshrined in Articles 1 and 2 of the Charter. For the most part, they are also found in article 26 (2) of the Universal Declaration of Human Rights, although article 13 (1) adds to the Declaration in three respects: education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups. Of those educational objectives which are common to article 26 (2) of the Universal Declaration of Human Rights and article 13 (1) of the Covenant, perhaps the most fundamental is that "education shall be directed to the full development of the human personality".

5. The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in article 13 (1), as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1), the Convention on the Rights of the Child (art. 29 (1)), the Vienna Declaration and Programme of Action (Part I, para. 33 and Part II, para. 80), and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2). While all these texts closely correspond to article 13 (1) of the Covenant, they also include elements which are not expressly provided for in article 13 (1), such as specific references to gender equality and

respect for the environment. These new elements are implicit in, and reflect a contemporary interpretation of article 13 (1). The Committee obtains support for this point of view from the widespread endorsement that the previously mentioned texts have received from all regions of the world.[2]

Article 13 (2): The right to receive an education – some general remarks

6. While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:[3]

> (a) *Availability* – functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;
>
> (b) *Accessibility* – educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:
>
> Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination);
>
> Physical accessibility – education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location

[2] The World Declaration on Education for All was adopted by 155 governmental delegations; the Vienna Declaration and Programme of Action was adopted by 171 governmental delegations; the Convention on the Rights of the Child has been ratified or acceded to by 191States parties; the Plan of Action of the United Nations Decade for Human Rights Education was adopted by a consensus resolution of the General Assembly (49/184).

[3] This approach corresponds with the Committee's analytical framework adopted in relation to the rights to adequate housing and food, as well as the work of the United Nations Special Rapporteur on the right to education. In its General Comment 4, the Committee identified a number of factors which bear upon the right to adequate housing, including "availability", "affordability", "accessibility" and "cultural adequacy". In its General Comment 12, the Committee identified elements of the right to adequate food, such as "availability", "acceptability" and "accessibility". In her preliminary report to the Commission on Human Rights, the Special Rapporteur on the right to education sets out "four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability", (E/CN.4/1999/49, para. 50).

(e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme);

Economic accessibility – education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education;

(c) *Acceptability* – the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));

(d) *Adaptability* – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

7. When considering the appropriate application of these "interrelated and essential features" the best interests of the student shall be a primary consideration.

Article 13 (2) (a): The right to primary education

8. Primary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.[4]

9. The Committee obtains guidance on the proper interpretation of the term "primary education" from the World Declaration on Education for All which states: "The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community" (art. 5). "[B]asic learning needs" are defined in article 1 of the World Declaration.[5] While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: "Primary education is the most important component of basic education."[6]

[4] See para. 6.

[5] The Declaration defines "basic learning needs" as: "essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning" (art. 1).

[6] Advocacy Kit, Basic Education 1999 (UNICEF), section 1, page 1.

10. As formulated in article 13 (2) (a), primary education has two distinctive features: it is "compulsory" and "available free to all". For the Committee's observations on both terms, see paragraphs 6 and 7 of General Comment 11 on article 14 of the Covenant.

Article 13 (2) (b): The right to secondary education

11. Secondary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.[7]

12. While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities.[8] Article 13 (2) (b) applies to secondary education "in its different forms", thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages "alternative" educational programmes which parallel regular secondary school systems.

13. According to article 13 (2) (b), secondary education "shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education". The phrase "generally available" signifies, firstly, that secondary education is not dependent on a student's apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all. For the Committee's interpretation of "accessible", see paragraph 6 above. The phrase "every appropriate means" reinforces the point that States parties should adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.

14. "(P)rogressive introduction of free education" means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education. For the Committee's general observations on the meaning of the word "free", see paragraph 7 of General Comment 11 on article 14.

[7] See para. 6.
[8] See International Standard Classification of Education 1997, UNESCO, para. 52.

Technical and vocational education

15. Technical and vocational education (TVE) forms part of both the right to education and the right to work (art. 6 (2)). Article 13 (2) (b) presents TVE as part of secondary education, reflecting the particular importance of TVE at this level of education. Article 6 (2), however, does not refer to TVE in relation to a specific level of education; it comprehends that TVE has a wider role, helping "to achieve steady economic, social and cultural development and full and productive employment". Also, the Universal Declaration of Human Rights states that "(t)echnical and professional education shall be made generally available" (art. 26 (1)). Accordingly, the Committee takes the view that TVE forms an integral element of all levels of education.[9]

16. An introduction to technology and to the world of work should not be confined to specific TVE programmes but should be understood as a component of general education. According to the UNESCO Convention on Technical and Vocational Education (1989), TVE consists of "all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life" (art. 1 (a)). This view is also reflected in certain ILO Conventions.[10] Understood in this way, the right to TVE includes the following aspects:

> (a) It enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State party's economic and social development;
>
> (b) It takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy; and occupational health, safety and welfare;
>
> (c) Provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes;
>
> (d) It consists of programmes which give students, especially those from developing countries, the opportunity to receive TVE in other States, with a view to the appropriate transfer and adaptation of technology;

[9] A view also reflected in the Human Resources Development Convention 1975 (Convention No. 142) and the Social Policy (Basic Aims and Standards) Convention 1962 (Convention No. 117) of the International Labour Organization.
[10] See note 8.

(e) It consists, in the context of the Covenant's non-discrimination and equality provisions, of programmes which promote the TVE of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.

Article 13 (2) (c): The right to higher education

17. Higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms at all levels.[11]

18. While article 13 (2) (c) is formulated on the same lines as article 13 (2) (b), there are three differences between the two provisions. Article 13 (2) (c) does not include a reference to either education "in its different forms" or specifically to TVE. In the Committee's opinion, these two omissions reflect only a difference of emphasis between article 13 (2) (b) and (c). If higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning; in practice, therefore, both secondary and higher education have to be available "in different forms". As for the lack of reference in article 13 (2) (c) to technical and vocational education, given article 6 (2) of the Covenant and article 26 (1) of the Universal Declaration, TVE forms an integral component of all levels of education, including higher education.[12]

19. The third and most significant difference between article 13 (2) (b) and (c) is that while secondary education "shall be made generally available and accessible to all", higher education "shall be made equally accessible to all, on the basis of capacity". According to article 13 (2) (c), higher education is not to be "generally available", but only available "on the basis of capacity". The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience.

20. So far as the wording of article 13 (2) (b) and (c) is the same (e.g. "the progressive introduction of free education"), see the previous comments on article 13 (2) (b).

Article 13 (2) (d): The right to fundamental education

21. Fundamental education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.[13]

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[11] See para. 6.
[12] See para. 15.
[13] See para. 6.

22. In general terms, fundamental education corresponds to basic education as set out in the World Declaration on Education For All.[14] By virtue of article 13 (2) (d), individuals "who have not received or completed the whole period of their primary education" have a right to fundamental education, or basic education as defined in the World Declaration on Education For All.

23. Since everyone has the right to the satisfaction of their "basic learning needs" as understood by the World Declaration, the right to fundamental education is not confined to those "who have not received or completed the whole period of their primary education". The right to fundamental education extends to all those who have not yet satisfied their "basic learning needs".

24. It should be emphasized that enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and life-long learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.

Article 13 (2) (e): A school system; adequate fellowship system; material conditions of teaching staff

25. The requirement that the "development of a system of schools at all levels shall be actively pursued" means that a State party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels, but the Covenant requires States parties to prioritize primary education (see para. 51). "(A)ctively pursued" suggests that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour.

26. The requirement that "an adequate fellowship system shall be established" should be read with the Covenant's non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups.

27. While the Covenant requires that "the material conditions of teaching staff shall be continuously improved", in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many States parties in recent years. Not only is this inconsistent with article 13 (2) (e), but it is also a major obstacle to the full realization of students' right to education. The Committee also notes the relationship between articles 13 (2) (e), 2 (2), 3 and 6-8 of the Covenant, including the right of teachers to organize and bargain collectively; draws the attention of States parties to the joint UNESCO-ILO Recommendation Concerning

[14] See para. 9.

the Status of Teachers (1966) and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997); and urges States parties to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role.

Article 13 (3) and (4): The right to educational freedom

28. Article 13 (3) has two elements, one of which is that States parties undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.[15] The Committee is of the view that this element of article 13 (3) permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression. It notes that public education that includes instruction in a particular religion or belief is inconsistent with article 13 (3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

29. The second element of article 13 (3) is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to "such minimum educational standards as may be laid down or approved by the State". This has to be read with the complementary provision, article 13 (4), which affirms "the liberty of individuals and bodies to establish and direct educational institutions", provided the institutions conform to the educational objectives set out in article 13 (1) and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in article 13 (1).

30. Under article 13 (4), everyone, including non-nationals, has the liberty to establish and direct educational institutions. The liberty also extends to "bodies", i.e. legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in article 13 (4) does not lead to extreme disparities of educational opportunity for some groups in society.

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[15] This replicates article 18 (4) of the International Covenant on Civil and Political Rights (ICCPR) and also relates to the freedom to teach a religion or belief as stated in article 18 (1) ICCPR. (See Human Rights Committee General Comment 22 on article 18 ICCPR, forty-eighth session, 1993.) The Human Rights Committee notes that the fundamental character of article 18 ICCPR is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of that Covenant.

Article 13: Special topics of broad application

Non-discrimination and equal treatment

31. The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. The Committee interprets articles 2 (2) and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169), and wishes to draw particular attention to the following issues.

32. The adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.

33. In some circumstances, separate educational systems or institutions for groups defined by the categories in article 2 (2) shall be deemed not to constitute a breach of the Covenant. In this regard, the Committee affirms article 2 of the UNESCO Convention against Discrimination in Education (1960).[16]

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[16] According to article 2:
"When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of article 1 of this Convention:
(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;
(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;
(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as

34. The Committee takes note of article 2 of the Convention on the Rights of the Child and article3 (e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.

35. Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant.

36. The Committee affirms paragraph 35 of its General Comment 5, which addresses the issue of persons with disabilities in the context of the right to education, and paragraphs 36-42 of its General Comment 6, which address the issue of older persons in relation to articles 13-15 of the Covenant.

37. States parties must closely monitor education – including all relevant policies, institutions, programmes, spending patterns and other practices – so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.

Academic freedom and institutional autonomy[17]

38. In the light of its examination of numerous States parties' reports, the Committee has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Accordingly, even though the issue is not explicitly mentioned in article 13, it is appropriate and necessary for the Committee to make some observations about academic freedom. The following remarks give particular attention to institutions of higher education because, in the Committee's experience, staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom. The Committee wishes to emphasize, however, that staff and students throughout the education sector are entitled to academic freedom and many of the following observations have general application.

39. Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in

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may be laid down or approved by the competent authorities, in particular for education of the same level."

[17] See UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997).

professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.

40. The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.

Discipline in schools[18]

41. In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual.[19] Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation. Nor should any form of discipline breach other rights under the Covenant, such as the right to food. A State party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by some States parties which actively encourage schools to introduce "positive", non-violent approaches to school discipline.

Limitations on article 13

42. The Committee wishes to emphasize that the Covenant's limitations clause, article 4, is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State. Consequently, a State party which closes a university or other educational institution on grounds such as national

[18] In formulating this paragraph, the Committee has taken note of the practice evolving elsewhere in the international human rights system, such as the interpretation given by the Committee on the Rights of the Child to article 28 (2) of the Convention on the Rights of the Child, as well as the Human Rights Committee's interpretation of article 7 of ICCPR.

[19] The Committee notes that, although it is absent from article 26 (2) of the Declaration, the drafters of ICESCR expressly included the dignity of the human personality as one of the mandatory objectives to which all education is to be directed (art. 13 (1)).

security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in art.4.

II. STATES PARTIES' OBLIGATIONS AND VIOLATIONS

General legal obligations

43. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect.[20] States parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" (art.2 (2)) and the obligation "to take steps" (art. 2 (1)) towards the full realization of article 13.[21] Such steps must be "deliberate, concrete and targeted" towards the full realization of the right to education.

44. The realization of the right to education over time, that is "progressively", should not be interpreted as depriving States parties' obligations of all meaningful content. Progressive realization means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 13.[22]

45. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[23]

46. The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

47. The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires

[20] See the Committee's General Comment 3, para. 1.
[21] See the Committee's General Comment 3, para. 2.
[22] See the Committee's General Comment 3, para. 9.
[23] See the Committee's General Comment 3, para. 9.

States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.

48. In this respect, two features of article 13 require emphasis. First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognize, for example, that the "development of a system of schools at all levels shall be actively pursued" (art. 13 (2) (e)). Secondly, given the differential wording of article 13 (2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party's obligation to fulfil (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfil (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfil (provide) in relation to article 13 coincides with the law and practice of numerous States parties.

Specific legal obligations

49. States parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13 (1).[24] They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13 (1).

50. In relation to article 13 (2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by

[24] There are numerous resources to assist States parties in this regard, such as UNESCO's Guidelines for Curriculum and Textbook Development in International Education (ED/ECS/HCI). One of the objectives of article 13 (1) is to "strengthen the respect of human rights and fundamental freedoms"; in this particular context, States parties should examine the initiatives developed within the framework of the United Nations Decade for Human Rights Education – especially instructive is the Plan of Action for the Decade, adopted by the General Assembly in 1996, and the Guidelines for National Plans of Action for Human Rights Education, developed by the Office of the High Commissioner for Human Rights to assist States in responding to the United Nations Decade for Human Rights Education.

taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.

51. As already observed, the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13 (2), States parties are obliged to prioritize the introduction of compulsory, free primary education.[25] This interpretation of article 13 (2) is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States parties.

52. In relation to article 13 (2) (b)-(d), a State party has an immediate obligation "to take steps" (art. 2 (1)) towards the realization of secondary, higher and fundamental education for all those within its jurisdiction. At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.

53. Under article 13 (2) (e), States parties are obliged to ensure that an educational fellowship system is in place to assist disadvantaged groups.[26] The obligation to pursue actively the "development of a system of schools at all levels" reinforces the principal responsibility of States parties to ensure the direct provision of the right to education in most circumstances.[27]

54. States parties are obliged to establish "minimum educational standards" to which all educational institutions established in accordance with article 13 (3) and (4) are required to conform. They must also maintain a transparent and effective system to monitor such standards. A State party has no obligation to fund institutions established in accordance with article 13 (3) and (4); however, if a State elects to make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds.

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[25] On the meaning of "compulsory" and "free", see paragraphs 6 and 7 of General Comment 11 on article 14.

[26] In appropriate cases, such a fellowship system would be an especially appropriate target for the international assistance and cooperation anticipated by article 2 (1).

[27] In the context of basic education, UNICEF has observed: "Only the State … can pull together all the components into a coherent but flexible education system." UNICEF, *The State of the World's Children*, 1999, 'The education revolution', p. 77.

55. States parties have an obligation to ensure that communities and families are not dependent on child labour. The Committee especially affirms the importance of education in eliminating child labour and the obligations set out in article 7 (2) of the Worst Forms of Child Labour Convention, 1999 (Convention No. 182).[28] Additionally, given article 2 (2), States parties are obliged to remove gender and other stereotyping which impedes the educational access of girls, women and other disadvantaged groups.

56. In its General Comment 3, the Committee drew attention to the obligation of all States parties to take steps, "individually and through international assistance and cooperation, especially economic and technical", towards the full realization of the rights recognized in the Covenant, such as the right to education.[29] Articles 2 (1) and 23 of the Covenant, Article 56 of the Charter of the United Nations, article 10 of the World Declaration on Education for All, and Part I, paragraph 34 of the Vienna Declaration and Programme of Action all reinforce the obligation of States parties in relation to the provision of international assistance and cooperation for the full realization of the right to education. In relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education. Similarly, States parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education.

57. In its General Comment 3, the Committee confirmed that States parties have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of each of the rights enunciated in the Covenant, including "the most basic forms of education". In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (art. 13 (3) and (4)).

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[28] According to article 7 (2), "(e)ach Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to: (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour" (ILO Convention 182, Worst Forms of Child Labour, 1999).

[29] See the Committee's General Comment 3, paras. 13-14.

Violations

58. When the normative content of article 13 (Part I) is applied to the general and specific obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to education. Violations of article 13 may occur through the direct action of States parties (acts of commission) or through their failure to take steps required by the Covenant (acts of omission).

59. By way of illustration, violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address de facto educational discrimination; the use of curricula inconsistent with the educational objectives set out in article 13 (1); the failure to maintain a transparent and effective system to monitor conformity with article 13 (1); the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take "deliberate, concrete and targeted" measures towards the progressive realization of secondary, higher and fundamental education in accordance with article 13 (2) (b)-(d); the prohibition of private educational institutions; the failure to ensure private educational institutions conform to the "minimum educational standards" required by article 13 (3) and (4); the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in non-conformity with article 4.

III. OBLIGATIONS OF ACTORS OTHER THAN STATES PARTIES

60. Given article 22 of the Covenant, the role of the United Nations agencies, including at the country level through the United Nations Development Assistance Framework (UNDAF), is of special importance in relation to the realization of article 13. Coordinated efforts for the realization of the right to education should be maintained to improve coherence and interaction among all the actors concerned, including the various components of civil society. UNESCO, the United Nations Development Programme, UNICEF, ILO, the World Bank, the regional development banks, the International Monetary Fund and other relevant bodies within the United Nations system should enhance their cooperation for the implementation of the right to education at the national level, with due respect to their specific mandates, and building on their respective expertise. In particular, the international financial institutions, notably the World Bank and IMF, should pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis.[30] When examining the reports of States parties, the Committee will consider the effects of the assistance provided by all actors other than States parties on the ability of States to meet their obligations under article 13.

[30] See the Committee's General Comment 2, para. 9.

The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to education.

Saburo Ienaga (Appellant) v. *The Japanese Government (Respondent)*

(Case Number (O) No. 1119 of 1994)

Tokyo High Court Judgement*

Un-Official Translation
Decided on 29 August 1997

JUDGEMENT

The Appellant has filed a *jokoku* appeal against a Tokyo High Court judgement pronounced on October 20, 1993 concerning the lawsuit before the court in which the plaintiff claimed for damages (Tokyo High Court (Ne) No. 3428 of 1989 and No. 2633 of 1990). The Appellant has requested the partial reversal of the judgement of the Court below, and the Appellees have requested the dismissal of the *jokoku* appeal. Thereupon, the Court renders the judgement as follows:

Main Text

1. The first paragraph of the main text of the judgement of the court below (the Tokyo High Court) shall be altered as follows.

The first and second paragraphs of the main text of the first instance shall be altered as follows.

> (1) The Appellees shall pay 400,000 yen and the interest of the said amount of money with the annual interest rate of five percent from the date of February 11 in 1984 to the payment date.
>
> (2) The remainder of the *jokoku* appeal shall be dismissed as ungrounded.

2. The Appellant shall bear three quarters of the costs of the lawsuit, and the Appellees shall bear the rest of the costs.

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* *Editor's Note*: This case was drawn to the Editor's attention by Ms Katarina Tomasevski, Special Rapporteur of the Commission on Human Rights on the right to education to whom the editor expresses his gratitude. The unofficial translation had been made available to her.

Summary of Judgement

1. Constitutionality of the Textbook Authorization

The Government, which is in a position under the Constitution to systematically decide and realize the national will regarding social and public matters, has the competence to decide the content of education for children to the extent that it is necessary and reasonable, and educational administration is not forbidden to make necessary and reasonable regulations with acceptable reasons. Therefore, authorization of textbooks for high school education by the Minister of Education based on such laws and regulations as Article 21 (1) and Article 51 of the School Education Law, former Regulation of Textbook Authorization, and former Standard of Authorization on High School Textbooks, does not violate Article 13 and Article 26 of the Constitution and Article 10 of the Fundamental Law of Education.

In addition, ordinary education is requested to be accurate, neutral and fair, to ensure a certain national standard regardless of region and school, and to accord with the stage of children's mental and physical development. The authorization by the Minister of Education of textbooks in ordinary education is conducted to realize the request above and it merely restricts expression and publication in a special form as a textbook, though it has an aspect to restrict the freedom of expression and freedom of academic publication of textbook writers. Thus, it shall be understood as an act within the reasonable and necessary extent and it does not violate Article 21 and Article 23 of the Constitution.

2. Standard of Discretion on Textbook Authorization

Examination and judgement by the Minister of Education including judgement of acceptance or rejection and judgement on whether or not to attach conditions and the content of the conditions, with the judgement of acceptance, shall be entrusted to the reasonable discretion of the Minister. In the case where unacceptable mistakes are made in the process of his judgements on the understanding of the situation of theories and the situation of education at the time of the authorization, which should be the basis of the contents of the textbook and indication of defects, or on the evaluations that the book applied is against the former standard of the authorization, the judgement consists of an illegal act as a deviation of discretion under the State Redress Law.

3. Concerning the Comment for Improvement at the first authorization in 1980

The Minister of Education made comments for improvement in 1980 on the description of "Shin ran" and "Japanese invasion" in the textbook of Japanese history written by the appellant for high school education. Comments for improvement are attached when it is considered that corrections will improve the draft as a textbook, and they do not have a direct effect on the judgement of

acceptance or rejection, having only a character as an advice or guidance by the Minister. Therefore, comments for improvement in principle should not be understood as an illegal act under the State Redress Law regardless of propriety of the comments, as long as there is not a special circumstance in which the writer or the publisher has to accept them against his/her will. In the case under consideration where the appellant refuted the above comments and did not accept them, the original draft was approved as the final draft without any correction, and also the authorization side didn't coerce the comments neither directly nor indirectly, the attachment of the comments by the Minister of Education cannot be considered as an illegal act under the State Redress Law.

4. Concerning the Comment of Modification at the Authorization on the Revised Textbook in 1983

(1) At the application for authorization on the revised textbook under consideration in 1983, the Minister of Education attached a comment of modification on the description of "resistance of Korean people against Japan" with the reason that what the word means was unclear and if it means the second outbreak of Rebellion by To-gaku-to, it was inappropriate to mention only the second rebellion and not the first rebellion by To-gaku-to. Considering the fact at the time of authorization that the military rebellion by the civil people which had occurred in Korea in 1894 was called the second rebellion of To-gaku-to or the Autumn Rebellion of Kogo Farmers' War, the comment made by the Minister cannot be considered as an illegal act.

(2) At the application for authorization on the revised textbook under consideration in 1983, the Minister of Education attached a comment of modification on the description of assaults by the Japanese Army on Chinese women in the description concerning "Cruel acts of the Japanese Army" with the reason that assaults on women by military forces had been common in the world to assault women and it was not appropriate to mention only the Japanese Army. Considering that the description was about the acts of the Japanese Army in such battlefields as Kahoku where the Chinese Eighth Army had established a liberated district and the fact that theories and research materials did not existed at the time of authorization which held a view that the assaults of the Japanese Army in such battlefields as Kahoku had occurred so frequently or had been so cruel as necessary to take them up in textbooks, the comment made by the Minister cannot be recognized as an illegal act.

(3) At the application for authorization on the revised textbook under consideration in 1983, the Minister of Education attached a comment of modification on the description newly adding the issue of "The 7th Unit", to delete the description entirely with the reason that it was too early to take up the issue in textbooks without having reliable studies at that time. The comment shall be considered as an Illegal act as a deviation of his discretion

since there were unacceptable mistakes in the process of his judgement on the recognition of theories at that time and on the evaluation that the description infringed the former standard of authorization.

(4) At the application for authorization on the revised textbook under consideration in 1983, the Minister of Education attached a comment of modification to add an issue of the group suicide concerning the sacrifice of Okinawa people on the description adding the killing of Okinawa people by the Japanese Army to the former description of the "Battle in Okinawa". The general understandings of the academic circles at the time of authorization was that characters of the Battle in Okinawa included that many Okinawa people had been killed by the Japanese Army who were supposed to protect the people and that many Okinawa people had committed group suicide as well as that many Okinawa people had died involved in the war. In addition, it is necessary to have a description in textbooks on the group suicide as well as the killing by the Army in order to teach the reality of miserable sacrifice of Okinawa people who were involved in the ground fighting. In light of these factual situations, the comment made by the Minister cannot be recognized as an illegal act.

5. Conclusions

Redress for the mental pain of the appellant by the illegal comment made by the Minister of Education on the description of "the 731 Unit" shall amount to 100,000 yen and the Government should pay 400,000 yen to the appellant which includes the amount of redress (300,000 yen) approved by the judgement below.

Saburo Ienaga (Appellant) v. *The Japanese Government (Respondent)*

(Case Number (O) No. 1119 of 1994)

Un-Official Translation
Decided on 16 March 1993

Tokyo High Court Judgement

JUDGEMENT

The Appellant has filed a *jokoku* appeal against the Tokyo High Court judgement pronounced on March 19, 1986 concerning a lawsuit before the court in which plaintiff claimed for damages (Tokyo High Court (Ne) No. 1773) of 1974, No. 1143 of 1975). The Appellant has requested the complete reversal of the judgement below. Thereupon, the Court renders judgement as follows:

Main Text

The appeal shall be dismissed.

The costs of the appeal shall be borne by the Appellant.

Summary of Judgement

1. Textbook Authorization, Article 26 of the Constitution (Right to education), and Article 10 of the Fundamental Law of Education

(1) Article 26 of the Constitution does not directly provide who shall and how to decide the content of education for children. Under the Constitution, parents have a freedom of education on children in home education, etc. teachers have a certain freedom of education in the sense that certain discretion concerning the concrete content of class education is admitted to them and private school is also admitted a limited freedom of education. While in the other area, the government has the competence to decide the content of education for children to the extent that it is necessary and reasonable in order to protect the benefits of children themselves or to respond to the benefits and interests concerning development of children in the public society. However, state intervention in the content of education is requested to be restrained especially, such intervention is not acceptable if it prevents children from growing up as a free and independent personality. Article 10 of the Fundamental Law of

> Education does not prohibit the educational administration from making, necessary and reasonable regulations on the content of education.
>
> (2) Authorization of textbooks for high school based on Article 21 (1) and Article 51 of the School Education Law, the former Regulation of Textbook Authorization, and the former Standard of Authorization on High School Textbooks is an approval by the Minister of Education on the book applied by an author or a publisher that it accords with the purpose of the Law of Fundamental Education and the School Education Law and that it is appropriate as a teaching material. The examination is conducted based on such standards as following: whether the contents of the book applied are in conformity with the purpose and guidelines of education provided in the Fundamental Education Law and the School Education Law and the purpose of the school under consideration whether the contents of the book applied are in conformity with the goals and content of subjects provided in the Course of Study; whether the contents are fair and non-biased concerning politics and religion; whether the contents are accurate; and whether the contents are suitable for that stage of children's mental and physical development. Therefore, the examination is not merely a consideration of formality but a substantial consideration of the contents of the book, in other words, the content of education.

However, in ordinary education, children and students do not have enough capability to criticize the content of class education and they can neither choose a school nor a teacher. In addition, to guarantee equal opportunity of education, content of education is requested to be accurate, neutral and fair, and to have a certain national standard regardless of region and school. The authorization is conducted to realize the request above and the concrete standard of examination cannot be said to go beyond the necessary and reasonable extent for the purpose above. Also it does not include the content which forbids children to grow up as a free and independent personality. Furthermore, the usage of authorized textbook does not deprive teachers of their discretion in class education.

The authorization does not violate Article 26 of the Constitution and Article 10 of the Law of Fundamental Education.

2. The Authorization and Article 21 of the Constitution (Freedom of Expression / Prohibition of Censorship)

> (1) As for books accepted as a result of authorization, their names are publicized on Kanpo (Official Gazette) and on the catalogue of textbooks which the Minister of Education sends to Boards of Education. The samples of them are also displayed at the Exhibition of Textbooks organized by the Boards of Education. Every elementary school, Junior

high school and high school is supposed to use textbooks chosen from those books on the display. While those books being rejected as a result of the authorization cannot have such special treatment and cannot be published as textbooks, the restriction is limited to publication in a special form as a textbook, which schools in ordinary education must use, and it is not prohibited to publicize those books in a form of an ordinary book and make them known to general public including teachers and students, in others words, to bring them into the free market of thought. (In fact, the appellant published and reprinted the rejected book with the name of "Textbook of Japanese history which did not pass the Textbook Authorization".) It is of course possible for authors to apply for authorization again on a book already published in a form of an ordinary book.

(2) Censorship as provided in Article 21 of the Constitution should be construed to indicate that it has, as a special quality, the prohibition of publication of what are judged inappropriate, after the administrative authorities as the main organ, for the purpose of prohibition of publication as a whole or a part, covering, the matters of expression of substance of thought, etc., conduct the compressive and general examination of the above specific matters of expression prior to its publication. Textbook Authorization, which does not prohibit publication in a form as an ordinary book and does not have a purpose to prohibit its publication nor a feature as an examination prior to its publication, shall not be recognized as censorship and does not violate the former part of Article 21 (2) of the Constitution.

(3) Freedom of Expression, provided under Article 21 (1) of the Constitution, may be subject to reasonable and necessary restrictions for the sake of the public welfare. Whether the restriction is reasonable and necessary has to be decided by balancing the extent to which the restriction is necessary against the content and nature of the freedom sought to be restricted, the type and scope of the specific restriction, and similar considerations. In ordinary education, education is requested to be accurate, neutral and fair, and to ensure a certain national standard. Considering that prohibition of the publication and usage of the book as a textbook recognized as unsuitable in light of these requests is necessary to realize these requests and that the authorization merely prohibit publication of the books in a special form as a textbook which were recognized unsuitable as textbooks in light of the requests, restrictions under the authorization should be understood as reasonable and necessary.

The former Standard of Authorization as the standard of the authorization under consideration and such provisions as goals of subjects provided in the Course of Study for High School Education consisting a part of the Standard, are formed systematically based on academic and educational viewpoints. Therefore for writers of textbooks who have expertise in the subject, the contents of the standard and goals cannot be said to be indefinite.

The authorization does not violate Article 21 (1) of the Constitution.

3. The authorization and Article 23 of the Constitution (Academic Freedom)

Textbooks are books not for the publication of academic outcome but for the use in ordinary education as educational material for children and students in subjects laid systematically in accordance with the structure of the curriculum. The authorization merely limits publication of academic outcome in a form of a textbook when the academic outcome is not yet supported in the academic circles or not recognized suitable for education for children and students in the grade and in the subject. Thus the authorization does not violate Article 23 of the Constitution.

4. Whether or not the Minister of Education went beyond his discretion concerning the treatment under the authorization

(1) The appellant side applied for authorization of a textbook of Japanese History for High school in 1962 and 1963. The Council on Authorization of Textbooks, which is an advisory institution for the Minister of Education, rejected it in 1962, indicating 323 defects in the draft, while the Council accepted it in 1963 with a condition that it should be reviewed after correction of 290 defects indicated by the Council. The judgement of acceptance or rejection by the Council was reported to the Minister of Education with its indication of defects, and the Minister made a decision in accordance with the report. (Furthermore, additional defects were indicated when the book was reviewed in 1963).

(2) Examination and Judgement in the authorization, which is conducted on a book applied with diversified viewpoints including whether the contents of the book are academically accurate; and whether the contents of the book are appropriate in achieving the goals of the subject; etc., is a specialized and technical judgement in the field of academics and education. Considering this characteristic, examination and judgement should be entrusted to the reasonable discretion of the Minister of Education. Therefore, when there are unacceptable misjudgements in the recognition of situations of theories which should be the basis of contents of the book and indication of defects (objective situation of theories at the time of authorization) and educational situation in the process of the judgement by the Council on the Authorization of Textbooks, and the

> judgement of the Minister of Education are made based on the misjudgement of the Council, the judgement should be understood as an illegal act under the State Redress Law as a deviation of his discretion.

The indication of defects by the Council in the authorization under consideration, although some of them were too detailed, was not recognized to have an unacceptable misjudgement, and the judgement by the Minister of Education cannot be understood as an illegal act as a deviation of his discretion.

5. Conclusions

Therefore, the claim for damages by the appellant, with the reason that the treatment by the Minster of Education was against the Constitution and illegal, is without foundation. The original judgement, which reached the same conclusions, shall be approved.

REFERENCE – RELATED ARTICLES OF LAW

Constitution of Japan

Article 13. All of the people shall be respected as individuals. Their fight to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Article 23. Academic freedom is guaranteed.

Article 26. All people shall have the right to receive an equal education correspondent to their ability, as provided by law.

All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.

School Education Law

Article 21. The primary school shall use the textbooks whose title of authorship is possessed by the Ministry of Education.

Books other than the above-mentioned textbooks and other teaching materials may be used if they are good and suitable.

Article 51. The provisions of Article 21, Article 28 paragraphs 3 to 11 inclusive and Article 34 shall also apply to the high school.

Fundamental Law of Education

Article 10. Education shall not be subject to improper control, but it shall be directly responsible to the whole people.

School administration shall, on the basis of this realization, aim at the adjustment and establishment of the various conditions required for the pursuit of the aim of education.

Mohini Jain (Miss) (Petitioner) v. *State of Karnataka and Others (Respondents)*

(3 Supreme Court Cases 666 (1992))*

Supreme Court of India

Constitution of India – Arts. 14, 21 and 41 – Charging of capitation fee in consideration of admission to educational institutions – Held, illegal and impermissible as it amounts to denial of citizen's right to education and is arbitrary and violative of Art. 14 – Denial of admission to those unable to pay capitation fee is patently unreasonable, unfair and unjust – Education – Universities – Admission – Capitation fee

Constitution of India – Art. 14 – Arbitrariness – State action or inaction which defeats any constitutional mandate stated in the directive principles is per se arbitrary and violative of Art. 14

Held:

The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society. Increasing demand for medical education has led to the opening of large number of medical colleges by private persons, groups and trusts with the permission and recognition of State Governments. The Karnataka State has permitted the opening of several new medical colleges under various private bodies and organisations. These institutions are charging capitation fee as a consideration for admission. Capitation fee is nothing but a price for selling education. The concept of "teaching shops" is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage. (Para. 14)

The Preamble promises and the directive principles are a mandate to the State to eradicate poverty so that the poor of this country can enjoy the right to life guaranteed under the Constitution. The State action or inaction which defeats the constitutional mandate is per se arbitrary and cannot be sustained. Capitation fee makes the availability of education beyond the reach of the poor. The State action in permitting capitation fee to be charged by state-recognised educational institutions is wholly arbitrary and as such violative of Article 14. The capitation fee brings to the fore a clear class bias. It enables the rich to take admission whereas the poor have to withdraw due to financial inability. A poor student with better merit cannot get

* Writ Petition (Civil) No. 456 of 1991 (Under Article 32 of the Constitution of India), decided on July 30 1992. (Before Kuldip Singh and R.M. Sahai, JJ.).

admission because he has no money whereas the rich can purchase the admission. Such a treatment is patently unreasonable, unfair and unjust. Right to admit non-meritorious candidates by charging capitation fee as a consideration strikes at the very root of the constitutional scheme and our educational system. Restricting admission to non-meritorious candidates belonging to the richer section of society and denying the same to poor meritorious candidates is wholly arbitrary, against the constitutional scheme and as such cannot be legally permitted. Capitation fee in any form cannot be sustained in the eyes of law. The only method of admission to the medical colleges in consonance with fair play and equity is by ways of merit and merit alone. Therefore, charging capitation fee in consideration of admission to educational institutions, is a patent denial of a citizen's right to education under the Constitution and is wholly arbitrary, violative of Art. 14 and as such illegal and not permissible. (Paras. 17 to 21)

> *E.P. Royappa v. State of T.N.,* (1974) 4 SCC 3: (1974) 2 SCR 348: 1974 SCC (L&S) 165; *Maneka Gandhi v. Union of India,* (1978) 1 SCC 248: (1978) 2 SCR 621; *Ramana Dayaram Shetty v. International Airport Authority of India,* (1979) 3 SCC 489: (1979) 3 SCR 1014; *Ajay Hasia. v. Khalid Mujib Sehravadi*, (1981) 1 SCC 722: (1981) 2 SCR 79: 1981 SCC (L&S) 258, *relied on*

Indian Medical Association in its 56th All India Medical Conference held at Cuttack on December 28-30, 1980; Presidential address delivered on January 17, 1992 at the 47th Annual Conference of the Association of Physicians in India held at Patna, relied on

> *D.P. Joshi v. State of M.B.*, AIR 1955 SC 334: (1955) 1 SCR 1215, *distinguished*
> *Dr. Pradeep Jain v. Union of India,* (1984) 3 SCC 654: (1984) 3 SCR 942**,** *referred to State of Punjab v. Ajaib Singh*, AIR 1953 SC 10, *cited*

Constitution of India – Arts. 19, 21, 38, 39(a), (f), 41 and 45 – Right to education – Held, is concomitant to the fundamental rights

Constitution of India – Parts III and IV – Directive principles are supplementary to and should be read into fundamental rights

Constitution of India – Arts. 21 and 41 – Right to life – Includes right to education

Held:

The "right to education" is concomitant to the fundamental rights enshrined under Part III of the Constitution. The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights

guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "right to education" under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate. (Paras. 14 and 9)

The fundamental rights including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. (Para. 13)

"Right to life" is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. (Para. 12)

Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608: (1981) 2 SCR 516: 1981 SCC (Cri) 212; *Bandhua Mukti Morcha v. Union of India,* (1984) 3 SCC 161; (1984) 2 SCR 67: 1984 SCC (L&S) 389*, relied on*

Thus every citizen has a "right to education" under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through state-owned or state-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulful its obligation under the Constitution. The students are given admission to the educational institutions – whether state-owned or state-recognised – in recognition of their "right to education" under the Constitution. (Para. 17)

Universities – Medical colleges – Admission – Capitation fee – Notification issued under S. 5 (1) of Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 providing for charging of "tuition fees" of Rs 2000 p.a. from candidates admitted by govt. or private medical colleges against govt. seats, Rs 25,000 p.a. from Karnataka students admitted by private medial colleges against non-govt. seats and Rs 60,000 p.a. from Indian students outside Karnataka admitted by private medical colleges against non-govt. seats – Held, fees permitted to be charged by private medical colleges from Karnataka as well as non-Karnataka candidates admitted against non-govt. seats amounted to capitation fees prohibited under S.3 of the Act and hence notification quashed with prospective effect – Administrative Law – Ultra vires – Constitution of India, Arts. 32, 12 & 14.

Held:

The State Government in fulfilling its obligation under the Constitution to provide medical education to the citizens has fixed Rs 2000 per annum as tuition fee for the students selected on merit for admission to the medical colleges and also against "Government seats" in Private Medical Colleges. Therefore, the tuition fee by a student admitted to the Private Medical College is only Rs 2000 per annum. For seats other than the "Government seats" which are to be filled from outside Karnataka the management has been given free hand where the criteria of merit is not applicable and those who can afford to pay Rs 60,000 per annum are considered at the discretion of the management. Whatever name one may give to this type of extraction of money in the name of medical education it is nothing but the capitation fee. If the State Government fixes Rs 2000 per annum as the tuition fee in Government colleges and for "Government seats" in Private Medical Colleges then it is the State responsibility to see that any private college which has been set up with Government permission and is being run with Government recognition is prohibited from charging more than Rs 2000 from any student who may be resident of any part of India. When the State Government permits a Private Medial College to be set up and recognises its curriculum and degrees then the said college is performing a function which under the Constitution has been assigned to the State Government. Therefore, Rs 25,000 and Rs 60,000 per annum permitted to be charged from Karnataka students and from Indian students from outside Karnataka State respectively in the notification are not tuition fees but in fact capitation fees and therefore, cannot be sustained being beyond the scope of the Act; rather contrary to Section 3 of the Act and as such has to be set aside. (Paras. 28 and 29)

Hence it is held and declared that it is not permissible in law for any educational institution to charge capitation fee as a consideration for admission to the said institution. (Para. 29)

However, nothing contained in this judgment shall be applicable to the case of foreign students and students who are non-resident Indians. Further, this judgment shall be operative prospectively. All those students who have already been admitted to the Private Medical Colleges in the State of Karnataka in terms of the Karnataka State notification dated June 5, 1989 shall not be entitled to the advantage of this judgment and they shall continue their studies on the same terms and conditions on which they were admitted to the consolidated MBBS course. (Para. 30)

Writ petition allowed R-M/T/11447/C

Advocates who appeared in this case:

Vijay Pandita, Rajinder Nath Pandita and R. Sathish, Advocates, for the Petitioner;
Santosh Hegde, Senior Advocate (R. Jagannatha Gouley, M.K. Dua, Kh. Nobin Singh, Manoj Sarup, C.S. Vaidyanathan, K.V. Mohan, Ms Anita Lalit and M. Veerappa, Advocates, with him) for the Respondents.

Ed.: In the present case, under Section 5(1) it was "competent for the Government, *by notification*, to regulate the tuition fee *or any other fee or deposit or other amount* that may be received or collected by any educational institution or class of such institutions in respect of *any* or all *class or classes of students*" and by definition in Section 2(b) "capitation fee" means "any amount, by whatever name called, paid or collected directly or indirectly *in excess of the fee prescribed under Section 5* . . .". By this definition, demand of fees up to Rs 25,000 and 60,000 per annum as prescribed in paras. (c) and (d) respectively of the impugned notification, being the fee prescribed under Section 5, was not a "capitation fee" *by definition* above. In fact Section 5 permitted in addition to tuition fees, the regulation of "any other fee or deposit or other amount", giving the impression that the legislature conceded collection of additional funds for the sake of economic viability of the institutions while seeking to ban any under-the-table payments above those prescribed.

The Court obviously has not accepted the definition of capitation fee provided by the legislature nor the classification by the impugned notification of students into different categories for payment of varying amounts of fees. According to it the amount of tuition fee fixed for a Government seat or a seat in a Government Medical College alone is a tuition fee and any amount above it, irrespective of its name, is a capitation fee. (Para. 28)

The Court's dictum in para. 29 to the effect:

> "We therefore hold and declare that it is not permissible in law for any educational institution to charge capitation fee as a consideration for admission to the said institution"

must therefore be read and applied on the basis of the Court's definition of capitation fee. Hence before it can be said that a fee or amount paid for admission to any institution is a capitation fee and therefore impermissible, the notification of the tuition fee for a Government seat or a seat in a Government institution is a must. Besides, the legislature in each State will have to suitably empower and guide the executive for issuing such a notification.

As stated above, *technically* any amount prescribed in impugned clauses (c) and (d) of the impugned notification was not to be a "capitation fee" by definition in Section 2(b) read with Section 5(1). It could therefore be contended that the legislative provisions themselves suffer from the vice of delegation of essential legislative function in not stating precisely what "capitations fee" means and leaving it to the delegated authority to determine and thereby define it.

II

The Court could not be drawn into a discussion of the question of economic viability of private medical colleges, their budgeting and expenses, etc. Nor does the judgment reveal anything on the record as whether a Government medical college is solely run on the fee of Rs 2000 it charges from each student or more funds are pumped in by the State to maintain and run it. This aspect assumes significance

since the statement of the intervener that private medical colleges do "not receive any financial aid from either the Central or the State Government" is not controverted. This means that if the Government medical colleges are separately funded then the existing private medical colleges, which are state-recognised and are thereby acting as "an agency to fulfil the obligation" of the State Government, must be equally funded by the State Government to the same extent. When for the object of fulfilling the State's obligation to provide education facilities the private medical colleges and the Government medical colleges have been put on par in the matter of charging fees, they cannot now be classified separately for the purpose of receiving financial aid. Article 14 will bind the State Government to treat them equally.

With the right of education having been declared as a fundamental right, the State also cannot allow the private medical colleges to close down for lack of funds, for with their closure the forty per cent government seats in each college will disappear, which under S. 2(e) have been reserved for "Scheduled Castes, Scheduled Tribes and Backward Classes and such other categories as may be specified". The right of education of these classes likely to be affected by the closure reinforces the State's obligation to equally fund the private medical colleges. Empirical data alone can reveal the ratio in Karnataka between the total number of government seats contributed by private medical colleges and the total seats in Government medical colleges, and the impact if the former are possibly affected by this judgment.

Moreover, if the resources allocated by the State Government for education are limited, as it does seem, a difficult and controversial policy decision would be whether such limited resources should be spent on higher technical education of the few or towards the unfulfilled constitutional mandate laid down in Art. 45 of *free and compulsory* education for all children up to the age of fourteen years. Fulfillment of this constitutional mandate is linked with the realisation of the fundamental right in Art. 24 of children below the age of fourteen years against their being employed, in any factory, mine or hazardous employment; which can only happen if they have to *compulsorily* attend school.

III

Private initiatives in education on a commercial basis were squarely condemned by the present judgment and were held "contrary to the constitutional scheme and wholly abhorrent to the Indian culture and heritage" and no redeeming feature is seen. Certainly there can be no sympathy or justification for extortion of money for admission to educational institutions. The situation is not confined to higher education, it is more rampant at the stage of primary and secondary school education. What would one call the exorbitant fees charged by the so-called public schools in metropolitan cities? That such fees are grudgingly but willingly paid points to insufficiency of educational institutions of a reasonably good standard, and the understandable desire of parents to provide their children with the best education feasible as a prudent investment for a bright career. Paradoxically, by and large it is admission to the private institutions that are more sought for. We have also to

contend, in our status-conscious society, with the unwavering desire of candidates backed by their parents to pursue a particular course or career. They do not accept the not-too-good performance at the qualifying or entrance examination as the final verdict on their aspirations. Again, there are other highly meritorious students who for the lack of many seats in their chosen discipline in their State must perforce seek admission in other States.

To resolve such an exploitative and unhappy situation the Supreme Court in the present case has ruled against private commercial initiatives relying solely on the State to fully meet the demand as a constitutional mandate. The questions one cannot help asking are: Will the State measure up to this responsibility? Does the State today have the resources and manpower to provide universal and all round education to all at all stages? Can the teachers and staff of government institutions, with security of service and no rule of accountability operating actively, measure up to this onerous role and responsibility? And lastly, how long will the State take to act upon this new mandate, and what are the candidates seeking admission **now** to do till then?

The concern of the Court for the cause of the meritorious against marginalization by the wealthier but less meritorious candidates is fully justified and commendable.[1] But should the concern for the former necessarily mean obliteration for the latter. Will foreclosing the option totally for the latter solve the problem of those of them who are willing to pay? What about *their* right to education? By what rational can we in a democracy tell such candidates eager to pursue a particular course of study and willing to pay for it that they cannot do so?

Human experience sadly shows that totally blocking the avenues for satisfaction of certain demands or desires that cannot be wished away, however deplorable we may consider them to be, opens more pernicious avenues for their satisfaction, e.g. prohibition of liquor leading to illicit liquor and organized crime. Regulation and not prohibition seems to be the way out. Regulation can be by police power or through market economy and competition. The choice is debatable. The desire of candidates who can afford to pay to pursue a particular course of study can neither be wished away nor can they wait till the State creates more seats by setting up and equipping new colleges. Their present need will have to be met somehow. The unpalatable turn of events may be their movement to colleges abroad (as many medical students have been going to the former USSR) entailing heavy drain on our foreign exchange or even relocation of our private medical and engineering colleges in neighbouring SAARC countries (with affiliation to any of the recognised foreign universities) who would be only too happy to host them with full operational freedom.

One is tempted to relate the recent experience with private commercially-oriented education with a seemingly different result. In the field of computer education, the computer teaching and training institutes, avowedly commercial with no under-the-table practices, have been charging fees not in any way nominal and

[1] Somehow one does not find in the present judgment any mention of the academic achievements or marks of the petitioner, Miss Mohini Jain, reflecting upon merit.

while operating to market forces and open competition have in a short span of 5–6 years provided the necessary equipped, qualified and proficient system of computer education producing quality trained manpower, more than that being produced by the government institutions and universities, thus helping to usher India into the computer age. Now, some of these private institutes even grant scholarships! Competition assures quality and standard, and the changing demands of the work place compel innovation. Tens of thousands of unemployable candidates have joined the workforce. They meet stringent work standards in India and abroad and have made the nation proud of its capability to export computer software. The key in preventing commercial enterprise from being extortionate is to let it grow so that it turns form a seller's market to a buyer's market, subject of course to the necessary regulation from the stage of inception, only by a non-governmental professional body or trade association. In case of private medical colleges the Medical Council of India duly empowered to ensure the requisite standards must realise and fully act upon its legal and social responsibilities.

IV

It is not clear how a future Bench would contend with the right of minorities under Art. 30(1) if the fees charged by any educational institution established by them are found to be "capitation fees" by any meaning of that term.

One would also be concerned with the position of private charitable educational institutions openly charging high fees to supplement their income to meet their expenditure for paying high salaries and equipping/maintaining controverted facilities of a very high standard. Is a Columbia or Harvard inconceivable in India?

V

The Court has also extended the horizon of Art. 14 by holding State action or inaction which defeats a constitutional mandate as per se arbitrary and therefore violative of Art. 14 (Para 18). This also means widening of the jurisdiction under Art. 32. The very many constitutional mandates that can be distilled from the entire Constitution especially Parts IV and III, and remain unfulfilled will be wide ranging considering that the Indian State has since 1950 not achieved much success in most areas; in some areas a beginning is yet to be made. If it results in inducing any sense of accountability in the government, the development is welcome.

VI

The "right to education" is yet another unenumerated right discovered by the Supreme Court in the Constitution of India and held to be concomitant to fundamental rights. For this right the Court has also drawn inspiration from the preamble and directive principles. According to it without education the freedoms in Art. 19 cannot be fully enjoyed nor can the dignity of the individual under Art. 21 be

assured.[2] The doctrine of a right existing within the penumbra of other fundamental rights is further established.

On the same rationale and on equally sound reasons one can contend for a right to property as emanating from the freedoms in Art. 19(1) and the concept of personal liberty in Art. 21 aided by the preamble and the directive principles in Art. 39(b) & (c), and Art. 14 as lately interpreted. Such a right would protect the citizen from unjust, unfair and unreasonable restraints imposed by the State on property which thereby prevent or obstruct the full realisation or full enjoyment of the freedoms of Art. 19 (while remaining within the limits of reasonable restrictions imposable under Art. 19(2) to (6)) and in any way impinge upon personal liberty under Art. 21 affecting his dignity.

Inasmuch as oppressive, irrational and extortionate levies by the State adversely affect the economic viability and financial resources of a citizen, his enjoyment of the freedoms under Art. 19(1) get affected, whether they be freedom of speech and expression (especially freedom of the press), freedom of association or freedom to practice any profession, or to carry on any occupation, trade or business, making imperative the recognition of the right of property as concomitant to the other fundamental rights. This would be apart from the right against extinguishment or deprivation of property under Art. 300-A.

Professor T.K. Tope in his recent work, the *Constitutional Law of India*, 2nd Edn. (1992) at pp. 177–78 has advocated that the concept of personal liberty includes the concept of right to property. He quotes Mathew, J. to the following effect:

> "In a society with a mixed economy, who can be sure that freedom in relation to property might not be regarded as an aspect of individual freedom. People without property have a tendency to become slaves. They become the property of others as they have no property themselves. They will come to say: 'Make us slaves, but feed us'. Liberty, independence, self-respect, have their roots in property. To denigrate the institution of property is to shut one's eyes to the stark reality evidenced by the innate instinct and the steady object of pursuit of the vast majority of the people. Protection of property interest may quite fairly be deemed in appropriate circumstances an aspect of freedom." [Mathew, K.K.: *Democracy, Equality and Freedom*, Ed. Upendra Baxi, (1978), pp. 38-39, (Eastern Book Company, Lucknow)]

To further quote Prof. Tope:

> "The Supreme Court of the USA in a case observed as follows: 'The dichotomy between personal liberties and property rights is a false one. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether

[2] It is interesting to read the earlier Supreme Court decision in *State of A.P.* v. *Lavu Narendranath*, (1971) 1SCC 607 at 614-15 where unrestricted right to admission to a medical college was pleaded on the basis of Art. 21.

> the property in question be a welfare cheque, a home, or a saving account. In fact a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.' [*Lynch* v. *Household Finance Corpn*., 405 US 538, 552] Walter Lippmen observed that 'the only dependable foundation of personal liberty is the economic security of property'. Learned Hand wondered why nobody took time to explain why property itself is not a personal right. [Learned Hand: *Spirit of Liberty*, p. 206, 1960, Ed. Dillard] These views might gain importance in view of the fact that Articles 19(1)(f) and 31 which dealt with right to property were deleted by the Forty-fourth Amendment Act. It would be possible to argue that the right to property is already covered by the right to personal liberty."

The Judgment of the Court was delivered by:

Kuldip Singh, J. – The Karnataka State Legislature, with the object of eliminating the practice of collecting capitation fee for admitting students into educational institutions, enacted the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 (the Act). The Act which replaces the Karnataka Ordinance No. 14 of 1983 came into force with effect from July 11, 1983. Purporting to regulate the tuition fee to be charged by the Private Medical Colleges in the State, the Karnataka Government issued a notification dated June 5, 1989 under Section 5(1) of the Act thereby fixing the tuition fee, other fees and deposits to be charged from the students by the Private Medical Colleges in the State. Under the notification the candidates admitted against "Government seats" are to pay Rs 2,000 per year as tuition fee.

CHAPTER X

THE RIGHT TO WORK

Contents:

- *The Attorney General of Guyana* v. *Caterpillar Americas Co.* – Court of Appeal of the Supreme Court of Judicature, Cooperative Republic of Guyana
- Rudolph James, 'The Right to Work', *Guyana Bar Association Review* Vol. No. 5, December 1983
- Mahendra Ramgopal 'The Right to Work Versus Dismissal At Pleasure In the Cooperative Republic of Guyana', *Guyana Bar Association Review* Vol. No. 5, December 1983
- *Mr. L.* v. *the Municipality of Hollola* – Supreme Court of Finland
- ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up
- *Air India Statutory Corporation etc.* v. *United Labour Union and others* – Supreme Court of India
- *Daily rated casual labour employed under P&T department through Bharatiya Dak Tar Mazdoor Manch* v. *Union of India and Others* and *National Federation of P&T Employees through its Secretary General and another* v. *Union of India and another* – Supreme Court of India
- *Life Insurance Corporation of India and Another* v. *Consumer Education and Research Centre and Others* – Supreme Court of India
- Sexual Harassment – *Apparel Export Promotion Council* v. *A. K. Chopra* – Supreme Court of India
- *Bandhua Mukti Morcha, etc.* v. *Union of India and Others* – Supreme Court of India

The Attorney General of Guyana (Appellant/Respondent) v. *Caterpillar Americas Co. (Respondent/Applicant)*

(Civil Appeal No. 43 of 1994)

Court of Appeal of the Supreme Court of Judicature
Appellate Jurisdiction

In the matter of the 1980 Constitution Act and the Constitution of the Co-operative Republic of Guyana particularly Articles 8, 142 and 153.

and

In the matter of the Rules of the Supreme Court touching Motion

and
In the matter of the Public Corporations Act 1988 and the Guyana Mining Enterprise Limited (Restructuring and Transfer of Assets and Liabilities) Order 1992.

Before:

The Hon. Mr. Justice CC. Kennard	-	Chancellor
The Hon. Mr. Justice M.A. Churaman	-	Justice of Appeal
The Hon. Mr. Justice Prem Persaud	-	Justice of Appeal

Mr R.H. McKay S.C. for the Appellant
Mr A. Chase S.C. for the Respondent

JUDGEMENT

CHURAMAN, J.A.:

I have the misfortune of having to differ from my distinguished brethren who in separate judgments of remarkable striking similarity – in tone, style, language and content – came to the conclusion that the American juristic concept of Eminent Domain, a concept rejected by the jurisprudence of England, India, Australia, and Ireland, is applicable to Guyana and is part of the jurisprudence of Guyana; each of my brethren expresses its applicability thus: ". . . the power of Eminent Domain is an essential attribute of sovereignty and it connotes the legal capacity of the state to acquire private property of citizens for public purposes . . . and there is no need to confer this authority expressly by the Constitution as *it exists without any declaration to that effect*." The consequence according to this majority view is that the state has the power and the constitutional capacity to deprive citizens of choses

in action – the right to sue for money – so long as it is in the public interest so to do, and the state is prepared to give bonds redeemable twelve or so years after. In other words, the citizen's rights to the immediate enjoyment of the fruits of their judgment can be taken away by the issuance of paper bonds. This seems to me a serious violation of the citizen's rights to property, and one specifically proscribed by the combined effects of Article 40 (c) and Article 142 of the Constitution of the Co-operative Republic of Guyana (hereafter the Constitution). The majority decision has the effect also, without either of my brethren saying so, of overruling the much respected decision of *Inland Revenue Commissioner* v. *Lilleyman and* others [1964] LRBG 221, a landmark decision of the British Caribbean Court of Appeal constituted by Archer, P, Jackson and Stoby, JJA. But more of this later.

First, the facts: In 1992, Caterpillar Americas Company (hereafter Caterpillar) was owed some $950,000 (U.S.) By Guyana Mining Enterprise (hereafter Guymine) a public corporation in Guyana. There is no controversy about this. The Government of Guyana held all the shares in Guymine through its nominee, The Bauxite Industry Development Company Ltd. (hereafter Bidco). Guymine was unable to pay its debts to Caterpillar, so the Government decided to re-structure Guymine. In short, what it did was to make an Order under the Public Corporations Act, 1988, the effect of which was *inter alia*, to transfer liability of the debt from Guymine to the Government of Guyana who, in turn, would discharge the indebtedness to Caterpillar by the issuance of bonds to mature some twelve years later. Caterpillar wanted their money forthwith; the Government, by their Order, said they must wait some twelve years.

Caterpillar moved to the High Court by motion, alleging that the Order made by the Minister under the Public Corporations Act contravened the provisions of the Constitution, and was therefore *ultra vires*, invalid and void.

The trial judge, in a lucid and well-reasoned judgment, agreed with the contentions of Caterpillar and struck down clauses 6(2), 6(5) and 6(6), the provisions compendiously relating to the issuance of bonds to be redeemed after twelve years, as being violative of the Constitution. The Government of Guyana through its proper office, the Attorney General, appeals to this Court.

In presenting this appeal, Mr. McKay for the appellants predicated his arguments on two broad premises. First, that on the doctrine of Eminent Domain, the Government has both the power and the duty, in the national interest, to make the order it did in 1992 to preserve the bauxite industry; and, secondly, argued strongly that there was no "taking of possession" by the Government of Caterpillar's property in contravention of the Constitution. I shall perforce devote some time to both these premises.

Mr. Chase, in an equally strong and persuasive argument, contended that Eminent Domain has no applicability to our jurisprudence, and that by the combined effect of Articles 40 and 142 of the Constitution, Caterpillar was deprived of its property in blatant contravention of the Constitution.

Central to this appeal, therefore, are the parameters of Eminent Domain as understood by jurists and the effect of Articles 40 and 142. It will be appropriate to

commence with an examination of the two important Articles of the Constitution. Article 40 so far as is relevant for present purposes, reads thus:

> "40.(1) Every person in Guyana is entitled to the basic right to a happy, creative and productive life . . ."

[and I can skip all that comes in between] and go immediately to (c) under that Article, and (c) reads thus:

> "(c) protection for the privacy of his home and other property and from deprivation of property without compensation."

Perhaps, I should also mention that within Article 40(1) (a) there is reference to the protection of the law, but let it be understood that this case was not brought under, or rather Mr. Chase's argument was not founded upon Article 40 in so far as the protection of the law is concerned, but in so far as the deprivation of property without compensation is concerned.

Article 142 (1) reads thus:

> "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except by or under the authority of a written law
>
> (a) providing for compensation for the property or any interest in or right over property so possessed or acquired and specifying the principles on which the compensation is to be determined and given; and
>
> (b) giving to any person claiming such compensation a right of access either directly or by way of appeal, for the determination of his interest in or right over the property and the amount of compensation, to the High Court."

One would have thought that this aspect of the matter was roundly answered in the case of *Lilleyman*, *(ibid)* but before I go to *Lilleyman*, let me first make this important observation. One must keep in the forefront of one's mind that our Constitution does not, neither in Article 40 nor 142, speak of compulsory acquisition or deprivation of property for *public purposes*. It is important to bear this in mind for this reason; pivotal to the reasoning of my brethren in the instant appeal is the argumentation in each judgment that "public purpose" is an essential pre-requisite for the right of the state to acquire private property, that is to say, the property must have been taken for some public purpose. With all due respect, our Constitution simply does not say so, and it seems to me, with deep respect, to be something of a confusion of thought to engraft upon our Constitution the essential pre-requisite of the American concept of Eminent Domain in justification of the conduct of the Government of Guyana in this matter. Our Constitution is the supreme law of the country. It does not exempt the Government from the constraints imposed by the Constitution, by taking property for public purposes. However public the purpose,

however noble the purpose, the Government – the executive – simply cannot take private property under the guise that it is being taken for public purposes. I shall return to public purposes in due course.

In the case of *Lilleyman,* the very questions raised by Mr. McKay were in fact considered. Deprivation of property was the hallmark of the decision in *Lilleyman*. The facts were these:

> "The National Development Savings Levy Ordinance, No. 16 of 1962, made provision for the levy of compulsory savings on the emoluments of every individual employed in British Guyana to be utilized for works of development in the colony and for the issue of bonds therefore repayable with interest after six years. Employers were required to deduct the levy form the emoluments of their employees and to pay it over to the Commissioner of Inland Revenue, the first-named defendant. The second-named defendant made deductions accordingly from the wages of the plaintiffs who were their employees. The plaintiffs thereupon brought an action against the first and second-named defendants and the Attorney-General as an added defendant in which it was claimed that the Ordinance was in violation of art. 12(1) of the Constitution, which provides that "no interest in or right over property of any description shall be compulsorily acquired, and no such property shall be compulsorily taken possession of, except by or under the authority of a written law and where provision applying to that acquisition or taking of possession is made by such a law – (a) requiring the prompt payment of adequate compensation; (b) giving to any person claiming such compensation a right of access, for the determination of his interest in or right over the property and the amount of compensation, to the Supreme Court; and (c) giving to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction."

The President of the Court, Mr. Justice Archer, referred to the combined effect of the ordinance, that is, the ordinance to deduct money for the purpose of this enforced loan, and he came to the conclusion that, although they do not operate to deprive any person permanently of money, there was no doubt that its effect was to impound money, thus revealing the whole scheme of the ordinance as one amounting to the exaction of a forced loan.

In other words, although the learned President came to the conclusion that the exaction of the forced loan of employees to make this contribution to the national levy was not to deprive them permanently of their money, none the less it was against the Constitution of 1961. He goes on to say, in referring to Article 12(1) which corresponds to our Article 142 – (vide p. 227):

> "The Attorney General urged that article 12(1) dealt with the acquisition of interests and rights, on the one hand, and the taking of possession of property, on the other; and that, in the context, property meant tangible property and the possession referred to meant physical possession. This argument is founded upon misreading of the whole article. Article 12(3)

> saves from the operation of Article 12(1) any law which provided for the acquisition of interests or the taking of possession of property (not the acquisition of interests or the taking of possession of property) which fulfils any of the purposes specified in sub-paras (a) to (f). There can be no sound reason for restricting the meaning of property in that paragraph as a consideration of the provisions of its sub-paragraphs, and, in particular, sub-paras (d) and (e) show . . ."

and these are the important words that I wish to emphasize:

> "And the word 'property' in that paragraph is of the widest import. The paragraph therefore contemplates property in the most general sense which, but for the exceptions which it creates, would be entitled to the protection afforded by article 12(l). Article 12(l) itself is so worded as to shield against deprivation the whole bundle of rights which constitutes property and to comprehend property in its widest connotation. Every description of interest in, or right over, property, which is itself property, is protected against deprivation without compensation by acquisition or the taking of possession unless the deprivation is authorized under article 12(3). The subject matter of article 12(l) cannot be limited to corporeal property, nor possession to physical possession, *and money and choses in action are therefore not excluded*." [Emphasis added]

In other words, the learned President was making the point clearly that depriving a man of his money or his right to money can be classified as property and, if taken away, can be classified as deprivation of his property.

Mr. Justice Jackson, supporting, also shared the view about money and choses in action being property which are classified under the relevant clause and, therefore, the Order was to that extent invalid. The learned Justice of Appeal was of the view (p.247) that "the substance of die Ordinance reveals that the transaction is a forced loan with all the elements of commercial borrowing and that the position of the Government to the citizen is one of borrower and lender".

But perhaps a crucial and distinguishing feature of the decision in Lilleyman was the fact that money simply is not and cannot be the subject of deprivation or compulsory acquisition under the Constitution then (1961) nor now (post 1980), for the simple and easily understood reason that once compensation is required to be paid for compulsory acquisition under the Constitution then the only compensation that could be paid is money. In other words if one compulsory acquires a citizen's money then the state must compensate him in money. It does not require too much intelligence to appreciate that loss of money can only be compensated by money. And the irony of this particular appeal is that the American concept of Eminent Domain itself recognizes this self evident postulate.

This is what Mr. Justice Stoby had to say in *Lilleyman*: (vide p.252)

> "In the United States of America, by reason of the absolute sovereignty of the Government the state has within the limits of its written constitution the power of eminent domain. All property, including choses in action,

> patent rights, franchises, charters or any other form of contract are within the sweep of eminent domain."

He then refers to Nichols on Eminent Domain and cites Nichols, and I quote:

> "A largely academic discussion has been waged over the question whether money can be taken by eminent domain, and it has been held or intimated that it cannot be. The objection is not based on an implied inherent limitation upon the power of government, but upon the difficulty of effecting a taking of money that would be of any service to the public without violating the constitution."

Then he goes to say (p.253) citing a judgement from India, that is, in the Bombay Dyeing Company case [1958] S.C.3280, Venkataram, J's dictum:

> "There is considerable authority in America that the power of eminent domain does not extend to the taking of money, the reason being that compensation which is to be paid in respect of money can only be money, and that, therefore, in substance it is a forced loan."

So, even for the moment accepting the validity of any argument that eminent domain does have some applicability, what is clear from *Lilleyman* is that money, or choses in action representing money, cannot be the subject of any confiscatory order or any order amounting to depravation of property. So, the contention that eminent domain invests the executive with the right to defer the payment to Caterpillar is simply an argument that flies in the face of *Lilleyman*.

Stoby JA's review and disputation on aspects of the Constitution of America, India, Australia, and Ireland was wide-ranging, erudite, and incisive. And he concluded (p.256) as follows:

> "This brief survey of certain constitutions reveal that immediately before British Guyana was granted full internal self-government, the United Kingdom Parliament knew that the question of what was to be so regarded as property for which compensation was payable had engaged the attention of the courts of law in many territories; it knew, too, that a forced loan is probably unconstitutional in the United States of America, India, Australia and Ireland."

Lilleyman was undoubtedly a case of utmost constitutional importance bearing on the central issue in this appeal. The central issue was then and is now whether the Government of the day can deprive a citizen of his money (or money represented by a chose in action) under the guise that issuance of bonds (rather than money) can be said to be compensation. America, the *fons et origo* of Eminent Domain says no; India, Australia, Ireland, and, I apprehend, all common law countries with a Westminister style Constitution say no. Guyana is I am confident no different. And I feel bound to say that I am disappointed that neither of my brethren saw fit either to analyze the *ratio* in *Lilleyman* or to give recognition to the erudition and scholarship distilled in the several judgments in *Lilleyman*. True my brother Kennard, C made

an obtuse comment to the effect that in *Lilleyman* compensation had to be prompt. With all due respect, the question of promptness of payment was not an issue in *Lilleyman*, and it is not an issue in this appeal. The observation is therefore otiose and with respect wholly irrelevant. It is difficult therefore to resist the urge to say that until time and circumstance shall have restored *Lilleyman* to its former jurisprudential pre-eminence, it will be, one feels certain, something of bereavement to practitioners, jurists, and scholars of the law that *Lilleyman* had been over-turned without a molecule of any intellectually analytical disputation of the forensic reasoning and soundness (or unsoundness) of judgment of a strong bench speaking with the tripartite voice of unanimity.

So far as the contention that there was no "compulsory taking of possession or acquisition" within the meaning of Article 142 is concerned, the matter was put thus by Mr. McKay. He contended that no property was compulsorily taken, and if there was any grievance it had to be for deprivation of property and that came under Article 40. But so the argument went. Article 40 was outside the purview of redress, as Article 153 made it clear that redress was only available for violation arising under Article 138 to 151 of the Constitution. This contention in my view is mis-guided. The claim filed by Caterpillar was for contravention of their fundamental rights under Article 40 and 142. Not the one, not the other; but rather both Articles. And the learned judge so dealt with it. He did not deal with it as merely "compulsory acquisition of property" under Article 142 to the exclusion of "deprivation of property" under Article 40(c). He dealt with it under both Articles and came to the conclusions that it was deprivation of property under the combined provisions of Articles 40 (c) and 142. This was plainly the right approach, and the learned judge must be commended for so dealing with it.

The correctness of the above approach was sanctioned by the Privy Council in 1985 in the case of *Societe United Docks* v. *Mauritius* [1985] 1All ER864 where Lord Templeman, reviewed the various provisions of the Mauritius constitution, which, may I add, so far as is relevant, is a facsimile of our own.

In the Mauritius constitution, the part headed "Protection of Fundamental Rights and Freedoms of the Individual" is set out in section 3 in these terms:

> "*Fundamental rights and freedoms of the individual* It is hereby recognized and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, color, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely - (a) the right of the individual to life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and (c) the right of the individual to protection for the privacy of his home and other property *and from depravation of property without compensation*, and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of the protection as are contained in those provisions being limitations

> designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest." [Emphasis added]

The article 8 of the Mauritius constitution goes on to deal with protection from deprivation of property, and I quote:

> "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say (a) the taking of possession or acquisition is necessary or expedient in the interest of defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such a manner as to promote the public benefit; and (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that taking of possession or acquisition - (1) for the prompt payment of adequate compensation; and (ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation". [Emphasis added]

The facts of *Societe* need not be discussed; but Lord Templeman said this: (p. 870)

> "Their Lordships have no doubt that all the provisions of Chapter II, including s 8, must be construed in the light of the provisions of s 3. The wording of s 3 is only consistent with an enacting section; it is not a mere preamble or introduction. *Section 3 recognizes that there has existed, and declares that there shall continue to exist, the right of the individual to protection from deprivation of property without compensation* subject to respect for others and respect for the public interest. *Section 8 sets forth the circumstances in which the right to deprivation of property can be set aside but it is not to curtail the ambit of s 3*. Prior to the Constitution the Government could not destroy the property of an individual without payment of compensation. The right which is by s 3 of the Constitution recognized and declared to exist is the right to protection against deprivation of property without compensation. A constitution concerned to protect fundamental rights and freedoms of the individual should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies. *Loss caused by deprivation and destructions is the same in quality and effect as loss caused by compulsory acquisition*". [Emphasis added]

I pause to say that the loss caused by depriving Caterpillar from taking steps under the general law to secure payment and satisfaction of their just claims is a loss

caused by deprivation which is no different in quality and effect to loss caused by compulsory acquisition. So, whichever way the argument goes, however modified, however verbose it may be, the pith and substance of the matter is; was Caterpillar deprived of the use of their money by the order made by the Minister. If the answer to that is yes, then the effect of the combined provisions of article 40 (a) and 142 (1) will give Caterpillar the right to move to the Court to say their rights were violated.

I move to a slightly different point in deference to Mr. McKay - a point which at one stage gave me some trouble and that is the contention that because of the *Kent Garment Factory* case [1991] 46 WIR 177 the claim should have been commenced by way of writ of summons and not by motion. I sat in *Kent Garment Factory*. But in *Kent Garment Factory* the claim was brought under article 40(1) (a) as distinct from 40(1) (c) alleging simply the protection of the law, but they did not allege deprivation of property, and indeed they could not have so alleged. Additionally, in *Kent Garment Factory* there was no allegation that article 142 of the Constitution had been breached. So, to that extent, *Kent Garment Factory* is a case of an entirely different color - it is a horse of a different color - and had it been of the same color, then I would have had no difficulty in upholding Mr. McKay's argument that it could not be commenced by motion buy only by writ of summons because that is what the decision does say. However, in this case it is brought not under the protection of the law, but under para. (c) dealing with deprivation of property without compensation and article 142 of the Constitution.

I turn now to the argument of Mr. McKay that compensation is required to be paid by the state only where there is substantial deprivation, and in the case at bar it cannot be said that there was substantial deprivation. My brothers were both impressed with this contention; I was not: All the cases cited on this aspect of the appeal are cases from India, cases with deep and profound jurisprudential learning. But I feel constrained to say that in interpreting the meaning of and applying the wise words of eminent judges, great care should be taken to understand and appreciate the issues from which such wise words emanated, for the content and meaning of words can only be gleaned from the color and context in which they were used.

The first thing that must be appreciated is that the Indian constitution is different from our constitution. The Indian constitution incorporates both a bill of rights as well as constitutional provisions in their written constitution. Article 19 speaks, for example, of protection of certain rights regarding freedom of speech, etc., and it says this:

> "All citizens shall have the right –
> (f) to acquire, hold and dispose of property."

That is, essentially a bill of rights clause. It gives to every *citizen* of India the right to hold and dispose of property.

In the constitutional provisions, this is what article 31 says:

> "31. Compulsory acquisition of property. – (1) No person shall be deprived of his property save by authority of law."

I pause. Notice the distinction. In the bill of rights it speaks of *citizens* having the right to hold property. This is why I say it is a bill of rights clause. In the constitutional provisions section, it says "*no person*"; that means citizen as well as non-citizen, shall not be deprived of his property save by authority of law.

And then article 31(2) amended the constitution, and this is what the amended article says:

> "(2) No property shall be compulsorily acquired or requisitioned *save for a public purpose . . .*"

I pause to emphasise that element –

> "*save for a public purpose* and save by authority of a law which provides for compensation for the property so acquired . . . *et cetera*",

which I need not read out in full. In other words, the constitution of India only allows compulsory acquisition of property if it is being acquired for a public purpose and, of course, with the other prerequisites of an Act that authorizes it including the payment of compensation. The point I wish to eclipse is this; our constitution does not say that the Government or the executive has the right to acquire property for a public purpose, out the constitution of India says that it can, and therein lies, I believe, the *causa causana* for some of the aberration of thought in this matter.

I now come back to the question of substantial deprivation of property because a substantial part of the reasoning of the majority judgements in this appeal is to the effect that this was not a taking which could be said to be a substantial deprivation of property. I will refer to the two leading cases on this point.

The first is the case of *The State of West Bengal* v. *Subodh Gopal Bose and Others* [1954] SCR 587. Now to understand what Patanjali Sastri, C.J. meant when he said what he said, one must first understand what the case was all about. I compliment my learned brother Persaud, JA for setting out the facts in undiluted form, and what now needs to be done is to put the issues in proper perspective for a more appreciative understanding of the learned Chief Justice's choice of the epithet "substantial" in the discussion of "deprivation of property" under Art. 31 of the Indian Constitution. These are the salient features: Subodh Gopal Bose purchased property in Bengal, and he therefore acquired the title to the property under section 37 of the Bengal Revenue Sales Act, 1859. The acquisition of that right and title gave him the authority to annul all under-tenures and subject to certain exceptions to forthwith eject all under-tenants; in other words, get rid of them. Because of the ensuing social dislocation arising therefrom the Government decided to take action, and an Act was passed which amended that right under s.37. What the amendment did was simply to enlarge the scope of the protection afforded by the Act as originally passed, that is to say, the protection given to under-tenants, and giving certain compensating benefits to the purchaser.

The point that one must bear in mind is this; the property had been acquired by the purchaser and the title was vested in him. That title was not disturbed by the amendment; his legal right to the eventual possession and enjoyment of his property was not disturbed. What was disturbed merely by way of curtailment was the ease with which he would have been previously allowed to evict the under-tenants prior to the amendment. So, a question arose whether that amounted to compulsory acquisition of property for a public purpose and this is what Patanjali Sastri, C.J. had to say at page 617.

> "The vague and expansive doctrine of 'police power' and the use of the term 'taken' in the Fifth Amendment [that is of America] construed in a very wide sense so as to cover any injury or damage to property, coupled with the equally vague and expansive concept of 'due Process', allow a greater freedom of action to the American courts in accommodating and adjusting, on what may seem to them a just basis, the conflicting demands of police power and the constitutional prohibition of the Fifth Amendment. Under the Constitution of India, however, such questions must be determined with reference to the expression 'taken possession of or acquired' as interpreted above, namely, that it must be read along with the word 'deprived' in clause (1) and understood as having reference to such substantial *abridgement of the rights of ownership* as would amount to deprivation of the owner of his property. No cut and dried test can be formulated as to whether in a given case the owner is 'deprived' of his property within the meaning of Article 31; each case must be decided as it arises on its own facts. Broadly speaking it may be said that an abridgement would be so substantial as to amount to a deprivation within the meaning of Article 31 if, in effect, *it withheld the property from the possession and enjoyment of the owner or seriously impaired its use and enjoyment by him or materially reduced its value*." [Emphases added]

And the learned Chief Justice ended his judgement with these words:

> "The purchaser [Bose] is left free in other respects to continue in enjoyment of the property as before. In other words, what the amending Act seeks to do is to enlarge the scope of the protection provided by the exception in the old section . . . while conferring certain compensating benefits on the purchaser."

In other words, he came to the conclusion that because he still held the property and he still held title, and all that happened was to make it a little more difficult for him to throw his tenants out, there was not the deprivation contemplated by article 31 of the constitution, and if I may say so, small wonder that the learned Chief Justice so held.

The other case, *Dwarkadas Shrinivas of Bombay* v. *the Sholapur Spinning and Weaving Co. Ltd. and others*, [1954] CSR 674 referred to by both of my learned brothers, we again need to look at the facts and keep in mind the issues which arose for determination. This was a case of a company established in 1913 which was highly successful until about 1949 when it was beset by problems. In 1949 the

directors, because of the difficulties, gave notice to the workers that the mills would be closed. Obviously, it was a factory, and pursuant to the notice the mills were closed. This created a labour problem and to solve it, the government, on the 5th October, 1949, appointed a controller to supervise the affairs of the mills under the Essential Supplies Emergency Powers Act, 1946. In 1949 the controller decided to call in more capital and asked the directors of the company to make a call upon the preference shareholders, that is, the amount remaining unpaid on each of the preference shares. The directors refused. Thereupon the Governor-General in 1950 promulgated the impugned ordinance, under which the mills could be managed and run by directors appointed by the central government. In 1950 the central government delegated all its powers to the government of Bombay. The government of Bombay then appointed certain directors who took over the assets and management of the mills, and they called upon the applicants to pay 1,062,000 rands which was the amount due on the preference shares. They challenged the constitutionality of the ordinance.

What is to be noted here is this: at no time did the government of India take over title to the mills. That remained in the directors, but every other aspect of its utilitarian function, monetary and otherwise, had been entreated so to speak by the Ordinance that was passed. Neither the directors nor the shareholders were able to enjoy any of the profits that might be forthcoming. On the contrary, the shareholders were asked to pay substantial sums as working capital based on the preferential shares which was, obviously, a burden. I cite from Mr. Justice Bose on page 734:

> "In my opinion, the possession and acquisition referred to in clause (2), mean the sort of 'possession' and 'acquisition' that amounts to 'deprivation' within the meaning of clause(1). No hard and fast rule can be laid down. Each case must depend on its own facts. But if there is substantial deprivation then clause 2 is, in my judgment, attracted. By substantial deprivation I mean the sort of deprivation that substantially robs a man of those attributes of enjoyment which normally accompany rights to, or an interest in, property. The form is un-essential. It is the substance that we must seek. Has that happened here? Of course it has. The plaintiff and the company have been left with the mere husk of title and . . . to add insult to injury the plaintiff has been called upon to pay substantial sums of money . . ."

Mr. Justice Bose had no difficulty in tossing aside, if I may say so, the question of public interest and the nobility of intentions to do good when it came to the question of the enjoyment of rights under the constitution; and using the parity of reasoning by Mr. Justice Bose, I say the question of depriving Caterpillar of their right to acquire their money by legitimate processes at the time it was due is an essential deprivation of their property and one that is attracted by the constitution. That is all I wish to say on the question of substantial deprivation of property.

I come back now to express some views in perhaps much wider compass on this whole question of eminent domain, a doctrine and a concept which, if I may say so, has left perceptions severely blinkered in the resolution of the issues presented in

this case. As I had said before, without repeating myself, I hope, eminent domain is an American concept. It is a concept which no case in Guyana has ever yet embraced with any degree of equanimity.

The learned Chancellor in his judgment [just handed to me] made reference to *Bats Shoe Company* [1976] 24WIR 207, and suggested that that case is authority for the proposition that . . . Article 142 of our present constitution can be said to deal with the issue of "Eminent Domain . . .". I was not able to check this before, but I was able to do so in the minute or so that I had before delivering this judgment and what Mr. Justice Ronald Luckhoo said in that case, I say with the deepest of respect, is a statement that does not in any way lend any credence to the applicability of eminent domain as a doctrine which is part and parcel our jurisprudence. Indeed, my brother Kennard may have done something of a disservice to the distinguished Justice of Appeal in the imputation that R.H. Luckhoo, JA's dictum was supportive of the understanding reached by my learned bother on the applicability of the American concept to an elucidation of our constitution. This is what Mr. Justice Ronald Luckhoo said at page 207:

> "Reference was made to the distinction between the power of eminent domain and the power of taxation, the former being the power of the State to take the property of the subject against his will by authority of law for a public purpose on payment of compensation. Eminent domain is a concept peculiarly American and is akin to our article 8 (1). A tax also has that quality of being a compulsory taking by the State for public purposes. *But there are essential differences between the two powers which can best be discerned in an extract from the judgment of Mukherjea, J. in The Commissioner, Hindu Religious Endowments . . .*" [Emphasis mine]

In other words, Mr. Justice Ronald Luckhoo, while recognizing that it is something that is akin to article 8 (1), that is to say, compulsory acquisition, immediately recognized that there are essential differences between eminent domain and the power of taxation. R.H. Luckhoo, JA's discussion, in context, was wide off the mark of any analysis, let alone interpretation and application of "eminent domain" *simpliciter*

What must also be borne in mind is that nearly every case cited on this question of eminent domain and substantial deprivation of property was decided in the 1950's – every single one of them – and I say so, I hope without fear of contradiction.

Seervai, in his treatise of 1968, para. 15.25, having analyzed, dissected and commented on *Dwarkadas Shrinivas* case, and Subodh case that I just mentioned, had this to say: [p.526]

> "It is difficult to deduce any consistent conclusion from these varying judgments, except that a substantial deprivation of property amounted to acquisition or taking possession. It would be unprofitable to consider these judgments in detail because several questions which were open when the judgments were delivered, have since been decided, and have

> undermined the basic postulates of those judgments. The whole basis of Sastri C.J.'s judgment was destroyed when the Supreme Court held in *Swami Motor Transport (P) Ltd, -v- Sankaraswamigal Mutt* that Art. 19 applied to abstract as well as concrete rights."

Motor Transport Ltd. was decided in 1963. I continue

> "As regards the free use made by Mahajan, J. and Das, J. of the concepts of 'eminent domain' and 'police power', it is enough to say that the method of construction adopted by them is impermissible. They first ascertained the contents of those powers in the United States a thing admitted to be almost impossible in the United States itself . . . and then proceeded to construe the Articles of our Constitution as embodying one or the other of those powers."

I pause for the moment to say what Willis says at p. 716.

> "When is there social interest for the police power, and public purpose for taxation, and public use for eminent domain? Probably all we can say in answer to this question is, whenever the Supreme Court says so."

Not very much a compliment by the distinguished writer on the principle of eminent domain even as it applies in the United States of America itself.

I continue with Mr. Seervai –

> "Das J. in dealing with the judgments of other judges pointed out that the impermissibility of this method of interpretation, though his own judgments are open to the very same objection."

And then he continues –

> "It is submitted that . . . the doctrines of 'police power' and 'eminent domain' play no part in the constitutional law of England nor do they play any part in the British North America Act of 1867, the Commonwealth of Australia Act, 1901, and the Government of India Act, 1935, which were enacted by the British Parliament. It may be added that section 299 (1) and (2) of the Government of India Act 1935, which are in identical language with Act 31 (1) and (2) had been interpreted by the Federal Court and the Privy Council without the slightest reference to the doctrine of 'police power' or 'eminent domain' and it would be strange indeed to incorporate into the identical language of Art. 31 (1) and (2) . . . doctrines which are no part of the law of England or of its dominions."

I commend these comments to those who think that our Article 40 (c) and Article 142 should be construed with reference to "eminent domain". But is to Mr. Justice Bose that I return once again – Mr. Justice Bose of India. This is what he had to say about judges in India applying the concept of eminent domain in the resolution of constitutional issues. He said this: [p-.731 in *Dwarkadas* case]

> "With the utmost respect I deprecate, as I have done in previous cases the use of doubtful words like 'police power', 'social control', eminent domain and the like. I say doubtful not because they are devoid of meaning, but because they have different shades of meaning in different countries and because they represent powers which spring from widely different sources. In my opinion it is wrong to assume these powers are inherent in the State of India and then to say how far the Constitution regulates and fits in with them. We have to interpret the plain provisions of the Constitution and it is for jurists and students of law, not for judges, to see whether our Constitution provides for these powers and it is for them to determine whether the shape which they take in India resemble any of the varying forms which they assume in other countries."

I entertain no doubt, from the review that I have attempted to undertake, that the question of eminent domain simply has no place on or jurisprudence. We cannot and must not rewrite the constitution of Guyana by superimposing on Article 142, or on the combined effect of Article 40 (c) and 142, some such concept that whenever the State is of the view that a public purpose is involved, that the State may, by the applicability of some alien concept, deprive people of property and then use noble intentions to justify that deprivation. If that is so, one wonders whether, for example, a bank or any financial institution taking in depositor's money which happens to be a Public Corporation may, under appropriate conditions leading up to re-structuring, with relevant legislation in place, issue depositors with bonds, in lieu of cash, redeemable after twelve or so years! Citizens of Guyana, alike with others, would no doubt see this as the extreme mockery of our Constitution.

I have no hesitation in upholding the very able judgement of the trial judge, Small, J., and I would accordingly dismiss this appeal with costs.

M.A. Churaman
Justice of Appeal

Dated this 26 day of January 2000

A Right To Work[1]

by Prof. Dr. Rudolph James[2]

I would like to extend a word of thanks to the National Executive Committee of the Clerical and Commercial Workers' Union for inviting me in the absence of Professor Lutchman to declare open their 21st Annual Delegates' Conference. In choosing the topic of my address (i.e. a Right to Work), I have tried to observe the traditions set by my predecessors, at least in the recent past.

As such, I have chosen a subject of contemporary interest (i.e. Chap. II of the 1980 Constitution), and a topic that is central to the workers' well-being. I have adopted a critical perspective, for criticism, we are told, is one of the forces to which governments of all shades are most sensitive particularly if the criticisms are articulate. I hope that you will not think me supremely naive for subscribing to what we know is an ideal.

Guyana is a signatory to two United Nations' sponsored documents: the Covenant on 'Political and Civil Rights'; and that on 'Social and Economic Rights'.

The 1980 Constitution, in Chapter 11, sets out, for the first time, those Social and Economic Rights, many of which were contained in the Constitutions of Socialist and some Developing Countries e.g. India (1947); Pakistan and more recently Nigeria (1979).

Guyana has only recently found out to her embarrassment, that the United Nations is not only interested in whether a State has legislated fundamental rights, but more important is the degree of enjoyment of those rights by its people. So although a Report on the 'Civil and Political Rights' was due to the Human Rights Committee in 1973, it was not until 1982 that the Government had enough courage to submit it – and this was after many reminders.

The Report listed only legislative statements articulating those rights in Guyana, and neglected to highlight the many qualifications on their implementation and their constant violation. The United Nations Committee, not being satisfied with Guyana's Report, responded by demanding information on the extent of their enjoyment.

Mutatis mutandis, it is not sufficient to aver that 'Economic and Social Rights' are articulated in the Constitution. To what extent are they observed and implemented?

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[1] University of Guyana. Excerpted from the *Guyana Bar Association Review* Vol. No. 5, December 1983.

[2] Dr. James has served in various capacities in the Faculty of Law at Universities in East and West Africa and Australia-ED.

SIGNIFICANCE OF GUARANTEES

There have been speculations on the significance of these guarantees, including their scope and effectiveness.

Article 18, "Land is for Social Use and Must go to the Tiller", has generated the most comments from members of the judiciary. These comments were made by them in an extra-judicial capacity. That principle is concerned with property rights, and the government is particularly property conscious, for property is an effective instrument for coercing the masses. It is therefore not surprising that the Kennard Committee has reported and an Agrarian Reform Committee is currently meeting to determine policies and legislation to effect the recommendations contained in the Report.

> "The principle of 'Equality for children born out of wedlock with those born within' (Art. 30) is dear to the Guyanese and it is commendable that the 'Desiree Bernard Committee's Report', has been given legislative force so early. But again we are in the realm of property rights."

The 'Right to Work' (Art 22), however has been studiously ignored, except for some rumblings by academic lawyers in the University. That the present leaders in their rhetorics, and our judges in their numerous addresses have omitted to take serious note of this right, is not surprising. With 80 per cent of the economy in the hands of the government, and with the government and its instrumentalities being the main employers, to recognise a principle incorporating a 'right to work' would be to effectively limit one vital area through which as we shall see, Party Paramountcy is effectuated in the Guyanese society. In so far as the judges are concerned, judicially they have shown an unprecedented contempt for fundamental rights in general, and 'job security' in particular.

I have, however, chosen to explore in some detail the principle of 'a right to work' because like Lord Denning I subscribe fully to the statement that

> "a man's right to work is just as important to him as, if not more important than his rights to property".

This is particularly so in a country like Guyana! Denning further admonished

> "Courts intervene everyday to protect rights of property. They must also intervene to protect the right to work" – *Lee* v. *Showmen's Guild of G.B.* (1952) 2 Q.B. 329, 341.

MEANING OF 'RIGHT TO WORK'

Jurisprudentially, a 'right to work' may be used in two senses: first, a right against the State to maintain a full employment policy and promote vocational training, so that the unemployed can find suitable employment. In short it is a guarantee of employment but not to any particular job. In this sense it is therefore a political goal

or 'programme' right. Marx, with characteristic cynicism, described this right in a capitalist economy as being "nonsense, a wretched pious wish". ('The Class Struggle in France 1948 to 1950' in *Surveys from Exile*). However, in a Welfare state such as Britain it is more than a 'pious wish' and forms a part of the social security laws. 'A right to work' may in this sense be defined as 'a right of a registered unemployed worker to be provided with work or otherwise to receive unemployment benefits in lieu thereof' – it is an enforceable right.

Secondly, in a broad sense, it represents a right of a worker against a possible employer to be employed, and to 'job security'. With reference to a right to be employed, if there is no duty to maintain full employment, there can be no such corresponding right to be given a job. The Common law has always held that –

> "an employer may refuse to employ a workman for the most mistaken, capricious, malicious . . . motives that can be conceived, the workman has no action against him."

This judge-made policy has, however, been subject to the fundamental guarantee of equal treatment of men and women, racial groups and supporters of different political Parties, (Arts. 149, 29, 40). A member of P.P.P or W.P.A. has, as much right under the Constitution to a job as does a member of the P.N.C party.

It is in the context of job security, that the 'right to work' becomes most meaningful. This is essentially the right to remain continuously employed, and to be reinstated or reemployed in the event that one's employment is unjustly terminated. The central measure of protection of tenure is the recognition of a law against 'unfair dismissal'.

The concept of 'unfair dismissal' negates any principle of 'dismissal at pleasure'. The latter expresses a feudal norm i.e. public servants holding their jobs at the pleasure of the Crown. The Privy Council in *Endell Thomas* v. *A.G. of Trinidad and Tobago* recently refuted the claim of the state to continue this anachronism in that country. Some of its remarks on the dangers of 'summary dismissal' are borne out in this country and for this reason I quote them *ad lib* –

> "In the case of an armed police force with the potentiality for harassment that such a force possesses the power of summary dismissal (of its members) opens up the prospect of converting it into what in effect might function as a private army of the political party in power."

Again,

> "Dismissal at pleasure would make it possible to operate . . . what in the United States at one time became known as the 'spoils' system upon a change of government, and would even enable a Government composed of the leaders of the political party that happened to be in power to dismiss all members of the public service who were not members of the ruling party and (were not) prepared to treat the proper performance of their public duties as subordinate to the furtherance of that party's political aims."

The Privy Council with judicial forthrightness therefore held

> "The whole purpose of Chapter VIII of the Constitution which bears the rubric 'The Public Service' is to insulate members of the civil service, the teaching service and the police service . . . from political influence exercised directly upon them by the Government of the day. The means adopted for doing this was to rest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments . . . promotions, transfers . . . and power to remove and exercise disciplinary control over members of the service."

That august body then cautioned:

> "In their Lordships view the power to remove must be understood as meaning remove for reasonable cause . . . and not as embracing any power to remove at the Commissions whim . . . Dismissal of individual members of the public service at whim is the negation of equality of treatment."

The Privy Council is not the only body blessed with judicial forthrightness. The Lagos High Court in *Shitta Bey* v. *The Federal Public Service Commission* held that it is implicit in the Republican form of Constitution, that there can be no concept of 'dismissal at pleasure' unless so provided in the Constitution. It therefore made a Declaration that the purported summary dismissal of the applicant by the Public Service Commission was invalid. In a further action by Shitta Bey for a mandamus to compel the recalcitrant Public Service Commission to reinstate him in his job, Idigbe, J. in the Supreme Court, the highest judicial forum in Nigeria, held on behalf of the Court:

> "My Lords, having reached the conclusion that a public servant in the established pensionable cadre of the Federal Public Service has a *legal status* and, *ex hypothesi***,** a right to remain in service until properly removed in accordance with the Civil Service Rules applicable to him, it follows, therefore, that by virtue of the decision in Exhibit 'D' in these proceedings, the applicant has a legal *right* to be properly reinstated and that the respondent has the *correlative* duty, to see that he is duly reinstated. Accordingly, I would . . . order that mandamus should issue against the respondent."

To all familiar with the administration of justice in Nigeria it would be apparent that were members of the Public Service Commission to disobey this order, they would soon find themselves in prison for contempt of Court.

Contrasting statements of our law made by our judges in Guyana, we have on record numerous notorious passages attesting to the continued existence of a right to 'dismissal at pleasure':

> "Let me assume that a deck-hand of the Transport and Harbours Department is liable to dismissal at pleasure by the authority competent to

> do so in law . . .”per Chancellor Luckhoo in *Evelyn* v. *Chichester* (1970) 15 W.I.R. 4. 0. “Today, just as before May 26, 1966, the Crown, in my view, is still entitled to dismiss its servants at pleasure . . .”. Crane J.A. *ibid.*
>
> “The Commission could have dismissed the appellants, if it had wished to do so, at their pleasure without assigning any reason . . .” per Chancelloil Luckhoo in *Re Arthur and Hermanstyne* (1972) 19 W.I.R. 20.

Even assuming that these outrageous statements create new law for Guyana, despite autonomous Service Commissions and the Republican status of this country, one should note that Mr. Eversley recently argued in a paper shortly to appear in the West Indian Law Journal, that the law of ‘dismissal at pleasure’ has *ipso facto* been abrogated by the guarantee of a ‘right to work’. This statement is unduly optimistic for two reasons: It is not borne out by the anti-labour attitude of some of our judges, and it underestimates the deviousness of a totalitarian order – for section 232 (7) of the Constitution of the Co-operative Republic confers on the President a power to remove a public officer from office ‘in the public interest’. A careful study of the jurisprudence of our courts augurs pessimism in answering the question whether the judges will compel the President to disclose reasons for dismissals, or accept his whims and fancies as conclusive.

We must envy the British who have even in cases of lawful termination of employment e.g. by notice, payment of salary in lieu of notice, for cause, etc. developed a law of ‘unfair dismissal’. The Employment Protection Act, 1975 provides for the reinstatement of the workers. This is his primary remedy where he is unfairly dismissed. This Act was hailed in the U. K as a “major advance for protection of the workers’ jobs”. The Industrial Stabilisation Act. 1965, of Trinidad and Tobago and its successor, the Industrial Relations Act, 1972 are intended to avoid dismissals which are “harsh or oppressive and unreasonable and unjust”. The remedy is by reinstatement or alternatively exemplary or punitive damages.

That the power to fire is subject to scrutiny is to caution the employer that its exercise must not be unjust and must be in accordance with ‘equity’.

The question of fairness is for labour tribunals and not left to the vagaries of the courts. Ever since the Moyne Commission Report of the late thirties, specialised labour tribunals have been advocated for establishment in the Region. Trinidad and Tobago has again been the precursor.

CONCLUSION

I have submitted that the guarantee in our Constitution of ‘a right to work’ is ambiguous. Whilst in capitalist countries such guarantees might take the form of a right to unemployment benefits, in the context of undeveloped states like Guyana, they are no more and no less than political rhetoric.

At the barest minimum, this guarantee ought to ensure ‘job-security’. It is inconsistent with the notion of ‘job security’, that workers should be dismissed

summarily and without good reasons being preferred. And though it is conceivable, though highly improbable, that our courts might, like the Privy Council and other independent Commonwealth Courts, declare that the Service Commissions can no longer perpetuate injustices behind the cloak of 'dismissal at pleasure', and that that concept is in violation of our Constitutional provisions in a state such as Guyana, one cannot conceive of the Courts restraining the President in his exercise of arbitrary and unjust dismissals. 'Summary dismissal' is an important tool to realising the ruling Party's 'Paramountcy' theory. Like the 'sword of Damocles' it reduces the subjects, including the police, army and other public servants to the status of menials of the regime in power.

I have diagnosed ailments but offered no cures. It is a well known fact that history is replete with instances, nay periods, where Governments have violated fundamental principles in their Constitutions, many of which they themselves promulgated and pledged to uphold. History has also presented the ultimate solution. In the short run, collective actions stand out as the most effective means to counteract abuses and the Trade Unions are in the best position to take the lead. I might end with an adaptation of my admonitions to the judiciary:

> "If the trade unions are complaisant towards government's injustices, government will, of course, take what it is given. If they are prepared to provide leadership, their voice will be listened to with respect and gratitude."

The Right to Work Versus Dismissal at Pleasure in the Cooperative Republic of Guyana[1]

By Mahendra Ramgopal[2]

> "To speak of the right of the Crown to dismiss its servants at pleasure is to use a lawyer's metaphor to cloak a political reality." Per Lord Diplock in *Endell Thomas* v. *Attorney-General of Trinidad and Tobago* (1981) 3 W.L.R. 601.

Article 22(l) of the Constitution of the Co-operative Republic of Guyana provides that every citizen has the right to work. Article 22 (3) provides that the right to work is guaranteed, *inter alia*; by socialist labour laws, socialist planning, development and management of the economy and by sustained efforts on the part of the State, Co-operatives, Trade Unions and other socio-economic organisations and the people working together to develop the economy in order to increase continuously the country's material wealth, expand employment opportunities, improve working conditions and progressively increase amenities and benefits.

In an address on 'The Functions of The Courts in Contemporary Guyana' by Chancellor V. E. Crane to the Guyana Bar Association on 28 October 1981, the Honourable Chancellor stated:

> "Now that Guyana has a Constitution into which are entrenched the principles and concepts of socialism, the courts are faced with the challenge, even more than before, in the evolving constitutional experiment, to develop it by judicial exposition and analysis and to apply those principles to such factual situations as are brought before them. From the legal stand-point, this is how the principles and bases of the political socio-economic system will develop. In the exercise of their constitutional interpretative functions, courts will make positive declarations on rights and duties."

The Honourable Chancellor continued:

> "It behoves every lawyer to exercise a greater sense of commitment to the country's socialist ideology and to spare no pains to have the principles of socialism tested and expounded by the courts . . . I would respectfully suggest to practitioners they should abandon all previous common law notions and approaches, to continuously fix their eyes on the constitution and to begin to think individually, collectively, imaginatively and

[1] Excerpt from the *Guyana Bar Association Review*, Vol. No. 5, December, 1983.

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> consistently about socialist democracy, that is now an inseparable and organic part of our national ethos."

QUESTION

The question is whether the prerogative power to dismiss at pleasure, which the Crown could have exercised before Guyana attained Republican status, is now vested in the State of Guyana, and is not of mere academic interest. The question is of some concern when one takes into consideration that, in Guyana today, a public servant is not in a position to file suit against a Government department for the tort of wrong-full dismissal. As was pointed out by Crane J. A. in *Deonarine Singh* v. *Transport & Harbours Department*. (1976) 22 W.I.R. 284 at p. 293:

> "Bitter pill as it might be at the present day to many constitutionalists, the fact remains that government departments are still not under the law generally; they are immune from suit and cannot be sued in our courts of justice unless permission is granted by statute to the citizen to do so. Meanwhile, a lead on this vital matter is awaited, particularly in view of the new social order that has come about since Independence. Until then, it means that a citizen who is seriously injured by the fault of a government department can recover as of right no compensation save by way of an *ex gratia* award."

FAIR PLAY

It is doubtful whether it could be considered fair play that after Guyana has celebrated its 12th anniversary as a Republic, the State remains immune from tortious liability. At present, there is no legislation in Guyana to compare with the Crown Proceedings Act, 1947, of the United Kingdom, on the State Liability and Proceedings Act, 1966, of the Republic of Trinidad and Tobago. It is respectfully submitted, that the lead on this vital matter that Chancellor Crane was awaiting since June 1976 is now long overdue, and that Parliament ought not to remain inactive on this issue any longer.

NATURAL JUSTICE

Before Guyana attained independence, in the case of *Cumberbatch* v. *Weber* (1965) L.R.B.G. 408. Archer P. in the British Caribbean Court of Appeal, held that a sergeant of police, was a public servant dismissible at pleasure and that consequently the rules of natural justice (alleged to be violated) did not apply. Shortly after Guyana attained Independence, in the case of *Nobrega* v. *A.G. of Guyana* (1967) 10 W.I.R. 187 before the Guyana Court of Appeal, counsel for the appellant Nobrega conceded that a Crown servant in Guyana was dismissible at pleasure. Luckhoo and Cummings, JJ.A. agreed with this view. But Stoby C. stated (at p. 193):

> "suffice it to say that in a case occurring after May 26 . . . having regard to Art. 96(l) of the Constitution of Guyana the position of Crown Servants may have to be re-examined and determined afresh. The reasons which impelled the U.K. Government to arbitrarily dismiss her servants on grounds of public policy no longer represent modern thinking and may not be valid in those countries with a written Constitution."

In *Re The Application of Gerriah Sarran* (1969) 14 W.I.R. 361 no issue as to a right to a hearing under article 96(l) of the Constitution was raised, so that the judicial observations on this point were *obiter dicta*. Crane J.A. in his judgment at p. 365 stated:

> "Under art. 96 no domestic tribunal is directed, but implied in the power to remove from office is the power to hold an enquiry in fulfilment of that power of removal. This must necessarily be so, I think, because natural justice demands that a man may not properly be removed from office unless he is given an opportunity to be heard."

Later (at p. 366) the learned judge referred to Sarran's 'property right' to remain in her occupation. Cummings J. A. in his judgment, concluded that "[i]n exercising their powers of removal and discipline under the constitution, the Public Service Commission perform judicial or quasi-judicial acts and they enquire into charges in accordance with rules of procedure which provide for the hearing of both sides and finding of fact upon a consideration of the evidence after which they make decisions and orders."

SUBORDINATED

In *Evelyn* v. *Chichester* (1969) 15 W.I.R. 410. the Guyana Court of Appeal held that a deckhand of the Transport and Harbours Department was a Public Servant and had a statutory right to be heard before the General Manager could properly dismiss him. Crane J.A. stated (at p. 446–47)

> "I can conceive of no authority more drastic or arbitrary and falling within the sphere of the prerogative, than the right claimed by the administration to dismiss the Crown Servants at will, without notice or without assigning cause or reason. But in our sphere, we are happy to say today, even the exercise of the Crown prerogative is subordinated to our Constitution, the supreme law of Guyana."

The Guyana Court of Appeal examined the question of dismissal at pleasure, albeit obiter, in the light of the particular facts that arose in *Sheikh Mohamed Hyder Ali* v. *The Public Service Commission* (Civil Appeal No. 37 of (1974)) where the appellant who was a public officer was dismissed from the Public Service by the Public Service Commission. The appellant's complaint, was centred mainly around the argument that there was a breach and violation of the rules of natural justice in the course of the inquiry which led to his dismissal. An order of *certiorari* was sought in

the High Court to have the decision of the Public Service Commission quashed. The trial judge, Massiah, J., held that there was no legal justification or basis for seeking to have the rules of natural justice applied. In the words of the trial judge:

> "The plain, unvarnished truth which may be anathema to some and surprising to others is that at present once a public servant has been dismissed by the Public Service Commission itself, and there has arisen no question of a lack of jurisdiction, he has no redress at law, whether or not an inquiry was held or even where an inquiry was improperly held."

The Court of Appeal, affirming the judgment of the trial judge, held that, on the evidence of the appellant himself and on the undisputed facts, there was no denial of natural justice. In arriving at this decision the Court of Appeal did not consider it necessary to make a definitive pronouncement on the dismissal at pleasure question. But, it should be considered worthy of note that Luckhoo, C. considered it relevant to refer to the important utterances of Lord Wilberforce in *Malloch* v. *Aberdeen Corpo* . . . (1971) 1 W.L.R. 1530 where His Lordship said (p. 1597):

> "The rigour of the principle is often, in modern practice mitigated for it has come to be perceived that the very possibility of dismissal without reason being given-action which may vitally affect a man's career or his pension – makes it all the more important for him, in suitable circumstances to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void. So, while the courts will necessarily respect the right for good reasons of public policy, to dismiss without assigning reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred upon him expressly or by necessary implication, and how far these extend."

TRANSMITTED

Persaud, J. A. in his judgment stated that:

> "One must not assume that the right to dismiss at pleasure which, even though it came to be regarded as part of the common law of England, but which clearly had its origin in the prerogative powers of the Crown, was automatically transmitted to the State of Guyana in 1966 upon our independence."

There is nothing to indicate that the power to dismiss at pleasure was passed on, or that any enactment of the Guyana Legislature provided that such a power shall be exercised by say the President as was done in the Indian Constitution, art. 310 (1) of which provides that "except as expressly provided by this constitution a person who is a member of the civil service holds office during the pleasure of the President and it is expressly provided by art. 311(2) that no such person aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable

opportunity to be heard". In other independent Commonwealth States, provisions have been specifically made for the appointment, discipline, and dismissal of civil servants. In Ghana there is a civil Service Commission, and legislation relating to the appointment, discipline and dismissal of civil servants, but the civil service Act vests the right of dismissal in the President; while in Nigeria such powers are vested in a Public Service Commission by virtue to the Constitution of Nigeria.

"Thus it will be seen" continued Persaud, J.A.,

> "that in each of the instances I have referred to, all previous colonial territories – there has been a specific vesting of the powers of discipline and dismissal, which leads one to believe that, it must have been accepted that it was not to be implied that the right to dismiss at pleasure, based as it was on the royal prerogative, was automatically inherited by an ex-colonial territory upon its becoming independent. My conclusion on this point therefore is that s. 5(l) of the Guyana Independence Order, 1966, does not vest the prerogative right of dismissal of civil servants in anyone. To say that it does is to reach that conclusion by implication which seems to be excluded by the very language of the section, i.e. that all laws shall be construed with such modification, adoption, qualification, and exceptions as may be necessary to bring them into conformity with the Guyana Independence Act 1966, and the Order itself."

FAIR

Persaud J.A further stated that Article 96(l) of the Constitution did not vest the prerogative power of dismissal at pleasure in the State, and "in the absence of any clear language to that effect, I would not be prepared to hold that the Public Service Commission has the right to dismiss at pleasure . . . I concede that the State should be free to terminate the services of a public officer who is an embarrassment, or who, is an obstructionist to State policy and aspirations; but, on the other hand, unless there is a clear enactment, a public officer should be heard before he is either dismissed or reduced in status. If one is to be fair to the public service, it is impossible to see it in any other light."

Haynes J.A. refrained from expressing his opinion on the dismissal at pleasure question because he considered that in any event it would have been *obiter dicta* only. It must be considered a real loss to the dismissal at pleasure debate, that Haynes, J.A. did not consider it necessary to record his opinion.

In *Endell Thomas* v. *Attorney General of Trinidad and Tobago* (1981) 3 W.L.R. 601 the plaintiff was a police officer in the Trinidad and Tobago police force. In 1972 he was charged with three offences against discipline. The Police Service Commission dismissed the plaintiff from the police force. He brought an action against the Attorney-General in the High Court claiming a declaration that he was still a member of the police force or that he had been wrongfully dismissed and was entitled to damages. In the High Court, Maharaj, J., certified three preliminary questions of law for the consideration of the court, one of which was whether the plaintiff was a Crown servant dismissible at pleasure. Braithwaite, J. at first instance

held that the plaintiff was not dismissible at pleasure. The Court of Appeal reversed that decision by a majority, Phillips J. A. dissenting. On the Plaintiff's appeal to the Privy Council it was held *inter alia*: that the Police Service Commission's power 'to remove' a police officer was a power to remove him for reasonable cause of which the commission was the sole judge, that, since the right of the Crown to dismiss its servants had not been transferred to the commission and was inconsistent with both the constitution of 1962 and the present constitution a police officer was not a servant of the Crown dismissible at pleasure. The judgment of their Lordships, delivered by Lord Diplock stated at p. 607,

> "To speak of the right of the Crown to dismiss its servants at pleasure is to use a lawyer's metaphor to cloak a political reality. 'At pleasure' means that the Crown servant may lawfully be dismissed summarily without there being any need for the existence of some reasonable cause for doing so, in other words 'at whim'. Under a party system of government such as exist in Trinidad and Tobago and was expected to exist after independence in other Commonwealth countries whose constitutions followed the Westminster model, dismissal at pleasure would make it possible to operate what in the United States at one time became known as the 'spoils' system upon a change of government, and would even enable a government, composed of the leaders of the political party that happened to be in power, to dismiss all members of the public service who were not members of the ruling party and prepared to treat the proper performance of their public duties as subordinate to the furtherance of that party's political aims. In the case of an armed police force, with the potentiality for harassment that such a force possesses, the power of summary dismissal opens the prospect of converting it into what in effect might function as a private army of the political party that had obtained a majority of the seats in Parliament at the last election.
>
> The whole purpose of Chapter VIII of the Constitution (similar to title 7 of the Constitution of the Cooperative Republic of Guyana) which bears the rubric 'the Public Service' is to insulate members of the civil service, the teaching service, and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day."

EQUALITY OF TREATMENT

> "In their Lordships' view there are overwhelming reasons why 'remove', in the context of 'to remove and exercise disciplinary control over', police officers in section 99(l) and in the corresponding sections relating to the other public services must be understood as meaning 'remove for reasonable cause' of which the commission is constituted the sole judge, and not as embracing any power to remove at the commission's whim. To construe it otherwise would frustrate the whole constitutional purpose of Chapter VIII of the Constitution which their Lordships have described. It would also conflict with one of the human rights recognised and

> entrenched by section l(d) (similar to Article 149 of the Constitution of the Cooperative Republic of Guyana) of the constitution, viz., 'the right of the individual to equality of treatment from any public authority in the exercise of any functions.' Dismissal of individual members of a public service at whim is the negation of equality of treatment."

In the light of the foregoing it is respectfully submitted that the preservation in Guyana of the historic legal doctrine of dismissibility at pleasure of public officers is iniquitous and out of tune with the present constitution of the Cooperative Republic. It is repugnant and irreconcilable that on one hand the State of Guyana should cling on to a prerogative power that was formerly vested in the Crown, and that on the other hand hold herself out as a Republic. It has already been pointed out that Guyana's present Constitution expressly provides for the right to work. To dismiss a public officer at the whim of the State, when the supreme law of the land guarantees the right to work is contradictory, unreasonable, unjust and unsatisfactory. The time is now ripe for the legal profession to accept the challenge thrown out by Chancellor Crane and to invite the Courts in the exercise of their 'constitutional interpretative functions' to positively declare that the common law notion of dismissal at pleasure has been abandoned as being incongruous and inconsistent with the supreme law of the Cooperative Republic of Guyana.

Mr. L. v. *the Municipality of Hollola*

Supreme Court of Finland*

JUDGEMENT OF 26 SEPTEMBER 1997

Direct translation of the summary adopted by the Supreme Court[1]

The municipality had, under Section 18.3 of the Employment Act (No. 275 of 1987), an obligation to arrange, for a long-term unemployed person who was looking for a job, a possibility to work for six months, when so directed by the labour authorities. As the municipality had failed to comply with this duty, it was ordered to pay compensation to the long-term unemployed person.

Extracts of the full judgment **(direct translation of the most relevant parts)**

The objective of the Employment Act is to arrange to a citizen the opportunity to work. The goal of the Act is to reach full employment. This goal is sought through measures of economic policy, as well as through employment policy measures. Chapter 4 of the Employment Act (No. 287 of 1987) includes provisions on the arrangement of employment and education opportunities. In the provisions that were in force in 1988-1992 special emphasis was put on the employment of long-term unemployed and young unemployed persons. According to Section 18.3 of the Employment Act (as in Act No. 287 of 1987) the State or the municipality was under an obligation to arrange, in accordance with a referral by the labour authorities for a long-term unemployed person an opportunity to work for six months if other efforts to employ the person in question had failed. The Employment Act placed the long-term unemployed and the young unemployed in a position different than that of other persons. The objective of the norms on the right of long-term unemployed persons to an arranged job was not merely to promote general employment but explicitly to guarantee to a person qualifying as a long-term unemployed under the Employment Act, an individual right to an arranged job. In their case, the possibility to receive a subsistence social security income was not an alternative to employing the person. Hence, a long-term unemployed person to whom the municipality has not arranged an opportunity to work, in accordance with Section 18.3 of the Employment Act, has a right to receive compensation for the loss he or she has suffered.
(. . .)

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* Published as KKO 1997:141 (Yearbook of the Supreme Court 1997 No 141).

[1] The Editor is grateful to Professor Martin Scheinin, Member of the Human Rights Committee, who provided this case and this translation.

As Mr. L. had by 12 December 1992 been unemployed without interruption for twelve months, as required in Section 18.2 of the Employment Act (as in Act No. 1732 of 1991), he had from that date a right to be provided an opportunity to work for six months.

(. . .)

The municipality of Hollola which had neglected its duty to arrange a job had, in its exercise of public power and through its neglect, caused a loss to Mr. L. The Employment Act and the Employment Ordinance included clear provisions on the fulfilment of the duty to arrange a job. The municipality had not acted in accordance with the reasonable requirements that apply when it performed one of its functions and tasks, when the nature and purpose of the task in question were taken into account. Consequently, the municipality was under an obligation to compensate, under Chapter 3, Section 2 of the Damages Act, the loss it has caused to Mr. L.

As to the amount of the loss to be compensated the Supreme Court decided the following.

According to Section 16.2 of the Employment Act (as in Act No. 275 of 1987), the State and the municipalities were under an obligation to strive for arranging to a person a job that corresponded to his ability to work and guaranteed his subsistence. On the basis of this provision Mr. L. did not enjoy a right to be provided, by the municipality of Hollola, solely such a job that would correspond to his education and experience. According to the information provided by the municipality, it would have not been able to provide a job other than general maintenance of public parks.

Through the Act on Temporary Amendments to the Employment Act (No. 595 of 1992) a new Section 19a was inserted to the Employment Act. According to its subsection 1, the working hours in, *inter alia*, jobs arranged under Section 18 of the Employment Act, had to be at least 75 per cent of the regular working hours in the same field when counted for a normal interval for salary payments. According to the testimony of a senior employment advisor, heard as witness in the case, the practice during the operation of Section 19a of the Employment Act had been that the working hours for persons in arranged jobs had been 75 per cent of the full working hours and they had been paid a salary corresponding to 75 per cent of the regular monthly salary paid in the same work.

(. . .)

The monthly salary of a worker in general maintenance of public parks would have been 4 500 FIM, 75 per cent of which amounts to 3 375 FIM per month. Hence, Mr. L. had, through the neglect of the municipality, suffered a salary loss of 20 250 FIM. The unemployment benefits received by Mr. L. for the same period amount to 14 616 FIM. Consequently, the loss caused to Mr. L. was, as established by the Court of Appeal, 5 634 FIM.

EXPLANATORY COMMENT

The case is not illustrative of Finnish law as it today (2000) stands. The facts of the case relate to a period of time when the Constitution Act included the following

provision on the right to work: 'Unless otherwise prescribed in an Act of Parliament, it is incumbent for the State to arrange a Finnish citizen a possibility to work' (Section 6, subsection 2, second sentence). In order to implement this clause, the Employment Act of 1987 included duties for municipalities and State authorities to arrange temporary jobs for two groups of persons: the long-term unemployed and the young unemployed. Although these provisions had been amended in 1992, they were applicable in the plaintiff's case.

When the case was decided by the court of first instance in June 1995, also the above-quoted constitutional provision was still in force. Hence, the court referred both to Section 6.2 of the Constitution Act and to the Employment Act as legal grounds for the duty of the municipality to pay compensation. On 1 August 1995, the new Chapter II of the Constitution Act entered into force. New Section 15, subsection 2, came to read as follows: 'The public authorities shall promote employment and work towards guaranteeing for everyone the right to work. Provisions on the right to receive training that promotes employability are laid down by an Act.' Although the Appeal Court and the Supreme Court upheld the duty of the municipality to pay compensation, they did not refer to old or new provisions in the Constitution. Today, Section 18 of the Constitution of 1999 is identical to Section 15 as adopted in 1995.

ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up

Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998[*]

(…)

PRESENTATION

On 18 June 1998 the International Labour Organization adopted the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* in Geneva, thereby taking up the challenges of globalization which have been the focus of considerable debate within the ILO since 1994. Although globalization is a factor of economic growth, and economic growth is a prerequisite for social progress, the fact remains that it is not in itself enough to guarantee that progress. It must be accompanied by a certain number of social ground-rules founded on common values to enable all those involved to claim their fair share of the wealth they have helped to generate.

The aim of the Declaration is to reconcile the desire to stimulate national efforts to ensure that social progress goes hand in hand with economic progress and the need to respect the diversity of circumstances, possibilities and preferences of individual countries.

A first step in this direction was made in Copenhagen in 1995, when the Heads of State and Government attending the World Summit for Social Development adopted specific commitments and a Programme of Action relating to 'basic workers' rights' – the prohibition of forced labour and child labour, freedom of association, the right to organize and bargain collectively, equal remuneration for work of equal value and the elimination of discrimination in employment. The WTO Ministerial Conference held in Singapore in 1996 then provided the opportunity for a second step to be taken. The States renewed their commitment to observe internationally recognized core labour standards, recalled that the ILO was the competent body to set and deal with these standards and reaffirmed their support for its work in promoting them.

The adoption of the Declaration constituted the third step. It makes a significant contribution to the aim set forth in paragraph 54(b) of the Programme of Action adopted by the Copenhagen Summit, which is to safeguard and promote respect for basic workers' rights, requesting States parties to the corresponding ILO Conventions to fully implement them and other States to take into account the principles embodied in them.

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The existing supervisory machinery already provides the means of assuring the application of Conventions in the States that have ratified them. For those that have not, the Declaration makes an important new contribution. Firstly, it recognizes that the Members of the ILO, even if they have not ratified the Conventions in question, have an obligation to respect 'in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions'. Next, and this is the first aspect of the follow-up provided in the Annex to the Declaration, it seeks to achieve this aim by implementing the ILO's unique Constitutional procedure in accordance with which each year States that have not ratified the core Conventions will be asked to submit reports on progress made in implementing the principles enshrined in them.

Lastly, by solemnly committing itself to mobilize its budgetary resources and its influence to help its Members to achieve the aims of the Copenhagen Summit, the Organization goes one step further. This commitment will be reflected in the global report, the second aspect of the follow-up provided in the Annex. The global report will provide an overview of the progress made in the preceding four-year period both in countries which have ratified the core Conventions as well as in those which have not, it will serve as a basis for assessing the effectiveness of the action taken during the preceding period and as a starting point for action plans for future assistance.

By adopting this Declaration, the ILO has taken up the challenge presented to it by the international community. It has established a social minimum at the global level to respond to the realities of globalization and can now look ahead to the new century with renewed optimism.

Michel Hansenne
Director-General
International Labour Office

ILO Declaration on Fundamental Principles and Rights at Work

Whereas the ILO was founded in the conviction that social justice is essential to universal and lasting peace

Whereas economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions;

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in

the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development;

Whereas the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation;

Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential;

Whereas the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgment in promoting fundamental rights at work as the expression of its constitutional principles;

Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application;

The International Labour Conference,

1. Recalls:

(a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances;

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

3. Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:

(a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;

(b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of those Conventions; and

(c) by helping the Members in their efforts to create a climate for economic and social development.

4. Decides that, to give full effect to this Declaration, a promotional follow-up, which is meaningful and effective, shall be implemented in accordance with the measures specified in the annex hereto, which shall be considered as an integral part of this Declaration.

5. Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.

Annex: Follow-up to the Declaration

I. OVERALL PURPOSE

1. The aim of the follow-up described below is to encourage the efforts made by the Members of the Organization to promote the fundamental principles and rights enshrined in the Constitution of the ILO and the Declaration of Philadelphia and reaffirmed in this Declaration.

2. In line with this objective, which is of a strictly promotional nature, this follow-up will allow the identification of areas in which the assistance of the Organization through its technical cooperation activities may prove useful to its Members to help them implement these fundamental principles and rights. It is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of this follow-up.

3. The two aspects of this follow-up, described below, are based on existing procedures: the annual follow-up concerning non-ratified fundamental Conventions will entail merely some adaptation of the present modalities of application of article 19, paragraph 5(e), of the Constitution; and the global report will serve to obtain the best results from the procedures carried out pursuant to the Constitution.

II. ANNUAL FOLLOW-UP CONCERNING NON-RATIFIED FUNDAMENTAL CONVENTIONS

A. Purpose and scope

1. The purpose is to provide an opportunity to review each year, by means of simplified procedures to replace the four-year review introduced by the Governing Body in 1995, the efforts made in accordance with the Declaration by Members which have not yet ratified all the fundamental Conventions.

2. The follow-up will cover each year the four areas of fundamental principles and rights specified in the Declaration.

B. Modalities

1. The follow-up will be based on reports requested from Members under article 19, paragraph 5(e), of the Constitution. The report forms will be drawn up so as to obtain information from governments which have not ratified one or more of the fundamental Conventions, on any changes which may have taken place in their law and practice, taking due account of article 23 of the Constitution and established practice.

2. These reports, as compiled by the Office, will be reviewed by the Governing Body.

3. With a view to presenting an introduction to the reports thus compiled, drawing attention to any aspects which might call for a more in-depth discussion, the Office may call upon a group of experts appointed for this purpose by the Governing Body.

4. Adjustments to the Governing Body's existing procedures should be examined to allow Members which are not represented on the Governing Body to provide, in the

most appropriate way, clarifications which might prove necessary or useful during Governing Body discussions to supplement the information contained in their reports.

III. GLOBAL REPORT

A. Purpose and scope

1. The purpose of this report is to provide a dynamic global picture relating to each category of fundamental principles and rights noted during the preceding four-year period, and to serve as a basis for assessing the effectiveness of the assistance provided by the Organization, and for determining priorities for the following period, in the form of action plans for technical cooperation designed in particular to mobilize the internal and external resources necessary to carry them out.

2. The report will cover, each year, one of the four categories of fundamental principles and rights in turn.

B. Modalities

1. The report will be drawn up under the responsibility of the Director-General on the basis of official information, or information gathered and assessed in accordance with established procedures. In the case of States which have not ratified the fundamental Conventions, it will be based in particular on the findings of the aforementioned annual follow-up. In the case of Members which have ratified the Conventions concerned, the report will be based in particular on reports as dealt with pursuant to article 22 of the Constitution.

2. This report will be submitted to the Conference for tripartite discussion as a report of the Director-General. The Conference may deal with this report separately from reports under article 12 of its Standing Orders, and may discuss it during a sitting devoted entirely to this report, or in any other appropriate way. It will then be for the Governing Body, at an early session, to draw conclusions from this discussion concerning the priorities and plans of action for technical cooperation to be implemented for the following four-year period.

IV. IT IS UNDERSTOOD THAT:

1. Proposals shall be made for amendments to the Standing Orders of the Governing Body and the Conference which are required to implement the preceding provisions.

2. The Conference shall, in due course, review the operation of this follow-up in the light of the experience acquired to assess whether it has adequately fulfilled the overall purpose articulated in Part 1.

The foregoing is the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up duly adopted by the General Conference of the International Labour Organization during its Eighty-sixth Session which was held at Geneva and declared closed the 18 June 1998.

IN FAITH WHEREOF we have appended our signatures this nineteenth day of June 1998.

The President of the Conference : Jean-Jacques OECHSLIN
The Director-General of the International Labour Office : Michel HANSENNE

Air India Statutory Corporation, etc. (Appellants) v. *United Labour Union and others, etc. (Respondents).* [*]

(AIR (1997) SUPREME COURT 645) [**]

Before: K. Ramaswamy, B. L. Hansaria and S.B. Majmudar, JJ

Civil Appeals Nos. 15535 with 15536-37 and 15532-15534 of 1996 (arising out of S.L.P. © Nos. 7417 with 7418-19 of 1992 and 12353-55 of 1995), D/-6-11-1996 and 6-12-1996.

(A) Contract Labour (Regulation and Abolition) Act (37 of 1970), S.1 – Act is a social welfare measure Interpretation of provisions – Shift of judicial orientation must be from private law to public law interpretation.

Constitution of India, Pre.

The Act is a social welfare measure to further the general interest of the community of workmen as opposed to the particular interest of the individual entrepreneur. It seeks to achieve a public purpose, i.e., regulate conditions of contract labour and to abolish it when it is found to be of perennial nature etc. The individual interest can, therefore, no longer stem the forward flowing tide and must, of necessity, give way to the broader public purpose of establishing social and economic democracy in which every workman realises socio-economic justice assured in the Preamble, Articles 14, 15 and 21 and the Directive Principles of the Constitution. The founding fathers of the Constitution, cognizant of the reality of life wisely engrafted the Fundamental Rights and Directive Principles in Chapters III and IV for a democratic way of life to every one in Bharat Republic. To make these rights meaningful to workmen and meaningful right to life a reality to workmen, shift of judicial orientation from private law principles to public law interpretation harmoniously fusing the interest of the individual entrepreneur and the paramount interest of the community. The judicial function of a Court, therefore, in interpreting the Constitution and the provisions of the Act, requires to build up continuity of socio-economic empowerment to the poor to sustain equality of opportunity and status and the law should constantly meet the needs and aspiration of the society in establishing the egalitarian social order. Therefore, the concepts engrafted in the statute require interpretation from that perspective, without doing violence to the language. Such an interpretation would elongate the spirit and purpose of the Constitution and make the

[*] From: 1993 Lab IC 1277 (Bombay).

[**] The judgments are printed in the order in which they are given in the Certified Copy – Ed.

aforesaid rights to the workmen a reality lest establishment of an egalitarian social order would be frustrated and Constitutional goal defeated. (Paras. 14, 15)

(B) Contract Labour (Regulation and Abolition) Act (37 of 1970), S.2 (1) (a) – Appropriate Govt. – Word 'Control' – To be interpreted broadly in keeping with constitutional goals and perspectives enshrined in Preamble, fundamental rights and Directive principle.

The Constitution adopted mixed economy and control over the industry in its establishment working and production of goods and services. After recent liberalized free economy private and multi-national entrepreneurship has gained ascendancy and entrenched into wider commercial production and services, domestic consumption goods and large scale industrial productions. Even some of the public Corporations are thrown open to the private national and multi-national investments. It is axiomatic, whether or not industry is controlled by Government or public Corporations by statutory form or administrative clutch or private agents, juristic persons, Corporation whole or Corporation sole, their constitution, control and working would also be subject to the same constitutional limitations in the trinity, viz. Preamble, the Fundamental Rights and the Directive Principles. They throw open an element of public interest in its working. They share the burden and shoulder constitutional obligations to provide facilities and opportunities enjoined in the Directive Principles, the Preamble and the fundamental rights enshrined in the Constitution. The word 'control', therefore, requires to be interpreted in the changing commercial scenario broadly in keeping with the aforesaid constitutional goals and perspectives. (Para. 25)

The two-Judge Bench in Heavy Engineering Case, AIR 1970 SC 82 narrowly interpreted the words "appropriate Government" on the common law principles which no longer bear any relevance when it is tested on the anvil of Article 14. (Para. 28)

(C) Contract Labour (Regulation and Abolition) Act (37 of 1970), S.2 (1) (a) – Appropriate Govt. – Corporation, Instrumentality or agency – If under control of an appropriate Govt. – Principles for determination laid down.

(1) The constitution of the Corporation or instrumentality or agency or Corporation aggregate or Corporation sole is not of sole material relevance to decide whether it is by or under the control of the appropriate Government under the Act.

(2) If it is a statutory Corporation, it is an instrumentality or agency of the State. If it is a company owned wholly or partially by a share capital, floated from public exchequer, it gives indicia that it is controlled by or under the authority of the appropriate Government.

(3) In commercial activities carried on by a Corporation established by or under the control of the appropriate Government having protection under Articles 14 and 19 (2), it is an instrumentality of agency of the State.

(4) The State is a service Corporation. It acts through its instrumentalities, agencies or persons-natural or juridical.

(5) The governing power, wherever located, must be subject to the fundamental constitutional limitations and abide by the principles laid in the Directive Principles.

(6) The framework of service regulations made in the appropriate rules or regulations should be consistent with and subject to the same public law principles and limitations.

(7) Though the instrumentality, agency or person conducts commercial activities according to business principles and are separately accountable under their appropriate bye-laws or Memorandum of Association, they become the arm of the Government.

(8) The existence of deep and pervasive State Control depends upon the facts and circumstance in a given situation and in the altered situation it is not the sole criterion to decide whether the agency or instrumentality or persons is by or under the control of the appropriate Government.

(9) Functions of an instrumentality, agency or person are of public importance following public interest element.

(10) The instrumentality, agency or person must have an element of authority or ability to effect the relations with its employees or public by virtue of power vested in it by law, memorandum of association or by laws or articles of association.

(11) The instrumentality, agency or person renders an element of public service and is accountable to health and strength of the workers, men and women, adequate means of livelihood, the security for payment of living wages, reasonable conditions of work, decent standard of life and opportunity to enjoy full leisure and social and cultural activities to the workmen.

(12) Every action of the public authority, agency or instrumentality or the person acting in public interest or any act that gives rise to public element should be guided by public interest in exercise of public power or action hedged with public element and is open to challenge. It must meet the test of reasonableness, fairness and justness.

(13) If the exercise of the power is arbitrary, unjust and unfair, the public authority, instrumentality, agency or the person acting in public interest, though in the field of private law, is not free to prescribe any unconstitutional conditions or limitations in their actions.

It must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations and all their actions should satisfy the basic law requirement of Article 14. The public law interpretation is the basic tools of interpretation in that behalf relegating common law principles to purely private law field. (Paras. 26, 27)

(D) Contract Labour (Regulation and Abolition) Act (37 of 1970), Ss.2 (1) (a), 10- Appropriate Govt. Air India Statutory Corporation – Central Govt. is the appropriate Govt. - Notification issued by Central Govt. prohibiting contract labour for sweeping, cleaning, dusting and watching of buildings of corporation – Was in exercise of powers as appropriate Govt. – Having once abolished Contract Labour in afore-mentioned services Central Govt. could not once refer it to a committee and cancel the abolition on basis of recommendations of the Committees. (Para. 29)

(E) Constitution of India. Part IV – Directive principles – Not stand elevated to inalienable fundamental human rights – Are justiciable by themselves.

The Directive Principles in our Constitution are fore-runners of the UNO Convention of Right to Development as inalienable human right for every person and all people are entitled to participate in, contribute to and enjoy economic, social, cultural and political development in which human rights, fundamental freedoms would be realized. It is responsibility of the State as well as the individuals, singly and collectively, of the development taking into account the need for fuller responsibility for the human rights, fundamental freedoms as well as the duties to the community with alone can ensure free and complete fulfillment of the human being. They promote and protect an appropriate social and economic order in democracy for development. The State should provide facilities and opportunities to ensure development and to eliminate all obstacles to development by appropriate economic and social reforms so as to eradicate all social injustice. These principles are imbedded as integral part of our Constitution in the Directive Principles. Therefore, the Directive Principles now stand elevated to inalienable fundamental human rights. Even they are justiciable by themselves. Social and economic democracy is the foundation for stable political democracy. To make them a way of life in the Indian polity, law as a social engineer, is to create just social order, remove the inequalities in social and economic life and socio-economic disabilities with which people are languishing; and to require positive opportunities and facilities as individuals and groups of persons for development of human personality in our civilized democratic set up so that every individual would strive constantly to

rise to higher levels. Therefore, for establishment of just social order in which social and economic democracy would be a way of life inequalities in income should be removed and every endeavour be made to eliminate inequalities in status through the rule of law. (Para. 38)

(F) Constitution of India, Pre, Art. 38 – Social justice – Concept under our Constitution.

The preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and livable with human dignity. The concept of "social justice" which the constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice" is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury to ward off distress and to make their life livable, for greater food of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the illegitimate expectation and constitutional goal. In a developing society like ours, steeped with unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor, the workmen etc. are languishing and to secure dignity of their person. The Constitution, therefore, mandate the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enliven the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results.

(G) Constitution of India, Pre. Arts. 14, 21 – Right to work – Is workman's means to development and source to earn livelihood – Though not fundamental right, once person is appointed to post/office be it Govt. or private the right has to be dealt with as per public element.

All essential facilities and opportunities to the poor people are fundamental means to development, to live with minimum comforts, food, shelter, clothing and health. Due to economic constraints, though right to work was not declared as a fundamental right, right to work of workmen, lower class, middle class and poor people is means

to development and source to earn livelihood. Though, right to employment cannot, as a right, be claimed but after the appointment to a post or an office, be it under the State, its agency instrumentality, juristic person or private entrepreneur it is required to be dealt with as per public element and to act in public interest assuring equality, which is a genus of Article 14 and all other concomitant rights emanating therefrom are species to make their right to life and dignity of person real and meaningful. In a socialist democracy governed by the rule of law, private property, right of the citizen for development and his right to employment and his entitlement for employment to the labour, would all harmoneously be blended to serve larger social interest and public purpose. (Para. 50)

(H) Contract Labour (Regulation and Abolition) Act (37 of 1970), S. 10 – Abolition of contract Labour – Effect – Direct relations of employer and employee is created between principal employer and workmen – Workman gets right to be regularized in service.

1919 AIR SCW 3026, Overruled.
1995 AIR SCW 2942, Partly Overruled.

Abolition of contract labour system ensures right to the workmen for regularisation of them as employees in the establishment in which they were hitherto working as contract labour through the contractor. The contractor stands removed from the regulation under the Act and direct relationship of "employer and employees" is created between the principle employer and workmen.
1919 AIR SCW 3026, Overruled
1995 AIR SCW 2942, Partly Overruled (Paras. 58, 66)

The Act does not provide total abolition of the contract labour system under the Act. The Act regulates contract labour system to prevent exploitation of the contract labour. The Preamble of the Act furnishes the key to its scope and operation. The Act regulates not only employment of contract labour in the establishment covered under the Act and its abolition in certain circumstances covered under Section 10 (2) but also "matters connection therewith". The phrase "matters connected therewith" gives clue to the intention of the Act. The enforcement of the provisions to establish canteen in every establishment under Section 16 is to supply food to the workmen at the subsidised rates as it is a right to food, a basic human right. Similarly, the provision in Section 17 to provide rest rooms to the workmen is a right to leisure enshrined in Article 43 of the Constitution. Supply of whole some drinking water, establishment of latrine and urinals as enjoined under Section 18 are part of the basic human right to health assured under Article 39 and right to just and humane conditions of work assured under Article 42. All of them are fundamental human rights to the workmen and are facets of right to life guaranteed under Article 21. When the principal employer is enjoined to ensure those rights and payment of wages while the contract labour system is under regulation, the question arises

whether after abolition of the contract labour system that workmen should be left in a lurch denuding them of the means of livelihood and the enjoyment of the basic fundamental rights provided while the contract labour systems regulated under the Act? The Advisory Committee constituted under Section 10 (1) requires to consider whether the process, operation and other work is incidental to or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment, whether it is of a perennial nature, that is to say, whether it is of substantive duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment, whether it is done ordinarily through regular workmen in the establishment or an establishment similar thereto, whether it is sufficient to employ considerable number of whole time workmen. Upon consideration of these facts and recommendation for abolition was made by the Advisory Board, the appropriate Government examines the question and takes a decision in that behalf. The explanation to Section 10 (2) provides that when any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final. It would thus give indication that on the abolition of the contract labour system by publication of the notification in the official Gazette, the necessary concomitant is that the whole time workmen are required for carrying on the process, operation or other work being done in the industry, trade, business, manufacture or occupation in that establishment. When the condition of the work which is of perennial nature etc., as envisaged in sub-section (2) of Section 10, thus are satisfied, the continuance of contract labour stands prohibited and abolished. The concomitant result would be that source of regular employment became open. (Para. 57)

The object of the Act is to regulate the contract labour so long as the contract labour is not perennial. The labour is required to be paid the prescribed wages and are provided with other welfare benefits envisaged under the Act under direct supervision of the principal employer. The violation visits with penal consequences. Similarly, when the appropriate Government finds that the employment is of perennial nature etc, contract system stand abolished, thereby it intended that if the workmen were performing the duties of the post which were found to be of perennial nature on par with regular service, they also require to be regularized. The Act did not intend to denude them of their source of livelihood and means of development, throwing them out from employment. The Act is a socio-economic welfare legislation. Right to socio-economic justice and empowerment are constitutional rights. Right to means of livelihood is also constitutional right. Right to facilities and opportunities are only part of and means to right to development. Without employment or appointment, the workmen will be denuded of their means of livelihood and resultant right to life, leaving them in the lurch since prior to abolition, they had the work and thereby earned livelihood. (Para. 58)

The founding fathers placed no limitation or fetters on the power to the High Court under Article 226 of the Constitution except self-imposed limitations. The arm of the Court is long enough to reach injustice wherever it is found. The Court as sentinel in the qui vive is to mete out justice in given facts. On finding that either the

workmen were engaged in violation of the provisions of the Act or were continued as contract labour, despite prohibition of the contract labour under Section 10 (1), the High Court has, by judicial review as the basic structure, constitutional duty to enforce the law by appropriate directions. Though there is no express provision in the Act for absorption of the employees whose contract labour system stood abolished by publication of the notification under Section 10 (1) of the Act, in a proper case, the Court as sentinel in the qui vive is required to direct the appropriate authority to act in accordance with law and submit a report to the Court and based thereon proper relief should be granted. (Paras. 59, 65)

Per S. B. Majmudar, J. (Concurring):

Section 10 nowhere provides in express term that on abolition of contract labour the workmen would become direct employees of the principal employer. It is obvious that no such express provision was required to be made as the very concept of abolition of a contract labour system wherein the work of the contract labour is of perennial nature for the establishment and which otherwise would have been done by regular workmen, would posit improvement of the lot of such workmen and not its worsening. Implicit in the provision of Section 10 is the legislative intent that on abolition of contract labour system, the erstwhile contract-workmen would become direct employees of the employer on whose establishment they were earlier working and were enjoying all the regulatory facilities on that very establishment under Chapter V prior to the abolition of such contract labour system. Though the legislature has expressly not mentioned the consequences of such abolition, but the very scheme and ambit of Section 10 of the Act clearly indicates the inherent legislative intent of making the erstwhile contract labourers direct employees of the employer on abolition of the intermediary contractor. If it is held that on abolition of contract labour system, the erstwhile contract labourers are to be thrown out of the establishment lock stock and barrel, it would amount to throwing the baby out with the bath water. (Para. 69)

The plea that contractor might have employed a number of workmen who may be in excess of the requirement and, therefore, the principal employer on abolition of the contract labour may be burdened with excess workmen is more imaginary than real. The principal employer as a wordly businessman in his practical commercial wisdom would not allow contractor to bring larger number of contract labour which may be in excess of the requirement of the principal employer. On the contrary, the principal employer would see to it that the contractor brings only those number of workmen who are required to discharge their duties to carry out the work of the principal employer on his establishment through, of course, the agency of the contractor. In fact the scheme of the Act and regulations framed there under clearly indicate that even the number of the workmen required for the given contract work is to be specified in the license given to the contractor. And all the more even apart from that, after the absorption of the erstwhile contract workmen by the principal employer on abolition of contract labour system under Section 10, it is always open

for the employer as an entrepreneur, in an appropriate case, if the excess working staff is not found to be required by him to retrench such excess staff in accordance with law by following the provisions of the Industrial Disputes Act, 1947. (Para. 69)

(I) Contract Labour (Regulation and Abolition) Act (37 of 1970), S. 10 – Abolition of contract labour – Absorption of workmen in regular employment – Inter se seniority of absorbed workmen – Determination – Date of engagement as contract labour would be the criterion.

Constitution of India, Art. 16.

The criteria to abolish the contract labour system is the duration of the work, the number of employees working on the job etc. That would be the indicia to absorb the employees on regular basis in the respective services in the establishments. Therefore, the date of engagement will be the criteria to determine their inter se seniority. In case, there would be any need for retrenchment of any excess staff, necessarily, the principle of "last come, first go" should be applied subject to his reappointment as and when the vacancy arises. (Para. 66)

Daily rated casual labour employed under P&T department through Bhartiya Dak Tar Mazdoor Manch (Petitioners)* v. *Union of India and others (Respondents).
(Writ Petition No. 373 of 1986)

and

National Federation of P&T Employees through its Secretary General and another (Petitioners)* v. *Union of India and another (Respondents).
(Writ Petition No. 302 of 1986).

Supreme Court of India

Writ petitions Nos. 373 and 302 of 1986 (Under Article 32 of the Constitution of India), decided on 27 October 1987.

Judge(s):

ES Venkataramiah
S Ranganathan

Excerpts from the judgment:

Venkataramiah, J. – These petitions are filed on behalf of persons who are working as 'Daily Rated Casual labour' in the Posts and Telegraphs Department. The 'Daily Rated Casual Labour' includes three broad categories of workers, namely, unskilled, semi-skilled and skilled. The unskilled labour consists of safai workers, helpers, peons etc. and are mostly engaged in digging, carrying loads and other similar types of work. The semi-skilled labour consists of carpenters, wiremen, draftsmen, A.C. mechanics etc. who have technical experience but do not hold any degree or diploma. The skilled labour consists of labour doing technical work, who hold requisite degrees/diplomats.

2. The principal complaint of the petitioners is that even though many of them have been working for the last ten years as casual labourers, the wages paid to them are very low and far less than the salary and allowances paid to the regular employees of the Posts and Telegraphs Department belonging to each of the categories referred to above and secondly no scheme has been prepared by the Union of India to absorb them regularly in its service and consequently they have been denied the benefits, such as increments, pension, leave facilities etc. which are enjoyed by those who

have been recruited regularly. They allege that they are being exploited by the Union of India.

7. The allegation made in the petitions to the effect that the petitioners are being paid wages far less than the minimum pay payable under the pay scales applicable to the regular employees belonging to corresponding cadres is more or less admitted by the respondents. The respondents, however, contend that since the petitioners belong to the category of casual labour and are not being regularly employed, they are not entitled to the same privileges which the regular employees are enjoying. It may be true that the petitioners have not been regularly recruited but many of them have been working continuously for more than a year in the department and some of them have been engaged as casual labourers for nearly ten years. They are rendering the same kind of service which is being rendered by the regular employees doing the same type of work. Clause (2) of Article 38 of the Constitution of India which contains one of the Directive Principles of State Policy provides that "the State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations". Even though the above directive principle may not be enforceable as such by virtue of Article 37 of the Constitution of India, it may be relied upon by the petitioners to show that in the instant case they have been subjected to hostile discrimination. It is urgent that the state cannot deny at least the minimum pay in the pay scales of regularly employed workmen even though the government may not be compelled to extend all the benefits enjoyed by regularly recruited employees. We are of the view that such denial amounts to exploitation of labour. The government cannot take advantage of its dominant position and compel any worker to work even as a casual labourer has agreed to work on such low wages. That he has done because he has no other choice. It is poverty that has driven him to that state. The government should be a model employer. We are of the view that on the facts and in the circumstances of this case the classification of employees into regularly recruited employees and casual employees for the purpose of paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scales are the lowest is not tenable. The further classification of casual labourers into three categories namely (i) those who have not compiled 720 days of service; (ii) those who have compiled 720 days of service and not compiled 1200 days of service and (iii) those who have compiled more than 1200 days of service for purpose of payment of different rates of wages is equally untenable. There is clearly no justification for doing so. Such a classification is violative of Articles 14 and 16 of the Constitution. It is also opposed to the spirit of Article 7 of the International Covenant on Economic, Social and Cultural Rights, 1966 which exhorts all States parties to ensure fair wages and equal wages for equal work. We feel that there is substance in the contention of the petitioners.

9. India is a socialist republic. It implies the existence of certain important obligations which the State has to discharge. The right to work, the right to free choice of employment, the right to just and favourable conditions of work, the right to protection against unemployment the right of everyone who works to just and favourable remuneration ensuring a decent living for himself and his family, the right of everyone without discrimination of any kind to equal pay for equal work, the right to rest, leisure, reasonable limitation on working hours and periodic holidays with pay, the right to form trade unions and the right to join trade unions of one's choice and the right to security of work are some of the rights which have to be ensured by appropriate legislative and executive measures. It is true that all these rights cannot be extended simultaneously. But they do indicate the socialist goal. The degree of achievement in this direction depends upon the economic resources, willingness of the people to produce and more than all the existence of industrial peace throughout the country. Of course, the question of security of work is of utmost importance. If a person does not have the feeling that he belongs to an organization engaged in production he will not put forward his best effort to produce more. That sense of belonging arises only when he feels that he will not be turned out of employment the next day at the whim of the management. It is for this reason it is being repeatedly observed by those who are in charge of economic affairs of the countries in different parts of the world that as far as possible security of work should be assured to the employees so that they may contribute to the maximisation of production. It is again for this reason that managements and the governmental agencies in particular should not allow workers to remain as casual labourers or temporary employees for an unreasonable long period of time. Where is any justification to keep persons as casual labourers for years as is being done in the Posts and Telegraphs Department? Is it for paying them lower wages? Then it amounts to exploitation of labour. Is it because you do not know that there is enough work for the workers? It cannot be so because there is so much of development to be carried out in the communications department that you need more workers. The employees belonging to skilled, semi-skilled and unskilled classes can be shifted from one department to another even if there is no work to be done in a given place. Administrators should realise that if any worker remains idle on any day, the country loses the wealth that he would have produced during that day. Our wage structure is such that a worker is always paid less than what he produces. So why allow people to remain idle? Anyway they have got to be fed and clothed. Therefore, why don't we provide them with work? There are several types of work such as road making, railway construction, house building, irrigation projects, communications etc. which have to be undertaken on a large scale. Development in these types of activities (even though they do not involve much foreign exchange) is not keeping pace with the needs of society. We are saying all this only to make the people understand the need for better management of manpower (which is a decaying asset) the non-utilisation of which leads to the inevitable loss of valuable human resources. Let us remember the slogan: "Produce or Perish". It is not an empty slogan. We fail to

produce more at our own peril. It is against this background that we say that non-regularisation of temporary employees or casual labour for a long period is not a wise policy. We, therefore, direct the respondents to prepare a scheme on a rational basis for absorbing as far as possible the casual laborers who have been continuously working for more than one year in the Posts and Telegraphs department.

10. The arrears of wages payable to the casual labourers in accordance with this order shall be paid within four months from today. The respondents shall prepare a scheme for absorbing the casual labourers, as directed above, within eight months from today.

11. These petitions are accordingly disposed of.

Life Insurance Corporation of India and Another (Appellants) v. *Consumer Education and Research Centre and Others (Respondents)*[1]

(AIR (1995) SC 181)

Supreme Court of India

Date : 10-05-1995

Judge(s)

K. Ramaswany
N. Venkatachala

Excerpts from the judgment:

15. Article 25 of the Universal Declaration of Human Rights envisages that everyone has the right to standard of living adequate for the health and well-being of himself and of his family including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond his control. Article 7 of the international Covenant on Economic and Social Rights equally assures right to everyone to the employment of just and favourable conditions of work which ensures not only adequate remuneration and fair wages but also decent living to the workers for themselves and their families in accordance with the provision of the Covenant. Covenant on Right to Development enjoins the State to provide facilities and opportunities to make rights a reality and truism, so as to make these rights meaningful.

16. A Constitution Bench of this Court in D.5. Nakara v. Union of India (SCR at p. 185) held that pension ensures freedom from undeserved want. The basic framework of the Constitution is to provide a decent standard of living to the working people and especially provides security from the cradle to the grave. Every State action whenever taken must be directed and be so interpreted as to take society one step towards the goal of establishing a socialist welfare society. While examining the constitutional validity of legislative/administrative action, the touchstone of the Directive Principles of State Policy in the light of the Preamble provides yardstick to hold one way or the other. In Olga Tellis v. Bombay Municipal Corpn. another Constitution Bench of this Court held that the right to life includes right to

[1] Source: Grand Jurix 2000, The Electronic Law Library.

livelihood because no person can live without the means of living i.e. means of livelihood. If the right to livelihood is not treated as part of constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of this means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.

17. Interpreting Article 19(e) vis-à-vis Article 25(2) of the Universal Declaration of Human Rights and Article 7 of the International Convention of Economic, Social and Cultural Rights, one of us (K. Ramaswamy, J.) in CESC Ltd. v. Subhash Chandra Bose (SCC at p. 462 in para 30) held that the right to social justice is a fundamental right. Right to livelihood springs from the right to life guaranteed under Article 21. The health and strength of a worker is an integral facet of right to life. Right to human dignity, development of personality, social protection, right to rest and leisure are fundamental human rights to a common man. Right to life and dignity of person and status without means are cosmetic rights. Socio-economic rights are, therefore, basic aspirations for meaningful right to life. Right to social security and protection of the family are integral part of the right to life. Right to social and economic justice is a fundamental right. In para 32, it was further held that right to medical care and health for protection against sickness are fundamental rights to the workmen. On this aspect, there was no disagreement by the majority members. In Consumer Education & Research Centre v. Union of India it was unanimously held by a Bench of three Judges that right to health of a worker is an integral facet of meaningful right to life and have not only a meaningful existence but also robust health and vigour without which the worker would lead a life of misery. Lack of health denudes his livelihood. Compelling economic necessity to work in an industry exposed to health hazards due to indigence of bread-winner to himself and his dependants, should not be at the cost of the health and vigour of the workman. Facilities and opportunities, as enjoined in Article 38, should be provided to protect the heath of the workman. Right to human dignity, development of personality, social protection are fundamental rights to the workmen. Medical facilities to protect the health of the workers are fundamental rights to workmen. It was, therefore, held that "the right to health, medical aid and to protect the health and the vigour of a worker while in service or post retirement is a fundamental human right under Article 21 read with Articles 39(e), 41, 43, 48-A of the Constitution of India and fundamental human right to make the life of workmen meaningful and purposeful with dignity of persons". In Regional Director E.S.I. Corpn. v. Francis Da Costa (SCC at p. 105) the same view was stated. Security against sickness and disablement is a fundamental right under Article 25 of the Universal Declaration of Human Rights and Article 7(b) of the International Covenant of Economic, Social and Cultural Rights and under Articles 39(e), 38 and 21 of the Constitution of India. Employees' State Insurance Act seeks to provide succor to maintain health of an injured workman and the interpretation should be so given as to live effect to right to medical benefit which is a fundamental right to the

workman. In Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde this Court held that right to economic empowerment to the poor, disadvantaged tribes and depressed and oppressed Dalits is a fundamental right to make their right to life and dignity of person meaningful and worth living. It was also held that socio-economic democracy is sine qua non to make political democracy a truly participatory democracy and a truism for unity and integrity of Bharat.

18. It would thus be well-settled law that the Preamble, Chapter of Fundamental Rights and Directive Principles accord right to livelihood as a meaningful life. Social security and disablement benefits are integral schemes of socio-economic justice to the people, in particular to the middle class and lower middle class and all affordable people. Life insurance coverage is against disablement or in the event of death of the insured economic support for the dependants, social security to livelihood to the insured or the dependants. The appropriate life insurance policy within the paying capacity and means of the insured to pay premia is one of the social security measures envisaged under the Constitution to make right to life meaningful worth living and right to livelihood a means for sustenance.

Notes:

Constitution of India – Arts. 12, 298, 21, 14, 19 and Preambles & Part IV – LIC policy under Table 58 restricted only to salaried persons in Govt. Semi Govt. or reputed commercial firms – Cannot be restricted to a class of persons thereby denying benefits to others – Restriction clause declared unconstitutional.

The policy confirming to only salaried class form Government, semi-Government or reputed commercial firms is discriminatory offending art. 14. Denial thereof to larger segments violates their constitutional rights. The rest of the conditions, age, etc, are valid and do not call for interference. The offending clause extending the benefit only to the salaried class in government, semi-Government and reputed firms is unconstitutional. Subject to compliance with other terms and conditions, the appellant is free to enforce Table 58 policy with all eligible lives. The declaration given, therefore, is perfectly valid. The offending part is severable from the rest of the conditions.

Selective application clause in Table 58 Policy of LIC is discriminatory thus struck down.

Constitution of India – Art. – Includes right to life insurance policy – Such policies must be within paying capacity of insured.

Sexual Harassment

Apparel Export Promotion Council (Appellant) v. *A.K. Chopra (Respondent)*

(AIR (1999) SC 62)[1]

Supreme Court of India

Civil Appeals Nos. 226-227 of 1999 (From the Judgment and Order dated 15-7-1997 of the Delhi High Court in L.P.As. Nos. 27 and 79 of 1997), decided on 20 January 1999.

Date: 20-01-1999

Before: A.S. Anand and V.N. Khare

Excerpts from the judgment:

Dr. Anand, C.J. – Special leave granted

2. Does an action of the superior against a female employee which is against moral sanctions and does not withstand the test of decency and modesty not amount to sexual harassment? Is physical contact with the female employee an essential ingredient of such a charge? Does the allegation that the superior "tried to molest" a female employee at the "place of work", not constitute an act unbecoming of good conduct and behaviour expected from superior? These are some of the questions besides the nature of approach expected from the law courts to cases involving sexual harassment which come to the forefront and require our consideration.

23. Against the growing social menace of sexual harassment of women at the work place, a three-Judge Bench of this Court, by a rather innovative judicial law-making process, issued certain guidelines in Vishaka v. State of Rajashan (1977) 6 SCC 241: 1997 SCC (Cri) 932 : JT (1997) 7 SC 384) after taking note of the fact that the present civil and penal laws in the country do not adequately provide for specific protection of women from sexual harassment at places of work and that enactment of such a legislation would take a considerable time. In Vishaka case (1997) 6 SCC 241: 1997 SCC (Cri) 932: JT (1997) 7SC 384) a definition of sexual harassment was suggested. Verma, J., (as a former Chief Justice then was), speaking for the three-Judge Bench opined: (SCC p. 252, para 17)

> "2. Definition:

[1] Source: Grand Jurix 2000, The Electronic Law Library.

> For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:
>
> (a) physical contact and advances;
>
> (b) a demand or request for sexual favours;
>
> (c) sexually-coloured remarks;
>
> (d) showing pornography;
>
> (e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.
>
> Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto."

24. An analysis of the above definition shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.

25. There is no gainsaying that each incident of sexual harassment at the place of work, results in violation of the fundamental right to gender equality and the right to life and liberty – the two most precious fundamental rights guaranteed by the Constitution of India. As early as in 1993, at the ILOI Seminar held at Manila, it was recognized that sexual harassment of women at the workplace was a form of 'gender discrimination against women'. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against women, 1979 (CEDAW) and the Beijing

Declaration which directs all state parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The international Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate the working environment. These international instruments cast an obligation on the Indian State to gender-sensitive its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be downed. This Court has in numerous cases emphasized that whole discussing constitutional requirements, court and counsel must never forget the core principle embodies in the international conventions and instruments and as far as possible, give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. (See with advantage – prem Shankar Shukla v. Delhi Admn. (1980) 3 SCC 526 : 1980 SCC (Cri) 815 : AIR 1980 SC (1535); Mackinnon Mackenzie and Co. Ltd. V. Audrey D'Costa (1987) 2 SCC 469: 1987 SCC (L&S) 100: JT (1987) 2SC 34); Sheela Barse v. Secy., Children's Aid Society (1987) 3SCC 50, 54: 1987 7 SC 384); People's Union for Civil Liberties v. Union of India (1997) 3 SCC 433: 1997 SCC (Cri) 434: JT (1997) 2 SCC 311) and D.K. Basu v. State of WB. (1997) 1 SCC 416, 438: 1997 SCC (Cri) 92) SCC at p. 438.

26. In cases involving violation of human rights, the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the international conventions and norms while dealing with the case.

Bandhua Mukti Morcha, etc. (Petitioners)* v. *Union of India and Others (Respondents)

(AIR (1997) SC 2218)

Supreme Court of India

Before: K. Ramaswamy and S. Saghir Ahmad, JJ.

Writ Petn. (C Nos. 12125 of 1984 with 11643 of 1985, D/-21-2-1997)

(A) Constitution of India, Art. 24 – Child labour – Prohibition – Various directions given to implement constitutional mandate in 1997 AIR SCW 407 –Need for their speedy implementation reiterated. (Para. 12)

(B) Constitution of India, Art. 28 – Child labour – prohibition – Evolving principles and policy for progressive elimination of children below age of 14 years in various employments – Supreme Court directed Govt. of India to convene meeting of concerned Ministers of respective state Govts. And their principal secretaries holding concerned Departments.

In the instant case the Supreme Court directed the Government of India to convene a meeting of the concerned Ministers of the respective State Governments and their Principal Secretaries holding concerned Departments, to evolve the principles and policies for progressive elimination of employment of the children below the age of 14 years in all employments governed by the respective enactments mentioned in 1997 AIR SCW 407 to evolve such steps consistent with the scheme laid down in that decision to provide (1) compulsory education to all children either by the industries itself or in co-ordination with it by the State Government to the children employed in the factories, mine or an other industry, organised or unorganised labour with such timings as is convenient to impart compulsory education, facilities for secondary, vocational profession and higher education: (2) apart from education, periodical health check-up; (3) nutrient food etc.; (4) entrust the responsibilities for implementation of the principles. Periodical reports of the progress made in that behalf be submitted to the Registry of the Supreme Court. (Para. 13)

Cases Referred : Chronological Paras.

1997 AIR SCW 407: (1996) 6 SCC 756
1993 AIR SCW 863: (1993) 1 SCC 645: AIR 1993 SC 2178
1991 AIR SCW 879: (1991) 2 SCC 716

U.S. Prasad, E.M.S. Natchippan, Ms. K. Hingorani, Advocates for Petitioners;

Rakesh Dwivedi, Addl. Advocate, General. R.B. Misra, T.N. Singh, Advocates, for State of U.P., R.P. Shrivastava, L.K. Gupta, C.V.S. Rao, Advocates, for Respondent. B.B. Singh Advocate, for the State of Bihar.

K. Ramaswamy, J.- This writ petition under Article 32 of the Constitution has been filed by way of public interest litigation seeking issue of a writ of mandamus directing the Government to take steps to stop employment of children in Carpet Industry in the State of Uttar Pradesh; to appoint a Committee to investigate into their conditions of employment; and to issue such welfare directive as are appropriate for total prohibition on employment of children below 14 years and directing the respondents to give them facilities like education, health, sanitation, nutritious food, etc.

2. The main contention of the petitioner group is that employment of the children in any industry or in a hazardous industry, is violative of Article 24 of the Constitution and derogatory to the mandates contained in Articles 39(e) and (f) and 45 of the Constitution read with the Preamble. Pursuant to the filing of the writ petition, this Court appointed Prem Bhai and others to visit factories manufacturing carpets and to submit their findings as to whether any number of children below the age of 14 years are working in the carpet industry etc. The Commissioner submitted his preliminary report. Subsequently, by Order dated August 1, 1991, this Court appointed a Committee consisting of Shri J.P. Vergese, Ms. Gyansudha Mishra and Dr. K.P. Raju to go around Mirzapur area and other places where carpets are being weaved to find out whether children are being exploited and to submit a comprehensive report. In furtherance thereof, a comprehensive report was submitted on November 18, 1991. The matter was heard and arguments were concluded. The judgment was reserved by proceedings dated October 18, 1994. Since the judgment could not be delivered, the matter was directed to be posted before a Bench consisting of S. Saghir Ahmad, J. We have heard the counsel on both sides.

3. The primary contention by the petitioner on behalf of the children below the age of 14 years, is that the employment of children by various carpet weavers in Varanasi, Mirzapur, Jaunpur and Allahabad areas is violative of Article 24. The report of the Committee discloses the enormity of the problem of exploitation to which the children are subjected. Children ranging between 5 to 12 years having been kidnapped from the Village Chhichhori (Patna Block, District Palamau in Bihar) in January and February, 1984 in three batches and were taken to village Bilwari in Mirzapur District of U.P. for being engaged in carpet weaving centres. They are forced to work all the day. Virtually, they are being treated as slaves and are subjected to physical torture revealed by the presence of marks of violence on their person. The Commission/Committee visited 42 villages and found in all 884 looms engaging 42% of the work force with the children below the age of 14 years. The total number of children are 369; 95% of them are of tender age ranging between 6 to 11 years and most of them belong to the Scheduled Castes and

Scheduled Tribes. Despite pursuasion, they could not be released and continue to languish under bondage. The Commission visited several villages, personally contacted the parents of the children in different places and found that the children were taken against their wishes and are wrongfully forced to work as bonded labour in the carpet industries. They have furnished the list of the children whom they contacted and the list of the carpet industries whereat the children were found engaged. The question, therefore, is: whether the employment of the children below the age of 14 years is violative of Article 24 and whether the omission on the part of the State to provide welfare facilities and opportunities deprives them of the constitutional mandates contained in Articles 45, 39(e) and (f), 21, 14 etc.?

4. Child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to the humanity. Mankind has best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood - socially, economically, physically and mentally - the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The founding fathers of the Constitution, therefore, have bestowed the importance of the role of the child in its best for development. Dr. Bhim Rao Ambedkar, was far ahead of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law.

5. Article 39(e) of the Constitution enjoins that the State shall direct its policy towards securing the health and strength of workers, men and woman; and the children of tender age will not be abused; the citizens should not be forced by economic necessity to enter avocations unsuited to their age or strength. Article 39(f) enjoins that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and the childhood and youth are protected against exploitation and against moral and material abandonment. Article 45 mandates that the State shall endeavour to provide free and compulsory education for all children until they complete the age of 14 years. The period of ten years provided therein has lost its relevance since as on date, more than 78 million out of 405 million children, 78% of them are employed between the age of 5 to 14 years without any basic and

elementary education, health, access to nutrient food and leisure. Article 24 of the Constitution prohibits employment of the children in factories etc. so that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Article 21 mandates that no person shall be deprived of his life or personal liberty except according to the "procedure established by law" which this court has interpreted to mean "due process of law". The bane of the poverty is the root of the child labour and they are being subjected to deprivation of their meaningful right to life, leisure, food, shelter, medical aid and education. Every child shall have, without any discrimination on the ground of caste, birth, colour, sex, language, religion, social origin, property or birth alone, in the matter of right to health, well being, education and social protection. Article 51-A enjoins that it shall be the duty of every citizen to develop scientific temper, humanism and the spirit of inquiry and to strive towards excellence in all spheres of individual and collective activities so that the nation constantly rises to higher levels of endeavour and achievement. Unless facilities and opportunities are provided to the children, in particular handicapped by social, economic, physical or mental disabilities, the nation stands to lose the human resources and good citizens. Education eradicates illiteracy - a means to economic empowerment and opportunity to life of culture. Article 26(1) of Universal Declaration of Human Rights assures that everyone has the right to education which shall be free, at least at the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made available and higher education shall equally be accessible to all on the basis of merit. Education enables development of human personality and strengthens the respect for human rights and fundamental freedoms. It promotes understanding, tolerance and friendship among people. It is, therefore, the duty of the State to provide facilities and opportunities to the children driven to child labour to develop their personality as responsible citizens.

6. Due to poverty, children and youth are subjected to many visible and invisible sufferings and disabilities, in particular, health, intellectual and social degradation and deprivation. The Convention on the Rights of the Child which was ratified by the Government of India on November 20, 1989 recognises the rights of the child for full and harmonious development of his or her personality. Child should grow up in a family environment, in an atmosphere of happiness, love and understanding. The child should be fully prepared to live an individual life in society. Article 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration. Article 27(1) provides that the State parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development Article 28 provides thus:

"1. State Parties recognise the right of the child to education, and with a view to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods in this regard. Particular account shall be taken of the needs of developing countries."

7. Article 31(1) recognises the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. Article 32(1) which is material for the purpose of this case reads as under:

"1. State Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments. States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."

8. Article 36 states that State parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare. No doubt, the Government, while ratifying the Convention with a reservation of progressive implementation of the governance, remained itself of the obligations undertaken thereunder, but they do not absolve the State in its fundamental governance of the imperatives of Directive Principles of the Constitution, particularly, Articles 45, 39(e) and (f), 46 read with the Preamble, Articles 21, 23 and 24 of the Constitution rendering socio-economic justice to the child and their empowerment, full growth of their personality - socially, educationally and culturally - with a right to leisure and opportunity for development of the spirit of reform, inquiry, humanism and scientific temper to improve excellence - individually and collectively.

9. In *Maharashtra State Board of Secondary and Higher Education v. K.S. Gandhi,* JT 1991(2) SC 296 : 1991(2) SCT 611 (SC), right to education at the secondary stage was held to be a fundamental right. In *J.P. Unnikrishnan v. State of Andhra Pradesh,* JT 1993(1) SC 474 : 1993(2) SCT 512 (SC), a constitution Bench had held education upto the age of 14 years to be a fundamental right; right to health has been held to be a fundamental right; right to potable water has been held to be a fundamental right; meaningful right to life has been held to be a fundamental right. The child is equally entitled to all these fundamental rights. It would, therefore, be incumbent upon the State to provide facilities and opportunity as enjoined under Article 39(e) and (f) of the Constitution and to prevent exploitation of their childhood due to indigence and vagary. As stated earlier, their employment - either forced or voluntary - is occasioned due to economic necessity; exploitation of their childhood due to proverty, in particular, the poor and the deprived sections of the society, is detrimental to democracy ad social stability, unity and integrity of the nation.

10. Various welfare enactments made by the Parliament and the appropriate State Legislatures are only testing illusions and a promise of unreality unless they are effectively implemented and make the right to life to the child driven to labour a reality, meaningful and happy. Article 24 of the Constitution prohibits employment of the child below the age of 14 years in any factory or mine or in any other hazardous employment, but it is a hard reality that due to poverty child is driven to be employed in a factory, mine or hazardous employment. Pragmatic, realistic ad constructive steps and actions are required to be taken to enable the child belonging to poor, weaker sections, Dalit and Tribes and minorities, enjoy the childhood and develop its full blossomed personality - educationally, intellectually and culturally - with a spirit of inquiry, reform and enjoyment of leisure. The child labour, therefore,

must be eradicated through well-planned, poverty-focussed alleviation, development and imposition of trade actions in employment of the children etc. Total banishment of employment may drive the children and mass them up into destitution and other mischievous environment, making them vagrant, hard criminals and social risks etc. Therefore, while exploitation of the child must be progressively banned, other simultaneously alternative to the child should be evolved including providing education, health care, nutrient food, shelter and other means of livelihood with self-respect and dignity of person. Immediate ban of child labour would be both unrealistic and counter-productive. Ban of employment of children must begin from most hazardous and intolerable activities like slavery, bonded labour, trafficking, prostitution, pornography and dangerous forms of labour and the like.

11. Illiteracy has many adverse effects in a democracy governed by rule of law. A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. The basic education and employment- oriented vocational education should be imparted so as to empower the children with these segments of the society to retrieve them from poverty and, thus, develop basic abilities, skills and capabilities to live meaningful life for economic and social empowerment. Compulsory education, therefore, to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions.

12. In *M.C. Mehta v. State of Tamil Nadu & Ors.,* JT 1996(11) SC 685, this Court has considered the constitutional perspectives of the abolition of the child labour and the child below 14 years of age in the notorious Sivakasi Match industries. It has mentioned in para 12 of the judgment the number of total workers and the child workers employed in the respective industries in the county. It has surveyed various enactments which prohibit employment of the child; the details thereof are not necessary to be reiterated. In para 27, it has noted the causes for failure to implement the constitutional mandate and has given various directions in that behalf. We, therefore, reiterate the directions given therein as feasible inevitable. We respectfully agree with them and reiterate the need for their speedy implementation.

13. We are of the view that a direction needs to be given that the Government of India would convene a meeting of the concerned Ministers of the respective State Governments and their Principal Secretaries holding concerned Departments, to evolve the principles of policies for progressive elimination of employment of the children below the age of 14 years in all employments governed by the respective enactments mentioned in M.C. Mehta's case to evolve such steps consistent with the scheme laid down in M.C. Mehta's case, to provide (1) compulsory education to all children either by the industries itself or in co-ordination with it by the State

Government to the children employed in the factories, mine or any other industry, organised or unorganised labour with such timings as is convenient to impart compulsory education, facilities for secondary, vocational profession and higher education; (2) apart from education, periodical health check-up; (3) nutrient food etc.; (4) entrust the responsibilities for implementation of the principles. Periodical reports of the progress made in that behalf be submitted to the Registry of this Court. The Central Government is directed to convene the meeting within two months from the date of receipt of the order. After evolving the principles, a copy thereof is directed to be forwarded to the Registry of this Court.

14. Shri Rakesh Dwivedi, learned Additional Advocate General of U.P. and Shri B.B. Singh, learned counsel for the State of Bihar, have taken notice on behalf of the States of Uttar Pradesh and Bihar respectively. They are directed to obtain the copy of the judgment and send the same to the respective States and to ensure implementation of directions issued by this Court from time to time to implement the welfare measures envisaged in the above orders until the principles and policies to be evolved in the afore- directed conference and implemented throughout the country.

15. Post this matter after three months.

16. The writ petitions are accordingly, disposed of subject to the above directions.

CHAPTER XI

THE RIGHT TO HOUSING

Contents:

The Government of the Republic of South Africa (First Appellant), the Premier of the Province of the Western Cape (Second Appellant), the Cape Metropolitan Council (Third Appellant) and the Oostenberg Municipality (Fourth Appellant) v. *Irene Grootboom and others (Respondents)*

(Case CCT 11/00)[*]

Constitutional Court of South Africa

JUDGEMENT

A. *Introduction*

1. The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our

[*] Heard on: 11 May 2000, Decided on: 4 October 2000.

Constitution records this commitment. The Constitution declares the founding values of our society to be human dignity, the achievement of equality and the advancement of human rights and freedoms.[1] This case grapples with the realisation of these aspirations for it concerns the state's constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa's new constitutional order.

2. The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.

3. The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing. They are the people whose constitutional rights have to be determined in this case.

4. Mrs Irene Grootboom and the other respondents[2] were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court (the High Court) for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.[3] The appellants were ordered to provide the respondents who were children and their parents with shelter. The judgment provisionally concluded that tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum.[4] The appellants who represent all spheres of government responsible for housing[5] challenge the correctness of that order.

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[1] See section 1(a) of the Constitution.

[2] The respondents are 510 children and 390 adults. Mrs Irene Grootboom, the first respondent, brought the application before the High Court on behalf of all the respondents.

[3] The judgment of Davis J in which Comrie J concurred is reported as Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (C).

[4] Id at 293A.

[5] The first appellant is the Government of the Republic of South Africa (the national government); the second is the Premier of the Province of the Western Cape representing the Western Cape Provincial Government (the Western Cape government); the third appellant, the Cape Metropolitan Council (the Cape Metro) is the supervisory tier of local government in

5. At the hearing of this matter an offer was made by the appellants to ameliorate the immediate crisis situation in which the respondents were living. The offer was accepted by the respondents. This meant that the matter was not as urgent as it otherwise would have been. However some four months after argument, the respondents made an urgent application to this Court in which they revealed that the appellants had failed to comply with the terms of their offer. That application was set down for 21 September 2000. On that day the Court, after communication with the parties, crafted an order putting the municipality on terms to provide certain rudimentary services.

6. The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas.[6] Influx control was rigorously enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the coloured labour preference policy. In consequence, the provision of family housing for African people in the Cape Peninsula was frozen in 1962. This freeze was extended to other urban areas in the Western Cape in 1968. Despite the harsh application of influx control in the Western Cape, African people continued to move to the area in search of jobs. Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape peninsula. The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals.[7] The legacy of influx control in the Western Cape is the acute housing shortage that exists there now. Although the precise extent is uncertain, the shortage stood at more than 100,000 units in the Cape Metro at the time of the inception of the interim Constitution in 1994. Hundreds of thousands of people in need of housing occupied rudimentary informal settlements providing for minimal shelter, but little else.

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the area; and the fourth appellant is the Oostenberg Municipality (the municipality) which is a further tier of local government. All the appellants are organs of government.

[6] The background to this policy was set out fully in the majority judgment of this court in Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another 2000 (4) BCLR 347 (CC) paras. 41-47.

[7] In 1985 when the coloured labour preference policy was finally abolished, it became possible for African people to acquire 99-year leasehold tenure in the Western Cape (this form of tenure had been established in the rest of the country in 1978). The following year the government abandoned its policy of influx control in its entirety.

7. Mrs Grootboom and most of the other respondents previously lived in an informal squatter settlement called Wallacedene. It lies on the edge of the municipal area of Oostenberg, which in turn is on the eastern fringe of the Cape Metro. The conditions under which most of the residents of Wallacedene lived were lamentable. A quarter of the households of Wallacedene had no income at all, and more than two thirds earned less than R500 per month.[8] About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare. Mrs Grootboom lived with her family and her sister's family in a shack about twenty metres square.

8. Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from the municipality no definite answer was given. Clearly it was going to be a long wait. Faced with the prospect of remaining in intolerable conditions indefinitely, the respondents began to move out of Wallacedene at the end of September 1998. They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing. They called the land "New Rust".

9. They did not have the consent of the owner and on 8 December 1998 he obtained an ejectment order against them in the magistrates' court. The order was served on the occupants but they remained in occupation beyond the date by which they had been ordered to vacate. Mrs Grootboom says they had nowhere else to go: their former sites in Wallacedene had been filled by others. The eviction proceedings were renewed in March 1999. The respondents' attorneys in this case were appointed by the magistrate to represent them on the return day of the provisional order of eviction. Negotiations resulted in the grant of an order requiring the occupants to vacate New Rust and authorising the sheriff to evict them and to dismantle and remove any of their structures remaining on the land on 19 May 1999. The magistrate also directed that the parties and the municipality mediate to identify alternative land for the permanent or temporary occupation of the New Rust residents.

10. The municipality had not been party to the proceedings but it had engaged attorneys to monitor them on its behalf. It is not clear whether the municipality was a party to the settlement and the agreement to mediate. Nor is it clear whether the eviction was in accordance with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.[9] The validity of the

[8] The figures appear from a needs assessment of the Wallacedene community compiled in December 1997 on behalf of the municipality.

[9] Section 4(6) provides: "If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the

eviction order has never been challenged and must be accepted as correct. However, no mediation took place and on 18 May 1999, at the beginning of the cold, windy and rainy Cape winter, the respondents were forcibly evicted at the municipality's expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings.

11. The respondents went and sheltered on the Wallacedene sports field under such temporary structures as they could muster. Within a week the winter rains started and the plastic sheeting they had erected afforded scant protection. The next day the respondents' attorney wrote to the municipality describing the intolerable conditions under which his clients were living and demanded that the municipality meet its constitutional obligations and provide temporary accommodation to the respondents. The respondents were not satisfied with the response of the municipality[10] and launched an urgent application in the High Court on 31 May 1999. As indicated above, the High Court granted relief to the respondents and the appellants now appeal against that relief.

12. In the remainder of this judgment, I first outline the reasoning adopted in the High Court judgment. Consideration is then given to the right of access to adequate housing in section 26 of the Constitution and the proper approach to be adopted to the application of that section. This is followed by evaluation of the housing programme adopted by the state in the light of the obligations imposed upon it by section 26. The respondents' claim in terms of the rights of children in section 28 of the Constitution is thereafter considered. Finally, the respondents' arguments concerning the conduct of the appellants towards them will be examined.

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relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

Section 4(7) provides: "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[10] The municipality responded on 27 May 1999 stating that it had supplied food and shelter at the Wallacedene Community Hall to the respondents and that it was approaching Western Cape government for assistance to resolve the problem. The respondents, however, considered that the Community Hall provided inadequate shelter as it could only house 80 people.

B. *The case in the High Court*

13. Mrs Grootboom and the other respondents applied for an order directing the appellants forthwith to provide:

> (i) adequate basic temporary shelter or housing to the respondents and their children pending their obtaining permanent accommodation;
>
> (ii) or basic nutrition, shelter, healthcare and social services to the respondents who are children.[11]

The respondents based their claim on two constitutional provisions. First, on section 26 of the Constitution which provides that everyone has the right of access to adequate housing. Section 26(2) imposes an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources. The section is fully considered later in this judgment. The second basis for their claim was section 28(1)(c) of the Constitution which provides that children have the right to shelter.

14. After conducting an inspection *in loco*, Josman AJ ordered that, pending the final determination of the application, temporary accommodation be provided for those of the respondents who were children and for one parent of each child who required supervision. Appellants furnished comprehensive answering affidavits to demonstrate that the state housing programme complied with their constitutional obligations. On the return day, the matter came before two judges. The High Court judgment consists of two separate parts. The first, under the heading "Housing" considered the claim in terms of section 26 of the Constitution. On this part of the claim the High Court concluded:

> "In short [appellants] are faced with a massive shortage in available housing and an extremely constrained budget. Furthermore in terms of the pressing demands and scarce resources [appellants] had implemented a housing programme in an attempt to maximise available resources to redress the housing shortage. For this reason it could not be said that [appellants] had not taken reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to have access to adequate housing."[12]

The court rejected an argument that the right of access to adequate housing under section 26 included a minimum core entitlement to shelter in terms of which the state was obliged to provide some form of shelter pending implementation of the

[11] Above n 3 at 280F-G.
[12] Above n 3 at 285A-B.

programme to provide adequate housing. This submission was based on the provisions of certain international instruments that are discussed later.[13]

15. The second part of the judgment addressed the claim of the children for shelter in terms of section 28(1)(c). The court reasoned that the parents bore the primary obligation to provide shelter for their children, but that section 28(1)(c) imposed an obligation on the state to provide that shelter if parents could not. It went on to say that the shelter to be provided according to this obligation was a significantly more rudimentary form of protection from the elements than is provided by a house and falls short of adequate housing. The court concluded that:

> "an order which enforces a child's right to shelter should take account of the need of the child to be accompanied by his or her parent. Such an approach would be in accordance with the spirit and purport of section 28 as a whole."

16. In the result the court ordered as follows:

> "(2) It is declared, in terms of section 28 of the Constitution that;
>
> (a) the applicant children are entitled to be provided with shelter by the appropriate organ or department of state;
>
> (b) the applicant parents are entitled to be accommodated with their children in the aforegoing shelter; and
>
> (c) the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children;
>
> (3) The several respondents are directed to present under oath a report or reports to this Court as to the implementation of paragraph (2) above within a period of three months from the date of this order;
>
> (4) The applicants shall have a period of one month, after presentation of the aforegoing report, to deliver their commentary thereon under oath;
>
> (5) The respondents shall have a further period of two weeks to deliver their replies under oath to the applicants' commentary;
>
> (6) There will be no order as to costs of these proceedings up to the date of this judgment;

[13] The International Covenant on Economic, Social and Cultural Rights, and the general comments issued by the United Nations Committee on Social and Economic Rights.

> (7) The case is postponed to a date to be fixed by the Registrar for consideration and determination of the aforesaid report, commentary and replies;
>
> (8) The order of Josman AJ dated 4 June 1999 will remain in force until such time as the further proceedings contemplated by the preceding paragraph have been completed."[14]

C. *Argument in this Court*

17. After the application for leave to appeal had been granted by this Court but before argument had been filed by any of the parties, the Human Rights Commission and the Community Law Centre of the University of the Western Cape applied to be admitted as *amici curiae*. That application was granted and the *amici* were permitted to present written and oral argument. Mr Budlender of the Legal Resources Centre submitted written argument and appeared on behalf of the *amici* at the hearing. We are grateful to him, the Human Rights Commission and the Community Law Centre for a detailed, helpful and creative approach to the difficult and sensitive issues involved in this case.

18. Written argument submitted on behalf of the appellants and the respondents concentrated on the meaning and import of the shelter component and the obligations imposed upon the state by section 28(1)(c). The written argument filed on behalf of the *amici* sought to broaden the issues by contending that all the respondents, including those of the adult respondents without children, were entitled to shelter by reason of the minimum core obligation incurred by the state in terms of section 26 of the Constitution. It was further contended on behalf of the *amici* that the children's right to shelter had been included in section 28(1)(c) to place the right of children to this minimum core beyond doubt. Respondents' counsel filed further written contentions in which they supported and adopted these submissions. No objection was taken to the issues having been thus broadened.

D. *The relevant constitutional provisions and their justiciability*

19. The key constitutional provisions at issue in this case are section 26 and section 28(1)(c). Section 26 provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[14] Above n 3 at 293H-294C.

Section 28(1)(c) provides:

> "(1) Every child has the right - . . . (c) to basic nutrition, shelter, basic health care services and social services."

These rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. They entrench the right of access to land, to adequate housing and to healthcare, food, water and social security. They also protect the rights of the child[15] and the right to education.[16]

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[15] Section 28 provides:

"A(1) Every child has the right :

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a matter of last resort, in which case, in addition to the rights the child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

(i) kept separately from detained person over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section a child means a person under the age of 18 years."

[16] Section 29(1) provides:

"A(1) Everyone has the right

(a) to a basic education, including adult basic education, and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public education institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account;

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that

20. While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate,[17] the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment.[18] During the certification proceedings before this Court, it was contended that they were not justiciable and should therefore not have been included in the text of the new Constitution. In response to this argument, this Court held:

> "[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion."

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution,

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(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are of no inferior to standards at comparable public educational institutions."

[17] Haysom Constitutionalism, Majoritarian Democracy and Socio-Economic Rights (1992) 8 SA Journal of Human Rights at 451; Mureinik Beyond a Charter of Luxuries: Economic Rights in the Constitution (1992) 8 SA Journal of Human Rights at 464; Davis 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 SA Journal of Human Rights at 475; Liebenberg 'Social and Economic Rights: A Critical Challenge in Liebenberg (ed) The Constitution of South Africa from a Gender Perspective (The Community Law Centre at the University of the Western Cape in association with David Philip Publishers, Cape Town 1995) at 79; Corder et al A Charter For Social Justice: A contribution to the South African Bill of Rights debate (University of Cape Town, Cape Town 1992) at 18; Scott and Macklem 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 University of Pennsylvania Law Review at 1; De Villiers Social and Economic Rights in van Wyk, Dugard, De Villiers and Davis (eds) Rights and Constitutionalism: The New South African Legal Order (Juta, Cape Town, 1994) at 599; South African Law Commission Final Report on Group and Human Rights (Project 58, October 1994) at 179.

[18] Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) at para. 78.

but how to enforce them in a given case.[19] This is a very difficult issue which must be carefully explored on a case-by-case basis. To address the challenge raised in the present case, it is necessary first to consider the terms and context of the relevant constitutional provisions and their application to the circumstances of this case. Although the judgment of the High Court in favour of the appellants was based on the right to shelter (section 28(1)(c) of the Constitution), it is appropriate to consider the provisions of section 26 first so as to facilitate a contextual evaluation of section 28(1)(c).

E. *Obligations imposed upon the state by section 26*
i) *Approach to interpretation*

21. Like all the other rights in Chapter 2 of the Constitution (which contains the Bill of Rights), section 26 must be construed in its context. The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the state to promote access to adequate housing and has three key elements. The state is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of this right. These elements are discussed later. The third subsection provides protection against arbitrary evictions.

22. Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.

23. Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

24. The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their

[19] Section 38 of the Constitution empowers the Court to grant appropriate relief for the infringement of any right entrenched in the Bill of Rights.

interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.

25. Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality.[20] The context in which the Bill of Rights is to be interpreted was described by Chaskalson P in *Soobramoney*:[21]

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[22]

ii) *The relevant international law and its impact*

26. During argument, considerable weight was attached to the value of international law in interpreting section 26 of our Constitution. Section 39 of the Constitution[23] obliges a court to consider international law as a tool to interpretation of the Bill of

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[20] See, for example, Brink v Kitshoff NO 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC); Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC). For an application of this type of contextual interpretation, see also S v Makwanyane and Another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC); Shabalala and Others v Attorney-General, Transvaal and Another 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC).

[21] Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para. 8.

[22] See also the comments of Mahomed DP in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para. 43, albeit in a different context.

[23] Section 39 of the Constitution provides:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie and open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

Rights. In *Makwanyane*[24] Chaskalson P, in the context of section 35(1) of the interim Constitution,[25] said:

> "public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]." (Footnotes omitted)

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa,[26] it may be directly applicable.

27. The *amici* submitted that the International Covenant on Economic, Social and Cultural Rights (the Covenant)[27] is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution. Article 11.1 of the Covenant provides:

> "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

This Article must be read with Article 2.1 which provides:

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[24] S v Makwanyane and Another above n 20 at para. 35.

[25] Section 35(1) of the interim Constitution provides:

"In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

[26] See sections 231-235 of the Constitution which regulate the application of international law in detail.

[27] The Covenant was signed by South Africa on 3 October 1994 but has as yet not been ratified.

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

28. The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26. These differences, in so far as they relate to housing, are:

(a) The Covenant provides for a *right to adequate housing* while section 26 provides for the r*ight of access* to adequate housing.
(b) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.

29. The obligations undertaken by states parties to the Covenant are monitored by the United Nations Committee on Economic, Social and Cultural Rights (the committee).[28] The *amici* relied on the relevant general comments issued by the committee concerning the interpretation and application of the Covenant, and argued that these general comments constitute a significant guide to the interpretation of section 26. In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of general comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core:

> "10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'etre. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within

[28] The committee consists of eighteen independent experts. Its purpose is to assist the United Nations Economic and Social Council to carry out its responsibilities relating to the implementation of the Covenant. See Craven The International Covenant on Economic, Social and Cultural Rights (Clarendon, Oxford 1995) at 1 and 42.

> the country concerned. Article 2(1) obligates each State party to take the necessary steps to the maximum of its available resources. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."

30. It is clear from this extract that the committee considers that every state party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing. Accordingly, a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant. A state party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right. However, it is to be noted that the general comment does not specify precisely what that minimum core is.

31. The concept of minimum core obligation was developed by the committee to describe the minimum expected of a state in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a minimum essential level "that must be satisfied by the states parties. The committee developed this concept based on extensive experience gained by [it] . . . over a period of more than a decade of examining States parties' reports". The general comment is based on reports furnished by the reporting states and the general comment is therefore largely descriptive of how the states have complied with their obligations under the Covenant. The committee has also used the general comment as a means of developing a common understanding of the norms by establishing a prescriptive definition.[29] Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.

32. It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The

[29] Id at 91.

committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information.

33. The determination of a minimum core in the context of "the right to have access to adequate housing" presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.

iii) *Analysis of section 26*

34. I consider the meaning and scope of section 26 in its context. Its provisions are repeated for convenience:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

Subsections (1) and (2) are related and must be read together. Subsection (1) aims at delineating the scope of the right. It is a right of everyone including children. Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.[30] The negative right is further spelt out in subsection (3) which prohibits arbitrary evictions. Access to housing could also be promoted if steps are taken to make the rural areas of our

[30] See, in this regard, the Certification judgment, above para 20.

country more viable so as to limit the inexorable migration of people from rural to urban areas in search of jobs.

35. The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

36. In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.

37. The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.

38. Subsection (2) speaks to the positive "obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its

obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources".

Reasonable legislative and other measures

39. What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government.[31] The last of these may, as it does in this case, comprise two tiers.[32] The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government.[33] Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern.[34] A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.

40. Thus, a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis.[35] Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met.[36]

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[31] See Chapter 3 of the Constitution.
[32] See sections 155(1)(b) and (c) of the Constitution as well as section 7(1)(b), read with sections 10B and 10C, of the Local Government Transition Act, 209 of 1993.
[33] See schedule 4 of the Constitution.
[34] See section 152(1)(b), read with sections 152(2) and 153(a).
[35] See section 214 of the Constitution, and, in particular, sections 214(2)(d) and (f).
[36] See sections 100, 139 and 155(7) of the Constitution.

41. The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

42. The state is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

43. In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.

44. Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability

to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

Progressive realisation of the right

45. The extent and content of the obligation consist in what must be achieved, that is, "the progressive realisation of this right". It links subsections (1) and (2) by making it quite clear that the right referred to is the right of access to adequate housing. The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The phrase is taken from international law and Article 2.1 of the Covenant in particular.[37] The committee has helpfully analysed this requirement in the context of housing as follows:

> "Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[38]

Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of "progressive realisation" in the context of our Constitution. The meaning ascribed to

[37] The text of Article 2.1 appears at para. 27 above.
[38] Para. 9 of general comment 3, 1990.

the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.

Within available resources

46. The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources. As Chaskalson P said in *Soobramoney*:[39]

> "What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled."

There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

F. *Description and evaluation of the state housing programme*

47. In support of their contention that they had complied with the obligation imposed upon them by section 26, the appellants placed evidence before this Court of the legislative and other measures they had adopted. There is in place both national and provincial legislation concerned with housing.[40] It was explained that in 1994 the state inherited fragmented housing arrangements which involved thirteen statutory housing funds, seven ministries and housing departments, more than twenty subsidy systems and more than sixty national and regional parastatals operating on a racial basis. These have been rationalised. The national Housing Act provides a framework which establishes the responsibilities and functions of each sphere of government with regard to housing. The responsibility for implementation is generally given to the provinces. Provinces in turn have assigned certain

[39] See n 21 above at para. 11.

[40] Examples of important legislation in this field include the Housing Act, 107 of 1997; the Housing Consumers Protection Measures Act, 95 of 1998; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998; the Development Facilitation Act, 67 of 1995; and the Western Cape Housing Development Act, 6 of 1999.

implementation functions to local government structures in many cases. All spheres of government are intimately involved in housing delivery and the budget allocated by national government appears to be substantial. There is a single housing policy and a subsidy system that targets low-income earners regardless of race. The White Paper on Housing aims to stabilise the housing environment, establish institutional arrangements, protect consumers, rationalise institutional capacity within a sustainable long-term framework, facilitate the speedy release and servicing of land and co-ordinate and integrate the public sector investment in housing. In addition, various schemes are in place involving public/private partnerships aimed at ensuring that housing provision is effectively financed.

48. "Housing development" is defined in section 1 of the Housing Act as:

> "the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to
>
> (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
>
> (b) potable water, adequate sanitary facilities and domestic energy supply . . ."

"Housing development project is defined as any plan to undertake housing development as contemplated in any national housing programme."

49. Section 2(1) of the Act sets out the general principles binding on national, provincial and local spheres of government. I set out those principles are that material to the determination of this case. All levels of government must:

> "(a) give priority to the needs of the poor in respect of housing development;
>
> (b) consult meaningfully with individuals and communities affected by housing development;
>
> (c) ensure that housing development
>
> > (i) provides as wide a choice of housing and tenure options as is reasonably possible;
> >
> > (ii) is economically, fiscally, socially and financially affordable and sustainable; is based on integrated development planning; and

> is administered in a transparent, accountable and equitable manner, and upholds the practice of good governance . . .
>
> (e) promote
>
> > (i) education and consumer protection in respect of housing development;
> >
> > (ii) conditions in which everyone meets their obligations in respect of housing development;
> >
> > (iii) the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions . . .
> >
> > (ix) the provision of community and recreational facilities in residential areas;
>
> (f) take due cognisance of the impact of housing development on the environment . . .
>
> (h) in the administration of any matter relating to housing development
>
> > (i) respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter 2 of the Constitution;
> >
> > (ii) observe and adhere to the principles of co-operative government and intergovernmental relations referred to in section 41 (1) of the Constitution; and
> >
> > (iii) comply with all other applicable provisions of the Constitution."

50. Over and above these general principles, the Act sets out the functions of the national, provincial and local government in relation to housing. The functions of national government are set out in section 3 of the Act.[41] The function of provincial

[41] Section 3 provides:
"(1) The national government acting through the Minister must, after consultation with every MEC and the national organisation representing municipalities as contemplated in section 163 (a) of the Constitution, establish and facilitate a sustainable national housing development process.
(2) For the purposes of subsection (1) the Minister must
(a) determine national policy, including national norms and standards, in respect of housing development;
(b) set broad national housing delivery goals and facilitate the setting of provincial and, where appropriate, local government housing delivery goals in support thereof;

governments are set out in section 7 of the Act[42] and the functions of municipalities are set out in section 9 of the Act.[43] The responsibilities of local government in the

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(c) monitor the performance of the national government and, in co-operation with every MEC, the performance of provincial and local governments against housing delivery goals and budgetary goals;
(d) assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their duties in respect of housing development;
(e) support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their duties in respect of housing development;
(f) promote consultation on matters regarding housing development between the national government and representatives of
(i) civil society
(ii) the sectors and subsectors supplying or financing housing goods or services;
(iii) provincial and local governments; and
(iv) any other stakeholder in housing development;
(g) promote effective communication in respect of housing development.

(3) For the purposes of subsection (2) (a) 'national norms and standards' includes norms and standards in respect of permanent residential structures, but are not limited thereto.
(4) For the purposes of performing the duties imposed by subsections (1) and (2) the Minister may -

(a) establish a national institutional and funding framework for housing development;
(b) negotiate for the national apportionment of the state budget for housing development;
(c) prepare and maintain a multi-year national plan in respect of housing development;
(d) allocate funds for national housing programmes to provincial governments, including funds for national housing programmes administered by municipalities in terms of Section 10;
(e) allocate funds for national facilitative programmes for housing development;
(f) obtain funds for land acquisition, infrastructure development, housing provision and end-user finance;
(g) institute and finance national housing programmes;
(h) establish and finance national institutions for the purposes of housing development, and supervise the execution of their mandate;
(i) evaluate the performance of the housing sector against set goals and equitableness and effectiveness requirements; and
(j) take any steps reasonably necessary to
(i) create an environment conducive to enabling provincial and local governments, the private sector, communities and individuals to achieve their respective goals in respect of housing development; and
(ii) promote the effective functioning of the housing market."

[42] Section 7 provides:
"A(1) Every provincial government must, after consultation with the provincial organisations representing municipalities as contemplated in section 163 (a) of the Constitution, do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy.

(2) For the purposes of subsection (1) every provincial government must
(a) determine provincial policy in respect of housing development;
(b) promote the adoption of provincial legislation to ensure effective housing delivery;
(c) take all reasonable and necessary steps to support and strengthen the capacity of municipalities to effectively exercise their powers and perform their duties in respect of housing development;
(d) co-ordinate housing development in the province;
(e) take all reasonable and necessary steps to support municipalities in the exercise of their powers and the performance of their duties in respect of housing development;
(f) when a municipality cannot or does not perform a duty imposed by this Act, intervene by taking any appropriate steps in accordance with section 139 of the Constitution to ensure the performance of such duty; and
(g) prepare and maintain a multi-year plan in respect of the execution in the province of every national housing programme and every provincial housing programme, which is consistent with national housing policy and section 3 (2) (b), in accordance with the guidelines that the Minister approves for the financing of such a plan with money from the Fund . . .".

[43] Section 9 provides:
"(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to
(a) ensure that
(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;
(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;
(b) set housing delivery goals in respect of its area of jurisdiction;
(c) identify and designate land for housing development;
(d) create and maintain a public environment conducive to housing development which is financially and socially viable;
(e) promote the resolution of conflicts arising in the housing development process;
(f) initiate plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;
(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and
(h) plan and manage land use and development.
(2) (a) Any municipality may participate in a national housing programme in accordance with the rules applicable to such programme by-
(i) promoting a housing development project by a developer;
(ii) subject to paragraph (b), acting as developer in respect of the planning and execution of a housing development project on the basis of full pricing for cost and risk;
(iii) entering into a joint venture contract with a developer in respect of a housing development project;

Cape Metro, and in particular the relationship between metropolitan government on the one hand and municipal government on the other, have been regulated by an agreement entered into between the Cape Metro and the municipalities within its jurisdiction.[44]

51. It emerges from the general principles read together with the functions of national, provincial and local government that the concept of housing development as defined is central to the Act. Housing development, as defined, seeks to provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements. What is more, it endeavours to ensure convenient access to economic opportunities and to health, educational and social amenities. All the policy documents before the Court are postulated on the need for housing

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(iv) establishing a separate business entity to execute a housing development project;

(v) administering any national housing programme in respect of its area of jurisdiction in accordance with section 10;

(vi) facilitating and supporting the participation of other role players in the housing development process.

(b) If a municipality has been accredited under section 10 (2) to administer national housing programmes in terms of which a housing development project is being planned and executed, such municipality may not act as developer, unless such project has been approved by the relevant provincial housing development board.

(3) (a) A municipality may by notice in the Provincial Gazette expropriate any land required by it for the purposes of housing development in terms of any national housing programme, if

(i) it is unable to purchase the land on reasonable terms through negotiation with the owner thereof;

(ii) it has obtained the permission of the MEC to expropriate such land before the notice of expropriation is published in the Provincial Gazette; and

(iii) such notice of expropriation is published within six months of the date on which the permission of the MEC was granted.

(b) Sections 1, 6 to 15 and 18 to 23 of the Expropriation Act, 1975 (Act No 63 of 1975), apply, with the changes required by the context, in respect of the expropriation of land by a municipality in terms of paragraph (a), and any reference in any of those sections;

(i) to the Minister and the State must be construed as a reference to the chief executive officer of the relevant municipality and the relevant municipality, respectively;

(ii) to Section 2 must be construed as a reference to this subsection; and

(iii) to This Act must be construed as a reference to this Act.

[44] The agreement is entitled Agreement in respect of the allocation of powers, duties and functions entered into between Cape Metropolitan Council and The Metropolitan Local Councils of Cape Town, Eastern, Heidelberg, Northern, Southern, Tygerberg. This agreement was entered into on 30 September 1996 in accordance with the provisions of the Cape Metropolitan Further Enactment, the Cape Metropolitan Negotiating Forum Agreement and the Local Government Transition Act.

development as defined. This is the central thrust of the housing development policy.

52. The definition of housing development as well as the general principles that are set out do not contemplate the provision of housing that falls short of the definition of housing development in the Act. In other words there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act.

53. What has been done in execution of this programme is a major achievement. Large sums of money have been spent and a significant number of houses has been built.[45] Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery. It is a programme that is aimed at achieving the progressive realisation of the right of access to adequate housing.

54. A question that nevertheless must be answered is whether the measures adopted are reasonable within the meaning of section 26 of the Constitution. Allocation of responsibilities and functions has been coherently and comprehensively addressed. The programme is not haphazard but represents a systematic response to a pressing social need. It takes account of the housing shortage in South Africa by seeking to build a large number of homes for those in need of better housing. The programme applies throughout South Africa and although there have been difficulties of implementation in some areas, the evidence suggests that the state is actively seeking to combat these difficulties.

55. Legislative measures have been taken at both the national and provincial levels. As we have seen, at the national level the Housing Act sets out the general principles applicable to housing development, defines the functions of the three spheres of government and addresses the financing of housing development. It thus provides a legislative framework within which the delivery of houses is to take place nationally. At the provincial level there is the Western Cape Housing Development Act, 1999. This statute also sets out the general principles applicable to housing development; the role of the provincial government; the role of local government; and other matters relating to housing development. Thus, like the Housing Act, this statute provides a legislative framework within which housing development at

[45] Some 362 160 houses were built or under construction between March 1994 and September 1997, while an overall total of some 637 190 subsidies had been allocated for projects in various stages of planning or development by October 1997.

provincial level will take place. All of the measures described form part of the nationwide housing programme.

56. This Court must decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. This must be done in the context of the scope of the housing problem that must be addressed. This case is concerned with the situation in the Cape Metro and the municipality and the circumstances that prevailed there are therefore presented.

57. The housing shortage in the Cape Metro is acute. About 206 000 housing units are required and up to 25 000 housing opportunities are required in Oostenberg itself. Shack counts in the Cape Metro in general and in the area of the municipality in particular reveal an inordinate problem. 28 300 shacks were counted in the Cape Metro in January 1993. This number had grown to 59 854 in 1996 and to 72 140 by 1998. Shacks in this area increased by 111 percent during the period 1993 to 1996 and by 21 percent from then until 1998. There were 2121 shacks in the area of the municipality in 1993, 5701 (an increase of 168 percent) in 1996 and 7546 (an increase of 32 percent) in 1998. These are the results of a study commissioned by the Cape Metro.

58. The study concludes that the municipality "is the most critical local authority in terms of informal settlement shack growth at this point in time", this despite the fact that, according to an affidavit by a representative of the municipality, 10 577 houses had been completed by 1997. The scope of the problem is perhaps most sharply illustrated by this: about 22 000 houses are built in the Western Cape each year while demand grows at a rate of 20 000 family units per year. The backlog is therefore likely to be reduced, resources permitting and, on the basis of the figures in this study, only by 2 000 houses a year.

59. The housing situation is desperate. The problem is compounded by rampant unemployment and poverty. As was pointed out earlier in this judgment, a quarter of the households in Wallacedene had no income at all, and more than two-thirds earned less than R500-00 per month during 1997. As stated above, many of the families living in Wallacedene are living in intolerable conditions. In some cases, their shacks are permanently flooded during the winter rains, others are severely overcrowded and some are perilously close to busy roads. There is no suggestion that Wallacedene is unusual in this respect. It is these conditions which ultimately forced the respondents to leave their homes there.

60. The Cape Metro has realised that this desperate situation requires government action that is different in nature from that encompassed by the housing development policy described earlier in this judgment. It drafted a programme (the Cape Metro

land programme) in June 1999, some months after the respondents had been evicted. It wrote:

> "From the above, it is seen that there is a complete mismatch between demand and supply in the housing sector, resulting in a crisis in housing delivery.
>
> However, the existing housing situation cannot just be accepted, as there are many families living in crisis conditions, or alternatively, there are situations in the [Cape Metro] where local authorities need to undertake legal proceedings (evictions) in order to administer and implement housing projects. A new housing programme needed [sic] to cater for the crisis housing conditions in the [Cape Metro]. The proposed programme is called an Accelerated Managed Land Settlement Programme."

Later in the document, the programme is briefly described as follows:

> "The Accelerated Managed Land Settlement Programme (AMSLP) can therefore be described as the rapid release of land for families in crisis, with the progressive provision of services.
>
> This programme should benefit those families in situations of crisis. The programme does not offer any benefits to queue jumpers, as it is the Metropolitan Local Council who determines when the progressive upgrading of services will be taken.
>
> The Accelerated Managed Land Settlement Programme (AMSLP) includes the identification and purchase of land, planning, identification of the beneficiaries, township approval, pegging of the erven, construction of basic services, resettlement and the transfer of land to the beneficiaries."

We were informed by counsel during the hearing that although this programme was not in force at the time these proceedings were commenced, it has now been adopted and is being implemented.

61. The Cape Metro land programme was formulated by the Cape Metro specifically "to assist the metropolitan local councils to manage the settlement of families in crisis". Important features of this programme are its recognition of (i) the absence of provision for people living in crisis conditions; (ii) the unacceptability of having families living in crisis conditions; (iii) the consequent risk of land invasions; and (iv) the gap between the supply and demand of housing resulting in a delivery crisis. Crucially, the programme acknowledges that its beneficiaries are families who are to be evicted, those who are in a crisis situation in an existing area such as in a flood-line, families located on strategic land and families from backyard shacks or on the waiting list who are in crisis situations. Its primary objective is the rapid release of land for these families in crisis, with services to be upgraded progressively.

62. In devising its programme the Cape Metro said the following:

> "Local government, by virtue of the powers and functions granted to it by national and provincial legislation and policy, needs to initiate, facilitate and develop housing projects. Part of this role is also the identification of vacant land for housing. There are currently a few programmes that are available to finance housing projects, for example, the project-linked subsidy, institutional subsidy and CMIP. None of these programmes deal directly with crisis situations in the housing field. The Accelerated Managed Land Settlement Programme (AMLSP) can therefore be described as the rapid release of land for families in crisis, with the progressive provision of services."

63. Section 26 requires that the legislative and other measures adopted by the state are reasonable. To determine whether the nationwide housing programme as applied in the Cape Metro is reasonable within the meaning of the section, one must consider whether the absence of a component catering for those in desperate need is reasonable in the circumstances. It is common cause that, except for the Cape Metro land programme, there is no provision in the nationwide housing programme as applied within the Cape Metro for people in desperate need.

64. Counsel for the appellants supported the nationwide housing programme and resisted the notion that provision of relief for people in desperate need was appropriate in it. Counsel also submitted that section 26 did not require the provision of this relief. Indeed, the contention was that provision for people in desperate need would detract significantly from integrated housing development as defined in the Act. The housing development policy as set out in the Act is in itself laudable. It has medium and long term objectives that cannot be criticised. But the question is whether a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by the section.

65. The absence of this component may have been acceptable if the nationwide housing programme would result in affordable houses for most people within a reasonably short time. However the scale of the problem is such that this simply cannot happen. Each individual housing project could be expected to take years and the provision of houses for all in the area of the municipality and in the Cape Metro is likely to take a long time indeed. The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide

housing programme. That is one of the main reasons why the Cape Metro land programme was adopted.

66. The national government bears the overall responsibility for ensuring that the state complies with the obligations imposed upon it by section 26. The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.

67. This case is concerned with the Cape Metro and the municipality. The former has realised that this need has not been fulfilled and has put in place its land programme in an effort to fulfil it. This programme, on the face of it, meets the obligation which the state has towards people in the position of the respondents in the Cape Metro. Indeed, the *amicus* accepted that this programme "would cater precisely for the needs of people such as the respondents, and, in an appropriate and sustainable manner". However, as with legislative measures, the existence of the programme is a starting point only. What remains is the implementation of the programme by taking all reasonable steps that are necessary to initiate and sustain it. And it must be implemented with due regard to the urgency of the situations it is intended to address.

68. Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper co-operation between the different spheres of government.

69. In conclusion it has been established in this case that as of the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier. I come later to the order that should flow from this conclusion.

G. *Section 28(1)(c) and the right to shelter*

70. The judgment of the High Court amounts to this: (a) section 28(1)(c) obliges the state to provide rudimentary shelter to children and their parents on demand if

parents are unable to shelter their children; (b) this obligation exists independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26; and (c) the state is bound to provide this rudimentary shelter irrespective of the availability of resources. On this reasoning, parents with their children have two distinct rights: the right of access to adequate housing in terms of section 26 as well as a right to claim shelter on demand in terms of section 28(1)(c).

71. This reasoning produces an anomalous result. People who have children have a direct and enforceable right to housing under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are.

72. The respondents and the *amici* in supporting the judgment of the High Court draw a distinction between housing on the one hand and shelter on the other. They contend that shelter is an attenuated form of housing and that the state is obliged to provide shelter to all children on demand. The respondents and the *amici* emphasise that the right of children to shelter is unqualified and that, the "reasonable measures" qualification embodied in sections 25(5) 26, 27 and 29 are markedly absent in relation to section 28(1)(c). The appellants disagree and criticise the respondents' definition of shelter on the basis that it conceives shelter in terms that limit it to a material object. They contend that shelter is more than just that, but define it as an institution constructed by the state in which children are housed away from their parents.

73. I cannot accept that the Constitution draws any real distinction between housing on the one hand and shelter on the other, and that shelter is a rudimentary form of housing. Housing and shelter are related concepts and one of the aims of housing is to provide physical shelter. But shelter is not a commodity separate from housing. There is no doubt that all shelter represents protection from the elements and possibly even from danger. There are a range of ways in which shelter may be constituted: shelter may be ineffective or rudimentary at the one extreme and very effective and even ideal at the other. The concept of shelter in section 28(1)(c) is not qualified by any requirement that it should be "basic" shelter. It follows that the Constitution does not limit the concept of shelter to basic shelter alone. The concept of shelter in section 28 (1)(c) embraces shelter in all its manifestations. However, it does not follow that the Constitution obliges the state to provide shelter at the most effective or the most rudimentary level to children in the company of their parents.

74. The obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27 of the Constitution.[46] Each of these sections expressly obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the rights with which they are concerned.[47] Section 28(1)(c) creates the right of children to basic nutrition, shelter, basic health care services and social services. There is an evident overlap between the rights created by sections 26 and 27 and those conferred on children by section 28. Apart from this overlap, the section 26 and 27 rights are conferred on everyone including children while section 28, on its face, accords rights to children alone. This overlap is not consistent with the notion that section 28(1)(c) creates separate and independent rights for children and their parents.

75. The extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms to meet these obligations. It requires the state to take steps to ensure that children's rights are observed. In the first instance, the state does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programmes.

76. Section 28(1)(c) must be read in this context. Subsections 28(1)(b) and (c) provide:

> "Every child has the right . . .
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
> (c) to basic nutrition, shelter, basic health care services and social services."

They must be read together. They ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. The section encapsulates the conception of the scope of

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[46] These sections are set out in para. 19 of this judgment.

[47] Section 25(5) mandates the state to foster conditions which enables citizens to gain land on an equitable basis; section 26(2) is concerned with the right to access to adequate housing; section 27(2) with the right to access to health care services, sufficient food and water and social security including appropriate social assistance if people are unable to support themselves and their dependants.

care that children should receive in our society. Subsection (1)(b) defines those responsible for giving care while subsection (1)(c) lists various aspects of the care entitlement.

77. It follows from subsection 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.

78. This does not mean, however, that the state incurs no obligation in relation to children who are being cared for by their parents or families. In the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation,[48] and the prevention of other forms of abuse of children mentioned in section 28. In addition, the state is required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. It follows from this judgment that sections 25 and 27 require the state to provide access on a programmatic and coordinated basis, subject to available resources. One of the ways in which the state would meet its section 27 obligations would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.

79. It was not contended that the children who are respondents in this case should be provided with shelter apart from their parents. Those of the respondents in this case who are children are being cared for by their parents; they are not in the care of the state, in any alternative care, or abandoned. In the circumstances of this case, therefore, there was no obligation upon the state to provide shelter to those of the respondents who were children and, through them, their parents in terms of section 28(1)(c). The High Court therefore erred in making the order it did on the basis of this section.

H. *Evaluation of the conduct of the appellants towards the respondents*

80. The final section of this judgment is concerned with whether the respondents are entitled to some relief in the form of temporary housing because of their special

[48] See section 28(1)(d).

circumstances and because of the appellants' conduct towards them. This matter was raised in argument, and although not fully aired in the papers, it is appropriate to consider it. At first blush, the respondents' position was so acute and untenable when the High Court heard the case that simple humanity called for some form of immediate and urgent relief. They had left Wallacedene because of their intolerable circumstances, had been evicted in a way that left a great deal to be desired and, as a result, lived in desperate sub-human conditions on the Wallacedene soccer field or in the Wallacedene community hall. But we must also remember that the respondents are not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout our country.

81. Although the conditions in which the respondents lived in Wallacedene were admittedly intolerable and although it is difficult to level any criticism against them for leaving the Wallacedene shack settlement, it is a painful reality that their circumstances were no worse than those of thousands of other people, including young children, who remained at Wallacedene. It cannot be said, on the evidence before us, that the respondents moved out of the Wallacedene settlement and occupied the land earmarked for low-cost housing development as a deliberate strategy to gain preference in the allocation of housing resources over thousands of other people who remained in intolerable conditions and who were also in urgent need of housing relief. It must be borne in mind however, that the effect of any order that constitutes a special dispensation for the respondents on account of their extraordinary circumstances is to accord that preference.

82. All levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms, and all state action in relation to housing falls to be assessed against the requirements of section 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.

83. But section 26 is not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that

human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen.

84. The national legislature recognises this. In the course of stating the general principles binding on all levels of government, the Housing Act provides that in the administration of any matter relating to housing development, all levels of government must respect, protect, promote and fulfil the rights in Chapter 2 of the Constitution.[49] In addition, section 2(1)(b) obliges all levels of government to consult meaningfully with individuals and communities affected by housing development. Moreover, section 9(1)(e) obliges municipalities to promote the resolution of conflict arising in the housing development process.

85. Consideration is now given to whether the state action (or inaction) in relation to the respondents met the required constitutional standard. It is a central feature of this judgment that the housing shortage in the area of the Cape Metro in general and Oostenberg in particular had reached crisis proportions. Wallacedene was obviously bursting and it was probable that people in desperation were going to find it difficult to resist the temptation to move out of the shack settlement onto unoccupied land in an effort to improve their position. This is what the respondents apparently did.

86. Whether the conduct of Mrs Grootboom and the other respondents constituted a land invasion was disputed on the papers. There was no suggestion however that the respondents' circumstances before their move to New Rust was anything but desperate. There is nothing in the papers to indicate any plan by the municipality to deal with the occupation of vacant land if it occurred. If there had been such a plan the appellants might well have acted differently.

87. The respondents began to move onto the New Rust Land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.

88. There is, however, no dispute that the municipality funded the eviction of the respondents. The magistrate who ordered the ejectment of the respondents directed a process of mediation in which the municipality was to be involved to identify some alternative land for the occupation for the New Rust residents. Although the reason for this is unclear from the papers, it is evident that no effective mediation took place. The state had an obligation to ensure, at the very least, that the eviction was

[49] See section 2(1)(h)(i).

humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.

89. In these circumstances, the municipality's response to the letter of the respondents' attorney left much to be desired. It will be recalled that the letter stated that discussions were being held with officials from the Provincial Administration in order to find an amicable solution to the problem. There is no evidence that the respondents were ever informed of the outcome of these discussions. The application was then opposed and argued on the basis that none of the appellants either individually or jointly could do anything at all to alleviate the problem. The Cape Metro, the Western Cape government and the national government were joined in the proceedings and would all have been aware of the respondents' plight.

90. In all these circumstances, the state may well have been in breach of its constitutional obligations. It may also be that the conduct of the municipality was inconsistent with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act. In addition, the municipality may have failed to meet the obligations imposed by the provisions of sections 2(1)(b), 2(1)(h)(i) and 9(1)(e) of the Housing Act. However no argument was addressed to this Court on these matters and we are not in a position to consider them further.

91. At the hearing in this Court, counsel for the national and Western Cape government, tendered a statement indicating that the respondents had, on that very day, been offered some alternative accommodation, not in fulfilment of any accepted constitutional obligation, but in the interests of humanity and pragmatism. Counsel for the respondents accepted the offer on their behalf. We were subsequently furnished with a copy of the arrangement which read as follows:

> "1. The Department of Planning, Local Government and Housing (Western Cape Province) undertakes in conjunction with the Oostenberg Municipality to provide temporary accommodation to the respondents on the Wallacedene Sportsfield until they can be housed in terms of the housing programmes available to the local authority, and in particular the Accelerated Land Managed Settlement Programme.
> 2. The temporary accommodation' comprises: a marked off site; provision for temporary structures intended to be waterproof; basic sanitation, water and refuse services.

3. The implementation of such measures is to be discussed with the Wallacedene community and the respondents."

Although, as indicated earlier, the special position of the respondents was aired during argument, the relief claimed by them was always grounded only in sections 26 and 28 of the Constitution and not on the breach of any statute (such as the Prevention of Illegal Evictions Act, or the Housing Act), the common law or any other provision of the Constitution. Accordingly, it is inappropriate for this Court to order any relief on grounds other than sections 26 or 28 of the Constitution.

92. This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.

I. *Summary and conclusion*

93. This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

94. I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.

95. Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand. The High Court order ought therefore not to have been made. However, section 26 does oblige the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.

96. In the light of the conclusions I have reached, it is necessary and appropriate to make a declaratory order. The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.

97. The Human Rights Commission is an *amicus* in this case. Section 184 (1) (c) of the Constitution places a duty on the Commission to "monitor and assess the observance of human rights in the Republic". Subsections (2) (a) and (b) give the Commission the power:

> (a) to investigate and to report on the observance of human rights;
> (b) to take steps to secure appropriate redress where human right have been violated.

Counsel for the Commission indicated during argument that the Commission had the duty and was prepared to monitor and report on the compliance by the state of its section 26 obligations. In the circumstances, the Commission will monitor and, if necessary, report in terms of these powers on the efforts made by the state to comply with its section 26 obligations in accordance with this judgment.

98. There will be no order as to costs.

J. *The Order*

99. The following order is made:

> 1. The appeal is allowed in part.
> 2. The order of the Cape of Good Hope High Court is set aside and the following is substituted for it:
>
> It is declared that:
>
> > (a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.
> >
> > (b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.

3. There is no order as to costs.

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Cameron AJ concur in the judgment of Yacoob J.

For the first and second appellants: JJ Gauntlett SC, A Schippers and N Bawa instructed by the State Attorney, Cape Town.
For the third and fourth appellants: JC Heunis SC and JW Olivier instructed by De Klerk & Van Gend for the third appellant and Marais Muller for the fourth appellant.
For the respondents: P Hodes SC, I Jamie and A Musikanth instructed by Apollos Smith & Associates.

Attorney for the *amici curiae*: GM Budlender instructed by the Legal Resources Centre.

P.G. Gupta (Appellant) v. *State of Gujarat and Others (Respondents)*

(1995 Supp (2) SCC 182)

Supreme Court of India

ORDER

In view of our judgment pronounced today in Special land Acquisition Officer v. Sidappa Omanna Tumari[1] the special leave petition is dismissed.

1995 Supp (2) Supreme Court Cases 182

Before : K. RAMASWAMY, S. MOHAN AND N. VENKATACHALA, JJ.

Civil Appeals No. 1529 of 1988 with Nos. 1525-1528 of 1988,[2] decided on December 4, 1994

A. Service Law - Government accommodation - Hire purchase scheme - Houses constructed for being rented to lower income group government servants, brought under - Entitlement to allotment of - Provision in Government Resolution entitling such of the government servants as had been allotted a better alternative accommodation elsewhere on concessional basis, held, tightly quashed by the High court as on the date of the resolution such government servants were either not in possession or were in illegal possession of the houses concerned. (Para. 5)

B. Service Law - Government accommodation - Hire purchase scheme - Houses, constructed at Ahmedabad for being rented to lower income group government servants, subsequent to shifting of the capital of the State of Gujarat from Bombay to Ahmedabad, brought under hire purchase scheme by a Government Resolution which also categorised the government servants for the purpose of priorities in the matter of allotment under the hire purchase scheme by a purpose of priorities in the matter of allotment under the hire purchase scheme - Last date for entitlement to priorities under the said resolution - Taking of the date of the Government Resolution by the High court as the date for the said purpose, held, neither arbitrary nor illegal - Cut-off date - Constitution of India, Art. 14. (Paras. 12 and 14)

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[1] 1992 Supp (2) SCC 168.

[2] From the Judgment and Order dated 7-11-1987 of the Gujarat High Court in S.C.A. No. 980 of 1980.

C. Gujarat Housing Board Act, 1961 (28 of 1961) - Ss. 74 and 82 - Scope and applicability - Houses constructed by the Board for allotment to weaker sections at Ahmedabad from Government of India funds - Subsequently the capital of the State of Gujarat shifting from Bombay to Ahmedabad - Consequently, on the State Government's request, the Government of India permitting the allotment of such houses to government servants on hire purchase basis subject to certain power by State under S. 82 - Regulations framed under S. 74 not applicable in such a case - Service Law - government accommodation. (Para. 6)

D. Service Law - Government accommodation - Hire purchase scheme - Rented houses, constructed for lower income group government servants, brought under - Entitlement to allotment of such houses - provision in Government Resolution entitling such of the government servants as had been transferred outside the city concerned on a permanent basis, held, rightly set aside by the High Court - Constitution of India, Arts. 19(1)(e), 21, 37, 38, 39(b) and 46 - International Covenant on Economic, Social and Cultural Rights, Art. 11(1). (Paras. 11,12 and 14)

Olga Tellis v. Bombay Municipal Corp., (1985) 3 SCC 545; Shantistar Builder v. Narayan Khimalal Totame, (1990) 1 SCC 520: AIR 1990 SC 630, referred to H-M/T/14138/SLA

Appeals dismissed

Advocates who appeared in this case :
N. Dushyant Dave, Ms. Meenakshi Arora and Harish J. Jhaveri, Advocates for the Appellants;
B.K. Mehta, Senior Advocate (Krishna Mahajan, P.H. Parekh and E.R. Kumar, Advocates, with him) for the Respondents

ORDER

1. Since common question of law has been raised, these appeals are being disposed of together. The Division Bench of the Gujarat High Court in its judgment dated 7-11-1987 decided Civil Application No. 980 of 1980 and batch. One of the questions therein raised was, whether the persons falling in categories *(iii)* and *(vi)* in the Government Resolution dated 18-2-1975 are entitled to priority in allotment of government quarters under hire purchase scheme? The High Court, after elaborate consideration, had concluded that:

> "In view of the aforesaid discussion, it must be held that the impugned resolutions dated 18-2-1975 and 10-3-1980 are legal and valid save and except priority categories (iii) and (vi) contained therein which are

quashed and set aside. Test of the resolutions shall be operated upon and implemented by the respondent authorities."

2. In these appeals, we are concerned only with regard to categories *(iii)* and *(vi)*. Admittedly, in the Lower Income Group Housing Scheme, 396 houses were constructed at Pahari at Ahmedabad and were allotted to the government employees on rental basis. Subsequently, the State Government had obtained sanction from the Central Government in May 1969 to convert the scheme into hire purchase scheme and for allotment to the government employees on the criteria indicated therein, namely, continuous residence for five years and also the eligibility criteria excluding the government servants who had already retired from service. Thereafter on 17-4-1971, the Government passed a resolution converting 200 out of 396 houses for allotment on hire purchase basis. On a further resolution dated 22-6-1972 all the 396 houses were pooled for allotment on hire purchase scheme. In the offending resolution the allotment was also sought to be given to category (iii), such of those employees working in Sachivalay (Secretariat) and originally allotted the house at Pahari at Ahmedabad but later they shifted their residence and they voluntarily vacated the houses and shifted to the houses allotted at Gandhinagar with better accommodation on concessional basis. It was also sought to be given to such of those employees in category (vi) who had been transferred outside Ahmedabad on a permanent basis. The entitlement under the scheme came to be challenged by some of the employees in the High Court. As stated earlier, the High Court while upholding other criteria for other categories, quashed the entitlement to the allotment to categories *(iii)* and *(vi)*. Thus, these appeals by special leave.

3. Shir Dave, learned counsel for the appellants, contends that initially when the Government of India had given permission for converting these houses for allotment from rental scheme to hire purchase basis, the requisite qualification of five years' stay therein was applicable. In view of the compulsion by the State Government, the category *(iii)* employees had shifted from Pahari to Gandhinagar. Therefore, they cannot be deprived of their entitlement to allotment on hire purchase basis.

4. Shri Mehta, learned Senior Counsel appearing for category *(vi)*, urges that the impugned Government Resolution militates against the statutory regulation of allotment made pursuant to Section 74 of the Gujarat Housing Board Act 1961 (for short 'the Act'). The Government have, therefore, no power under Section 82 of the Act to pass any resolution contrary to the statutory regulations. It is also contended that the lower income group housing scheme was initiated to benefit the people of lower income group having an annual income of Rs 6000 to purchase the houses on hire purchase scheme. The initial scheme to give benefit to the poorer employees has been given a go-by hitting hard the weaker segments among the employees and their rights and allotment on priority basis was, therefore, defeated. The criteria adopted by the Government are, therefore, irrational and arbitrary and it has no nexus between the object of allotment on hire purchase basis and the policy. The denial thereof to category *(vi)* employees violates Articles 14, 19 and 21 of the

Constitution. It is also contented that though none has challenged the entitlement to allotment of category *(vi)* employees, the High Court, after reserving the cases for consideration, had denied them the benefit in the judgment. Therefore, the High Court has committed manifest error of law.

5. Having given our anxious consideration to the contentions raised by the learned counsel for the appellants, we are of the considered view that there is no force in any of them. It is true that initially when the Government of India had given sanction for converting 396 lower income group houses from rental scheme to hire purchase scheme, category *(iii)* employees were in occupation of the respective allotted houses. It is seen that they had vacated the respective premises as they were allotted government houses having better accommodation at Gandhinagar at concessional rates. As on the date of the resolution passed by the Government, admittedly, they were not in possession of the houses at Pahari or some of them were in illegal occupation. In these circumstance, the conclusion reached by the high Court that the category *(iii)* employees are not entitled to the allotment, is just and reasonable. It is not vitiated by any error of law.

6. With regard to the exercise of power by the State under Section 82 of the Act vis-à-vis the regulations made under Section 74 of the Act, we need not go into that question. The reasons are eloquent. Though the lower income group houses were constructed for the allotment to the weaker sections from the funds allotted by the Government of India, after the bifurcation of the Bombay State, Gujarat State was formed and the capital of the State of Gujarat was shifted from Bombay to Ahmedabad in the year 1970. Thereafter at the request of the State Government, the Government of India had given permission for allotment of those houses to the government employees. The statutory exercise of power under Section 82 and operation of the regulations under Section 74, under these circumstances, have no bearing in relation to the allotment of these houses to the government employees in question. Thus, it is unnecessary for us to go into the question of legality of the exercise of the power by the Government under Section 82 vis-à-vis the statutory regulations made under Section 74 by the Board with previous consent of the State Government.

7. It is true that the Gujarat Housing Board had constructed houses under low income group scheme for allotment to the poorer segments of the society within prescribed annual income. Article 19(1)(e) protects the right to residence and settlement in any part of the territory of India. The protection of life assured under Article 21 has been given expanded meaning of right to life. It is settled law that all the related provisions under the Constitution must be read together and given meaning of widest amplitude to cover variety of rights which go to constitute the meaningful right to life. The Preamble to the Constitution says that the people of India having resolved to secure to all its citizens social and economic justice also made it subject to equality of status and opportunity to promote the dignity of the

individual in the united and integrated Bharat. Article 37 declares the rights in Part IV or fundamental law in the governance of the country. Article 39(b) enjoins that the ownership and control of the material resources of the community are to promote the welfare of the people by securing social and economic justice to the weaker sections so as to serve the common good to minimise the inequalities in income and endeavour to eliminate inequalities in status. The State, thereby, evolved the scheme to provide facilities and opportunities to the individuals and also groups of people who have no houses of their own. Article 46, in particular, enjoins that the State should promote with special care the economic interest of the weaker sections of the people and to protect them form social injustice.

8. Article 11(1) of the International Covenant on Economic, Social and Cultural Rights laid down that the States' parties to the Covenant recognise the right to everyone "to an adequate standard of living for himself and for his family including food, clothing and housing and to the continuous improvement of living conditions". The State parties will take appropriate steps to ensure the realisation of these rights. Recognising these obligations of the State and to give effect to the essential importance of international cooperation, the directions contained in Articles 38, 39, and 46, the Housing Scheme for allotment to lower income group of the people was made. Possession of real property is the basis for and the symbol of wealth and influence in society. To the poor, settlement with a fixed abode and right to residence guaranteed by Article 19(1)(e) remain more a teasing illusion unless the State provides them the means to have food, clothing and shelter so as to make their life meaningful and worth living with dignity.

9. In Olga Tellis v. Bombay Municipal Corp.[3], when the squatters and the pavement-dwellers were sought to be ejected by the respondent, without due process of law, they invoked the jurisdiction of this Court under Article 32. A Constitution Bench held that their eviction from the dwellings would result in deprivation of their livelihood. Right to life under Article 21 includes rights to livelihood and so if deprivation of livelihood is effected without reasonable procedure established by law, it would be violative of Article 21. In that context, this Court held that the sweep of the right to life conferred by Article 21 is wide and far-reaching. Life means more than animal existence. It does not mean merely that life cannot be extinguished or taken away as, for example, by imposition of execution of death sentence, except according to procedure established by law. That is but one aspect of right to life. An equally important facet of that right to livelihood is no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to

[3] (1985) 3 SCC 545, 572 (para. 32).

live. There is, thus, a close nexus between life and the means of livelihood and as such that, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life.

10. In Shantistar Builders v. Narayan Khimalal Totame[4] a Bench of three Judges, to which one of us (K. Ramaswamy, J.) was a member, held that: (SCC Headnote)

> "The right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body, for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that every citizen must be ensured of living in a well-built comfortable house but a reasonable home particularly for people in India can even be mud-built thatched house or a mud-built fire-proof accommodation."

11. As stated earlier, the right to residence and settlement is a fundamental right under Article 19(1)(e) and it is a facet of inseparable meaningful right to life under Article 21. Food, shelter and clothing or minimal human rights. The State has undertaken as its economic policy planned development of the country and has undertaken massive housing schemes. As its part, allotment of houses was adopted, as is enjoined by Articles 38, 39 and 46, Preamble and 19(1)(e), facilities and opportunities to the weaker sections of the society of the right of residence, make the life meaningful, livable in equal status with dignity of person. It is, therefore, imperative of the State to provide permanent housing accommodation to the poor in the housing schemes undertaken by it or its instrumentalities within their economic means so that they could make the payment of the price in easy instalments and have permanent settlement and residence assured under Articles 19(1)(e) and 21 of the constitution. Thus far there is no problem but the crucial question is whether that right is still available to the appellants in category *(vi)*.

12. It is seen that after the capital was shifted to Ahmedabad, these houses were allotted to government employees. That came with the shifting of the capital. Initially, on 17-4-1971, 200 houses were got converted from rental basis scheme to the hire purchase scheme. Thereafter the Government reconsidered the matter and by resolution dated 22-6-1972, resolved to allot all the 396 houses to the government employees on hire purchase scheme. Thus, the diversion became compulsive necessity. Therefore, the High Court has taken the criteria of 22-6-1972 as the last date for fixing the entitlement for the priorities mentioned in the offending resolutions and allotment of the houses to the government employees. It is true, that

[4] (1990) 1 SCC 520: AIR 1990 SC 630.

a date has to be fixed with reference to a particular case and fixation of any date always may appear to be arbitrary. But some connection has to be established for fixation of the date for allotment of the houses. In this case, since the Government had taken decision on 22-6-1971 to convert the rental basis scheme into hire purchase scheme that date bears rational relation to the object of allotment. Therefore, it cannot be said to be arbitrary or irrational offending Article 14 of the constitution.

13. It is contended that appellants in category (*vi*) were taken by surprise by the adverse order like a bolt from the blue from the decision of the High Court without arguments nor challenge made to it, has no substance. From the judgment it is clear that category *(iii)* persons who had vacated the houses were treated on a par with category *(vi)* employees transferred from the capital to the districts. From the material on record it would appear that the eligibility of category *(vi)* employees was also questioned. Though some of them managed to remain in possession, they cannot claim right to allotment under hire purchase scheme. Therefore, the High Court has rightly considered that when category *(ii)* employees were excluded on the ground that they shifted their residence from Phari to Gandhinagar, the same parity should be applied to category *(vi)* employees who have been transferred from the capital to the districts.

14. In these circumstances, we do not find any illegality in excluding employees of categories *(iii)* and *(vi)* for allotment under hire purchase scheme. The appeals are accordingly dismissed. No costs.

M/s. Shantistar Builders (Appellant) v. *Narayan Khimalal Totame and Others (Respondents)*

(1990 (1) SCC 520)

Supreme Court of India

Before: Ranganath Misra, P.B. Sawant and K. Ramaswamy, JJ.

Civil Appeal No. 2598 of 1989[1] decided on 31 January 1990

A. Urban Land (Ceiling and Regulation) Act, 1976, Sections 2(d), 20 and 21 - Constitution of India, Article 46 - `Weaker Sections of Society' - Who are - The expression Weaker Sections has not been defined in the Land Ceiling Act nor in Article 46 of Constitution of India - As a guideline, persons having income less than Rs. 18,000/- may come within the definition of weaker sections of Society - This limit of 18,000/- may be varied from time to time with fall in value of rupee. [Paras 15 and 18]

B. Urban Land (Ceiling and Regulation) Act, 1976, Sections 16 and 23 - Scope and object of Act - The Act purports to take away excess land from the holders thereof and utilize the same for purposes of housing or other public purposes. [Para 4]

C. Urban Land (Ceiling and Regulation) Act, 1976, Sections 20 and 21 - Urban vacant sites exempted from provisions of the Ceiling Act for Housing Scheme - It is necessary that there should be a committee in respect of the schemes in every urban agglomeration for weaker sections sanctioned under Sections 20 and 21 for overseeing the implementation of every scheme. [Para 21]

A.B. Divan and F.S. Nariman, Senior Advocates (P.H. Parekh, R.F. Nariman, U.S. Desai, Shalini Soni, Y.M. Desai, D.Y. Chandrachud, P.M. Vakil, J.P. Pathak and Ms Gitanjali Mithrani, Advocates, with them) for the Appellant;

S.K. Dholakia and Ms Indira Jaisingh, Senior Advocates (A.M. Khanwilkar, A.S. Bhasme, M.N. Shroff, M.P. Vashi and V.B. Naik-in-person, Adovates, with them) for the Respondents.

[1] From the Judgment and Order dated 12 December 1988 of the Bombay High Court in W.P.No. 4837 of 1987

Judgment:

Ranganath Misra, J. - Respondents filed a writ petition under Art. 226 of the Constitution in the Bombay High Court challenging permission to the builders to escalate the rates in respect of construction permitted on exempted land under the provisions of the Urban Land (Ceiling & Regulation) Act, 1976 (hereinafter 'Act' for short). The respondents made an application (Civil Application No. 5748/88) for amendment of the averments in that writ petition but by order dated 12th of December, 1988, the High Court rejected the civil application and refused leave to amend. By a subsequent order dated 16th of December, 1988, in the writ petition, the High Court held :

> "The Writ Petition as filed does not survive. It has become infructuous by changed Government policy and the resolutions and letters already referred to in our order under the Civil Application. Hence, the same is dismissed.
>
> We propose to give some directions regarding future monitoring of the scheme. These directions are restricted to this particular project only and although detailed monitoring is desirable with regard to all schemes sanctioned under Section 20, this should be considered by the Government and no directions by the Court can be given generally without considering the difficulties of the Government. However, this one scheme is capable of proper monitoring and we propose to give certain additional directions to the competent authority for monitoring the same ..."

The direction of the High Court in regard to monitoring has been challenged by the builder in this appeal by special leave.

2. At the initial stage of hearing of this appeal we had been told that the State of Maharashtra was considering the formulation of certain guidelines in respect of constructions over exempted lands covered under S. 20 of the Act and at the close of the hearing the formulation of the State Government has been placed for our consideration.

3. A Constitution Bench of this Court in Union of India v. Valluri Basavaiah Chaudhary, (1979) 3 SCR 802: (AIR 1979 SC 1415), while dealing with a dispute relating to the vires of the Act stated (at p. 1419 of AIR):

> "The primary object and purpose of the Urban Land (Ceiling and Regulation) Act, 1976, as the long title and the preamble show, is to provide for the imposition of a ceiling on vacant land in urban agglomerations, for the acquisition of such land in excess of the ceiling limit, to regulate the construction of buildings on such land and for matters connected therewith, with a view to preventing the concentration of urban land in the hands of a few persons and speculation and

> profiteering therein, and with view to bringing about an equitable distribution of land in urban agglomerations to subserve the common good, in furtherance of the Directive Principles of Art. 39(b) and (c)."

4. Under the scheme of the Act, urban agglomerations have been divided into four classes and a ceiling has been prescribed for each classification. The vacant land in excess of the ceiling under the provisions of S. 10 of the Act vests in the State by way of acquisition and the vacant sites thus acquired by the State are intended to be utilised for purposes of housing and Ss. 23 and 24 of the Act provide for disposal of vacant land. The Act, therefore, purports to take away the excess land from the holders thereof and utilise the same for purposes of housing and other public purposes. Chapter IV of the Act provides for regulation of transfer as also use of urban property. Section 20 empowers the State to exempt lands from the purview of the Act by providing:

> "20. Power to exempt.
>
> (1) Notwithstanding anything contained in any of the foregoing provisions of this chapter,-
>
> (a) where any person holds land in excess of the ceiling limit and the State Government is satisfied, either on its own motion or otherwise, that, having regard to the location of such land, the purpose for which such land is being used of is proposed to be used and such other relevant factors as the circumstances of the case may require, it is necessary or expedient in the public interest so to do, that Government may, by order, exempt, subject to such conditions, if any, as may be specified in the order, such vacant land from the provisions of this chapter; . . . "

And S. 21 provides :

> "21. Excess vacant land not to be treated as excess in certain cases.
>
> (1) Notwithstanding anything contained in any of the foregoing provisions of this chapter, where a person holds any vacant land in excess of the ceiling limit and such person declares within such time, in such form and in such manner as may be prescribed before the Competent Authority that such land is to be utilised for the construction of dwelling units (each such dwelling unit having a plinth area not exceeding eighty square metres) for the accommodation of the weaker sections of the society in accordance with any scheme approved by such authority as the State Government may, by notification in the Official Gazette, specify in this behalf, then, the Competent Authority may, after making such inquiry as it deems fit, declare such land, not to be excess land for the purposes this chapter and permit such person to continue to hold such land for the aforesaid purpose, subject to such terms and conditions as may be prescribed, including a condition as to the time limit within which such buildings are to be constructed."

5. Both Ss. 20 and 21 contain provisions that if Government or the Competent Authority as the case may be, is satisfied that any of the conditions subject to which exemption was granted is not complied with, it shall be competent for it to withdraw the order under S. 20 or declare such land to be excess land under S. 21 and bring it within the mischief of the statute.

6. In the instant case on January 11, 1978 on the basis of an application made on 24th October, 1987, the State Government made an order of exemption, the salient portion of which are extracted for convenience:

"GOVERNMENT OF MAHARASHTRA

No. HWS-1077/XXXV

GENERAL ADMINISTRATION DEPARTMENT,

MANTRALAYA,

BOMBAY-400 032.

11th January, 1978.

ORDER

WHEREAS (1) Shri Kumarpal Vadilal Shah (2) Shri Navinchandra Vadilal Shah (3) Smt. Champaben w/o Vadilal Shah (4) Shri Vasantlal Vadilal Shah (5) Shri Babulal Vadilal Shah (6) Smt. Pushpa Mangaldas Shah (7) Smt. Nirmala Hiralal Shah (8) Smt. Shakuntala Tansukhlal Parekh and (9) Smt. Madhubala Vadilal Shah (persons at Sr. Nos. 2 to 9 by their Constituted Attorney Shri Kumarpal Vadilal Shah), 26, Suneel Shopping Centre, Opp. Navrang Talkies, Andheri (West), Bombay - 400 058, hold vacant lands in excess of the Ceiling Limit in the Greater Bombay Urban Agglomeration, details of which are given in the Schedule 'A' herein :

AND WHEREAS the said persons have applied for exemption under Section 20 of the Urban Land (C. & R.) Act, 1976 (33 of 1976).

AND WHEREAS, the said persons have mentioned in their application, that their Scheme of construction of houses for Weaker Section will be executed by them, through Messrs STAR BUILDERS, 302, Sharda Chambers, 15 New Marine Lines, Bombay20.

NOW THEREFORE, In exercise of the powers conferred by sub-section (1) of Section 20 of the said Act, after having recorded in writing the reasons for making this Order, the Government of Maharashtra hereby exempts the said vacant lands, from the provisions of Chapter 111 of the said Act, subject to the following conditions viz.:

1) The lands exempted under this exemption order shall be used by the said persons for the purpose of housing for Weaker Section comprising 17,000 (seventeen thousand) tenements consisting of 3,000 (three thousand) tenements of plinth area, not exceeding 20.00 sq. metrs., 10,000 (ten thousand) tenements of plinth area, not exceeding 30.00 sq. mets., 3,000 (three thousand) tenements of plinth area, not exceeding 44,00 sq. mtrs. and 1,000 (one thousand) tenements of plinth area, not exceeding 57.00 sq. mtrs. Any change made in the user of the land shall amount to a breach of this condition.

2) The said persons shall make full utilization of the land so exempted for the purpose aforesaid, by constructing on the land the 17,000 tenements as specified in the condition No. 2 above. The said persons shall commence construction of the tenements within a period of one year from the date of this exemption order and shall complete the construction work within a period of five years from that date, failing which the exemption shall stand withdrawn. If only a part of land is utilized and a part remains vacant at the end of period of five years, exemption shall be deemed to have been withdrawn.

3) The final selling price, all inclusive of each of the dwelling units shall not exceed Rs. 50/-, Rs. fifty only) per sq. ft. of plinth area. Each tenement is to be provided with all the amenities as mentioned in the Schedule 'B' attached to this Order and as mentioned in the State Government Scheme, announced on 2nd October, 1977 for construction of houses for Weaker Sections of Society on surplus vacant land by the land holder. The details of construction shall not be inferior to those already mentioned in the application. The actual construction and the quality of construction, will be subject to the building regulations of the local authorities, and subject to such other conditions as may be imposed, by the Collector of Thane, Town Planning Authority and the B. M. R.D.A. and other Statutory Regulations.

4) to 6) . . .

7) The said persons shall not transfer the exempted lands (with or without buildings thereon) or any part thereof to any other persons, except for the purpose of mortgage in favour of any financial institution, specified in sub-section (1) of Section 19 of the said Act, for raising finances for the purposes of construction or any one of the tenements mentioned above. Breach of this condition shall mean that the exemption granted under this order stands withdrawn.

8) & 9) . . .

10) The construction work under the scheme will be further subject to all other conditions incorporated in the Scheme of Weaker Section Housing announced by the State Government on 2nd October, 1977 and subject to such other conditions as may be imposed by the local authorities, Collector of Thane, Town Planning Authorities and the B. M. R. D. A.

> 11) If at any time, the State Government is satisfied that there is a breach of any of the conditions mentioned in this Order, it shall be competent for the State Government by order to withdraw the exemption from the date specified in the Order;"

7. Respondents contended before the High Court that the builder had violated the conditions imposed in the order of exemption; that need of the weaker sections, of society was not being attended to and a big racket had been formed by real estate speculators to eliminate the economically weaker sections and persons genuinely in need of housing accommodation and to make unauthorised and illegal. profit out of such transactions. They had also challenged the sanction of escalation following the demand of the builder and alleged that the legislative purpose of according exemption and even as contemplated in the original order of exemption have been departed from in allowing escalation beyond reasonable limits. It had been further alleged that applications from genuine persons belonging to the economically weaker sections have been overlooked and persons not entitled to the benefit have been registered by the builders and even allotted apartments and the builders are in collusion with racketeers.

8. We have already indicated that the High Court did not examine the factual aspects involved in the dispute when it dismissed the writ petition but proceeded to lay down the guidelines. The respondents have alleged that their claims for allotment of premises have been overlooked though they came earlier in point of time. There is also a serious dispute raised by them before us that the escalation permitted by the State Government to the builder is excessive and not warranted.

9. Basic needs of man have traditionally been accepted to be three - food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that every citizen must be ensured of living in a well-built comfortable house but a reasonable home particularly for people in India can even be mud-built thatched house or a mud-built fire-proof accommodation.

10. With the increase of population and the shift of the rural masses to urban areas over the decades the ratio of poor people without houses in the urban areas has rapidly increased. This is a feature which has become more perceptible after independence. Apart from the fact that people in search of work move to urban agglomerations, availability of amenities and living conveniences also attract people to move from rural areas to cities. Industrialisation is equally responsible for

concentration of population around industries. These are features which are mainly responsible for increase in the homeless urban population. Millions of people today live on the pavements of different cities of India and a greater number live animal like existence in jhuggis.

11. The Planning Commission took note of this situation and was struck by the fact that there was no corresponding rise in accommodation with the growth of population and the shift of the rural people to the cities. The growing realisation of this disparity led to the passing of the Act and acquisition of vacant sites for purposes of housing. Considerable attention has been given in recent. years to increasing accommodation though whatever has been done is not at all adequate. The quick growth of urban population overshadows all attempts of increasing accommodation. Sections 20 and 21 of the Act vest power in the State Governments to exempt vacant sites from vesting under the Act for purposes of being taken over if housing schemes are undertaken by owners of vacant urban lands. Section 21 specifically emphasises upon weaker sections of the people. That term finds place in Art. 46 of the Constitution and S. 21 uses the same language. 'Weaker Sections' have, however, not been defined either in the Constitution or in the Act itself. An attempt was made in the Constituent Assembly to provide a definition but was given up. Attempts have thereafter been made from time to time to provide such definition but on account of controversies which arise once the exercise is undertaken, there has been no success. A suggestion for introducing economic criterion for explaining the term was made in the approach to the Seventh Five Year Plan (1985-1990) brought out by the Planning Commission and approved by the National Development Council and the Union Government. A lot of controversy was raised in Parliament and the attempt was dropped. In the absence of a definition perhaps a proper guideline could be indicated but no serious attention has been devoted to this aspect.

12. Members of the Scheduled Castes and Scheduled Tribes have ordinarily been accepted as belonging to the weaker sections. Attempt to bring in the test of economic means has often been tried but no guideline has been evolved. Undoubtedly, apart from the members of the Scheduled Castes and Scheduled Tribes, there would be millions of other citizens who would also belong to the weaker sections. The Constitution-makers intended all citizens of India belonging to the weaker sections to be benefited when Art. 46 was incorporated in the Constitution. Parliament in adopting the same language in S. 21 of the Act also intended people of all weaker sections to have the advantage. It is, therefore, appropriate that the Central Government should come forward with an appropriate guideline to indicate who would be included within weaker sections of the society.

13. In recent years on account of erosion of the value of the rupee, rampant prevalence of black money and dearth of urban land, the value of such land has gone up sky-high. It has become impossible for any member of the weaker sections to

have residential accommodation anywhere and much less in urban areas. Since a reasonable residence is an indispensable necessity for fulfilling the Constitutional goal in the matter of development of man and should be taken as included in 'life' in Art. 21, greater social control is called for and exemptions granted under Ss. 20 and 21 should have to be appropriately monitored to have the fullest benefit of the beneficial legislation. We, therefore, commend to the Central Government to prescribe appropriate guidelines laying down the true scope of the term 'Weaker sections of the society' so that everyone charged with administering the statute would find it convenient to implement the same.

14. Respondents who claim to belong to weaker sections of the society maintain that they are entitled to allotment of 262 plus 558 flats. It is true that initially the claim was for a smaller number but the number has gone up when further petitions were filed before the High Court. There is, perhaps, some basis in the objection of the builders as also the stand taken by the State Government before us that the respondents' claim should undergo in depth scrutiny. We direct that the genuineness of the claim should be scrutinised in accordance with the guidelines which shall now be indicated but in the event of the claims being found tenable, the builders shall have a direction to provide accommodation in terms of the scheme for those who are found to be acceptable. To ensure implementation of this direction, the builders are called upon not to make any commitment or allotments for flats until the claims of the 1420 applicants are scrutinised and allotment of accommodation for such number of persons as are found entitled is provided.

15. We shall now proceed to deal with the guidelines. The Government of Maharashtra by the Resolution No. WLC-1090/ 3422 (D-XIII) in the Housing and Special Assistance Department have laid down the guidelines. We shall refer to the preamble and some of the provisions thereof. The preamble indicates:

> "Close and effective monitoring of the implementation of weaker sections housing schemes sanctioned under Sections 20 and 21 of the Urban Land (Ceiling & Regulation) Act, 1976, is one of the most important duties of the competent authorities who have been entrusted with the task of implementing the Urban Land Ceiling Act, 1976, in the nine urban agglomerations in Maharashtra, viz. Bombay, Pune, Thane, Ulhasnagar, Kolhapur, Solapur, Sangli, Nasik and Nagpur. Competent authorities are required to ensure that construction of flats for the weaker sections of the society on land exempted under Sections 20 and 21 is completed within the time-frame stipulated. in the exemption order. They are also required to ensure that the terms and conditions of the exemption order such as issue of advertisements, giving particulars of the schemes, sale of flats at the prices approved by government, sizes of flats, non-eligibility of persons who already own a dwelling unit in the same urban agglomeration to purchase a flat from such schemes, handing over of land affected by development plan, reservations to the planning authority etc. are all complied with. Physical implementation of weaker sections

> housing schemes in Maharashtra is one of the important issues on the agenda at the meetings of competent authorities convened by the Housing Department periodically. General and special instructions regarding effective monitoring of implementation of the housing schemes are given to competent authorities in such meetings. Government of Maharashtra have carefully considered the importance attaching to close and effective monitoring of the implementation of weaker sections housing schemes and is now pleased to direct by way of codification of earlier instructions on the subject that competent authorities should ensure that the following instructions are scrupulously complied with . . ."

16. After this preamble, 16 paragraphs in what has been named as the Code - and a copy of this Code is appended to the judgment as annexure for convenience - indicate the guidelines.

17. We are of the view that allotment shall be on the basis of 'one family one flat' and the family shall include husband, wife and dependant children. A family which has one flat in any urban agglomeration within the State shall not be entitled to allotment or acquisition by transfer of a flat under this Code.

18. Government nominees contemplated under the Code must belong to weaker sections of the society and shall also be subjected to the rule of one family - one flat. The number of Government nominees should not exceed 5% of the total accommodation available in any scheme.

19. Every builder shall maintain a register of applicants chronologically registering them on the basis of the date of receipt of the applications. The register should be uptodate and available for inspection by the authorities. As and when an application is received by the builder an appropriate receipt acknowledging acceptance of such application shall be issued to the applicant and in such receipt, the number in the Application Register shall be clearly indicated. Simultaneously, a copy of the application with its number shall be sent by the builder to the Committee for its record.

20. As a working guideline we direct that a 'means test' for identifying 'weaker sections of the society' shall be adopted and for the present income of the family of the applicant must not exceed Rs. 18,000/- (eighteen thousand) to come within the meaning of the term to qualify for allotment. The applicant shall be called upon to satisfy the Committee about the limit of income and the present prescription of Rs. 18,000/- may be varied from time to time by the State Government taking into consideration the fall of the value of the rupee, general improvement in the income of the people now within the annual income limit of Rs. 18,000/- and other relevant factors. It shall be open to the State Government to prescribe appropriate guideline in the matter of identifying the 'weaker sections of the society.

21. 'Competent authority' has been defined in S. 2(e) of the Act. From the Code it appears that he is an officer subordinate to the Collector of the District so far as the State of Maharashtra is concerned as an appeal is contemplated from his orders to the Collector. The duties and responsibilities and powers vested in the competent authority under the Code are wide and considerable. We are of the opinion. (without in any way casting any aspersion) that it would be difficult for the competent authority to exercise efficiently and to the satisfaction of everyone the duties cast upon him under the Code. In the matter of implementation of the scheme and with a view to providing satisfactory execution thereof and fulfilling the laudable purpose stipulated under the Act and undertaken by the scheme, it is necessary that there should be a committee in respect of the schemes in every urban agglomeration for weaker sections sanctioned under Ss. 20 and 21 of the Act for overseeing the implementation of every scheme, particularly in the matter of due compliance of the conditions under which exemption is granted, timely construction of the flats, appropriate advertisement as contemplated, registration of the applications in response to advertisements in a systematic manner, appropriate allotment of flats including priorities on the basis of registration, ensuring legitimate charges only being demanded and monitoring strict compliance to avoid underhand dealing or any unjust treatment. It should. be handled by the competent authority in a committee consisting of himself, a judicial officer not below the rank of an Additional District, Judge and a Government engineer not below the rank of Superintending Engineer. In the committee, the judicial officer shall function as the Chairman.

22. This Committee shall have powers to scrutinize all relevant documents and give appropriate directions to the builders and applicants keeping the requirements of the schemes and the Code in view. To the extent we have indicated the powers conferred on the competent authority in terms of the State Code shall stand vested in the committee. The Bombay High Court shall take steps to ensure that in respect of schemes in every agglomeration undertaken and which the State Government may in future undertake, the services of an efficient judicial officer not below the rank of an Additional District Judge on such terms as the State Government and the High Court consider appropriate shall be made available for discharging the duties indicated and/or as may be provided. We would like to impress upon every committee that fulfilment of the laudable purpose of providing a home to the poor homeless depends upon its commitment to the goal and every effort should be made by it to ensure that the builder does not succeed in frustrating the purpose. The State Government shall suitably modify its Code in the light of this judgment and recirculate the same to all concerned within four weeks from today.

23. At present we have confined the directions to the State of Maharashtra. Liberty is given to members of the weaker sections residing in other States, builders and the respective State Governments to ask for extension of the Code with such modifications as may be necessary for other parts of the Country.
Order accordingly.

Olga Tellis and Others (Petitioners) v. *Bombay Municipal Corporation and Others (Respondents)*

(AIR (1986) SC 180)*

Writ Petitions Nos. 4610-4612 of 1981

and

Vayyapuri Kuppusami and Others (Petitoners) v. *State of Maharashtra and others (Respondents)*

Writ Petitions Nos. 5068-5079 of 1981

Supreme Court of India

Writ Petitions Nos. 4610-4612 and 5068-5079 of 1981 (Under Article 32 of the Constitution of India), decided on July 10, 1985.

Date: 10-07-1985

Before: A.V. Varadarajan, O. Chhinnappa Reddy, S. Murtaza Fazal Ali, V.D. Tulzapurkar, Y.V. Chandrachud

Excerpts from the judgment:

Y.V. Chandrachud, C.J. – These writ petitions portray the plight of lakhs of persons who live on pavements and in slums in the city of Bombay. They constitute nearly half the population of the city. The first group of petitions relates to pavement dwellers while the second group relates to both pavement and basti or slum dwellers. Those who have made pavements their homes exist in the midst of fifth and squalor, which has to be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they case, for no conveniences are available to them. Their daughters, come of age, bathe under the nosy gaze of passers-by, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Menfolk, without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say: "Who doesn't commit crimes in this city?"

* Source: Grand Jurix 2000, The Electronic Law Library.

2. It is these men and women who have come to this Court to ask for a judgment that they cannot be evicted from their squalid shelters without being offered alternative accommodation. They rely for their rights on Article 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood. They have no option but to flock to big cities like Bombay, which provide the means of bare subsistence. They only choose a pavement or a slum which is nearest to their place of work. In a word, their plea is that the right to life is illusory without a right to the protection of the means by which alone life can be lived. And the right to life can only be taken away or abridged by a procedure established by law which has to be fair and reasonable, not fanciful or arbitrary such as is prescribed by the Bombay Municipal Corporation Act or the Bombay Police Act. They also rely upon their right to reside and settle in any part of the country which is guaranteed by Article 19(1)(e).

8. The case of the petitioners in the Kamraj Nager group of cases is that there are over 500 hutments in this particular basti, which was built in about 1960 by persons who wee employed by a Construction company engaged in laying water pipes along the Western Express Highway. The residents of Kamraj Nagar and Municipal employees, factory or hotel workers, construction supervisors and so on. The residents of the Tulsi Pipe Road hutments claim that they have been living there for 10 to 15 years and that they are engaged in various small trades. On hearing about the Chief Minister's announcement, they filed a writ petition in the High Court of Bombay for an order of injunction restraining the officers of the State Government and the Bombay Municipal Corporation from implementing the directive of the Chief Minister. The High Court granted an ad-interim injunction to be in force until July 21, 1981. On that date respondents agreed that the huts will not be demolished until October 15, 1981. However, it is alleged, on July 23, 1981 the petitioners were huddled into State Transport buses for being deported out of Bombay. Two infants were born during the deportation but that was set off by the death of two others.

9. The decision of the respondents to demolish the huts is challenged by the petitioners on the ground that it is violative of Articles 19 and 21 of the Constitution. The petitioners also ask for a declaration that the provisions of Sections 312, 313 and 314 of the Bombay Municipal Corporation Act, 1888 are invalid in violating Articles 14, 19 and 21 of the Constitution. The reliefs asked for in the two groups of writ petitions are that the respondents should be directed to withdraw the decision to demolish the pavement dwellings and the slum hutments and where they are already demolished, to restore possession of the sites to the former occupants.

11. The counter-affidavit says that no person has any legal right to encroach upon or to construct any structure on a footpath, public street or on any place over which the public has a right of way. Numerous hazards of health and safety arise if action is

not taken to remove such encroachments. Since, no civic amenities can be provided on the pavements, the pavement dwellers use pavements or adjoining streets for easing themselves. Apart from this, some of the pavement dwellers indulge in anti-social acts like chain-snatching illicit distillation of liquor and prostitution. The lack of proper environment leads to increased criminal tendencies, resulting in more crime in the cities. It is, therefore, in public interest that public places like pavements and paths are not encroached upon. The Government of Maharashtra provides housing assistance to the weaker sections of the society like landless labourers and persons belonging to low income groups within the framework of its planned policy of the economic and social development of the State. Any allocation for housing has to be made after balancing the conflicting demands from various priority sectors. The paucity of resources is a restraining factor on the ability of the State to deal effectively with the question of providing housing to the weaker sections of the society. The Government of Maharashtra has issued policy directives that 75% of the housing programme should be allocated to the lower income groups and the weaker sections of the society. One of the objects of the State's planning policy is to ensure that the influx of the populations from the rural to the urban areas is reduced in the interest of a proper and balanced social and economic development of the State and of the country. This is proposed to be achieved by reversing the rate of growth of metropolitan cities and by increasing the rate of growth of small and medium towns. The State Government has therefore devised an Employment Guarantee Scheme to enable the rural population, which remains unemployed or underemployed at certain periods of the year, to get employment during such periods. A sum of about Rs. 180 crores was spent on that scheme during the years 1979-80 and 1980-81. On October 2, 1980 the State Government launched two additional schemes for providing employment opportunities for those who cannot get work due to old age or physical infirmities. The State Government has also launched a scheme for providing self-employment opportunities under the 'sanjay Gandhi Niradhar Anudan Yojana'. A monthly pension of Rs. 60 is paid to those who are too old to work or are physically handicapped. In this scheme, about 1,56,943 persons have been identified and a sum of Rs. 2.25 crores was disbursed. Under another scheme called 'sanjay Gandhi Swawalamban Yojana', interest-free loans, subject to a maximum of Rs. 2500, were being given to persons desiring to engage themselves in gainful employment of their own. About 1,75,00 persons had benefited under this scheme, to whom a total sum of Rs. 5.82 crores was disabused by way of loan. In short, the objective of the State Government was to place greater emphasis on providing infrastructural facilities to small and medium towns and to equip them so that they could act as growth and service centers for the rural hinterland. The phenomenon of poverty which is common to all developing countries has to be tackled on an all-India basis by making the gains of development available to all sections of the society through a policy of equitable distribution of income and wealth. Urbanisation is a major problem facing the entire country, the migration of people from the rural to the urban areas being a reflection of the colossal poverty existing in the rural areas. The rural poverty cannot, however, be

eliminated by increasing the pressure of population on metropolitan cities like Bombay. The problem of poverty has to be tackled by changing the structure of the society in which there will be a more equitable distribution of income and greater generation of wealth. The State Government has stepped up the rate of construction of tenements for the weaker section of the society from 2500 to 9500 per annum.

13. The counter-affidavit of the State Government describes the various steps taken by the Central Government under the Five Year Plan of 1978-83 in regard to the housing programmes. The plan shows that the inadequacies of Housing policies in India have both quantitative and qualitative dimensions. The total investment in housing shall have to be of the magnitude of Rs. 2790 crores if the housing problem has to be tackled even partially.

18. The only other pleading which deserves to be noticed is the affidavit of the journalist petitioner, Ms. Olga Tellis, in reply to the counter-affidavit of the Government of Maharashtra. According to her, one of the important reasons of the emergence and growth of squatter-settlements in the metropolitan cities in India is that the development and master plans of the cities have not been adhered to. The density of population in the Bombay metropolitan region is not high according to the Town Planning standards. Difficulties are caused by the fact that the population is not evenly distributed over the region, in a planned manner. New constructions of commercial premises, small-scale industries and entertainment houses in the heart of the city, have been permitted by the Government of Maharashtra contrary to law and even residential premises have been allowed to be converted into commercial premises. This coupled with the fact that the State Government has not shifted its main offices to the northern opportunities in that region. Unless economic and leisure activity is decentralised, it would be impossible to find a solution to the problems arising out of the growth of squatter colonies. Even if squatters are evicted, they come back to the city because it is there that job opportunities are available. The alternate pitches provided to the displaced pavement dwellers on the basis of the so-called 1976 census are not an effective means to their resettlement because those sites are situated far away from the Malad Railway Station involving cost and time which are beyond their means. There are no facilities available at Malvani, like schools and hospitals, which drives them back to the stranglehold of the city. The permission granted to the 'National Centre of Performing Arts' to construct an auditorium at the Nariman Point Backbay Reclamation, is cited as a "gross" instance of the short-sighted, suicidal and discriminatory policy of the Government of Maharashtra. It is as if the sea is reclaimed for the construction of business and entertainment houses in the centre of the city, which creates job opportunities to which the homeless flock. They work therein and live on pavements. The grievance is that, as a result of this imbalance, there are not enough jobs available in the northern tip of the city. The improvement of living conditions in the slums and the regional distribution of job opportunities are only viable remedies for relieving congestion of the population in the centre of the city. The

increase allowed by the State Government in the Floor Space Index over and above 1.33, had led to a further concentration of population in the centre of the city.

19. In the matter of housing, according to Ms. Tellis affidavit, Government has not put to the best use the finances and resources available to it. There is a wide gap between the demand and supply in the area of housing which was in the neighbourhood of forty five thousand units in the decade 1971-81. A huge amount of hundreds of crores of rupees shall have to be found by the State Government every year during the period of the Sixth Plan if adequate provision for housing is at all to be made. The Urban Land Ceiling Act has not achieved its desired objective nor has it been properly implemented. The employment schemes of the State Government are like a drop in the ocean and no steps are taken for increasing job opportunities in the rural sector. The neglect of health, education, transport and communication in that sector drives the rural folk to the cities, not only in search of a living but in search of the basic amenities of life. The allegation of the State Government regarding the criminal propensities of the pavement dwellers is stoutly denied in the reply-affidavit and it is said to be contrary to the studies of many experts. Finally it is stated that it is no longer the objective of the Sixth Plan to reverse the rate of growth of metropolitan cities. The objective of the earlier plan (1978-83) has undergone a significant change and the target now is to ensure the growth of large metropolitan cities in a planned manner. The affidavit claims that there is adequate land in the Bombay metropolitan region to absorb a population of 20 million people, which is expected to be reached by the year 2000 A.D.

20. The arguments advanced before us by Ms. Indira Jaisingh, Mr V.M. Tarkunde and Mr. Ram Jethmalani cover a wide range but the main thrust of the petitioners' case is that evicting a pavement dweller or slum dweller from his habitat amounts to depriving of his right to livelihood, which is comprehended in the right guaranteed by Article 21 of the Constitution that no person shall be deprived of his life except according to procedure established by law. The question of the guarantee of personal liberty contained in Article 21 does not arise and was not raised before us. Counsel for the petitioners contended that the Court must determine in these petitions the content of the right to life, the function of property in a welfare state, the dimension and true meaning of the constitutional mandate that property must subserve common good, the sweep of the right to reside and settle in any part of the territory of India which is guaranteed by Article 19(l)(e) and the right to carry on any occupation, trade or business which is guaranteed by Article 19 (l)(g), the competing claims of pavement dwellers on the one hand and of the pedestrians on the other and, the larger question of ensuring - equality before the law. It is contended that it is the responsibility of the courts to reduce inequalities and social imbalances by striking down statutes which perpetuate them. One of the grievances of the petitioners against the Bombay Municipal Corporation Act, 1888 is that it is a century old antiquated piece of legislation passed in an era when pavement dwellers and slum dwellers did not exist and the consciousness of the modern notion of a welfare state

was not present to the mind of the colonial legislature. According to the petitioners, connected with these issues and yet independent of them, is the question of the role of the Court in setting the tone of values in a democratic society. The argument which bears on the provisions of Article 21 is elaborated by saying that the eviction of pavement and slum dwellers will lead, in a vicious circle, to the deprivation of their employment, their livelihood and, therefore, to the right to life. Our attention Is drawn in this behalf to an extract from the Judgment of Douglas in Baksey v. Board of Regents, 347 M.D. 442 (1954) in which the learned Judge said: "The right to work I have assumed was the most precious liberty that man possesses. Man has indeed, as much right to work as he has to live, to be free and to own property. To work means to eat and it also means to live." The right to live and the right to work are integrated and inter-dependant and, therefore, if a person is deprived of his job as a result of his eviction from a slum or a pavement, his very right to life is put in jeopardy. It is urged that the economic compulsions under which these persons are forced to live in slums or on pavements impart to their occupation the character of a fundamental right.

21. It is further urged by the petitioners that it is constitutionally impermissible to characterise the pavement dwellers as "tresspassers" because, their occupation of pavements arises from economic compulsions. The State is under an obligation to provide to the citizens the necessities of life and, in appropriate cases, the courts have the power to issue order directing the State, by affirmative action, to promote and protect the right to life. The instant situation is one of crisis, which compels the use of public property for the purpose of survival and sustenance. Social commitment is the quintessence of our Constitution which defines the conditions under which liberty has to be enjoyed and justice has to be administered. Therefore, Directive Principles, which are fundamental in the governance of the country must serve as a beacon light to the interpretation of the Constitutional provisions. Viewed in this context, it is urged, the impugned action of the State Government and the Bombay Municipal Corporation is violative of the provisions contained in Articles 19(1;(e), 19(l)(g) and 21 of the Constitution. The paucity of financial resources of the State is no excuse for defeating the fundamental rights of the citizens.

22. In support of this argument, reliance is placed by the petitioners on what is described as the factual context. A publication dated January 1982 of the Planning Commission, Government of India, namely, The Report of the Expert Group of Programmes for the Alleviation of Poverty, is relied on as showing the high incidence of poverty in India. That Report shows that in 1977-78, 48% of the population lived below the poverty line, which means that out of a population of 303 million who lived below the poverty line, 252 million belonged to the rural areas. In 1979-80 another 8 million people from the rural areas were found to live below the poverty line. A Government of Maha-rashtra Publication "Budget and the new 20 Point Socio-Economic Programme" estimates that there are about 45 lakh families in rural areas of Maharashtra who live below the poverty line. Another 40% was in

the periphery of that area. One of the major causes of the persistent rural poverty of landless labourers, marginal farmers, shepherds, physically handicapped persons and others is the extremely narrow base of production available to the majority of the rural population.

23. The average agricultural holding of a farmer is 0.4 hectares, which is hardly adequate to enable him to make both ends meet. Landless labourers have no resource base at all and they constitute the hardcore of poverty. Due to economic pressures and lack of employment opportunities, the rural population is forced to migrate to urban areas in search of employment. The Economic Survey of Maharashtra published by the State Government shows that the bulk of public investment was made in the cities of Bombay, Pune and Thane, which created employment opportunities attracting the starving rural population to those cities. The slum census conducted by the Government of Maharashtra in 1976 shows that 79% of the slum-dwellers belonged to the low-income group, with a monthly-income, below Rs.600. The study conducted by P. Ramachandran of the Tata Institute of Social Sciences shows that in 1972, 91% of the pavement dwellers had a monthly income of less than Rs.200. The cost of obtaining any kind of shelter in Bombay is beyond the means of a pavement dweller. The principal public housing sectors in Maharashtra, namely, The Maharashtra Housing and Area Development Agency (MHADA) and the City and Industrial Development Corporation of Maharashtra Ltd. (CIDCO) have been able to construct only 3000 and 1000 units respectively as against the annual need of 60,000 units. In any event, the cost of housing provided even by these public sector agencies is beyond the means of the slum and pavement-dwellers. Under the Urban Land (Ceiling and Regulation) Act 1975, private land owners and holders are given facility to provide housing to the economically weaker sections of the society at a stipulated price of Rs.90 per sq.ft., which also is beyond the means of the slum and pavement-dwellers. The reigning market price of houses in Bombay varies from Rs.150 per sq.ft. outside Bombay to Rs.2000 per sq.ft. in the centre of the city.

24. The petitioners dispute the contention of the respondents regarding the non-availability of vacant land for allotment to houseless persons. According to them, about 20,000 hectares of unencumbered land is lying vacant in Bombay. The Urban Land (Ceiling and Regulation; Act,1975) has failed to achieve its object as is evident from the fact that in Bombay, 5% of the land-holders own 55% of the land. Even though 2952.83 hectares of Urban land is available for being acquired by the State Government as being in excess of the permissible ceiling area, only 41.51% of this excess land was, so far, acquired. Thus, the reason why there are homeless people in Bombay is not that there is no land on which homes can be built for them but, that the planning policy of the State Government permits high density areas to develop with vast tracts of land lying vacant. The pavement-dwellers and the slum-dwellers who constitute 50% of the population of Bombay, occupy only 25% of the cities residential land. It is in these circumstances that out of sheer necessity for a bare

existence, the petitioners are driven to occupy the pavements, and slums. They live in Bombay because they are employed in Bombay and they live on pavements because there is no other place where they can live. This is the factual context in which the petitioners claim the right under Articles 19(1)(e) and (g) and Article 21 of the Constitution.

25. The petitioners challenge the vires of section 314 read with sections 312 and 313 of the Bombay Municipal Corporation Act, which empowers the Municipal Commissioner to remove, without notice, any object or structure or fixture which is set up in or upon any street. It is contended that, in the first place, section 314 does not authorise the demolition of a dwelling even on a pavement and secondly, that a provision which allows the demolition of a dwelling without notice is not just, fair or reasonable. Such a provision vests arbitrary and unguided power in the Commissioner. It also offends against the guarantee of equality because, it makes an unjustified discrimination between pavement dwellers on the one hand and pedestrians on the other. If the pedestrians are entitled to use the pavements for passing and repassing, so are the pavement dwellers entitled to use pavements for dwelling upon them. So the argument goes. Apart from this, it is urged, the restrictions which are sought to be imposed by the respondents on the use of pavements by pavement-dwellers are not reasonable. A State which has failed in its constitutional obligation to usher a socialistic society has no right to evict slum and pavement-dwellers who constitute half of the cities population. Therefore, sections 312,313 and 314 of the B.M.C. Act must either be read down or struck down.

26. According to the learned Attorney-General, Mr. K.K.Singhvi and Mr. Shankaranarayanan who appear for the respondents, no one has a fundamental right, whatever be the compulsion, to squat on or construct a dwelling on a pavement, public road or any other Place to which the public has a right of access. The right conferred by Article 19(l)(e) of the Constitution to reside and settle in any part of India cannot be read to confer a licence to encroach and trespass upon public property. Sections 3(w) and (x) of the B.M.C. Act define “Street” and “Public Street” to include a highway, a footway or a passage on which the public has the right of passage or access. Under section 289(1) of the Act, all pavements and public streets vest in the Corporation and are under the control of the Commissioner. In so far as Article 21 is concerned, no deprivation of life, either directly or indirectly, is involved in the eviction of the slum and pavement-dwellers from public places. The Municipal Corporation is under an obligation under section 314 of the B.M.C. Act to remove obstructions on pavements, public streets and other public places. The Corporation does not even possess the power to permit any person to occupy a pavement or a public place on a permanent or quasi-permanent basis. The petitioners have not only violated the provisions of the B.M.C. Act, but they have contravened sections 111 and 115 of the Bombay Police Act also. These sections prevent a person from obstructing any other person in the latter’s use of a street or public

place or from committing a nuisance. Section 117 of the Police Act prescribes punishment for the violation of these sections.

27. We will first deal with the preliminary objection raised by. Mr. K.K.Singhvi, who appears on behalf of the Bombay Municipal Corporation, that the petitioners are estopped from contending that their huts cannot be demolished by reason of the fundamental rights claimed by them. It appears that a writ petition, No. 986 of 1981, was filed on the Original Side of the Bombay High Court by and on behalf of the pavement dwellers claiming reliefs similar to those claimed in the instant batch of writ petitions. A learned Single Judge granted an ad-interim injunction restraining the respondents from demolishing the huts and from evicting the pavement dwellers. When the petition came up for hearing on July 27, 1981, counsel for the petitioners made a statement in answer to a query from the court, that no fundamental right could be claimed to put up dwellings on foot-paths or public roads. Upon this statement, respondents agreed not to demolish until October 15, 1981, huts which were constructed on the pavements or public roads prior to July 23, 1981. On August 4, 1981, a written undertaking was given by the petitioners agreeing, inter alia, to; vacate the huts on or before October 15, 1981 and not to obstruct the public authorities from demolishing them. Counsel appearing for the State of Maharashtra responded to the petitioners undertaking by giving an undertaking on behalf of the State Government that, until October 15, 1981, no pavement dweller will be removed out of the city against his wish. On the basis of these undertakings, the learned Judge disposed of the writ petition without passing any further orders. The contention of the Bombay Municipal Corporation is that since the pavement dwellers had conceded in the High Court that, they did not claim any fundamental right to put up huts on pavements or public roads and since they had given an undertaking to the High Court that they will not obstruct the demolition of the huts after October 15, 1981 they are estopped from contending in this Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, which is comprehended within the fundamental right to life guaranteed by Article 21 of the Constitution.

28. It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements, or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and substance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts, to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his

right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15,16,19,21 and 29, and some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to asset that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well-founded is another matter. But the argument has to be examined despite the concession.

29. The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In Basheshar Nath v. CIT (1995 Supp 1 SCR 528: AIR 1959 SC 149: (1959) 35 ITR 190), a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das C.J. and Kapoor, J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ.) held that not only could there no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction according to the learned Judges, between the fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

30. We must, therefore, reject the preliminary objection and proceed to consider the validity of the petitioner's contention on merits.

31. The scope of the jurisdiction of this Court to deal with writ petitions under Article 32 of the Constitution was examined by a Special Bench of this Court in Ujjam Bai v. State of U.P. (1963) 1 SCR 778: AIR 1962 SC 1621). That decision would show that in three classes of cases the question of enforcement of the fundamental rights would arise, namely, (1) where action is taken under a statute which is ultra vires the Constitution; (2) where that statute is intra vires but the action taken is without jurisdiction; and (3) an authority under an obligation to act judicially passes an order in violation of the principles of natural justice. These categories are of course, not exhaustive. In Naresh Shridhar Mirajkar v. State of Maharashtra (1966) 3 SCR744, 770: AIR 1967 SC 1) a Special Bench of nine learned Judges of this Court held that, where the action taken against a citizen is procedurally ultra vires, the aggrieved party can move this Court under Article 32. The contention of the petitioner is that the procedure prescribed by Section 314 of the B.M.C. Act being arbitrary and unfair, it is not "procedure established by law" within the meaning of Article 21 and, therefore, they cannot be deprived of their fundamental right to life by resorting to that procedure. The petitions are clearly maintainable under Article 32 of the Constitution.

32. As we have stated summing up the petitioner's case, the main plank of their argument is that the right of life which is guaranteed by Article 21 includes the right to livelihood and since they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional. For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right of life. An equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right of life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed that explains the massive migration of the rural population of big cities. They migrate because they have no means of livelihood in the villages. The motives force which propels their

desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat only if they have the means of livelihood. That is the context in which it was said by Douglas, J. in Baksey (347 MD 442 (1954) that the right to work is the most precious liberty that man possesses. It is the most precious liberty because it sustains and enables a man to live and the right of life is a precious freedom. "Life", as observed by Field, J. in Munn v. Illinois (1877) 94 US 113), means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in Kharak Singh v. State of U.P. (1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri: LJ 329).

33. Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, *inter alia*, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The principles in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the state to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right of life. The State may not by affirmative action be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.

34. Learned counsel for the respondents placed strong reliance on a decision of this Court in In Re Sant Ram (1960) 3 SCR 499: AIR 1960 SC 932: (1961) 1 SCJ 98) in support of their contention that the right to life guaranteed by Article 21 does not include the right to livelihood. Rule 24 of the Supreme Court Rules empowers the Registrar to publish lists of persons who are proved to be habitually acting as touts. The Registrar issued a notice to the appellant and one other person to show cause why their names should not be included in the list of touts. That notice was challenged by the appellant on the ground, *inter alia*, that it contravenes Article 21 of the Constitution since, by the inclusion of his name in the list of touts, he was deprived of his right to livelihood which is included in the right to life. It was held by the Constitution Bench of this Court that the language of Article 21 cannot be pressed in aid of the argument that word 'life' in Article 21 includes 'livelihood'

also. This decision is distinguishable because, under the Constitution, no person can claim the right to livelihood by the pursuit of an opprobrious occupation or a nefarious trade or business, life toutism, gambling or living on the gains of prostitution. The petitioners before us do not claim the right to dwell on pavements or in slums for the purpose of pursuing any activity which is illegal, immoral or contrary to public interest. Many of them pursue occupations which are humble but honourable.

35. Turning to the factual situation, how far it is true to say that if the petitioners are evicted from their slum and pavement dwellings, they will be deprived of their means of livelihood? It is impossible, in the very nature of things, to gather reliable data on this subject in regard to each individual petitioner and none has been furnished to us in that form. That the eviction of a person from a pavement or slum will inevitably lead to the deprivation of his means of livelihood, is a proposition which does not have to be established in each individual case. That is an inference which can be drawn from acceptable data. Issues of general public importance, which effect the lives of large sections of the society, defy a just determination if their consideration is limited to the evidence pertaining to specific individuals. In the resolution of such issues, there are no symbolic samples which can effectively project a true picture of the grim realities of life. The writ petitions before us undoubtedly involve a question relating to dwelling houses but they cannot be equated with a suit for the possession of a house by one private person against another. In a case of the latter kind, evidence has to be led to establish the cause of action and justify the claim. In a matter like the one before us, in which the future of half of the city's population is at stake, the Court must consult authentic empirical data compiled by agencies, official and non-official. It is by that process that the core of the problem can be reached and a satisfactory solution found. It would be unrealistic on our part to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements. Common sense, which is a cluster of life's experience, is often more dependable than the rival facts presented by warring litigants.

36. It is clear from the various expert studies to which we have referred while setting out the substance of the pleadings that one of the main reasons of the emergence and growth of squatter-settlements in big metropolitan cities like Bombay is the availability of job opportunities which are lacking in the rural sector. The undisputed fact that even after eviction, the squatters return to the cities affords proof of that position. The Planning Commission's publication, The Report of the Expert Group of Programmes for the Alleviation of Poverty (1982) shows that half of the population in India lives below the poverty line, a large part of which lives in villages. A publication of the Government of Maharashtra, Budget and the New 20-point Socio-Economic Programme shows that about 45 lakhs of families in rural areas live below the poverty line and that the average agricultural holding of a

farmer, which is 0,4 hectares, is hardly enough to sustain him and his comparatively large family. The landless labourers, who constitute the bulk of the village population, are deeply imbedded in the mire of poverty. It is due to these economic pressures that the rural population is forced to migrate to urban areas in search of employment. The affluent and the not-so-affluent are alike in search of domestic servants. Industrial and Business House pay a fair wages to the skilled workman that a villager becomes in course of time. Having found a job, even if it means washing the pots and pans, the migrant sticks to the big city. If driven out, he returns in quest of another job. The cost of public sector housing is beyond his modest means and less we refer to the deals of private builders the better for all, excluding none. Added to these factors is the stark reality of growing insecurity in villages on account of the tyranny of parochialism and casteism. The announcement made by the Maharashtra Chief Minister regarding the deportation of willing pavement dwellers affords some indication that they are migrants from the interior areas, within and outside Maharashtra. It is estimated that about 200 to 300 people enter Bombay every day in search of employment. These facts constitute empirical evidence to justify the conclusion that persons in the position of petitioners live in slums and on pavements because they have small jobs to nurse in the city and there is nowhere else to live. Evidently, they chose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means. To lose the pavement or the slum is to lose the job. The conclusion, therefore, in terms of the constitutional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life.

37. Two conclusions emerge from this discussion: one, that the right to life which is conferred by Article 21 includes the right to livelihood and two, that it is established that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. But the Constitution does not put an absolute embargo on the deprivation of life or personal liberty. By Article 21, such deprivation has to be according to procedure established by law. In the instant case, the law which allows the deprivation of the right conferred by Article 21 is the Bombay Municipal Corporation Act, 1888, the relevant provisions of which are contained in Sections 312(1), 313(1)(a) and 314. These sections which occur in Chapter XI entitled 'Regulation of Streets' read thus:

Section 312 - Prohibition of structures or fixtures which cause obstruction in streets.

(1) No person shall, except with the permission of the Commissioner under Section 310 or 317, erect or set up any wall, fence, rail, post, step, booth or other structure of fixture in or upon any street or upon any open channel, drain, well or tank in any street so as to form an obstruction to or an encroachment upon, or a projection over, or to occupy, any portion or such street, channel, drain well or tank.
Section 313 - Prohibition of deposit, etc. of things in the streets.

(1) No person shall except with the written permission of the Commissioner,-

(a) place or deposit upon any street or upon any open channel, drain or well in any streets (or in any public place) any stall, chair, bench, box, ladder, bale or other things so as to form an obstruction thereto or encroachment thereon.

Section 314 - Power to remove without notice anything erected, deposited or hawked in contravention of Section 312, 313 or 313-A.

The Commissioner may, without notice, cause to be removed -

(a) any wall, fence, rail, post, step, booth or other structure or fixture which shall be erected or set up in or upon any street, or upon or over any open channel, drain, well or tank contrary to the provisions of sub-section (1) of Section 312, after the same comes into force in the city or in the suburbs, after the date of the coming into the force of the Bombay Municipal (Extension of Limits) Act, 1950 or in the extended suburbs after the date of the coming into force of the Bombay Municipal Further Extension of Limits and Schedule BBA (Amendment) Act, 1956;

(b) any stall, chair, bench, box, ladder, bale, board or shelf, or any other thing whatever placed in contravention of sub-section (1) of Section 313;

(c) any article whatsoever hawked or exposed for sale in any public place or in any public street in contravention of the provisions of Section 313-A and any vehicle, package, box, board, shelf or any other thing in or on which such article is placed or kept for the purpose of sale.

By Section 3(w), "street" includes a causeway, footway, passage etc., over which the public have a right of passage or access.

38. These provisions, which are clear and specific, empower the municipal Commissioner to cause to be removed encroachments on footpaths or pavements over which the public have a right of passage or access. It is undeniable that, in these cases, wherever constructions have been put upon the pavements, the public has a right of passage or access over those pavements. The argument of the petitioners is that the procedure prescribed by Section 314 or the removal of encroachments from pavements is arbitrary and unreasonable since, not only does it not provide for the giving of a notice before the removal of an encroachment but, it provides expressly that the Municipal Commissioner may cause the encroachment to be removed "without notice".

39. It is so far too well-settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Article 21 must be fair, just and reasonable. (See E.P. Royappa v. State of T.N. (1974) 2 SCR 348 :

(1974) 4 SCC 3 : 1974 SCC (L&S) 165); Maneka Gandhi v. Union of India (187)8 2 SCR 621) (1978) 1 SCC 248); M.H. Hoscot v. State of Maharashtra (1979) 1 SCR 192 : (1978) 3 SCC 544: 1978 SCC (Cri) 468); Sunil Batra (I) v. Delhi Administration (1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155); Sita Ram v. State of U.P. (1979)2 SCR 1085 : (1979) 2 SCC 656 : 1979 SCC (Cri) 576); Hussainara Khatoon (IV) v. Home Secretary, State of Bihar (1979) 2 SCR 532, 537 : (1980) 1 SCC 98, 103 : 1980 SCC (Cri) 40); Hussainara Khatoon (I) v. Home Secretary, State of Bihar (1980) 1 SCC 81 : 1980 SCC (Cri) 23); SunilBatra (II) v. Delhi Administration (1980) 2 SCR 557 : (1980) 3 SCC 488 : 1980 SCC (Cri) 777); Jolly George Varghese v. Bank of Cochin (1980) 2 SCR 913, 921-922 : (1980) 2 SCC 360, 367 : AIR 1980 SC 470); Kasturi Lal Lakshmi Reddy v. State of J & K (1980) 3 SCR 1338; 1356 : 1980) 4 SCC 1 and Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 2SCR 516, 523-524 : (1981) 1 SCC 608, 614 : 1981 SCC (Cri) 212).

40. Just as a mala fide act has no existence in the eye of law, even so unreasonableness, vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must confirm to norms of justice and fair play. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be within the scope of authority conferred by law and secondly, it must be reasonable. If any action within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself reasonable. The substance of the law cannot be divorced from the procedure which it prescribes for. How reasonable the law is depends upon how fair is the procedure prescribed by it. Sir Raymond Evershed 'The Influence of Remedies on Rights' (Current Legal Problems 1953, Volume 6) says that, "from the point of view of the ordinary citizen, it is the procedure that will most strongly weight with him. He will tend to form his judgment of the excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work". Therefore, "He that takes the procedural sword shall perish with the sword" (Per Frankfurter, J. in Viteralli v. Seton, 3 L Ed 2d 1012).

41. Justice K.K. Mathew points out in his article on 'The Welfare State, Rule of Law and Natural Justice', which is to be found in his book Democracy, Equality and Freedom (Eastern Book Co., Lucknow (1978) p.28), that there is "substantial law notion is the protection of the individual against arbitrary exercise of power wherever it is found". Adopting that formulation, Bhagwati, J. speaking to the Court, observed in Ramana Dayram Shetty v. International Airport Authority of India (1979) 3 SCR 1014, 1032: (1979) 3 SCC 489, 504), that it is (SCC p. 504, para

10) "unthinkable that in a democracy governed by the rule of law, the executive Government or any of its officer should posses arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement".

42. Having given our anxious and solicitous consideration to this question, we are of the opinion that the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passage or access, cannot be regarded as unreasonable, unfair or unjust. There is no static measure of reasonableness which can be applied to all situations alike. Indeed, the question "Is the procedure reasonable?" implies and postulates the inquiry as to whether the procedure prescribed is reasonable in the circumstances of the case. In Francis Coralie Mullin, Bhagwati, J. said at p. 524: (SCC p 615, para 4)

> ". . . it is for the Court to decide in the exercise of its constitutional power to judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise."

43. In the first place, footpaths or pavements are public properties which are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets. The main reason for laying out pavements is to ensure that the pedestrians are able to go about their daily affairs with a reasonable measure of safety and security. That facility, which has matured into a right of the pedestrians, cannot be set at naught by allowing encroachments to be made on the pavements. There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up constructions on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that the former should be preferred to the latter. No one has the right to make use of public property for a private purpose without the requisite authorization and, therefore, it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon. Public streets, of which pavements form a part, are primarily dedicated for the purpose of passage and even the pedestrians have but the limited right of using pavements for the purpose of passing and repassing. So long as a person does not transgress the limited purpose for which pavements are made, his use thereof is legitimate and lawful. But if a person puts any public property to use for which it is not intended and is not authorized so to use it, he becomes a trespasser. The common example which is cited in some of the English cases (see, for example, Hickman v. Maisey (1900) 1 QB 752: 1900WN 72 (CA) is that if a person, while using a highway for passage, sits down for a time to rest himself by the side of the road, he does not commit a trespass. But if a person puts up a

dwelling on the pavement, whatever may be the economic compulsations behind such an act, this user of the pavement would become unauthorised. As stated in Hickman (1900) 1 QB 752: 1900 WN 72 (CA) it is not easy to draw an exact line between the legitimate user of a highway as a highway and the user which goes beyond the right conferred upon the public by its dedication. But, as in many other cases, it is not difficult to put cases well on one side of the line. Putting up a dwelling on the pavement is a case which is clearly on one side of the line showing that it is an act of trespass. Section 61 of the Bombay Municipal corporation Act lays down the obligatory duties of the Corporation, under clause (d) of which it is its duty to take measures for abatement of all nuisances. The existence of dwellings on the pavements is unquestionably a source of nuisance to the public, at least for the reason that they are denied the use of pavements for passing and repassing. They are compelled, by reason of the occupation of pavements by dwellers to use highways and public streets as passages. The affidavit filed on behalf of the Corporation shows that the fall-out of pedestrians in large numbers on highways and streets constitutes a grave traffic hazard. Surely, pedestrians deserve consideration in the matter of their physical safety, which cannot be sacrificed in order to accommodate persons who use public properties for a private purpose, unauthorized. Under clause (O) of Section 61 of the B.M.C. Act, the Corporation is under an obligation to remove obstructions upon public streets and other public places. The counter-affidavit of the Corporation shows that the existence of hutments on pavements is a serious impediment in repairing the roads, pavements, drains and streets. Section 63(k), which is discretionary, empowers the Corporation to take measures to promote public safety, health or convenience not specifically provided otherwise. Since it is not possible to provide any public conveniences to the pavements dwellers on or near the pavements, they answer the nature's call on the pavements or on the streets adjoining them. These facts provide the background to the provision for removal of encroachments on pavements and footpaths.

44. The challenge of the petitioners to the validity of the relevant provisions of the Bombay Municipal Corporation Act is directed principally at the procedure prescribed by Section 314 of that Act, which provides by clause (a) that the Commissioner may, without notice, take steps for the removal of encroachments in or upon any street, channel, drains, etc. By reason of Section 3(w), 'street' includes a causeway, footway or passage. In order to decide whether the procedure prescribed by Section 314 is fair and reasonable, we must first determine the true meaning of that section because the meaning of the law determines its legality. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down. Considered in its proper perspective, Section 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner, in appropriate cases, to dispense with previous notice to persons who are likely to be affected by the proposed action. It does not require and cannot be read to mean that, in total disregard of the relevant

circumstances pertaining to a given situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What Section 314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It does not command that the Commissioner shall, without notice, cause an encroachment to be removed. Putting it differently, Section 314 confers on the Commissioners the discretion to cause an encroachment to be removed with or without notice. That direction has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. We must lean in favour of this interpretation because it helps sustain the validity of the law. Reading Section 314 as containing a command not to issue notice before the removal of an encroachment will make the law invalid.

45. It must further be presumed that, while vesting in the Commissioner, the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.

46. It was urged by Shri K.K. Singhvi on behalf of the Municipal Corporation that the Legislature may well have intended that no notice need be given in any case whatsoever because no useful purpose could be served by issuing a notice as to why an encroachment on a public property should not be removed. We have indicated above that far from so intending the Legislature has left it to the discretion of the Commissioner whether or not to give notice, a discretion which has to be exercised reasonably. Counsel attempted to demonstrate the practical futility of issuing the show cause notice by pointing out firstly that the only answer which a pavement dweller, for example, can make to such a notice is that he is compelled to live on the pavement because he has no other place to go to and, secondly, that it is hardly likely that in pursuance of such a notice, pavement dwellers or slum dwellers would ask for time to vacate since, on their own showing, they are compelled to occupy some pavement or slum or the other if they are evicted. It may be true to say that, in the generality of cases, persons who have committed encroachments on pavement or

on other public properties may not have an effective answer to give. It is a notorious fact of contemporary life in metropolitan cities that no person in his senses would opt to live on a pavement or in a notorious fact of contemporary life in metropolitan cities that no person in his senses would opt to live on a pavement or in a slum if any other choice were available to him. Anyone who cares to have even a fleeting glance at the pavement or slum dwellings will see that they are very hell on earth. But, though this is so, the contention of the Corporation that no notice need be given because there can be no effective answer to it, betrays a misunderstanding of the rule of hearing, which is an import element of the principles of natural justice. The decision to dispense with notice cannot be founded upon a presumed impregnability of the proposed action. For example, in the common run of cases, a person may contend in answer to a notice under Section 314 that (i) there was, in fact, no encroachment on any public road, footpath or pavement, or (ii) the enrichment was so slight and negligible as to cause no nuisance or inconvenience to other members of the public, or (iii) time may be granted for removal of the encroachment in view of humane considerations arising out of personal, seasonal or other factors. It would not be right to assume that the Commissioner would reject these or similar other considerations without a careful application of mind. Human compassion must soften the rough edges of justice in all situations. The eviction of the pavement or slum dweller not only means his removal from the house but the destruction of the house itself. And the destruction of a dwelling house is the end of all that one holds dear in life. Humbler the dwelling, greater the suffering and more intense the sense of loss.

47. The proposition that notice need not be given of a proposed action because there can possibility be no answer to it, is contrary to the well-recognised understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their preserved only when there is some institutional check on arbitrary action on the part of public authorities (Kadish, 'Methodology and Criteria in Due Process Adjudication – A Survey and Criticism', 66 Yale LJ 319, 340 (1957). The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consist in the opportunity which it gives to individuals or groups against whom decisions, taken by public authorities, operate to participate in the processes by which those decisions are made an opportunity that expresses their dignity as persons (Goldberg v. Kelly, 397 US 254, 264-65 (1970) (right of the poor to participate in public processes).

Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to

be heard from and the right to be told why are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a thing, is a least to be consulted about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the "validity and moral authority of a conclusion largely depend on the mode by which it was reached . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done" (Joint Anti-facist Refugee Committee v. McGrath, 341 US 123, 171-72 (1951). At stake here is not just the much-acclaimed appearance of justice but from a perspective that treats process as intrinsically significant, the very essence of justice (See 'American Constitutional Law' by Laurence H. Tribe, Professor of Law, Harvard University (1978 Edn., p. 503).

The instrumental facet of the right of hearing consists in the means which it affords of assuring that the public rules of conduct, which result in benefits and prejudices alike, are in fact accurately and consistently followed.

It ensures that a challenged action accurately reflects the substantive rules applicable to such action; its point is less to assure participation than to use participation to assure accuracy (ID).

48. Any discussion of this topic would be incomplete without reference to an important decision of this Court in S.L. Kapoor v. Jagmohan (1981) 1 SCR 746, 766: (1980) 4 SCC 379, 395). In that case, the supersession of the New Delhi Municipal Committee was challenged on the ground that it was in violation of the principles of natural justice since no show cause notice was issued before the order to supersession was passed. Linked with that question was the question whether the failure to observe the principles of natural justice matters at all, if such observance would have made no difference, the admitted or indisputable facts speaking for themselves. After referring to the decisions in Ridge v. Baldwin (1964) AC 40, 68: (1963) 2 All ER 66, 73); John v. Rees (1970) 1 Ch 345, 402); Annanunthodo v. Oilfields Workers' Trade Union (1961) 3 All ER 621, 625 (HL): Margarita Fuentes et al v. Tobert L. Shevin (32 L Ed 2d 556, 574) Chintapalli Agency Taluk Arrack Sales Cooperative, Society Ltd, v. Secretary (Food and Agriculture) Government of A.P. (1978) 1 SCR 563, 567, 569-70: (1977) 4 SCC 337, 341, 343-44) and to an interesting discussion of the subject in Jackson's Natural Justice (1980 Edn.), the Court, speaking through one to us, Chinnappa Reddy, J. said: (SCC p. 395, para 24)

> "In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

These observations sum up the true legal position regarding the purport and implications of the right of hearing.

49. The jurisprudence requiring hearing to be given to those who have encroached on pavements and other public properties evoked a sharp response from the respondents' counsel. "Hearing to be given to trespassers who have encroached on public properties? To persons who commit crime?", they seemed to ask in wonderment. There is no doubt that the petitioners are using pavements and other public properties for an unauthorized purpose. But their intention or object in doing so is not to "commit an offence or intimidate, insult or annoy any person", which is the gist of the offence of 'Criminal trespass' under Section 441 of the Penal Code. They manage to find a habitat in places which are mostly filthy or marshy, out of sheet helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice. Trespass is a tort (see Ramaswamy Iyer's 'Law of Torts' 7th edn., by Justice and Mrs. S.K. Desai, p.98, para 41). But even the law of Torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is reasonable and appropriate to the occasion and, what is even more important, the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him. Besides under the law Torts, necessity is a plausible defence which enables a person to escape liability on the ground that the acts complained of is necessary to prevent greater damage, inter alia to him. "Here, as elsewhere in the law of Torts, a balance has to be struck between competing sets of values . . .".

50. The charge made by the State Government in its affidavit that slum and pavement dwellers exhibit especial criminal tendencies is unfounded. According to Dr. P.K. Muttagi, Head of the unit for urban studies of the Tata Institute of Social Sciences, Bombay, the surveys carried out in 1972, 1977, 1979 and 1981 show that many families which have chosen the Bombay footpaths just for survival have been living there for several years and that 53% of the pavement dwellers are self-employed as hawkers in vegetables, flowers, ice-cream, toys, balloons, buttons, needles and so on. Over 38% are in the wage-employed category as casual labourers, construction workers, domestic servants and luggage carriers. Only 1.7% of the total number is generally unemployed. Dr. Muttagi found among the pavement dwellers a graduate of Marathwada University and a Muslim poet of some standing. "These people have merged with the landscape, become part of it, like the chameleon", though their contact with their more fortunate neighbours who live in adjoining high-rise buildings is causal The most important finding of Dr. Muttagi is that the pavement dwellers are a peaceful lot, "for they stand to lose their shelter on the pavement if they disturb the affluent or indulge in fights with their fellow dwellers". The charge of the State Government, besides being contrary to these scientific findings, is born of prejudice against the poor and the destitute. Affluent people

living in sky scrapers also commit crimes varying from living on the gains of prostitution and defrauding the public treasury to smuggling. But they get away. The pavement dwellers, when caught, defend themselves by asking, "Who does not commit crimes in this city?" As observed by Anand Chakravarti, "The separation between existential realities and the rhetoric of socialism indulged in by the wielders of power in the government cannot be more profound."

51. Normally, we would have directed the Municipal Commissioner to afford an opportunity to the petitioners to show why the encroachments committed by them on pavements or footpaths should not be removed. But the opportunity which was denied by the Commissioner was granted by us in an ample measure, both sides having made their contentions elaborately on facts as well as on law. Having considered those contentions, we are of the opinion that the Commissioner was justified in directing the removal of the encroachments committed by the petitioners on pavements, footpaths or accessory roads. As observed in S.L. Kapoor (1981) 1 SCR 746, 766: (1980) 4 SCC 379, 395), ". . . where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs". Indeed in that case, the Court did not set aside the order of super session in view of the factual position stated by it. But, though we do not see any justification for asking the Commissioner to hear the petitioners, we propose to pass an order which, we believe, he would or should have passed, had he granted a hearing to them and heard what we did. We are of the opinion that the petitioners should not be evicted from the pavements, footpaths or accessory roads until one month after the conclusion of the current monsoon season, that is to say, until October 31, 1985. In the meanwhile, as explained later, steps may be taken to offer alternative pitches to the pavement dwellers who were or who happened to be censuses in 1976. The offer of alternative pitches to such pavement dwellers should be made good in the spirit in which it was made, though we do not propose to make it a condition precedent to the removal of the encroachments committed by them.

52. Insofar as the Kamraj Nagar Basti is concerned, there are over 400 hutments therein. The affidavit of the Municipal Commissioner, Shri D.M. Sukhthankar, shows that the Basti was constructed on an accessory road, leading to the Highway. It is also clear from that affidavit that the hutments were never regularised and no registration numbers were assigned to them by the Road Development Department. Since the Basti is situated on a part of the road leading to the Express Highway, serious traffic hazards arise on account of the straying of the Basti children on to the Express Highway, on which there is heavy vehicular traffic. The same criterion would apply to the Kamraj Nagar Basti as would apply to the dwellings constructed unauthorisedly on other roads and pavements in the city.

53. The affidavit of Shri Arvind V. Gokak, Administrator of the Maharashtra Housing and Areas Development Authority, Bombay, shows that the State Government had taken a decision to compile a list of slums which were required to be removed in public interest and to allocate, after a spot inspection, 500 acres of vacant land in or near the Bombay Suburban District for resettlement of hutment dwellers removed from the slums. A census was accordingly carried out on January 4, 1976 to enumerate the slum dwellers spread over about 850 colonies all over Bombay. About 67% of the hutment dwellers produced photographs of the heads of their families, on the basis of which the hutments were numbered and their occupants were given identity cards. Shri Gokak further says in his affidavit that the Government had also decided that the slums which were in existence for a long time and which were improved and developed, would not normally be demolished unless the land was required for a public purpose. In the event that the land was so required, the policy of the State Government was to provide alternate accommodation to the slum dwellers that were censuses and possessed identity cards. The circular of the State Government dated February 4, 1976 (No. SIS/176/D-41) bears but this position. In the enumeration of the hutment dwellers, some persons occupying pavements also happened to be given census cards. The Government decided to allot pitches to such persons at a place near Malavani. These assurances held forth by the Government must be made good. In other words, despite the finding recorded by us that the provision contained in Section 314 of the B.M.C. Act is valid, pavement dwellers to which census cards were given in 1976 must be given alternate pitches at Malvani though not as a condition precedent to the removal of encroachments committed by them. Secondly, slum dwellers that were censused and were given identity cards must be provided with alternate accommodation before they are evicted. There is a controversy between the petitioners and the State Government as to the extent of vacant land which is available for resettlement of the inhabitants of pavements and slums. Whatever that may be, the highest priority must be accorded by the State Government to the resettlement of these unfortunate persons by allotting to them such land as the Government finds to be conveniently available. The Maharashtra Employment Guarantee Act, 1977, the Employment Guarantee Schemes, the 'New Twenty Point Socio-Economic Programme, 1982', the 'Affordable Low Income Shelter Programme in Bombay Metropolitan Region' and the 'Programme of House Building for the Economically Weaker Sections' must not remain a dead letter as such schemes and programmes must be initiated if the theory of equal protection of laws has to take its rightful place in the struggle for equality. In these matters, the demand is not so much for less governmental interference as for positive governmental interference as for positive governmental action to provide equal treatment to neglected segments of society. The profound rhetoric of socialism must be translated into practice, for the problems which confront the State are problems of human destiny.

54. During the course of arguments, an affidavit was files by Shri S.K. Jahagirdar, Under-Secretary in the Department of Housing, Government of Maharashtra, setting out the various housing schemes which are under the consideration of the State Government. The affidavit contains useful information on various aspects relating to slum and pavement dwellers. The census of 1976 which is referred to in that affidavit shows that 28.18 lakhs of people were living in 6,27,404 households spread over 1680 slum pockets. The earning of 80% of the slum households did not exceed Rs. 600 per month. The State Government has a proposal to undertake 'Low Income Scheme Shelter Programme' with the aid of the World Bank. Under that scheme 85,000 small plots for construction of houses would become available, of which 40,000 would be in Greater Bombay, 25,000 in the Thane-Kalyan area and 20,000 in the New Bombay region. The State Government is also proposing to undertake 'slum Upgrading programme (SUP)' under which basic civic amenities would be made available to the slum dwellers. We trust that these schemes, grandiose as they appear, will be pursued faithfully and the aid obtained from the World Bank utilised systematically and effectively for achieving this purpose.

55. There is no short term or marginal solution to the question of squatter colonies, nor are such colonies unique to the cities of India. Every country, during its historical evolution, has faced the problem of squatter settlements and most countries of the under-developed world face this problem today. Even the highly developed affluent societies face the same problem, though with their larger resources and smaller populations, their task is far less difficult. The forcible eviction of squatters, even if they are resettled in other sites, totally disrupts the economic life of the household. It has been a common experience of squatters eventually selling their new plots and return to their original sites near their place of employment. Therefore, what is of crucial importance to the question of thinning out the squatters' colonies in metropolitan cities is to create new opportunities for employment in the rural sector and to spread the existing job opportunities evenly in urban areas. Apart from the further misery and degradation which it involves, eviction of slum and pavement dwellers is an ineffective remedy for decongesting the cities. In a highly readable and moving account of the problems which the poor have to face, Susan George says ('How the Other Half Dies – The Real Reasons for World Hunger' (Pelican books):

> "So long as thoroughgoing land reform re-grouping and distribution of resources to the poorest, bottom half of the population does not take place. Third World countries can go on increasing their production until hell freezes and hunger will remain, for the production will go to those who already have plenty – to the developed world or to the wealthy in the Third World itself. Poverty and hunger walk hand in hand." (p.18)

We will close with a quotation form the same book which has the following message:

> "Malnourished babies, wasted mothers, emaciated corpses in the streets of Asia have definite and definable reasons for existing. Hunger may have been the human race's constant companion and 'the poor may always be with us' but in the twentieth century, one cannot take this fatalistic view of the destiny of millions of fellow creatures. Their condition is not inevitable but is caused by identifiable forces within the province of rational human control." (p.15)

57. To summarise, we hold that no person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or earmarked for a public purpose like for example a garden or a playground; that the provision contained in Section 314 of the Bombay Municipal Corporation Act is not unreasonable in the circumstances of the case; and that the Kamraj Nagar Basti is situated on an accessory road leading to the Western Express Highway. We have referred to the assurances given by the State Government in its pleadings here which, we repeat, must be made good. Stated briefly, pavement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate pitches at Malvani or at such other convenient place as the Government considers reasonable but not further away in terms of distance; slum dwellers who were given identity cards and whose dwellings where numbered in the 1976 census must be given alternate sites for their resettlement; slums which have been in existence for along time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land is required for a public purpose, in which case, alternate sites or accommodation will be provided to them; the 'Low Income Scheme Shelter Programme' which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly; and the 'slum Upgradation Programme (SUP)' under which basic amenities are to be given to slum dwellers will be implemented without delay. In order to minimise the hardship involved in any eviction, we direct that the slums, wherever situated will not be removed until one month after the end of the current monsoon season, that is until October 31, 1985 and thereafter, only in accordance with the judgment. If any slum is required to be removed before that date, parties may apply to this Court. Pavement dwellers, whether censused or uncensused, will not be removed until the same date viz., October 31, 1985.

The writ petitions will stand disposed of accordingly. There will be no order as to costs.

CHAPTER XII

THE RIGHT TO PROPERTY

Contents:

Alina Simunek et al. v. *the Czech Republic*

(Communication No. 516/1992)

Human Rights Committee

Views adopted on 19 July 1995 at the fifty-fourth session.

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

Meeting on 19 July 1995,

Having concluded its consideration of communication No. 516/1992 submitted to the Human Rights Committee by Mrs. Alina Simunek, Mrs. Dagmar Hastings Tuzilova and Mr. Josef Prochazka under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communications are Alina Simunek, who acts on her behalf and on behalf of her husband, Jaroslav Simunek, Dagmar Tuzilova Hastings and Josef Prochazka, residents of Canada and Switzerland, respectively. They claim to be victims of violations of their human rights by the Czech Republic. The Covenant was ratified by Czechoslovakia on 23 December 1975. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.

FACTS AS SUBMITTED BY THE AUTHORS:

2.1 Alina Simunek, a Polish citizen born in 1960, and Jaroslav Simunek, a Czech citizen, currently reside in Ontario, Canada. They state that they were forced to leave Czechoslovakia in 1987, under pressure of the security forces of the communist regime. Under the legislation then applicable, their property was confiscated. After the fall of the Communist government on 17 November 1989, the Czech authorities published statements which indicated that expatriate Czech citizens would be rehabilitated in as far as any criminal conviction was concerned, and their property restituted.

2.2 In July 1990, Mr. and Mrs. Simunek returned to Czechoslovakia in order to submit a request for the return of their property, which had been confiscated by the District National Committee, a State organ, in Jablonece. It transpired, however, that between September 1989 and February 1990, all their property and personal effects had been evaluated and auctioned off by the District National Committee. Unsaleable items had been destroyed. On 13 February 1990, the authors' real estate was transferred to the Jablonece Sklarny factory, for which Jaroslav Simunek had been working for twenty years.

2.3 Upon lodging a complaint with the District National Committee, an arbitration hearing was convened between the authors, their witnesses and representatives of the factory on 18 July 1990. The latter's representatives denied that the transfer of the authors' property had been illegal. The authors thereupon petitioned the office of the district public prosecutor, requesting an investigation of the matter on the ground that the transfer of their property had been illegal, since it had been transferred in the absence of a court order or court proceedings to which the authors had been parties. On 17 September 1990, the Criminal Investigations Department of the National Police in Jablonece launched an investigation; its report of 29 November 1990 concluded that no violation of (then) applicable regulations could be ascertained, and that the authors' claim should be dismissed, as the Government had not yet amended the former legislation.

2.4 On 2 February 1991, the Czech and Slovak Federal Government adopted Act 87/1991, which entered into force on 1 April 1991. It endorses the rehabilitation of Czech citizens who had left the country under communist pressure and lays down

the conditions for restitution or compensation for loss of property. Under Section 3, subsection 1, of the Act, those who had their property turned into State ownership in the cases specified in Section 6 of the Act are entitled to restitution, but only if they are citizens of the Czech and Slovak Federal Republic and are permanent residents in its territory.

2.5 Under Section 5, subsection 1, of the Act, anyone currently in (illegal) possession of the property shall restitute it to the rightful owner, upon a written request from the latter, who must also prove his or her claim to the property and demonstrate how the property was turned over to the State. Under subsection 2, the request for restitution must be submitted to the individual in possession of the property, within six months of the entry into force of the Act. If the person in possession of the property does not comply with the request, the rightful owner may submit his or her claim to the competent tribunal, within one year of the date of entry into force of the Act (subsection 4).

2.6 With regard to the issue of exhaustion of domestic remedies, it appears that the authors have not submitted their claims for restitution to the local courts, as required under Section 5, subsection 4, of the Act. It transpires from their submissions that they consider this remedy ineffective, as they do not fulfil the requirements under Section 3, subsection 1. Alina Simunek adds that they have lodged complaints with the competent municipal, provincial and federal authorities, to no avail. She also notes that the latest correspondence is a letter from the Czech President's Office, dated 16 June 1992, in which the author is informed that the President's Office cannot intervene in the matter, and that only the tribunals are competent to pronounce on the matter. The author's subsequent letters remained without reply.

2.7 Dagmar Hastings Tuzilova, an American citizen by marriage and currently residing in Switzerland, emigrated from Czechoslovakia in 1968. On 21 May 1974, she was sentenced in absentia to a prison term as well as forfeiture of her property, on the ground that she had 'illegally emigrated' from Czechoslovakia. Her property, 5/18 shares of her family's estate in Pilsen, is currently held by the Administration of Houses in this city.

2.8 By decision of 4 October 1990 of the District Court of Pilsen, Dagmar Hastings Tuzilova was rehabilitated; the District Court's earlier decision, as well as all other decisions in the case, were declared null and void. All her subsequent applications to the competent authorities and a request to the Administration of Houses in Pilsen to negotiate the restitution of her property have, however, not produced any tangible result.

2.9 Apparently, the Administration of Housing agreed, in the spring of 1992, to transfer the 5/18 of the house back to her, on the condition that the State notary in Pilsen agreed to register this transaction. The State notary, however, has so far

refused to register the transfer. At the beginning of 1993, the District Court of Pilsen confirmed the notary's action (Case No. 11 Co. 409/92). The author states that she was informed that she could appeal this decision, via the District Court in Pilsen, to the Supreme Court. She apparently filed an appeal with the Supreme Court on 7 May 1993, but no decision had been taken as of 20 January 1994.

2.10 On 16 March 1992, Dagmar Hastings Tuzilova filed a civil action against the Administration of Houses, pursuant to Section 5, subsection 4, of the Act. On 25 May 1992, the District Court of Pilsen dismissed the claim, on the ground that, as an American citizen residing in Switzerland, she was not entitled to restitution within the meaning of Section 3, subsection 1, of Act 87/1991. The author contends that any appeal against this decision would be ineffective.

2.11 Josef Prochazka is a Czech citizen born in 1920, who currently resides in Switzerland. He fled from Czechoslovakia in August 1968, together with his wife and two sons. In the former Czechoslovakia, he owned a house with two three-bedroom apartments and a garden, as well as another plot of land. Towards the beginning of 1969, he donated his property, in the appropriate form and with the consent of the authorities, to his father. By judgments of a district court of July and September 1971, he, his wife and sons were sentenced to prison terms on the grounds of "illegal emigration" from Czechoslovakia. In 1973, Josef Prochazka's father died; in his will, which was recognized as valid by the authorities, the author's sons inherited the house and other real estate.

2.12 In 1974, the court decreed the confiscation of the author's property, because of his and his family's "illegal emigration", in spite of the fact that the authorities had, several years earlier, recognized as lawful the transfer of the property to the author's father. In December 1974, the house and garden were sold, according to the author at a ridiculously low price, to a high party official.

2.13 By decisions of 26 September 1990 and of 31 January 1991, respectively, the District Court of Ustí rehabilitated the author and his sons as far as their criminal conviction was concerned, with retroactive effect. This means that the court decisions of 1971 and 1974 (see paragraphs 2.11 and 2.12 above) were invalidated.

COMPLAINT:

3.1 Alina and Jaroslav Simunek contend that the requirements of Act 87/1991 constitute unlawful discrimination, as it only applies to "pure Czechs living in the Czech and Slovak Federal Republic". Those who fled the country or were forced into exile by the ex-communist regime must take a permanent residence in Czechoslovakia to be eligible for restitution or compensation. Alina Simunek, who lived and worked in Czechoslovakia for eight years, would not be eligible at all for

restitution, on account of her Polish citizenship. The authors claim that the Act in reality legalizes former Communist practices, as more than 80% of the confiscated property belongs to persons who do not meet these strict requirements.
3.2 Alina Simunek alleges that the conditions for restitution imposed by the Act constitute discrimination on the basis of political opinion and religion, without however substantiating her claim.

3.3 Dagmar Hastings Tuzilova claims that the requirements of Act 87/1991 constitute unlawful discrimination, contrary to article 26 of the Covenant.

3.4 Josef Prochazka also claims that he is a victim of the discriminatory provisions of Act 87/1991; he adds that as the court decided, with retroactive effect, that the confiscation of his property was null and void, the law should not be applied to him at all, as he never lost his legal title to his property, and because there can be no question of 'restitution' of the property.

COMMITTEE'S DECISION ON ADMISSIBILITY:

4.1 On 26 October 1993, the communications were transmitted to the State party under rule 91 of the rules of procedure of the Human Rights Committee. No submission under rule 91 was received from the State party, despite a reminder addressed to it. The authors were equally requested to provide a number of clarifications; they complied with this request by letters of 25 November 1993 (Alina and Jaroslav Simunek), 3 December 1993 and 11/12 April 1994 (Josef Prochazka) and 19 January 1994 (Dagmar Hastings Tuzilova).

4.2 At its 51st session the Committee considered the admissibility of the communication. It noted with regret the State party's failure to provide information and observations on the question of the admissibility of the communication. Notwithstanding this absence of cooperation on the part of the State party, the Committee proceeded to ascertain whether the conditions of admissibility under the Optional Protocol had been met.

4.3 The Committee noted that the confiscation and sale of the property in question by the authorities of Czechoslovakia occurred in the 1970's and 1980's. Irrespective of the fact that all these events took place prior to the date of entry into force of the Optional Protocol for the Czech Republic, the Committee recalled that the right to property, as such, is not protected by the Covenant.

4.4 The Committee observed, however, that the authors complained about the discriminatory effect of the provisions of Act 87/1991, in the sense that they apply only to persons unlawfully stripped of their property under the former regime who now have a permanent residence in the Czech Republic and are Czech citizens. Thus

the question before the Committee was whether the law could be deemed discriminatory within the meaning of article 26 of the Covenant.

4.5 The Committee observed that the State party's obligations under the Covenant applied as of the date of its entry into force. A different issue arose as to when the Committee's competence to consider complaints about alleged violations of the Covenant under the Optional Protocol was engaged. In its jurisprudence under the Optional Protocol, the Committee has consistently held that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol.[1] A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.

4.6 While the authors in the present case have had their criminal convictions quashed by Czech tribunals, they still contend that Act No. 87/1991 discriminates against them, in that in the case of two of the applicants (Mr. and Mrs. Simunek; Mrs. Hastings Tuzilova), they cannot benefit from the law because they are not Czech citizens or have no residence in the Czech Republic, and that in the case of the third applicant (Mr. Prochazka), the law should not have been deemed applicable to his situation at all.

5. On 22 July 1994 the Human Rights Committee therefore decided that the communication was admissible in as much as it may raise issues under articles 14, paragraph 6, and 26 of the Covenant.

STATE PARTY'S EXPLANATIONS

6.1 In its submission, dated 12 December 1994, the State party argues that the legislation in question is not discriminatory. It draws the Committee's attention to the fact that according to article 11, Section 2, of the Charter of Fundamental Rights and Freedoms, which is part of the Constitution of the Czech Republic, ". . . the law may specify that some things may be owned exclusively by citizens or by legal persons having their seat in the Czech Republic."

6.2 The State party affirms its commitment to the settlement of property claims by restitution of properties to persons injured during the period of 25 February 1948 to 1 January 1990. Although certain criteria had to be stipulated for the restitution of confiscated properties, the purpose of such requirements is not to violate human

[1] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991 but, on 31 December 1992, the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

rights. The Czech Republic cannot and will not dictate to anybody where to live. Restitution of confiscated property is a very complicated and de facto unprecedented measure and therefore it cannot be expected to rectify all damages and to satisfy all the people injured by the Communist regime.

7.1 With respect to the communication submitted by Mrs. Alina Simunek the State party argues that the documents submitted by the author do not define the claims clearly enough. It appears from her submission that Mr. Jaroslav Simunek was probably kept in prison by the State Security Police. Nevertheless, it is not clear whether he was kept in custody or actually sentenced to imprisonment. As concerns the confiscation of the property of Mr. and Mrs. Simunek, the communication does not define the measure on the basis of which they were deprived of their ownership rights. In case Mr. Simunek was sentenced for a criminal offence mentioned in Section 2 or Section 4 of Law No. 119/1990 on judicial rehabilitation as amended by subsequent provisions, he could claim rehabilitation under the law or in review proceedings and, within three years of the entry into force of the court decision on his rehabilitation, apply to the Compensations Department of the Ministry of Justice of the Czech Republic for compensation pursuant to Section 23 of the above-mentioned Law. In case Mr. Simunek was unlawfully deprived of his personal liberty and his property was confiscated between 25 February 1948 and 1 January 1990 in connection with a criminal offence mentioned in Section 2 and Section 4 of the Law but the criminal proceedings against him were not initiated, he could apply for compensation on the basis of a court decision issued at the request of the injured party and substantiate his application with the documents which he had at his disposal or which his legal adviser obtained from the archives of the Ministry of the Interior of the Czech Republic.

7.2 As concerns the restitution of the forfeited or confiscated property, the State party concludes from the submission that Alina and Jaroslav Simunek do not comply with the requirements of Section 3 (1) of Law No. 87/1991 on extrajudicial rehabilitations, namely the requirements of citizenship of the Czech and Slovak Federal Republic and permanent residence on its territory. Consequently, they cannot be recognized as persons entitled to restitution. Remedy would be possible only in case at least one of them complied with both requirements and applied for restitution within 6 months from the entry into force of the law on extrajudicial rehabilitations (i.e. by the end of September 1991).

8.1 With respect to the communication of Mrs. Dagmar Hastings-Tuzilova the State party clarifies that Mrs. Dagmar Hastings-Tuzilova claims the restitution of the 5/18 shares of house No. 2214 at Cechova 61, Pilsen, forfeited on the basis of the ruling of the Pilsen District Court of 21 May 1974, by which she was sentenced for the criminal offence of illegal emigration according to Section 109 (2) of the Criminal Law. She was rehabilitated pursuant to Law No. 119/1990 on judicial rehabilitations by the ruling of the Pilsen District Court of 4 October 1990. She applied for

restitution of her share of the estate in Pilsen pursuant to Law No. 87/1991 on extrajudicial rehabilitations. Mrs. Hastings-Tuzilova concluded an agreement on the restitution with the Administration of Houses in Pilsen, which the State Notary in Pilsen refused to register due to the fact that she did not comply with the conditions stipulated by Section 3 (1) of the law on extrajudicial rehabilitations.

8.2 Mrs. Hastings-Tuzilova, although rehabilitated pursuant to the law on judicial rehabilitations, cannot be considered entitled person as defined by Section 19 of the law on extrajudicial rehabilitations, because on the date of application she did not comply with the requirements of Section 3 (1) of the above-mentioned law, i.e. requirements of citizenship of the Czech and Slovak Federal Republic and permanent residence on its territory. Moreover, she failed to fulfil the requirements within the preclusive period stipulated by Section 5 (2) of the law on extrajudicial rehabilitations. Mrs. Hastings-Tuzilova acquired Czech citizenship and registered her permanent residence on 30 September 1992.

8.3 Section 20 (3) of the law on extrajudicial rehabilitations says that the statutory period for the submission of applications for restitution based on the sentence of forfeiture which was declared null and void after the entry into force of the law on extrajudicial rehabilitations starts on the day of the entry into force of the annulment. Nevertheless, this provision cannot be applied in the case of Mrs. Hastings-Tuzilova due to the fact that her judicial rehabilitation entered into force on 9 October 1990, i.e. before the entry into force of Law No. 87/1991 on extrajudicial rehabilitations (1 April 1991).

9.1 With respect to the communication of Mr. Josef Prochazka the State party argues that Section 3 of Law No. 87/1991 on extrajudicial rehabilitations defines the entitled person, i.e. the person who could within the statutory period claim the restitution of property or compensation. Applicants who did not acquire citizenship of the Czech and Slovak Federal Republic and register their permanent residence on its territory before the end of the statutory period determined for the submission of applications (i.e. before 1 October 1991 for applicants for restitution and before 1 April 1992 for applicants for compensation) are not considered entitled persons.

9.2 From Mr. Prochazka's submission the State party concludes that the property devolved to the State on the basis of the ruling of the Usti nad Labem District Court of 1974 which declared the 1969 deed of gift null and void for the reason that the donor left the territory of the former Czechoslovak Socialist Republic. Such cases are provided for in Section 6 (1) (f) of the law on extrajudicial rehabilitations which defined the entitled person as the transferee according to the invalidated deed, i.e. in this case the entitled person is the unnamed father of Mr. Prochazka. Consequently, the persons to whom the sentence of forfeiture invalidated under Law No. 119/1990 on judicial rehabilitations applies, cannot be regarded as entitled persons, as Mr. Prochazka incorrectly assumes.

9.3 With regard to the fact that the above-mentioned father of Mr. Prochazka died before the entry into force of the law on extrajudicial rehabilitations, the entitled persons are the testamentary heirs - Mr. Prochazka's sons Josef Prochazka and Jiri Prochazka, provided that they were citizens of the former Czech and Slovak Federal Republic and had permanent residence on its territory. The fact that they were rehabilitated pursuant to the law on judicial rehabilitations has no significance in this case. From Mr. Prochazka's submission the State party concludes that Josef Prochazka and Jiri Prochazka are Czech citizens but live in Switzerland and did not apply for permanent residence in the Czech Republic.

AUTHORS' COMMENTS ON THE STATE PARTY'S SUBMISSIONS

10.1 By letter of 21 February 1995, Alina and Jaroslav Simunek contend that the State party has not addressed the issues raised by their communication, namely the compatibility of Act No. 87/1991 with the non-discrimination requirement of article 26 of the Covenant. They claim that Czech hard-liners are still in office and that they have no interest in the restitution of confiscated properties, because they themselves benefited from the confiscations. A proper restitution law should be based on democratic principles and not allow restrictions that would exclude former Czech citizens and Czech citizens living abroad.

10.2 By letter of 12 June 1995 Mr. Prochazka informed the Committee that by order of the District Court of 12 April 1995 the plot of land he inherited from his father will be returned to him (paragraph 2.11).

10.3 Mrs. Hastings Tuzilova had not submitted comments by the time of the consideration of the merits of this communication by the Committee.

EXAMINATION OF THE MERITS

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 This communication was declared admissible only insofar as it may raise issues under article 14, paragraph 6, and article 26 of the Covenant. With regard to article 14, paragraph 6, the Committee finds that the authors have not sufficiently substantiated their allegations and that the information before it does not sustain a finding of a violation.

11.3 As the Committee has already explained in its decision on admissibility (para. 4.3 above), the right to property, as such, is not protected under the Covenant.

However, a confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant.

11.4 The issue before the Committee is whether the application of Act 87/1991 to the authors entailed a violation of their rights to equality before the law and to the equal protection of the law. The authors claim that this Act, in effect, reaffirms the earlier discriminatory confiscations. The Committee observes that the confiscations themselves are not here at issue, but rather the denial of a remedy to the authors, whereas other claimants have recovered their properties or received compensation therefore.

11.5 In the instant cases, the authors have been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens and residents of the Czech Republic. The question before the Committee, therefore, is whether these preconditions to restitution or compensation are compatible with the non-discrimination requirement of article 26 of the Covenant. In this context the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26 of the Covenant.[2] A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

11.6 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the authors' original entitlement to the property in question and the nature of the confiscations. The State party itself acknowledges that the confiscations were discriminatory, and this is the reason why specific legislation was enacted to provide for a form of restitution. The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. Bearing in mind that the authors' original entitlement to their respective properties was not predicated either on citizenship or residence, the Committee finds that the conditions of citizenship and residence in Act 87/1991 are unreasonable. In this connection the Committee notes that the State party has not advanced any grounds which would justify these restrictions. Moreover, it has been submitted that the authors and many others in their situation left Czechoslovakia because of their political opinions and that their property was confiscated either because of their political opinions or because of their emigration from the country. These victims of political persecution sought residence and citizenship in other countries. Taking into account that the State party itself is

[2] Zwaan de Vries v. the Netherlands, Communication No. 182/1984, Views adopted on 9 April 1987, para. 13.

responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation.

11.7 The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory.

11.8 In the light of the above considerations, the Committee concludes that Act 87/1991 has had effects upon the authors that violate their rights under article 26 of the Covenant.

12.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the denial of restitution or compensation to the authors constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

12.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which may be compensation if the properties in question cannot be returned. To the extent that partial restitution of Mr. Prochazka's property appears to have been or may soon be effected (para. 10.2), the Committee welcomes this measure, which it deems to constitute partial compliance with these Views. The Committee further encourages the State party to review its relevant legislation to ensure that neither the law itself nor its application is discriminatory.

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

[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.]

G. Ato del Avellanal v. *Peru*
(Communication No. 202/1986)

The Human Rights Committee

Views adopted on 28 October 1988 at the thirty-fourth session.

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

Meeting on 28 October 1988,

Having concluded its consideration of communication No. 202/1986 submitted to the Committee by Graciela Ato del Avellanal under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party concerned,

Adopts the following:

VIEWS UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL

1. The author of the communication (initial letter dated 13 January 1986 and a subsequent letter dated 11 February 1987) is Graciela Ato del Avellanal, a Peruvian citizen born in 1934, employed as professor of music and married with Guillermo Burneo, currently residing in Peru. She is represented by counsel. It is claimed that the Government of Peru has violated articles 2, Paragraphs 1 and 3, 3, 16, 23, paragraphs 4 and 26 of the Covenant, because the author has been allegedly discriminated against only because she is a woman.

2.1 The author is the owner of two apartment buildings in Lima, which she acquired in 1974. It appears that a number of tenants took advantage of the change in ownership to cease paying rent for their apartments. After unsuccessful attempts to collect the overdue rent, the author sued the tenants on 13 September 1978. The court of first instance found in her favour and ordered the tenants to pay her the rent due since 1974. The Superior Court reversed the judgement on 21 November 1980 on the procedural ground that the author was not entitled to sue, because, according to article 168 of the Peruvian Civil Code, when a woman is married only the husband is entitled to represent matrimonial property before the Courts ("El marido

es el page 3 representante de la sociedad conyuqal"). On 10 December 1980 the author appealed to the Peruvian Supreme Court, submitting *inter alia* that the Peruvian Constitution now in force abolished discrimination against women and that article 2 (2) of the Peruvian Magna Carta provides that "the law grants rights to women which are not less than those granted to men". However, On 15 February 1984 the Supreme Court upheld the decision of the Superior Court. Thereupon, the author interposed the recourse of *amparo* on 6 May 1984, claiming that in her case article 2 (2)of the Constitution had been violated by denying her the right to litigate before the courts only because she is a woman. The Supreme Court rejected the recourse of *amparo* on 10 April 1985.

2.2 Having thus exhausted domestic remedies in Peru, and pursuant to article 39 of the Peruvian Law No. 23506, which specifically provides that a Peruvian citizen who considers that his or her constitutional rights have been violated may appeal to the Human Rights Committee of the United Nations, the author seeks United Nations assistance in vindicating her right to equality before the Peruvian courts.

3. By its decision of 19 March 1986, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication in so far as it may raise issues under articles 14, paragraph 1, 16 and 26 in conjunction with articles 2 and 3 of the Covenant. The Working Group also requested the State party to provide the Committee with (a) the text of the decision of the Supreme Court of 10 April 1985, (b) any other relevant court orders or decisions not already provided by the author and (c) the text of the relevant provisions of the domestic law, including those of the Peruvian Civil Code and Constitution.

4.1 By its submission dated 20 November 1986 the State party noted that "in the action brought by Mrs. Graciela Ato de1 Avellanal and one other, the decision of the Supreme Court dated 10 April 1985 was deemed accepted, since no appeal was made against it under article 42 of Act No. 23385".

4.2 The annexed decision of the Supreme Court, dated 10 April 1985 "declares valid the ruling set out on 12 sheets, dated 24 July 1984, declaring inadmissible the application for amparo submitted on 2 sheets by Mrs. Graciela Ato de1 Avellanal de Burneo and one other against the First Civil Section of the Supreme Court; [and] orders that the present decision, whether accepted or enforceable, be published in the *Diario Oficial, El Peruano* within the time-limit laid down in article 41 of Law No. 23156".

5.1 Commenting on the State party's submission under rule 91, the author, in a submission dated 11 February 1987 contends that:

> "1. It is untrue that the ruling of 10 April 1985, of which I was notified on 5 August 1985, was accepted. As shown by the attached copy of the original application, my attorneys appealed against the decision in the petition of 6 August 1985, which was stamped as received by the Second Civil Section of the Supreme Court on 7 August 1985.
>
> 2. The Supreme Court has never notified my attorneys of the decision which it had handed down on the appeal of 6 August 1985."

5.2 The author also encloses a copy of a further application, stamped as received by the Second Civil Section of the Supreme Court on 3 October 1985 and reiterating the request that the appeal lodged should be upheld. She adds that "once again, the Supreme Court failed to notify my attorneys of the decision which it had handed down on this further petition".

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to article 5, paragraph 2 (a) of the Optional Protocol, the Committee observed that the matter complained of by the author was not being examined and had not been examined under another procedure of international investigation or settlement.

6.3 With regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee noted the State party's contention that the author has failed to appeal the decision of the Peruvian Supreme Court of 10 April 1985. However, in the light of the author's submission of 11 February 1987 the Committee found that the communication satisfied the requirements of article 5, paragraph 2 (b) of the Optional Protocol. The Committee further observed that this issue could be reviewed in the light of any further explanations or statements received from the State party under article 4, paragraph 2, of the Optional Protocol.

7. On 9 July 1987 the Human Rights Committee therefore decided that the communication was admissible, in so far as it raised issues under articles 14, Paragraph 1, and 16 in conjunction with articles 2, 3 and 26 of the Covenant.

8. The time-limit for the State party's submission under article 4, paragraph 2, of the Optional Protocol expired on 6 February 1988. No submission has been received from the State party, despite a reminder sent to the State party on 17 May 1988.

9.1 The Human Rights Committee, having considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol, notes that the facts of the case, as submitted by the author, have not been contested by the State Party.

9.2 In formulating its views, the Committee takes into account the failure of the State party to furnish certain information and clarifications, in particular with regard to the allegations of discrimination of which the author has complained. It is not sufficient to forward the text of the relevant laws and decisions, without specifically addressing the issues raised in the communication. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee all relevant information. In the circumstances, due weight must be given to the author's allegations.

10.1 With respect to the requirement set forth in article 14, paragraph 1, of the Covenant that "all persons shall be equal before the courts and tribunals", the committee notes that the court of first instance decided in favour of the author, but the Superior Court reversed that decision on the' sole ground that according to article 168 of the Peruvian Civil Code only the husband is entitled to represent matrimonial property, i.e. that the wife was not equal to her husband for purposes of suing in Court.

10.2 With regard to discrimination on the ground of sex the Committee notes further that under article 3 of the Covenant State parties undertake "to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant" and that article 26 provides that all persons are equal before the law and are entitled to the equal protection of the law. The Committee finds that the facts before it reveal that the application of article 168 of the Peruvian Civil Code to the author resulted in denying her equality before the courts and constituted discrimination on the ground of sex.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the events of this case, in so far as they continued or occurred after 3 January 1981 (the date of entry into force of the Optional Protocol for Peru), disclose violations of articles 3, 14, paragraph 1, and 26 of the Covenant.

12. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the victim. In this connection the Committee welcomes the State party's Commitment, expressed in articles 39 and 40 of Law No. 23506, to co-operate with the Human Rights Committee, and to implement its recommendations.

Josef Frank Adam v. *the Czech Republic*
(Communication No 586/1994)

The Human Rights Committee

Views adopted on 23 July 1996 at the fifty-seventh session.[*]

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

Meeting on 23 July 1996,

Having concluded its consideration of communication No. 589/1994, submitted to the Human Rights Committee by Mr. Joseph Frank Adam under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Joseph Frank Adam, an Australian citizen, born in Australia of Czech parents, residing in Melbourne, Australia. He submits the communication on his own behalf and on that of his two brothers, John and Louis. He claims that they are victims of a violation of article 26 of the International Covenant on Civil and Political Rights by the Czech Republic. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.[1]

THE FACTS AS SUBMITTED BY THE AUTHORS

2.1 The author's father, Vlatislav Adam, was a Czech citizen, whose property and business were confiscated by the Czechoslovak Government in 1949. Mr. Adam fled the country and eventually moved to Australia, where his three sons, including the author of the communication, were born. In 1985, Vlatislav Adam died and, in his last will and testament, left his Czech property to his sons. Since then, the sons have been trying in vain to have their property returned to them.

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[*] The text of an individual opinion of one Committee member is appended.

[1] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

2.2 In 1991, the Czech and Slovak Republic enacted a law rehabilitating Czech citizens who had left the country under Communist pressure and providing for restitution of their property or compensation for the loss thereof. On 6 December 1991, the author and his brothers, through Czech solicitors, submitted a claim for restitution of their property. Their claim was rejected on the grounds that they did not fulfil the then applicable dual requirement of Act 87/91 that applicants have Czech citizenship and be permanent residents in the Czech Republic.

2.3 Since the rejection of their claim, the author has on several occasions petitioned the Czech authorities, explaining his situation and seeking a solution, all to no avail. The authorities in their replies refer to the legislation in force and argue that the provisions of the law, limiting restitution and compensation to Czech citizens are necessary and apply uniformly to all potential claimants.

THE COMPLAINT

3. The author claims that the application of the provision of the law, that property be returned or its loss be compensated only when claimants are Czech citizens, makes him and his brothers victims of discrimination under article 26 of the Covenant.

THE STATE PARTY'S OBSERVATIONS AND THE AUTHOR'S COMMENTS

4.1 On 23 August 1994, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure.

4.2 In its submission dated 17 October 1994, the State party states that the remedies in civil proceedings such as that applicable in the case of Mr. Adam are regulated by Act No. 99/1963, by the Code of Civil Procedure as amended, in particular by Act No. 519/1991 and Act No. 263/1992.

4.3 The State party quotes the texts of several sections of the law, without, however, explaining how the author should have availed himself of those provisions. It concludes that since 1 July 1993, Act No. 182/1993, on the Constitutional Court, stipulates the citizens' right to appeal also to the Constitutional Court of the Czech Republic. Finally, Mr. Adam did not make use of the possibility of filing a claim before the Constitutional Court.

5.1 By letter of 7 November 1994, the author informs the Committee that the State party is trying to circumvent his rights by placing his property and business on sale.

5.2 By letter of 5 February 1995, the author contests the relevance of the State party's general information and reiterates that his lawyers in Czechoslovakia have

been trying to obtain his property since his father died in 1985. He submits that as long as Czech law requires claimants to be Czech citizens, there is no way that he can successfully claim his father's property in the Czech courts.

THE COMMITTEE'S DECISION ON ADMISSIBILITY

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observed *ratione materiae* that although the author's claims relate to property rights, which are not themselves protected in the Covenant, he also alleges that the confiscations under prior Czechoslovak governments were discriminatory and that the new legislation of the Czech Republic discriminates against persons who are not Czech citizens. Therefore, the facts of the communication appear to raise an issue under article 26 of the Covenant.

6.3 The Committee has also considered whether the violations alleged can be examined *ratione temporis*. It notes that although the confiscations took place before the entry into force of the Covenant and of the Optional Protocol for the Czech Republic, the new legislation that excludes claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the Czech Republic, which could entail discrimination in violation of article 26 of the Covenant.

6.4 Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.5 With respect to the requirement of exhaustion of domestic remedies, the Committee recalls that only such remedies have to be exhausted which are both available and effective. The applicable law on confiscated property does not allow for restoration or compensation to the author. Moreover, the Committee notes that the author has been trying to recover his property since his father died in 1985 and that the application of domestic remedies can be deemed, in the circumstances, unreasonably prolonged.

7. Based on those considerations, the Human Rights Committee decided on 16 March 1995 that the communication was admissible inasmuch as it may raise issues under article 26 of the Covenant.

OBSERVATIONS OF THE STATE PARTY

8.1 By note verbale of 10 November 1995, the State party reiterates its objections to the admissibility of the communication, in particular that the author has not availed himself of all national legal remedies.

8.2 It argues that the author is an Australian citizen permanently resident in Australia. As to the alleged confiscation of his father's property in 1949, the State party explains that the Decree of the President of the Republic No. 5/1945 did not represent the conveyance of the ownership title to the State but only restricted the owner in exercising his ownership right.

8.3 The author's father, Vlatislav Adam, was a citizen of Czechoslovakia and left the country for Australia, where the author was born. If indeed Vlatislav Adam willed his Czech property to his sons by virtue of his testament, it is not clear whether he owned any Czech property in 1985, and the author has not explained what steps, if any, he has taken to acquire the inheritance.

8.4 In 1991 the Czech and Slovak Federal Republic adopted a law (Act No. 87/1991) on extrajudicial rehabilitations which rehabilitates Czech citizens who left the country under Communist oppression, and stipulates the restitution of their property and compensation for their loss. On 6 December 1991, the author and his brothers claimed the restitution of their property. Their claim was rejected because they were not persons entitled to the recovery of property pursuant to the Extrajudicial Rehabilitation Act, since they did not satisfy the conditions of citizenship of the Czech Republic and of permanent residence there. The author failed to invoke remedies available against the decision denying him restitution. Moreover, the author failed to observe the legal six-month term to claim his property, the statute of limitations having ended on 1 October 1991. Nevertheless, pursuant to article 5, paragraph 4, of the Extrajudicial Rehabilitation Act, the author could have filed his claims in court until 1 April 1992, but he did not do so.

8.5 The author explains that his attorney felt that there were no effective remedies and that was why they did not pursue their appeals. That subjective assessment is irrelevant to the objective existence of remedies. In particular, he could have lodged a complaint with the Constitutional Court.

8.6 Czech constitutional law, including the Charter of Fundamental Rights and Freedoms, protects the right to own property and guarantees inheritance. Expropriation is possible only in the public interest and on the basis of law, and is subject to compensation.

8.7 The Extrajudicial Rehabilitation Act was amended in order to eliminate the requirement of permanent residence; that occurred pursuant to a finding of the

Constitutional Court of the Czech Republic of 12 July 1994. Moreover, in cases in which the real estate cannot be surrendered, financial compensation is available.

8.8 Articles 1 and 3 of the Charter of Fundamental Rights and Freedoms stipulate equality in the enjoyment of rights and prohibits discrimination. The right to judicial protection is regulated in article 36 of the Charter. The Constitutional Court decides about the abrogation of laws or of their individual provisions if they are in contradiction with a constitutional law or international treaty. A natural person or legal entity is entitled to file a constitutional complaint.

8.9 The author not only failed to invoke the relevant provisions of the Extrajudicial Rehabilitation Act in a timely fashion. He could also have lodged a claim to domestic judicial authorities based on the direct applicability of the International Covenant on Civil and Political Rights, with reference to article 10 of the Constitution, article 36 of the Charter of Fundamental Rights and Freedoms, articles 72 and 74 of the Constitutional Court Act, and article 3 of the Civil Procedure Code. If the author had availed himself of those procedures and if he had not been satisfied with the result, he could still have sought review of legal regulations pursuant to the Constitutional Court Act.

9.1 The State party also endeavours to explain the broader political and legal circumstances of the case and contends that the author's presentation of the facts is misleading. After the democratization process begun in November 1989, the Czech and Slovak Republic, and subsequently the Czech Republic, made a considerable effort to remove some of the property injustices caused by the communist regime. The endeavour to return property, as stipulated in the Rehabilitation Act, was in part a voluntary and moral act of the Government and not a duty or legal obligation. "It is also necessary to point out the fact that it was not possible and, with regard to the protection of the justified interests of the citizens of the present Czech Republic, even undesirable, to remove all injuries caused by the past regime over a period of forty years."

9.2 The precondition of citizenship for restitution or compensation should not be interpreted as a violation of the prohibition of discrimination pursuant to article 26 of the Covenant. "The possibility of explicit restriction to acquiring the ownership of certain property by only some persons is contained in article 11, paragraph 2, of the Charter of Fundamental Rights and Freedoms. This article states that the law may determine that certain property may only be owned by citizens or legal entities having their seat in the Czech and Slovak Federal Republic. In this respect, the Charter speaks of citizens of the Czech and Slovak Federal Republic, and after January 1, 1993, of citizens of the Czech Republic."

9.3 The Czech Republic considers the restriction to exercising rights of ownership by imposing the condition of citizenship to be legitimate. In this connection, it refers

not only to article 3, paragraph 1, of the Charter of Fundamental Rights and Freedoms, containing the non-discrimination clause, but above all to the relevant clauses of international human rights treaties.

THE AUTHOR'S COMMENTS

10.1 As to the facts of the claim, the author explains that in January 1949 his father was ordered out of his business, which was confiscated. He had to hand over the books and the bank accounts and was not even able to take his own personal belongings. As to his departure from Czechoslovakia, he was not able to emigrate legally but had to cross the border illegally into West Germany, where he remained in a refugee camp for a year before being able to immigrate to Australia.

10.2 He disputes the State party's contention that he did not avail himself of domestic remedies. He reiterates that he himself and his attorneys in Prague have tried to assert the claim to inheritance since his father died, in 1985, without success. In December 1991, he and his brothers submitted their claim, which was rejected for lack of citizenship and permanent residence. Moreover, their claim was by virtue of inheritance. He further complains about unreasonably prolonged proceedings in the Czech Republic, in particular that whereas their letters to the Czech Government reached the Czech authorities within a week, the replies took 3 to 4 months.

10.3 As to their Czech citizenship, they claim that the consulate in Australia informed them that if both mother and father were Czech citizens, the children were automatically Czech citizens. However, the Czech Government subsequently denied that interpretation of the law.

REVIEW OF ADMISSIBILITY

11.1 The State party has requested that the Committee revise its decision on admissibility on the grounds that the author has not exhausted domestic remedies. The Committee has taken into consideration all arguments presented by the State party and the explanations given by the author. In the circumstances of this case, considering that the author is abroad and that his lawyers are in the Czech Republic, it would seem that the imposition of a strict statute of limitations for lodgings claims by persons abroad is unreasonable. In the author's case, the Committee has taken into account the circumstance that he has been trying to assert his inheritance claim since 1985 and that his Prague attorneys have been unsuccessful, ultimately not because of the statute of limitations but because the Rehabilitation Act, as amended, stipulates that only citizens can claim restitution or compensation. Since the author, according to his last submission, which has not been disputed by the State party

(para. 10.3) is not a Czech citizen, he cannot invoke the Rehabilitation Act in order to obtain the return of his father's property.

11.2 In the absence of legislation enabling the author to claim restitution, recourse to the Constitutional Court cannot be considered an available and effective remedy for purposes of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances of this case, such a remedy must be considered as an extraordinary remedy, since the right being challenged is not a constitutional right to restitution as such, bearing in mind that the Czech and Slovak legislature considered the 1991 Rehabilitation Act to be a measure of moral rehabilitation rather than a legal obligation (para. 9.1). Moreover, the State has argued that it is compatible with the Czech Constitution and in keeping with Czech public policy to restrict the ownership of property to citizens.

11.3 Under these circumstances, the Committee finds no reason to set aside its decision on admissibility of 16 March 1995.

EXAMINATION OF THE MERITS

12.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

12.2 The communication was declared admissible only insofar as it may raise issues under article 26 of the Covenant. As the Committee has already explained in its decision on admissibility (para. 6.2 above), the right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure of a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds, in violation of article 26 of the Covenant.

12.3 The issue before the Committee is whether the application of Act 87/1991 to the author and his brothers entailed a violation of their right to equality before the law and to the equal protection of the law. The Committee observes that the confiscations themselves are not here at issue but rather the denial of restitution to the author and his brothers, whereas other claimants under the Act have recovered their properties or received compensation therefore.

12.4 In the instant case, the author has been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens. The question before the Committee, therefore, is whether the precondition to restitution or compensation is compatible with the non-discrimination requirement of article 26 of the Covenant. In this context, the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26 of

the Covenant.[2] A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

12.5 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the original entitlement of the author's father to the property in question and the nature of the confiscation. The State party itself has acknowledged that the confiscations under the Communist governments were injurious and that is why specific legislation was enacted to provide for a form of restitution. The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. Bearing in mind that the author's original entitlement to his property by virtue of inheritance was not predicated on citizenship, the Committee finds that the condition of citizenship in Act 87/1991 is unreasonable.

12.6 In this context, the Committee recalls its rationale in its views on communication No. 516/1992 (Simunek et al. v. the Czech Republic), adopted on 19 July 1995, [3] in which it considered that the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the departure of the author's parents in 1949, it would be incompatible with the Covenant to require the author and his brothers to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation.

12.7 The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not dispositive in determining a breach of article 26 of the Covenant, but rather the consequences of the enacted legislation. Whatever the motivation or intent of the legislature, a law may still contravene article 26 of the Covenant if its effects are discriminatory.

12.8 In the light of the above considerations, the Committee concludes that Act 87/1991 and the continued practice of non-restitution to non-citizens of the Czech Republic have had effects upon the author and his brothers that violate their rights under article 26 of the Covenant.

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[2] See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII. D, communication No. 182/1994, (Zwaan-de Vries v. the Netherlands), views adopted on 9 April 1987, para. 13.

[3] Ibid., Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X. K.

13.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the denial of restitution or compensation to the author and his brothers constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

13.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his brothers with an effective remedy, which may be compensation if the property in question cannot be returned. The Committee further encourages the State party to review its relevant legislation to ensure that neither the law itself nor its application is discriminatory.

13.3 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

APPENDIX

[Original: English]

INDIVIDUAL OPINION OF COMMITTEE MEMBER NISUKE ANDO

Considering the Human Rights Committee's views on communication No. 516/1992, I do not oppose the adoption by the Committee of the views in the instant case. However, I would like to point to the following:

First, under current rules of general international law, States are free to choose their economic system. As a matter of fact, when the United Nations adopted the International Covenant on Civil and Political Rights in 1966, the then Socialist States were managing planned economies under which private ownership was largely restricted or prohibited in principle. Even nowadays not a few States parties to the Covenant, including those adopting marked-oriented economies, restrict or

prohibit foreigners from private ownership of immovable properties in their territories.

Second, consequently, it is not impossible for a State party to limit the ownership of immovable properties in its territory to its nationals or citizens, thereby precluding their wives or children of different nationality or citizenship from inheriting or succeeding to those properties. Such inheritance or succession is regulated by rules of private international law of the States concerned, and I am not aware of any universally recognized "absolute right of inheritance or of succession to private property".

Third, while the International Covenant on Civil and Political Rights enshrines the principle of non-discrimination and equality before the law, it does not prohibit "legitimate distinctions" based on objective and reasonable criteria. Nor does the Covenant define or protect economic rights as such. This means that the Human Rights Committee should exercise utmost caution in dealing with questions of discrimination in the economic field. For example, restrictions or prohibitions of certain economic rights, including the right of inheritance or succession, which are based on nationality or citizenship, may well be justified as legitimate distinctions.

(*Signed*) Nisuke Ando

Ibrahima Gueye et al. v. *France*
(Communication No. 196/1985)

The Human Rights Committee

Views adopted on 3 April 1989 at the thirty-fifth session.

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

Meeting on 3 April 1989,

Having concluded its consideration of communication No. 196/1985, submitted to the Committee by Ibrahima Gueye and 742 other retired Senegalese members of the French Army under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information, made available to it by the author of the communication and by the State party,

Adopts the following:

VIEWS UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL[1]

1.1 The authors of the communication (initial letter of -12 October 1985 and subsequent letters of 22 December 1986, 6 June 1987 and 21 July 1988) are Ibrahima Gueye and 742 other retired Senegalese members of the French Army, residing in Senegal. They are represented by counsel.

1.2 The authors claim to be victims of a violation of article 26 of the Covenant ..: by France because of alleged racial discrimination in French legislation which provides for different treatment in the determination of pensions of retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal in 1960 and who receive pensions that are inferior to those enjoyed by retired French soldiers of French nationality.

[1] Pursuant to rule 84, paragraph 1 (b), of the Committee's provisional rules of procedure, Ms. Christine Chanet did not participate in the adoption of the views of the Committee. Mr. Birame Ndiaye did not participate in the adoption of the views pursuant to rule 85.

1.3 It is stated that pursuant to Law No. 51-561 of 18 May 1951 and Decree No. 51-590 of 23 May 1951, retired members of the French Army, whether French or Senegalese, were treated equally. The acquired rights of Senegalese retired soldiers were respected after independence in 1960 until the Finance Act No. 74.1129 of December 1974 provided for different treatment of the Senegalese. Article 63 of this Law stipulates that the pensions of Senegalese soldiers would no longer be subject to the general provisions of The Code of Military Pensions of 1951. Subsequent French legislation froze the level of pensions for the Senegalese as of 1 January 1975.

1.4 The authors state that the laws in question have been challenged before the Administrative Tribunal of Poitiers, France, which rendered a decision on 22 December 1980 in favour of Dia Abdourahmane, a retired Senegalese soldier, ordering the case to be sent to the French Minister of Finance for purposes of full indemnification since 2 January 1975. The authors enclose a similar decision of the Conseil d'Etat of 22 June 1982 in the case of another Senegalese soldier. However, these decisions, it is alleged, were not implemented, in view of a new French Finance Law No. 81.1179 of 31 December 1981, applied with retroactive effect to 1 January 1975, which is said to frustrate any further recourse before the French judicial or administrative tribunals.

1.5 As to the merits of the case, the authors reject the arguments of the French authorities that allegedly justify the different treatment of retired African (not only Senegalese) soldiers on the grounds of: (a) their loss of French nationality upon independence; (b) the difficulties for French authorities to establish the identity and the family situation of retired soldiers in African countries; and (c) the differences in the economic, financial and social conditions prevailing in France and in its former colonies.

1.6 The authors state that they have not submitted the same matter to any other procedure of international investigation or settlement.

2. By its decision of 26 March 1986, the Human Rights Committee. transmitted the communication under rule 91 of the Committee's provisional rules of procedure to the State party requesting information and observations relevant to the question of the admissibility of the communication.

3.1 In its initial submission under rule 91, dated 5 November 1986, the State party describes the factual situation in detail and argues that the communication is "inadmissible as being incompatible with the provisions of the Covenant (art. 3 of the Optional Protocol), additionally, unfounded", because it basically deals with rights that fall outside the scope of the Covenant (i.e. pension rights) and, at any rate, because the contested legislation does not contain any discriminatory provisions within the meaning of article 26 of the Covenant.

3.2 In a further submission under rule 91, dated 8 April 1987, the State party invokes the declaration made by the French Government upon ratification of the Optional Protocol on 17 February 1984 and contends that the communication is inadmissible ratione temporis:

> "France interprets article 1 [of the Optional Protocol] as giving the Committee the competence to receive communications alleging a violation of a right set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Republic, or from a decision relating to acts, omissions, developments or events after that date. It is clear from this interpretative declaration that communications directed against France are admissible only if they are based on alleged violations which derive from acts or events occurring after 17 May 1984, the date on which the Protocol entered into force with respect to France under article 9, paragraph 2, of the said Protocol. However, the statement of the facts contained both in the communication itself and in the initial observations by the French Government indicates that the violation alleged by the authors of the communication derives from Law No. 79.1102 of 21 December 1979, which extended to the nationals of four States formerly belonging to the French Union, including Senegal, the régime referred to as 'crystallization' of military pensions that had already applied since 1 January 1961 to the nationals of the other States concerned. Since this act occurred before ratification by France of the Optional Protocol, it cannot therefore provide grounds for a communication based on its alleged incompatibility with the Covenant unless such communication ignores the effect ratione temporis which France conferred on its recognition of the right of individual communication."

4.1 In their comments of 22 December 1986, the authors argue that the communication should not be declared inadmissible pursuant to article 3 of the Optional Protocol as incompatible with the provisions of the Covenant, since a broad interpretation of article 26 of the Covenant would permit the Committee to review questions of pension rights if there is discrimination, as claimed in this case.

4.2 In their further comments of 6 June 1987, the authors mention that although the relevant French legislation pre-dates the entry into force of the Optional Protocol for France, the authors had continued negotiations subsequent to 17 May 1984 and that the final word was spoken by the Minister for Economics, Finance and Budget in a letter addressed to the authors on 12 November 1984.

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 With regard to the State party's contention that the communication was inadmissible under article 3 of the Optional Protocol as incompatible with the

Covenant, the Committee recalled that it had already decided with respect to prior communications (Nos. 172/1984, 180/1984, 182/1984) that the scope of article 26 of the Covenant permitted the examination of allegations of discrimination even with respect to pension rights.

5.3 The Committee took note of the State party's argument that, as the alleged violations derived from a law enacted in 1979, the communication should be declared inadmissible on the grounds that the interpretative declaration made by France upon ratification of the Optional Protocol precluded the Committee from considering alleged violations that derived from acts or events occurring prior to 17 May 1984, the date on which the Optional Protocol entered into force with respect to France. The Committee observed in this connection that in a number of earlier. cases (Nos. 6/1977, 24/1977), it had declared that it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the Covenant for a State party, unless it is a violation that continues after that date or has effects which themselves constitute a violation of the Covenant after that date. The interpretative declaration of France further purported to limit the Committee's competence ratione temporis to violations of a right set forth in the Covenant, which result from "acts, omissions, developments or events occurring after the date on which the Protocol entered into force" with respect to France. The Committee took the view that it had no competence to examine the question whether the authors were victims of discrimination at any time prior to 17 May 1984; however, it remained to be determined whether there had been violations of the Covenant subsequent to the said date, as a consequence of acts or omissions related to the continued application of laws and decisions concerning the rights of the applicants.

6. On 5 November 1987, the Human Rights Committee therefore decided that the communication was admissible.

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 4 June 1988, the State party recalls its submission under rule 91. It adds that Senegalese nationals who acquired French nationality and kept it following Senegal's independence are entitled to the same pension scheme as all other French former members of the armed forces. Articles 97, paragraph 2, to 97, paragraph 6, of the Nationality Code offer any foreigner who at one point in time possessed French nationality the possibility of recovering it. The State party argues that this possibility is not merely theoretical, since, in the past, approximately 2,000 individuals have recovered French nationality each year.

7.2 The State party further explains that a Senegalese former member of the armed forces who lost his French nationality following Senegal's independence and then recovered his French nationality would ipso facto recover the rights to which French nationals are entitled under the Pension Code, article L 58 of which provides that "the right to obtain and enjoy the pension and life disability annuity is suspended: . . .

by circumstances which cause a person to lose the status of French national for as long as that loss of nationality shall last". This implies that once nationality is recovered, the right to a pension is re-established. The State party concludes that nationality remains the sole criterion on which the difference in treatment referred to by the authors is based.

8.1 In their comments on the State party's submission, the authors, in a letter dated 21 July 1988, submit that the State party has exceeded the deadline for submission of its submission under article 4, paragraph 2, of the Optional Protocol by 12 days, and that for this reason it should be ruled inadmissible. In this connection, they suspect that "(b) by stalling and making full use, even beyond the deadlines set under the Committee's rules of procedure, of procedural tactics so as to delay a final decision, the State party hopes that the authors will die off one by one and that the amounts it will have to pay will drop considerably". Alternatively, the authors argue that the Committee should not further examine the State party's observations as they repeat arguments discussed at length in earlier submissions and thus should be considered to be of a dilatory nature.

8.2 With respect to the merits of their case, the authors maintain that the State party's argument concerning the question of nationality is a fallacious one. They submit that the State party is only using the nationality argument as a pretext, so as to deprive the Senegalese of their acquired rights. They further refer to article 71 of the 1951 Code of Military Pensions, which stipulates:

> "Serving or former military personnel of foreign nationality possess the same rights as serving or former military personnel of French nationality, except in the case where they have taken part in a hostile act against France."

In their view, they enjoy "inalienable and irreducible pension rights" under this legislation. Since none of them has ever been accused of having participated in a hostile act against France, they submit that the issue of nationality must be "completely and definitely" ruled out.

8.3 The authors argue that they have been the victims of racial discrimination based on the colour of their skin, on the purported grounds that:

> (a) In Senegal, registry office records are not well kept and fraud is rife;
>
> (b) As those to whom pensions are owed, i.e. the authors, are blacks who live in an underdeveloped country, they do not need as much money as pensioners who live in a developed country such as France.

The authors express consternation at the fact that the State party is capable of arguing that, since the creditor is not rich and lives in a poor Country, the debtor

may reduce his debt in proportion to the degree of need and poverty of his creditor, an argument they consider to be contrary not only to fundamental principles of law but also to moral standards and to equity.

9.1 The Human Rights Committee, having considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol, bases its views on the following facts, which appear uncontested.

9.2 The authors are retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal in 1960. Pursuant to the Code of Military Pensions of 1951, retired members of the French Army, whether French or Senegalese, were treated equally. Pension rights of Senegalese soldiers were the same as those of French soldiers until a new law, enacted in December 1974, provided for different treatment of the Senegalese. Law No. 79/1102 of 21 December 1979 further extended to the nationals of four States formerly belonging to the French Union, including Senegal, the régime referred to as "crystallization" of military pensions that had already applied since 1 January 1961 to the nationals of other States concerned. Other retired Senegalese soldiers have sought to challenge the laws in question, but French Finance Law No. 81.1179 of 31 December 1981, applied with retroactive effect to 1 January 1975, has rendered further recourse before French tribunals futile.

9.3 The main question before the Committee is whether the authors are victims of discrimination within the meaning of article 26 of the Covenant or whether the differences in pension treatment of former members of the French Army, based on whether they are French nationals or not, should be deemed compatible with the Covenant. In determining this question, the Committee has taken into account the following considerations.

9.4 The Committee has noted the authors claim that they have been discriminated against on racial grounds, that is, one of the grounds specifically enumerated in article 26. It finds that there is no evidence to support the allegation that the State party has engaged in racially discriminatory practices *vis-à-vis* the authors. It remains, however, to be determined whether the situation encountered by the authors falls within the purview of article 26. The Committee recalls that the authors are not generally subject to French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights. It notes that nationality as such does not figure among the prohibited grounds of discrimination listed in article 26, and that the Covenant does not protect the right to a pension, as such. Under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. There has been a differentiation by reference to nationality acquired upon independence. In the

Committee's opinion, this falls within the reference to "other status" in the second sentence of article 26. The Committee takes into account, as it did in communication No. 182/1984, that "the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26".

9.5 In determining whether the treatment of the authors is based on reasonable and objective criteria, the Committee notes that it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past. They had served in the French Armed Forces under the same conditions as French citizens; for 14 years subsequent to the independence of Senegal they were treated in the same way as their French counterparts for the purpose of pension rights, although their nationality was not French but Senegalese. A subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided . Nor can differences in the economic, financial and social conditions as between France and Senegal be invoked as a legitimate justification. If one compared the case of retired soldiers of Senegalese nationality living in Senegal with that of retired soldiers of French nationality in Senegal, it would appear that they enjoy the same economic and social conditions. Yet, their treatment for the purpose of pension entitlements would differ. Finally, the fact that the State party claims that it can no longer carry out checks of identity and family situation, so as to prevent abuses in the administration of pension schemes cannot justify a difference in treatment. In the Committee's opinion, mere administrative inconvenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment. The Committee concludes that the difference in treatment of the authors is not based on reasonable and objective criteria and constitutes discrimination prohibited by the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the events in this case, in so far as they produced effects after 17 May 1984 (the date of entry into force of the Optional Protocol for France), disclose a violation of article 26 of the Covenant.

11. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the victims.

NOTES

Submission dated 5 November 1986, paragraph 3.1. above.

The deadline for the State party's submission under article 4, paragraph 2, expired on 4 June 1988. Although the submission is dated 4 June 1988, it was transmitted under cover of a note dated 16 June 1988.

The Attorney General of Guyana (Appellant/Respondent) v. *Caterpillar Americas Company (Respondent/Applicant)*

(Civil Appeal 43/1994)

Court of Appeal of the Supreme Court of Judicature Appellate Jurisdiction

CIVIL APPEAL NO. 43 OF 1994

In the matter of the 1980 Constitution Act and the Constitution of the Cooperative Republic of Guyana particularly Articles 8, 142 and 153.

and

In the matter of the Rules of the Supreme Court touching motions.

and

In the matter of the Public Corporations Act 1988 and the Guyana Mining Enterprise Limited (Restructuring and Transfer of Assets and Liabilities) Order 1922.

Before:

The Hon. Mr. Justice CC. Kennard	-	Chancellor
The Hon. Mr. Justice M.A. Churaman	-	Justice of Appeal
The Hon. Mr. Justice Prem Persaud	-	Justice of Appeal

JUDGMENT

PREM PERSAUD, J.A.

The Bauxite Industry was once a flourishing component of the Guyana economy but in the 1980's it started a decline which eventually led to its collapse in the 1990's. The reasons for its eventual failure are manifold and need not be explored in these proceedings, save to say that its financial instability was partly due to the then existing state of the bauxite market: The Company incurred great losses, its financial resources were depleted to the extent that deteriorating plant and machinery could not be replaced or even serviced. This naturally resulted in the Company's failure to generate a reliable output and the consequential loss of the refractory market.

The industry was critical to the growth of the country's economy and important to the welfare of its people, and the Government infused massive capital starts to aid it. Despite all aid, however, the Company was unable to generate operational

surpluses and this militated against any contribution by the company to the country's fiscal and external accounts.

The Company of which reference is made is the Guyana Mining Enterprise Limited, a Public corporation under the Public Corporation Act of Guyana, hereinafter referred to as GUYMINE:

It had been carrying on operations up the Demerara River area and the works there were referred to as Linden Bauxite Mines or the Linden Operations of Guymine. These operations there failed and the Linden mines were no longer able to operate in an efficient and profitable manner. Guymine had purchased heavy duty machinery and equipment from the respondent and executed seven promissory notes for the value of the goods. They defaulted in the payment.

Because of the difficulties Guymine was experiencing the Government decided to divest the Linden operations of Guymine, to separate them from the Berbice works and re-organize the Linden operations. And the Government has thought it "necessary . . . to make provision for the payment of the debts of Guymine . . . In relation to the operation of Guymine in the past." Guymine of course could not pay its debts: Its assets were approximately eight and a half billion dollars, whilst the liabilities were approximately fifteen billion dollars.

The Government assumed part of the existing commercial debts of Guymine to the extent of twenty two million, three hundred thousand U.S. dollars, among other things. Funds will be provided by multilateral financial institutions.

By an Order made under the Public Corporations Act, 1988, (No 21 of 1988) called the Guyana Mining Enterprise Limited (Restructuring and Transfer of Assets and Liabilities) Order, 1992 No. 19 of 1992, Guymine stands dissolved: The gist of the Order is that the Government assumes responsibility for the payment of the money owed to the Respondent and issued a bond which will mature in twelve years and one day from the date of issuance but may be discharged in part or wholly at any time after the expiry of four years form the date of its issuance and prior to its maturity, and shall bear simple interest at the rate of five per cent per annum, which interest shall be payable annually in arrears. (See Clauses 5:6 of Ord. 19 of 1992).

The Respondent filed its originating motion seeking a declaration that the Order particularly Clauses 5, 6(4) (5) (6) are violative of Articles 142 of the Constitution, contrary to existing law, null and void: a declaration that the order is colourable legislation and therefore bad, ineffective and invalid and *inter alia* it contravenes and is inconsistent with Article 142 of the Constitution: *A declaration that the Order is unconstitutional more particularly in relation to Article 142 and incapable of depriving the applicants of their rights in respect of debt due to them by Guymine*: An order requiring payment of US £950.168.31 due by the company to the applicants as at 19 June 1992 together with interest at 6% per annum until payment: a declaration that the promissory notes executed between 1987 and 1992 by the company for value received from the applicants and in the latters' favour are valid and subsisting and should be discharged in due course of law: Damages: Such further order and, of course, costs.

In promulgating the Order, 19 of 1992, the Minister sought to act under the provisions of the Public Corporation Acts, 21 of 1988. Under Section 6(1), any corporation may be reconstituted by the Minister by order: Under Section 8 (1) the Minister may by order transfer to a corporation or place under its control the whole or a part of any undertaking of any other corporation or other body corporate owned by the State or in which the controlling interest is vested in the State or any agency on behalf of the State.

It seems therefore that the mechanics were satisfied in the making of the Order. But it is the order itself which is being challenged.

Article 142(1) of the 1980 Constitution provides as follows:

> "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except by or under the authority of a written law which provides for compensation for the property or any interest in or right over property so possessed or acquired and either fixes the amount of compensation or specifies the principles on which the compensation is to be determined."

The respondent's case is that the Government has compulsorily acquired and deprived them of their property, in breach of their rights under the constitution. The learned trial judge found that the State compulsorily acquired the right or interest in the respondent's property when it sought to prevent it from exercising its contractual rights against Guymine and to compel it to accept bonds in lieu of cash, in contravention of article 142 of the Constitution.

In my judgment this is the crux of the matter and it is for determination whether the State compulsorily acquired the property or assets of the respondent without adequate compensation. Of course the debt owing to the respondent is property within the meaning of Articles 40(1)(c) and 142 of the Constitution. See *I.R.C. -v- Lilleyman (*1964) LRBG 221: *Government of Mauritius -v- Societe United Docks*: 1985 Law Reports of the Commonwealth.

The next question, and the main one for determination, is: Was there deprivation or compulsorily acquisition of property? And if there was: Was adequate compensation paid?

Cheshire & North's Private International Law, 12th Ed. (1992) provides a useful classification which assists in ascertaining the true nature of an expropriatory legislation. True they were discussing international law, but the principles remain to guide and aid us. Expropriatory legislation can take one of four forms:

> (i) Requisition - which term is confined to the seizure of property in the public interest for a limited period usually at the end of some emergency (say a war) in return for compensation:
>
> (ii) Nationalization - which is the permanent absorption of property into public ownership in furtherance of some political aim and in return for compensation:

> (iii) Compulsory acquisition which is the permanent seizure of property in fulfillment of some economic or social aim and in exchange for compensation:
>
> (iv) Confiscation which is the permanent seizure of private property without the payment of compensation:

I shall get back to this later.

Learned Senior Counsel for the appellant raised the question of **'***Eminent Domain'* in presenting his case that the Order was properly enacted and not in breach of the respondents' constitutional rights. Eminent Domain is an American concept. *The Osborn's Concise Law Dictionary (1993)* defines it as a:

> "doctrine originating in the United States giving the government the right to take private property for public purposes. In international law the State is regarded as not only having a power of disposition over the whole of the national territory, but also as being the representative owner of both the national territory and all other property found within its limits."

The power of Eminent Domain then seems to be an essential attribute of sovereignty and connotes the legal capacity of the State to take private property of individuals for *public purposes*. Since it is an inseparable incidence of sovereignty there is no need to confer this authority expressly by the Constitution, and it exists without any declaration to that effect. But because it is used for *public purposes* there must be constraint within certain limits and there must be safeguards subject to which the right may be exercised. See *The State of Bihar v. Kameshwar Singh* AIR (1952) SC 252, 259. In the United Sates the limitations which exist are (I) there must be a law authorizing the taking of property: (ii) the property must be taken for some public use: (iii) just compensation should be paid.

In my judgment, our 1980 Constitution Articles 40 1(c) and 142 can be said to deal with the topic of eminent domain as defined above. Dealing with Fundamental rights and freedoms of the individual, Article 40(2) declares that:

> "the provisions of Title 1 of Part 2 shall have effect for the purpose of affording protection to the aforesaid fundamental rights and freedoms of the individual subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the *rights and freedoms of others or public interest.*"

Title one of Part 2 of course deals with the protection of fundamental rights and freedoms of the individual and encompasses article 138 to 151. Article 142 imposes limitations subject to which the superior power of the State to acquire property may be exercised, the limitations are those set out above.

An applicant cannot obtain redress under the fundamental rights provisions of the Constitution unless the contravention falls within Articles 138-151. See Article 153(2), for it seems clear to me that Article 40 does not fall within Article 153

which deals with the enforcement of the protective provisions- "if any person alleges that any of the provisions of articles 138 to 151 (the fundamental rights provisions) has been, is being or is likely to be contravened . . .".

In *Kent Garment Factory Limited* v. *Attorney General* (1991) 46 WIR 177 Chancellor George traced the history of articles of similar import and content of article 40 and said, at p. 187.

> "In my perception, article 40(l) of the Constitution is not one of the articles that attracts the special procedure contemplated by article 153."

I have set out earlier the provision of Article 142 of the Constitution.

The marginal note to that article reads: "*Protection from deprivation of property*". Section 57(3) of the Interpretation and General Clauses Act, Chapter 2:01 provides for the marginal note to be construed and have effect as part of Article 142. It reads:

> "Every schedule, table or marginal note to any written law, together with any notes to any Act or note to any Part thereof shall be construed and have effect as part of the written law."

In *Societe United States* v. *Government of Mauritius (1985) LRC (Const.)* Lord Templeman said at p. 841:

> "Loss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition."

And Lord Diplock in *A.G. of Gambia* v. *Momodu Jobe* (1984) 2 WLR 174 said at p. 183

> "A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms . . . is to be given a generous and purposive Constitution."

For these reasons I would hold that the question of the deprivation of property can properly be considered under Article 142 of the Constitution:

I now go on to consider the second limb of the limitations and safeguards.

What is Public Purpose? In as much as "public purpose" is made a condition for the exercise of the State's power of compulsory acquisition of private property no definition of that phrase is given in the Constitution. We have therefore to look at what the courts have decided as a definition of the extent of the expression. In the Privy Council ruling in the case of *Hamabai Framjee Petit* v. *Secretary of State 42 IA 44*, the Government of India had given certain land in Bombay on lease. Under the terms of the lease the Government had the right to resume the possession, subject to paying compensation if it desired to use it for a public purpose. It gave notice of its intention to resume possession with the object of using the land for providing residential accommodation to government servant at reasonable rates. The

Privy Council held that the resumption of land was for a "public purpose" and therefore valid. The Court held that:

> "the phrase 'public purpose' whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

This rationale was followed in *State of Bihar* v. *Kameshwar Singh* AIR 1952 SC 252: *State of Bombay* v. *R.S. Nanji,* AIR 1956 SC 294: *Somavanti* v. *State of Punjab* AIR 1963 SC 151, 163: *Arnold Rodricks* v. *State of Maharashtra* AIR 1966 SC 1788.

In *Ali Gulshan* v. *State*, 55 BOM LR 308, premises were requisitioned for housing a member of the staff of a foreign consulate and was held to be for a public purpose: It seems clear that what would serve the general interest of the community is properly a public purpose. In *Somavanti* v. *State of Punjab* (supra) the Supreme Court said:

> "Broadly speaking, the expression 'Public purpose' would, however, include a purpose in which the general interest of the community as opposed to the particular interest of the individuals, is directly and vitally concerned".

The phrase "public purpose" however does not and cannot have a static connotation which is fixed for all times. In *Kameshwar Singh* case (supra) Mahajan J (as he then was) observed that the phrase has to be construed according to the spirit of the times in which the particular legislation is enacted. It is bound to vary with the times and the prevailing conditions in a given locality. In his Constitutional Law, at p. 817 Willis proffered this explanation:

> "What is public use? On this question there have been two viewpoints. One may be called the older viewpoint and other the newer viewpoint. According to the older viewpoint, in order to have a public use there must be use by the public . . . According to the newer viewpoint there is a public use if the thing taken is useful to the public. This makes public use for eminent Domain practically synonymous with public purpose for taxation somewhat like social interest for police power. Under this rule it is not necessary for the benefit to be for the whole community but it must be for a considerable number".

As I mentioned "public purpose" cannot have a static connotation. In the *Somavanti* case (supra) the court asserted that it would not be a practical proposition even to attempt a comprehensive definition; and Das, J in *State of Bihar* v. *Kameshwar Sing* (supra) said

> "No hard and fast definition can be laid down as to what is a 'public purpose' as the concept has been rapidly changing in all countries".

In my judgment it would be no less "public purpose" if the acquired property is of some benefit to a section of the community. Where a very large section of the community is concerned its welfare is a matter of public concern.

In the case of *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Company* AIR 1954 SC 119 the court held that there is a public purpose where the property is taken over to keep labour going on and contended and to maintain the supply of essential commodities; And in *Municipal Corporation* v. *Sind* AIR 1947 Sind 69, the court held that the acquisition of land for manufacture of salt has been an acquisition for a public purpose. And in a most interesting judgment the Court in *Sudhendra* v. *Shailendra (1950)* 87 CLJ 140 held that the acquisition of land for the housing of a minister is a public purpose as the cannot give his best to the State and the public if he has to live in discomfort!

In our context, does the Order 21 of 1992 fall within any of the above definition approved by *Cheshire* (supra). Surely it is not confiscatory, nor nationalisation nor a requisition is it compulsory acquisition? If we accept 'compulsory acquisition' as defined, then it is not, because the property, i.e. the debt owing, was not permanently seized or taken.

In interpreting the scope of the Order we must take into account the intention of the Government and the reason for promulgating same. By early 1992 there were reasonable grounds for the Government's belief that Guymine was hopelessly insolvent after many years of trading losses and despite extensive governmental support. But such support could no longer be continued because the Government itself was in serious financial difficulties. The natural process was for Guymine to face liquidation proceedings; social harm would befall many communities, and its creditors could recover little or nothing by way of eventual dividend on Guymine's winding up.

The Government approached international financial institutions, sought and followed their advice. Meetings were held with all the creditors but only three refused to agree to government's plan to restructure the corporation and for payment. Insofar as it was an unusual method of achieving its objective I am minded to attribute that factor more to the particular financial institution than to the Government.

The choice for Guymine was between insolvency proceedings necessarily taking place and the 1992 Order; the 1992 Order was regarded as the lesser of two evils. It gave to Guymine's creditors a better and more immediate prospect of recovering a divided that any insolvency proceedings; and its 'adjudicating authority' deprived creditors of no real prospect of recovering their debt even though payment was postponed.

In Re: Helbert Wagg & Co. (1956) Ch 323 at 329 Upjohn J. stated:

> "It cannot be doubted that legislation intended to protect the economy of the nation and the general welfare of its inhabitants regardless of their nationality by various measures of foreign exchange control or by altering its value of its currency, is recognised by foreign courts although its effect is usually partially confiscatory. In individual cases the result of such

> legislation is in fact to confiscate in some degree private rights of property but the right of the state to do so has never been challenged."

And at pp 351-352 he suggested that such measures could be tested by considering whether the measures were passed with the genuine intention of protecting the economy. He added that a Ste is in the best position to know what measures of control are best suited to its particular needs and must be allowed much latitude in its choice of control methods.

The respondent has adduced no evidence and thee is nothing to suggest or infer that the Government's intention was anything but bona fide for Public purpose for the protection of Bauxite Industry, and for the honouring of the debts of the Bauxite Company's creditors. Nor has the respondent advanced any evidence to show that the interest of 5% being paid to it for the 12 years duration was too low or was unreasonable having regards to international standards.

And on the third limitation was just compensation paid?

The 1992 Order was plainly a liquidation of an insolvent company made in good faith and not a confiscation of property. Indeed it is only because of the Order that the plaintiff and Guymine's other creditors will be paid the full amount they are owed, albeit not as promptly as they would like. Far from taking anything from the plaintiff the order gave them something of real value - a Government guarantee that they will be paid.

In *Travellers Insurance Company* v. *Nullingron* 878 F 2d 354, 355-56 (11th Cir 1989) the Courts upheld a bankruptcy plan that converted a 5-year floating rate secured loan into a 30 year fixed rate mortgage pursuant to special legislation designed to help farmers during an agricultural crisis. Likewise, in *Wachovia Bank & Trust Company* v. *Harris*, 455 F2d 841., 8444 (4th CIR) 1972, the Court of Appeals approved a bankruptcy plan's fixing of a 20 year payment period even though the parties contemplated earlier payment.

I accept that the 1992 Order was made in good faith and for a public purpose by the Government to restructure the Bauxite Industry and guarantee payment of their debts. In my judgment whatever procedural rights the respondent may been deprived of, such deprivation is not *sufficiently substantial* for the court to grant relief to it.

In *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Company* 1954 SCR 674, Bose J. held that compensation is to be provided by the State only where there is a substantial deprivation of property: And in the *State of West Bengal* v. *Sinbad Bose AIR 1954 SC 92*, the Supreme Court of India held that "the Constitutional obligation of paying compensation arose only where the State action resulted in the substantial deprivation of private property."

In *State of Bengal* v. *Subodh Gopal Bose* AIR 1954 SCR Vol. 5 587 the Supreme Court of India, considering Article 31 of the Indian Constitution which is similar to Article 142 of our Constitution, held that "a Constitutional obligation of paying compensation arose only where the state action resulted in the substantial deprivation of private property of the individual". In his Judgement the learned Chief Justice Patanjali Sastri setting our the facts and his judgment said:

"The first respondent herein (hereinafter referred to as the respondent) purchased the entire TOUZI No 341 of the 24 Pargannas Collectorate at a revenue sale held on January 9th, 1943. As such purchaser, the Respondent acquired under Section 37 of Bengal Revenue Sales Act, 1859, the right "to avoid and annul all under-tenures and forthwith to eject all under-tenants" with certain exceptions which are not material herein. In exercise of that right the respondent gave notices of ejectment and brought a suit in 1946 to evict certain under-tenants, including the second respondent herein and to recover possession of the lands. The suit was decreed against the second respondent who preferred an appeal to the District Judge, contending that the under-tenure came within one of the exceptions referred to in Section 37.

When the appeal was pending, the bill, which was later passed as the West Bengal Revenue Sales (West Bengal Amendment) Act 1950 (hereinafter referred to as 'the amending Act') was introduced in the West Bengal Legislative Assembly on March 23rd, 1950. It would appear, according to the 'statement of objects and reasons' annexed to the bill, that great hardship was being caused to a large section of the people by the application of Section 37 of the Bengal Land Revenue Sales Act 1859 in the Urban areas and particularly in Calcutta and its suburbs were 'the present phenomenal increase in land values had supplied the necessary incentive to speculative purchasers in exploiting this provision (S.37) of the law for unwarranted large scale eviction' and it was, therefore, considered necessary to enlarge the scope of protection already given by the section to certain categories of tenants with due safeguards for the security of Government revenues . . .

The bill was eventually passed as the amending Act and it came into force on March 15th, 1950. It is substituted by Section 4 the new Section 37 in the place of the original Section 37 and it provided by Section 7 that all pending suits, appeals and other proceedings which has not already resulted in delivery of possession shall abate.

Thereupon the respondent, contending that Section 7 was void and was abridging his Fundamental rights under Article 19 (1)(f) and Article 31 moved to the High Court under Article 228 to withdraw the pending appeal and determine the Constitutional issue raised by him. The appeal was accordingly withdrawn and the case was heard by Trevor Harris, CJ and Banerjee J., who, by separate but concurring judgment, declared Section 7 unconstitutional and void and returned the case to the District Court for disposal.

The learned Judges held that the respondent's rights to annul under-tenures and evict under-tenants being a vested right acquired by him under his purchase before Section 7 was amended, the *retrospective deprivation of that right by Section 7 of the amending act without any abatement of the price paid by the respondent at the revenue sale was an infringement of his fundamental right under Article 19 (1)(f) to hold property with all the rights acquired under his purchase, and such*

> *deprivation was not a reasonable restriction on the respondent's exercise of his vested rights, Section 7 was not saved by C1 (5) of that article and was void."*

The Supreme Court had no hesitation in reversing the decision of Harries CJ and Banerjee J. The learned Chief Justice Sastri after stating that article 19 of the Constitution has no application to the case which ought to be considered under Article 31 said at p. 102:

> "I find it difficult to hold that the abridgment sought to be effected retrospectively of the rights of a purchaser at a revenue sale is so substantial as to amount to a deprivation of his property within the meaning of Article 31 (1) and (2). In the result the appeal is allowed and the judgment of the High Court set aside."

In my judgment the property of the respondent was not acquired by the State by the Order. It merely guaranteed the payment of the debt owing. The debt was not disputed. The respondent could not have recovered the sums owing from Guymine, and the Government has acted clearly with the intention of salvaging the industry with the assistance of overseas financial assistance, and to protect and preserve the debts owing tot he respondent, in order to ensure that they be paid in due course. The economy of the country depended upon the viable performance of the Bauxite Industry, and a substantial section of the population depended upon it for their livelihood and well-being. There is nothing in the record or otherwise to question the intention of the Government.

In *Charanjit Lal* v. *Union of India* AIR 1951 S.C. 49 Das J. proffered this meaning of acquisition:

> "It cannot be disputed that acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former."

I agree with this opinion.

Of course the respondent was entitled to payment immediately, but the Order provided for bonds to be issued payable in 12 years time with interest at the rate of 5% per annum. I am of the judgment that in the absence of any evidence to the contrary the interest of 5% under the order to be paid to the respondent was adequate, and there is no evidence or suggestion that the figure is not and adequate or reasonable sum over the years when the bond will mature. Indeed when the notes were executed no interest was set out in the prescribed form, and only asterisks inserted. The notes accompanying the asterisks suggested 1% over chase prime adjusted on each installment and 5% over chase prime. There was no evidence as to the meaning of those things.

The respondent is a creditor and is not deprived of the entirety of his rights to which he is entitled by being the owner of the promissory notes. The test is whether

it has been dispossessed substantially form the rights held by it. There is no evidence that the bonds are not convertible in the commercial market; o evidence was led to show that the respondent was prejudiced by the deferment of payment or that the bonds are worthless. It can and is free to sell or dispose of its rights and interests in the bonds to anyone. No one has taken away the notes form him. Its legal and beneficial interest is left intact. I rely on the Indian cases cited an come to the conclusion that even if the deferment of the payment can be said to be depriving the respondent of its property, in my judgment, that deprivation is not substantial enough to merit a finding that the constitutional rights of the respondent have been violated of the respondent will be honoured by the State itself.

In *Charanjit Lal* v. *Union of India* AIR 1951 SC 41 the Court was called upon to consider the validity of an Act in relation to Article 31(1) and (2) of the constitution. It is of great interest to note the provisions of that Article 31 (1) -

> "No person shall be deprived of his property save by authority of law. 31(2) No property, movable or immovable, including any interest in, or in any company owing, and commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and in the manner in which, the compensation is to be determined and given."

This article is not couched in the same language as our Article 142 but the intent and purpose seem to be similar. Mukherjea, J. in his judgment could have been addressing the issue before our court as he was concluding this judgment at para 65:

> "We should bear in mind that a Corporation which is engaged in production of a commodity vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in. If its possibilities are large and it has a prosperous and useful career for a long period of time and is about to collapse not for any economic reason but through sheer perversity of the controlling authority, one cannot say that the Legislature has no authority to treat it as a class by itself and make special legislation applicable to is alone in the interest of the community at large . . . and at para 66 . . . What the law has attempted to do is to regulate the affairs of this Company by laying down certain special rules for its management and administration."

And judged by international standards also, the order of 1992 is not Arbitrary, whimsical or fanciful UN Resolution 1803 stresses the primacy of the State's own laws. The relevant portion reads:

> "Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility security or the national interest which

> are recognised as overriding purely individual or private interests, both domestic and foreign."

There is a presumption of constitutionality of legislation and it is for those who contend otherwise to establish to the satisfaction of the Court that it is unconstitutional, and it is for the party who attacks the validity of the legislation to show that it is arbitrary and unsupportable. In *Middleton v. Texas Power and L. Company*, 249 U.S. 152 at 157, the US Supreme Court said:

> "It must be presumed that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds".

In our local case of *Attorney-General* v. *Mohamed Alli* (1987) 41 WIR 176 at 189 Chancellor Massiah advised that:

> "there must be borne in mind also that there exists a presumption in favour of the constitutional validity of an impugned enactment".

And he went on to cite *Basu's Commentary on the Constitution of India* (5th Edn) Vol. 1, at page 199:

> "The most important of the self-imposed limits upon the power of judicial review both in the United States and in India is the presumption in favour of the constitutional validity of a statute which is challenged as unconstitutional."

And in *Pillai* v. *Mundananyake* (1955) 2 All ER 833, Lord Oaksey speaking for the Judicial Committee of the Privy Council when a law enacted by the Parliament of Ceylon (now Sri Lanka) was under challenge as being unconstitutional, observed, at p. 837:

> "The principle that a legislature cannot do indirectly what it cannot do directly has always been recognised by their Lordship's Board, and a legislature must, of course, be assumed to intend the necessary effect of its statutes. But the maxim *omina preasumuntur rite esse acta* is at least as applicable to the Act of a legislature as to any other acts, and the court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. It must be shown affirmatively by the party challenging a stature which is, on its face *intra vires*, that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly."

In view of all that I have hitherto set forth, in my judgment, the impugned Clauses of the order, No. 19 of 1992, are not violative of Article 142 of the Constitution of Guyana, and are not null and void. As a result, in the circumstances I will allow the appeal and discharge the order made by the learned trial judge.

The appellant is entitled to its costs both her and in the Court below, to be taxed certified fit for to Senor Counsel

Prem Persaud
Justice of Appeal

Milovan Poropat, Senija Poropat, Muradifa Seremet, and Muhamed Hrelja v. *Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*

(Cases nos. CH/97/48, CH/97/52, CH/97/105, and CH/97/108)

Human Rights Chamber for Bosnia and Herzegovina

Decision on Admissibility and Merits (delivered on 9 June 2000)

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 10 May 2000 with the following members present:

Ms. Michèle Picard, President
Mr. Giovanni Grasso, Vice-President
Mr. Dietrich Rauschning
Mr. Hasan Balic
Mr. Rona Aybay
Mr. Zelimir Juka
Mr. Jakob Möller
Mr. Mehmed Dekovic
Mr. Manfred Nowak
Mr. Miodrag Pajic
Mr. Vitomir Popovic
Mr. Viktor Masenko-Mavi
Mr. Andrew Grotrian
Mr. Mato Tadic

Mr. Anders Mansson, Registrar
Ms. Olga Kapic, Deputy Registrar

Having considered the aforementioned application introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Article VIII(2) of the Agreement and Rules 52, 57 and 58 of its Rules of Procedure:

CH/97/48 *et al.*

I. INTRODUCTION

1. The applicants are citizens of Bosnia and Herzegovina. Before the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) they deposited foreign currency with commercial banks in that country. Because of growing shortage of such currency and other economic problems, the withdrawal of money from these "old" foreign currency savings accounts was progressively restricted by legislation enacted during the 1980s and the early 1990s.

2. Before and during the war in Bosnia and Herzegovina the applicants were largely unable to withdraw money from their accounts. Their post-war withdrawal attempts were all rejected, either without reasons or with reference to legislation enacted by the SFRY, the Republic of Bosnia and Herzegovina and, later, the Federation of Bosnia and Herzegovina. The applicants have initiated court proceedings in this matter. However, their action has so far been unsuccessful and the proceedings are still pending.

3. According to legislation enacted by the Federation of Bosnia and Herzegovina in 1997 and 1998, in particular the Law on Determination and Settlement of Citizen's Claims in the Privatisation Process (hereinafter "the Citizens' Claims Law"), claims based on the old foreign currency savings accounts are to be resolved in the process of privatisation of socially and publicly owned property. Like the claims of pensioners, soldiers and workers in formerly socially owned companies, the balances of the savings are to be recorded in a "Unique Citizen's Account" maintained by the Federal Payment Bureau. Instead of payment of outstanding pensions, salaries or savings, the Bureau issues "certificates" in the commensurate amounts. According to the relevant legal provisions, these certificates can be used in the privatisation process to purchase apartments, municipal business premises and shares and assets of enterprises. This solution has been designed to settle the various claims and, thereby, prevent the public debt payment system and the banking system from collapse.

4. In May and June 1999 and January 2000 the applicants received statements from the Unique Citizen's Account. Ms. Seremet's and Mr. Hrelja's statements recorded their foreign currency claims. Both unsuccessfully appealed against the registration in the unique account, stating that they wished to receive cash disbursement of their savings. The statements received by Mr. and Ms. Poropat did not record their foreign currency savings but only their so-called "general claims" as their claims against the banks had not been registered in the unique account.

5. None of the applicants has so far participated in the privatisation process. All of them are in difficult financial situations and, allegedly, would need additional money to support their daily needs. Using the above-mentioned certificates in the privatisation process is not an option for them as they already own private houses

and cannot make use of the assets made available in the privatisation process or do not have the supplementary cash necessary for purchasing such assets. The applicants claim that they may soon be forced to sell their certificates on the secondary market where, according to advertisements in daily newspapers in February 2000, such certificates were being offered for sale at about 5 per cent of their nominal value.

6. The applications raise issues in regard to the applicants' right to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the European Convention on Human Rights and their right to a fair hearing within a reasonable time under Article 6 of that Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

7. Mr. Milovan Poropat and Ms. Senija Poropat, who are a married couple, lodged their applications against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina on 14 July 1997. The applications were registered on 18 August 1997. Ms. Muradifa Seremet's application, directed against the Federation of Bosnia and Herzegovina, and Mr. Muhamed Hrelia's application, directed against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, were introduced on 2 and 12 December 1997, respectively, and registered on the latter date. The applicants are represented by the second applicant, Ms. Senija Poropat.

VI. OPINION OF THE CHAMBER

A. Admissibility

126. Before examining the merits of the applications, the Chamber shall decide whether to accept them, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(a), the Chamber shall consider whether effective remedies exist and, if so, whether the applicants have demonstrated that they have been exhausted. According to Article VIII(2)(b), it shall not address any application which is substantially the same as a matter which has already been submitted to another procedure of international investigation or settlement. Under Article VIII(2)(c), the Chamber shall dismiss any application which it considers incompatible with the Agreement. Further, pursuant to Article VIII(2)(d), it may reject or defer consideration if the applications concern a matter currently pending before, *inter alia,* any other international human rights body responsible for the adjudication of applications or the decision of cases.

1. Competence ratione temporis

127. Both respondent Parties argue that it became impossible to make withdrawals from the old foreign currency savings accounts already during the existence of the SFRY and that, thus, the accounts were blocked at that time, i.e. before the entry into force of the Agreement. Allegedly, the legislation that has been enacted and in force after the dissolution of the SFRY neither stipulated any obligation on the respondent Parties to repay the savings in question nor affected the savings in any other way.

128. The Chamber recalls that, in accordance with generally accepted principles of international law, it cannot decide whether events occurring before the entry into force of the Agreement on 14 December 1995 involve violations of human rights (see, e.g., case no. CH/96/1, *Matanovic,* decision on the merits delivered on 6 August 1997, paragraph 32, Decisions on Admissibility and Merits 1996-1997).

129. The Chamber observes that although, generally, the withdrawal of money from the old foreign currency savings accounts was increasingly restricted in the 1980s and the early 1990s and a substantial part of the money needed to repay the savings apparently disappeared before and during the war, the claims against the banks based on those savings were never extinguished. In this connection, it should be noted that one of the applicants, Mr. Poropat, was able to withdraw money from his accounts as late as mid-1994. Moreover, as is evident from legislation enacted by the Republic of Bosnia and Herzegovina between 1992 and 1996, the claims were considered valid and the issue was to be resolved by special regulation. Notably, the Decision on Aims and Objectives of the Foreign Exchange Policy (see paragraph 91 above), issued on 10 April 1996, stipulated that the claims should be settled as part of the consolidation of the public debt of Bosnia and Herzegovina. The Chamber further notes that none of the banks in which the applicants placed their savings have been declared bankrupt. Thus, the substance of the applicants' right, that is, their entitlement to the money placed on the accounts, has not been changed by economic realities or the legislation passed.

130. Having regard to the above, the Chamber finds that the applicants' claims against the banks in question remained valid at the entry into force of the Agreement. The Chamber is thus competent *ratione temporis* to examine whether, thereafter, any legislation enacted or applied or any other action taken by either respondent Party has affected these claims. The Chamber is also competent to examine whether a failure to act after the entry into force of the Agreement may involve the responsibility of either respondent Party.

2. Competence *ratione personae*

(a) Bosnia and Herzegovina's objection in regard to case no. CH/97/105

131. Bosnia and Herzegovina argues that it cannot be considered as respondent Party in regard to the application lodged by Ms. Seremet as it was directed only against the Federation of Bosnia and Herzegovina.

132. The Chamber recalls that its jurisdiction, established by Article 11(2) of the Agreement, extends to alleged or apparent human rights violations where such a violation is alleged or appears to have been committed by one or several of the Parties to the Agreement. Having regard to them complexity of the legal and constitutional arrangements of Bosnia and Herzegovina, the Chamber considers that it would be unreasonable to expect applicants to be able in all circumstances to address the correct respondent Party. For this reason, the Chamber has consistently held that it is not restricted by the applicant's choice of respondent Party. It has, on several occasions, examined applications in regard to a respondent Party designated by the Chamber itself (see, e.g., case no. *CH/96/31, Turcinovic,* decision on admissibility of 9 May 1997, Decisions on Admissibility and Merits 1996-1997).

133. The Chamber therefore rejects the argument of Bosnia and Herzegovina that it is precluded from examining the potential responsibility of Bosnia and Herzegovina for the events complained of in the application lodged by Ms. Seremet.

(b) The Republika Srpska as respondent Party

134. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina are of the opinion that, if the present applications are examined on the merits, the Chamber should designate also the Republika Srpska as respondent Party because the possible consequences of the Chamber's decision would concern both Entities as well as the State of Bosnia and Herzegovina.

135. The Chamber notes, however, that the applicants, who live in the Federation, have claims against banks located on the territory of the Federation. They have not alleged that the Republika Srpska has violated any of their rights, nor can the Chamber, of its own motion, find that any events relating to their applications involve the responsibility of the Republika Srpska.

136. The Chamber therefore rejects the claim that the Republika Srpska should be designated as respondent Party in the present cases.

(c) General responsibility of the respondent Parties for the alleged violations

137. Both respondent Parties claim that they cannot be held responsible for possible violations in the present cases. Bosnia and Herzegovina states that the old foreign currency savings accounts were blocked already during the existence of the SFRY and that Bosnia and Herzegovina has not taken any action, enacted any legislation or afforded any guarantees which have affected the applicants' situation. The Federation of Bosnia and Herzegovina further points out that it is not the owner of the banks with which the applicants have deposited their savings. Both respondent Parties also stress that neither of them has inherited any assets from the SFRY and that the foreign currency savings is one of the issues to be resolved in the succession negotiations.

138. The Chamber first considers that it is not determinative for the possible violations of the applicants' rights whether the State or the Federation of Bosnia and Herzegovina has inherited or will inherit, following the conclusion of the succession negotiations, any assets from the SFRY. This is so because the negotiations are conducted between the five successor states of the SFRY and will determine the distribution of rights and obligations between these states. Should Bosnia and Herzegovina be assigned any assets, the entitlement to and administration of those assets would have to be determined in accordance with the respective constitutional functions and responsibilities of Bosnia and Herzegovina and its Entities. However, whatever the outcome of the negotiations, the present applicants or any other depositors of foreign currency savings cannot claim any individual rights on the basis of agreements concluded between the successor states or between Bosnia and Herzegovina and its Entities.

139. As regards the Federation's argument that it is not the owner of the banks in question, the Chamber recalls that, although the banks, until their privatisation, are considered as socially or state owned, they are defined as independent legal persons performing business in accordance with market conditions with a view to making profit (see paragraphs 87 and 94 above). To this end, the banks enter into contractual relationships with individuals and other legal persons. The Chamber therefore considers that responsibility for the matters complained of in the present cases should not be imputed to either respondent Party on the basis of their possible involvement as owners of the banks in question. However, the operation of the banks in the Federation, or indeed in the whole of Bosnia and Herzegovina, is, like in other countries, regulated by legislation and subject to licensing and supervision. The State and the Federation of Bosnia and Herzegovina are responsible in the present cases for such measures and other action taken in so far as they have affected the applicants' position in regard to the banks and, in particular, to the savings deposited with the banks.

140. The question remains, however, whether and to what extent the regulation of the matters relevant to the present applications falls within the responsibility of the respective respondent Party, either because it has been given the relevant competence, by the Constitution of Bosnia and Herzegovina and other legislation or due to any special capacity, or because it has, *de facto,* taken action affecting the matters in question.

(i) Responsibility of Bosnia and Herzegovina

141. The Chamber recalls that, pursuant to Article I of the Constitution, Bosnia and Herzegovina has continued its legal existence under international law as a state and has thus inherited the status of the former Republic of Bosnia and Herzegovina. It is in this capacity that Bosnia and Herzegovina takes part in the negotiations regarding the succession to the assets of the SFRY. However, this status alone cannot be understood as creating a responsibility for the former internal obligations of the SFRY, including those stemming from the depositing of foreign currency with the National Bank of Yugoslavia and the guarantees afforded by the SFRY with respect to the savings.

142. However, the Republic of Bosnia and Herzegovina adopted laws and regulations addressing the issue of foreign currency savings (see paragraphs 88-91 above). Article 9 of the 1992 Decree provided that the Republic guaranteed for foreign currency savings, and Article 12 of the 1994 Decree stated that people could use their savings freely. Noting that Article 144 of the 1992 Decree specified that the reimbursement of individuals' foreign currency savings that had been deposited with the National Bank of Yugoslavia was to be determined by separate regulation, the Chamber finds it established that the express guarantee and the permission to use savings freely did not apply to the old foreign currency savings but only to those "new" savings that people had started to deposit at the time when the legislation of the Republic was enacted. Nevertheless, by reserving the settlement of the old foreign currency savings for separate regulation, the Republic implicitly recognised responsibility for these savings. The 1995 and 1996 Decisions not only reiterated this implicit recognition but specifically stated that the issue of the old savings was to be resolved by the enactment of a state law on public debt or in another way within the overall consolidation of the public debt of the state. In this connection, the Chamber recalls that, under Article 111(l)(d) of the Constitution, the responsibility for monetary policy rests with the institutions of Bosnia and Herzegovina. As the 1995 Decision concerns issues relating to the monetary policy, it remained in effect as the law of Bosnia and Herzegovina according to the transitional arrangements contained in Annex 11 to the Constitution. The 1996 Decision, issued by the Republic after the entry into force of the Agreement, is to be considered as having been issued on behalf of the State of Bosnia and Herzegovina, and thus applied as State law.

143. Moreover, Article VII of the Constitution designates the Central Bank of Bosnia and Herzegovina as the sole authority for monetary policy throughout the country. It is true that the Central Bank has not been given the authority to regulate the operation of banks in general or the foreign currency savings in particular. However, the disbursement of savings from the bank accounts in question has repercussions on the circulation of foreign currency and thus affects the monetary policy, for which the Central Bank, as a State institution, is responsible.

144. The Chamber further notes that the Framework Law on Privatisation of Enterprises and Banks (see paragraph 93 above), which recognises the right of the Entities to privatise non-privately owned enterprises and banks located on their territory and provides that the Entities shall adopt legislation to that effect covering the assets and liabilities thus located, was adopted by the Parliamentary Assembly of Bosnia and Herzegovina on 19 July 1999 following the issuance of the law on an interim basis by the High Representative on 22 July 1998. In the Chamber's opinion, the fact that the Parliamentary Assembly adopted this legislation - which indirectly concerns also the old foreign currency savings - is an indication of the competence of the State to regulate these matters, at least in setting out the general principles to be applied.

145. The Chamber thus finds that it is competent *ratione personae* to consider the applications in regard to Bosnia and Herzegovina.

(ii) Responsibility of the Federation of Bosnia and Herzegovina

146. The Chamber recalls that the laws on banks, citizens' claims and privatisation applicable in the territory of the Federation of Bosnia and Herzegovina have all been enacted by the Federation and the authorities designated to implement the legislation are all institutions of the Federation. Further, the applicants' and other plaintiffs' legal actions in regard to foreign currency savings accounts have been examined by courts with jurisdiction only in the territory of the Federation.

147. The Chamber thus finds that it is competent *ratione personae* to consider the applications also in regard to the Federation of Bosnia and Herzegovina.

3. *Lis alibi pendens*

148. Bosnia and Herzegovina claims that the Chamber is prevented from examining the present cases on account of an identical application being pending before the European Court of Human Rights.

149. The Chamber recalls that Article 35 paragraph 2(b) of the Convention - on which Article VIII(2)(b) of the Agreement is modelled - prevents the European Court of Human Rights from dealing with a petition which is substantially the same

as a matter which has already been submitted to another procedure of international investigation or settlement. The European Commission on Human Rights - which, before the reform of the Convention system on 1 November 1998, examined the admissibility of applications under the identical Article 27 paragraph l(b) - applied the concept of "substantially same application" in a very restrictive manner and found itself prevented from dealing with a petition only if, *inter alia,* the applicant in the other international procedure was identical to the one that had introduced the petition to the Commission (see, e.g. application no. 11603/85, *Council of Civil Service Unions and others* v. *the United Kingdom,* decision of 20 January 1987, Decisions and Reports 50, p. 228 at pp. 236-237).

150. The Chamber notes that, whatever issue is the subject matter of the application lodged with the European Court, neither the applicants nor the respondent Parties in the present cases are identical to those concerned by that application. Further, the present applicants do not have accounts in Ljubljanska Banka to which reference is made.

151. It follows that it has not been shown that an application identical to or substantially the same as the present cases is pending before another international body. This objection is accordingly rejected.

4. Exhaustion of effective domestic remedies

152. The respondent Parties argue that domestic remedies have not been exhausted by the applicants. Allegedly, the proceedings initiated by them have been delayed due to the conduct of their representative. The Federation states that the remedies cannot be considered inefficient, as the Supreme Court of the Federation has issued judgments in similar cases.

153. The Chamber recalls that the applicants initiated court proceedings in 1996 and 1997 in an attempt to have cash disbursed from their savings accounts. None of the applicants have so far been successful. Only Ms. Poropat has received a judgment on the merits, in which the Municipal Court rejected the claim. Following her appeal, that case is now pending before the Cantonal Court. Ms. Seremet's and Mr. Hrelja's cases are still pending before the Municipal Court. Only the case of Mr. Poropat has come to a conclusion. It was not examined on the merits, however, but was dismissed by a procedural decision which concluded that the action had been withdrawn as the applicant had failed to request the continuation of proceedings.

154. The Chamber notes that the Municipal Court rejected Ms. Poropat's claim with reference to the applicable legislation, in particular the Citizens' Claims Law, and the fact that neither the State nor the Federation of Bosnia and Herzegovina had succeeded into any assets of the SFRY, including the foreign currency deposited

with the National Bank of Yugoslavia. In other judgments brought to the Chamber's attention (see paragraphs 74 and 75 above) which have been issued after the enactment of the Citizens' Claims Law, claims for disbursement of old foreign currency savings have been rejected either because they could not be legally granted under the SFRY Law on Foreign Currency Transactions or because the Citizens' Claims Law presented various procedural obstacles to the examination of the cases.

155. The legal position of the courts is thus not entirely clear. In any event, it appears that no court proceedings initiated in order to have cash disbursement of old foreign currency savings have been successful. The Chamber also notes the particulars of the applicants' cases. In the proceedings concerning Ms. Serement and Mr. Hrelja the Municipal Court has decided to postpone its examination on several occasions due to the failure of one of the respondents to appoint a representative. Further, in the former case, the court requested the applicant's representative to submit the correct name and address of that respondent. Considering that that respondent is the State of Bosnia and Herzegovina, the court's request is rather perplexing. The Chamber finally takes into account that, except for the case lodged by Mr. Poropat, the proceedings are still pending in the domestic courts after periods varying between two years and seven months and three years and four months (as of April 2000), in two of the cases without any decision on the merits of the claims having been taken.

156. Having regard to the above, the Chamber considers that there are no effective remedies available to the applicants which they should be required to exhaust. In these circumstances, the failure of Mr. Poropat to attend the Municipal Court's hearing and, later, to request the continuation of proceedings does not preclude the Chamber from examining also his application.

5. Conclusion as to admissibility

157. As no other ground for declaring the cases inadmissible has been established, the Chamber declares the applications admissible in respect of both respondent Parties.

B. Merits

158. Under Article XI of the Agreement the Chamber will next address the question whether the facts established above disclose a breach by the respondent Parties of their obligations under the Agreement. In terms of Article I of the Agreement the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms", including the rights and freedoms provided for by the Convention and its Protocols.

1. Article 1 of Protocol No. 1 to the Convention

159. The applicants complain that their property rights under Article 1 of Protocol No. 1 have been violated. This provision reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

160. The applicants assert that their rights have been violated due to the refusal to disburse their foreign currency savings and the conversion of those savings into privatisation certificates. The respondent Parties assert, however, that the accounts in question were blocked *de facto* already before the war as there were no assets available to the banks and that subsequent legislation has not affected the applicants' and other foreign currency depositors' claims against the banks in any way. Rather, the legislation on the privatisation process allegedly protects the depositors from losing their possessions.

(a) The existence of "possessions" under Article 1 of Protocol No. :1

161. The Chamber first finds that, irrespective of the financial situation of the banks concerned and the general economy of the State and Federation of Bosnia and Herzegovina, the restrictions on withdrawals of old foreign currency savings or the *de facto* blocking of these savings, the money deposited on the applicants' accounts represents an economic value. The applicants' claims against the banks based on their foreign currency savings thus constitute "possessions" within the meaning of Article 1 of Protocol No. 1. It must therefore be determined whether their right to peacefully enjoy these possessions has been violated.

(b) General considerations

162. The Chamber recalls that the European Court of Human Rights has established the relationship between the different parts of Article 1 of Protocol No. 1. *In James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, pp. 29-30, paragraph 37), the Court stated:

> "Article 1 in substance guarantees the right of property In its judgment of 23 September 1982 in the case of Sporrong and Lönnroth, the Court analysed Article 1 as comprising 'three distinct rules': the first rule, set out in the first sentence of the first paragraph, is of a general nature and

> enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest (Series A no. 52, p. 24, paragraph 61) . . . The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule."

163. Whatever rule of Article 1 of Protocol No. 1 is deemed applicable in a particular case, it has to be determined whether a "fair balance" has been struck between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights. Thus, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The requisite balance will not be found if the persons concerned have had to bear "an individual and excessive burden". The European Court has taken into account, *inter alia,* the possibility to obtain compensation, the existence of procedural safeguards and the length of proceedings in assessing whether a disproportionate burden has been imposed on the individuals (see, e.g., the *Sporrong and Lönnroth v. Sweden* judgment, pp. 26-28, paragraphs 70-73). It has, however, acknowledged that, in taking decisions interfering with the property rights of individuals, states enjoy a margin of appreciation which, in complex and difficult matters, is a wide one. In *Lithgow and Others v. the United Kingdom* Judgment of 8 July 1986, Series A no. 102, p. 51, paragraph 122), which concerned the nationalisation of property, the Court stated:

> "A decision to enact nationalisation legislation will commonly involve consideration of various issues on which opinions within a democratic society may reasonably differ widely. Because of their direct knowledge of their society and its needs and resources, the national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one."

The Chamber considers that this conclusion applies, *mutatis mutandis,* to the matters relevant to the present cases. The foreign currency savings have been considered in the context of the public debt of the State and Federation of Bosnia and Herzegovina and the privatisation of socially owned property in the Federation. These are issues of great economic importance for the State and the Federation and, consequently, they involve considerations of a complex nature which could reasonably be subject to differing opinions.

(c) Alleged violation by Bosnia and Herzegovina

Whether Bosnia and Herzegovina has interfered with the applicants' rights

164. As the Chamber has noted above (paragraph 142), the Republic of Bosnia and Herzegovina, between 1992 and 1996, adopted legislation which provided that the issue of the old foreign currency savings was to be determined by special regulation. The 1995 and 1996 Decisions (see paragraphs 90 and 91 above), which were applicable as the law of Bosnia and Herzegovina, more specifically stated that the issue was to be resolved within the overall consolidation of the public debt of the state. As the Chamber has found, this legislation implicitly recognised responsibility of Bosnia and Herzegovina for these savings. Both from the wording of the Decisions and from evidence given at the Chamber's hearings (see the statement of Mr. Piljak, at paragraph 50 above), it is clear that the initial intention was to gradually reimburse the savings as payments on the public debt. However, save for the adoption of the Framework Law on Privatisation of Banks and Enterprises (see paragraph 93 above) - which only sets out certain general principles - Bosnia and Herzegovina failed to regulate the old foreign currency savings, whether by legislation on the public debt or otherwise.

165. The question is whether the failure of Bosnia and Herzegovina to take action in this regard amounts to an interference with the applicants' - and other foreign currency depositors' – property rights. The Chamber recalls, in this connection, Article I of the Agreement according to which the Parties are obliged to "secure" internationally recognised human rights to persons within their jurisdiction. This requirement involves a positive obligation to take action to guarantee human rights, including the right to peaceful enjoyment of possessions.

166. In determining to what extent Bosnia and Herzegovina was under such a positive obligation in the present cases, the Chamber considers that not only the implicit recognition of its responsibility of the old foreign currency savings is of importance. Regard must also be had to the factual situation of these savings following the entry into force of the Agreement and the issuance of the 1995 and 1996 Decisions. For several years, there had been considerable difficulties in having money withdrawn from the accounts in question. Furthermore, Article 150 of the 1992 Decree had stipulated that the SFRY Law on Foreign Exchange Transactions, which had regulated the operation of the old foreign currency savings accounts and the purposes for which these savings could legally be used, ceased to apply. However, no other law or regulation had been put in its place. Thus, there was an immediate need for Bosnia and Herzegovina to take action and honour its responsibility for the savings by regulating the issue. The Framework Law did not solve this situation. Thus, by its failure to take adequate action, Bosnia and Herzegovina left the depositors in a situation where there was no legal basis on

which they could claim reimbursement of their savings, whether directly from the banks or indirectly from the State through payments on the public debt.

167. In these circumstances, the Chamber considers that Bosnia and Herzegovina has failed to secure to the depositors of old foreign currency savings their right to peacefully enjoy their possessions. This amounts to an interference of that right within the meaning of Article 1 of Protocol No. 1.

Whether the interference has been justified

168. The resolution of the problem of the old foreign currency savings clearly involves considerations of a complex nature. In deciding what measures to take in regard to this issue, the respondent Parties thus enjoy a wide margin of appreciation. However, the Chamber has found that Bosnia and Herzegovina failed to take adequate action in a timely and appropriate manner. The Chamber does not overlook the fact that Bosnia and Herzegovina has not had - and still does not have - the financial means to repay the totality of these savings. Nevertheless, having particular regard to the factual situation of the savings as described in paragraph 166 above, the Chamber cannot find that the failure of Bosnia and Herzegovina to take adequate action to regulate this issue has been in the general interest. Accordingly, the interference has not been justified.

169. In conclusion, there has been a violation by Bosnia and Herzegovina of the applicants' right to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention.

(d) Alleged violation by the Federation of Bosnia and Herzegovina

Whether the Federation has interfered with the applicants' rights

170. In determining whether the Federation of Bosnia and Herzegovina has interfered with the applicants' rights under Article 1 of Protocol No. 1, the crucial question is whether the situation as regards their right to withdraw money from their accounts has been changed by legislation enacted or other measures taken by the Federation. The provisions of the Citizens' Claims Law are clearly relevant in this respect as they aim at settling the claims of persons with old foreign currency savings as well as other recognised claims. Also the provisions of other laws regulating the privatisation of socially owned property are of importance. However, the Chamber will have regard not only to the wording of the legal provisions but also to their implementation in practice. Further, it has to be taken into account whether the applicants or other depositors of foreign currency savings have actually succeeded in their attempts to have money disbursed from their accounts.

171. The Federation of Bosnia and Herzegovina argues that the Citizens' Claims Law only provides the foreign currency savers with a possibility to use their funds in a certain manner and that the banks' obligation towards the savers remains unchanged. The same assertion has been made by the Federal Ministry of Finance (see paragraph 65 above). The Director of the Privatisation Agency has made contradicting statements in this respect, on some occasions claiming that participation in the privatisation process is voluntary (paragraphs 54 and 66) and on other occasions stating that the transfer of funds from the banks to the Unique Citizen's Account is done *ex lege* without the individual saver's consent (paragraph 69). As is evident from the Municipal Court's judgment in Ms. Poropat's case (paragraph 27) and other judgments reviewed by the Chamber (paragraph 75), the position of the Federation courts is not very clear in this respect. The Federation Ombudsmen and the OHR have stated that the individual savers have no right to choose whether they wish to take part in the privatisation process or not (paragraphs 78 and 80).

172. The Chamber recalls that, under Article 3 of the Citizens' Claims Law, a person with old foreign currency savings exceeding DEM 100 acquires a claim against the Federation equal to the amount of his or her savings. Article 7 stipulates that such a claim shall be transferred by the relevant bank to a Unique Citizen's Account maintained by the Federal Payment Bureau. Article 10 establishes a time-limit within which the body authorised to determine the claim - apparently the bank in question - is obliged to submit an order for the registration of the claim in the unique account. According to Article 11, the unique account is opened *ex officio* and the individual is given a privatisation certificate in an amount corresponding to the registered claims. The possibility for an individual to make objections, provided for by Article 14, only concerns the amount of the claim and not the transfer and registration as such.

173. The Chamber thus notes that there are no provisions in the Citizens' Claims Law indicating that the individual is free to dispose of his or her savings in any other way than to have them converted into privatisation certificates. Instead, the Law provides for the compulsory transfer of foreign currency savings from the bank to the Unique Citizen's Account. This conclusion is reinforced by Articles 12 and 13 of the Instructions on Registration and Settlement of Citizens' Claims in the Unique Citizen's Account (see paragraph 97 above), which stipulate that the bank is obliged to submit information on the identity of the individual saver and the amount of savings to the Federal Payment Bureau which will then register the amount in the unique account.

174. In support of its contention that the banks remain debtors of the foreign currency account holders, the Federation of Bosnia and Herzegovina further refers to Articles 22 and 35 of the Law on Opening Balance Sheets of Enterprises and Banks

(see paragraph 102 above). The Chamber notes that, under Article 22, the banks shall present the value of frozen foreign currency savings in their balance sheets. Except for savings that have actually been paid out, the banks may only make reductions for the amounts they are obliged to pay upon request under Article 3 of the Citizens' Claims Law, that is, savings which do not exceed DEM 100. The remaining foreign currency amounts are to be recorded in the balance sheets as liabilities of the banks. Article 24 of the Law on Opening Balance Sheets states, however, that these liabilities shall be written off against the banks' claims towards the National Bank of Yugoslavia. Furthermore, according to Article 35, the remaining liabilities are to be transferred to the Federal Ministry of Finance upon completion of the privatisation of the banks. It thus appears that, following the privatisation, the individual savers will no longer have any claims against the banks. This interpretation is supported by Article 52 paragraph 3 of the above mentioned instructions on citizens' claims (see paragraph 97). The Chamber is therefore unable to agree with the Federation's contention that the Law on Opening Balance Sheets shows that the relationship between the banks and the individual savers remains unchanged.

175. It is true that, in practice, not all savings deposited on old foreign currency savings accounts have been transferred from the banks to the Unique Citizen's Account. At the Chamber's first hearing on 9 March 1999, Mr. Mujagi stated that 26 per cent of those savings had thus far been transferred and converted into privatisation certificates. Of the present applicants, the savings of Mr. and Ms. Poropat have not been transferred. It further occurs that the transfer of Ms. Seremet's and Mr. Hrelja's savings were made at their request. They have stated, however, that they did so out of fear that they would otherwise lose their savings. Their fear was based on reports in the media. In this respect, the Chamber notes the statement made by Mr. Mujagic in *Oslobodenje* in December 1998 (see paragraph 67 above).

176. The Chamber considers that, on account of the wording of the relevant legal provisions and the contradicting statements made by public authorities, the individual savers have had good reasons to believe that the transfer of foreign currency savings from the banks to the Unique Citizen's Account is compulsory and that, if they did not facilitate the transfer by providing the banks with verification on their identity and the amounts of their savings, they would lose their claims against the banks. More importantly, the savers have apparently been unable to have cash disbursed from their accounts. All the present applicants have initiated court proceedings to this end. So far, only Ms. Poropat has received a judgment on the merits, in which the Municipal Court rejected her claim for disbursement (see paragraph 27 above). Her claim against the bank was dismissed on the ground that it lacked standing to be sued. The court seemingly found that the bank had been relieved of its obligation to pay the deposited savings. In the court's opinion, however, that obligation had not been taken over by the other parties against which

Ms. Poropat had directed her action, i.e. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. The court referred, *inter alia,* to Article 3 of the Citizens' Claims Law which, according to the court's interpretation, does not provide any guarantees for the foreign currency savings but specifies that payments of savings exceeding DEM 100 cannot be made. The Chamber further notes that Ms. Seremet and Mr. Hrelja objected to their banks against the registration of their claims in the Unique Citizen's Account and stated that they wished to have cash disbursements of their savings. Ms. Seremet's objection was rejected by the bank. In Mr. Hrelja's case, the bank did not respond.

177. While not overlooking the fact that the apparent compulsory nature of the provisions of the Citizens' Claims Law and related legislation has not been applied comprehensively in practice, the Chamber considers that the decisive factor is that the banks have refused to pay out the savings in question, finding themselves prevented from doing so under this legislation, and the courts have upheld the banks' decisions and thus confirmed their conclusions. It thus appears that, whether or not the individual savers will be able to claim any money from the Federal Ministry of Finance under Article 35 of the Law on Opening Balance Sheets of Enterprises and Banks, their savings are frozen at least until the privatisation of banks has been completed. The Citizens' Claims Law and the related privatisation laws not only relieve the banks from their contractual obligations towards their savers but, in fact, obliges them not to make any payments for an undetermined period of time. Having regard to the above, the Chamber concludes that the measures contained in the legislation enacted by the Federation of Bosnia and Herzegovina have interfered with the property rights of the individual savers, including the present applicants.

Whether the interference has been justified

178. The Chamber notes that the applicants' claims based on their foreign currency savings are still considered as valid. Their conversion into certificates which, according to the Citizens' Claims Law and the related privatisation laws, are to be used in the privatisation process does not purport to change that situation. The Chamber has noted above (paragraph 174) that, following the privatisation of banks, the individual savers will no longer have any claims against the banks. It is not clear whether, upon completion of the privatisation programme, the savers will be able to claim any money from the Federal Ministry of Finance (see paragraphs 177 above and 190 below). However, the Chamber does not deem it necessary to determine whether the applicants, so far, have been deprived of their possessions as, in any event, the Federation legislation has established measures of control of the use of the applicants' property. The Chamber recalls, in this respect, that the legislation prescribes that foreign currency savings that have been converted into certificates may be used to buy privatised property, whereas savings that have not been thus

converted shall be transferred to the Ministry of Finance and may thus not be used at all for a period of time. The Chamber will therefore consider the measures established by the Federation legislation under the second paragraph of Article 1 of Protocol No. 1.

(a) Lawfulness and purpose of the interference

179. The Chamber has concluded that the basis for the interference in question is to be found in the provisions of the Citizens' Claims Law and the related privatisation laws. This is so irrespective of the fact, noted above, that the provisions have not been comprehensively applied in practice. Although the various laws, in several respects, are not entirely clear and the accessibility of the laws and the foreseeability of their consequences may thus be questioned, the Chamber accepts that the measures taken by the Federation could be considered as having been in accordance with the law. In so finding, the Chamber recalls that it is in the first place for the domestic authorities to interpret and apply domestic law.

180. Moreover, the measures have clearly been taken in the general interest. In this connection, the Chamber notes the economic difficulties of the Federation of Bosnia and Herzegovina in general and of the banks in particular. As stated by the Federation (see paragraph 115 above) and by Messrs. Omievi6 and Stojanov (paragraphs 42 and 59, respectively), the banks are likely to go bankrupt if they were to disburse the old foreign currency savings.

(b) Proportionality of the interference

181. As was pointed out by the European Court of Human Rights in the *James and Others v. the United Kingdom* judgment (see paragraph 162 above), the second paragraph of Article 1 of Protocol No. 1 has to be construed in the light of the general principle set out in the first sentence of this Article. This sentence has been interpreted by the Court as including the requirement that a measure of interference should strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

182. The Federation of Bosnia and Herzegovina asserts that the settlement of the foreign currency savings through the privatisation process strikes a fair balance between the general interest and the interests of the individual savers. It refers, in particular, to the fact that neither the banks nor the State or Federation would be able to pay out the savings in question. Moreover, the liabilities for which certificates have been issued are allegedly covered by the value of assets made available in the privatisation process. Thus, the individual claimants will be able to obtain full compensation for their claims. The Federation accepts, however, that there is a discrepancy between the savers whose claims have been registered in the Unique

Citizen's Account and the savers whose claims have not been so registered. To solve this situation, the agent of the Federation suggested, at the Chamber's first public hearing, that the holders of certificates based on old foreign currency savings could be excluded from the applicable two-year time-limit and that the certificates could be returned and the original claims revalidated in case objective reasons had prevented the holders in question from using the certificates in the privatisation process.

183. The applicants submit that a fair balance between general and private interests has not been struck. Rather, they have suffered unjustified and disproportionate hardship. They would allegedly need the money deposited on the accounts to support their daily needs.

184. The Chamber recalls that the Federation enjoys a wide margin of appreciation in determining what is in the general interest in a matter as complex as the present one, which involves the settlement of private bank savings and large-scale privatisation of socially owned property. Nevertheless, the measures opted for by the Federation must have a reasonable foundation and must not impose an excessive burden on the individuals concerned.

185. As regards the claims that have been registered in the Unique Citizen's Account and converted into certificates, including the claims of Ms. Seremet and Mr. Hrelja, the Chamber recalls that they can be used to buy various kinds of privatised property, as specified in Article 15 of the Citizens' Claims Law. According to the applicants, they live in houses that they own and cannot buy any apartments that are offered for sale as they do not have occupancy rights over such apartments. As for the other property mentioned in Article 15, i.e. municipal business premises and shares and assets of enterprises, the Chamber considers that they are of use mainly for investors and entrepreneurs. It is further questionable whether individuals with small savings, like the applicants, could reasonably be expected to buy items offered in the privatisation process or would be able to afford these items. The Federation states that they can buy tools, computers and other appliances. It is, however, uncertain to what extent such items have been made available so far or will be made available in the future. In March 1999, the OHR claimed that none of the foreign currency savers had been able to use their certificates (see paragraph 82 above). Also, in February 2000, the OHR stated that a rapid privatisation had been impeded by a non-navigable bureaucracy, legislative barriers, resistance from enterprise managers and political resistance (paragraph 71 above). However, the Federation claims that, as of December 1999, assets were being made available on a large scale at public auctions. In any event, it appears that the start of the privatisation process has been slow.

186. In this connection, the Chamber recalls that, according to Article 18 of the Citizens' Claims Law, the certificates can be used for a period of only two years from the date when the Federal Payment Bureau issued a statement on the individual's balance on the Unique Citizens' Account. After the expiration of that period, the claims on which the certificates have been issued are extinguished. The slow progress in the privatisation process thus clearly affects the individuals' possibility to realise the value of their claims. The solution to this problem suggested by the agent of the Federation (see paragraph 182 above) has apparently not been considered by the relevant authorities.

187. Furthermore, although the certificates issued to foreign currency savers are based on the amount of money they have deposited on the relevant accounts, the certificates are not treated as equal means of payment as cash money in the privatisation process. Article 28 of the Law on Privatisation of Enterprises not only stipulates that 35 per cent of the price of items offered for sale in the so-called small-scale privatisation shall be paid in cash; it also provides that a discount may be given if a larger proportion of the sale price is paid in cash. According to Article 29, these rules also apply to the sale of certain municipal business premises. Moreover, under Article 24 of the Law on Sale of Apartments with Occupancy Rights, cash payment entitles the buyer of such an apartment to a 20 per cent reduction of the price. This reduction originally applied also to payments by certificates based on foreign currency savings but that part of Article 24 was deleted when the Law was amended on 3 April 1998.

188. The Chamber recalls, in this respect, the public sale of the premises owned by the company "Bosnafolklor" in Sarajevo (see paragraph 72 above), in which a bidder offering KM 700,000 in cash was favoured over a bidder who offered the asking price of KM 1,200,000 but wished to pay only KM 470,000 in cash and the remainder with certificates.

189. The Chamber also takes into account that people in difficult economic circumstances may need their savings to meet their daily needs and may thus be forced to sell their certificates on the secondary market, where they are being sold for a fraction of their nominal value. This situation applies also in general to people with small amounts of savings, as they may have difficulties in finding reasonable items to buy in the privatisation process. While the Federation states that this is not the intended use of the certificates, the sale on the secondary market is clearly not illegal and, therefore, cannot be considered as an "abuse" or a "wrongful use" by the holders of the certificates. It should also be noted that the delay in making items available in the privatisation process and the unfavourable treatment of certificates in the sale of these items contribute to public distrust in the privatisation programme in general and a decrease in the actual value of the certificates.

190. As regards the claims that have not been registered in the Unique Citizen's Account and thus not converted into privatisation certificates, which is the case for Mr. and Ms. Poropat, the Chamber notes, as has been stated by the Federation, that, under Article 35 of the Law on Opening Balance Sheets of Enterprises and Banks, these claims are to be transferred to the Federal Ministry of Finance after the bank privatisation programme has been completed. It appears that they are to be regulated by the Law on Foreign Debt. However, it is highly doubtful whether these claims will actually be paid to the individual savers and, if so, to what extent. In this respect, reference is made to the opinion of 21 April 1998 given by the Ministry of Finance (see paragraph 65 above), i.e. the Ministry to which these claims will be' transferred. The Ministry stated that, "as the Federation has only a limited budget and other property which could compensate depositors, it is very uncertain whether such depositors [i.e. depositors who do not participate in the privatisation process] will be compensated at all and, if so, in what way". In any event, the Chamber notes that the savings of these people will be frozen until the banks have been privatised. Accordingly, the savings may not be used at all for an undetermined period of time.

191. The Chamber also finds that people in the Federation have not been satisfactorily informed of the measures applied in regard to the old foreign currency savings and the privatisation process in general. Consequently, they have not been in a position to fully assess the consequences of their actions. The Chamber refers in this respect to the statement made by Mr. Mujagic in *Oslobodenje, on* which two of the present applicants apparently relied when they had their claims registered in the Unique Citizen's Account. It should also be noted that several experts and witnesses heard by the Chamber expressed uncertainty in regard to various aspects of the procedure set up by the Federation.

192. Having regard to the above circumstances, the Chamber considers that the measures applied by the Federation in respect of the old foreign currency savings, taken as a whole, place an individual and excessive burden on many individual savers, including the present applicants. While not overlooking the general interest involved, including the need to regulate the settlement of these savings in the context of economic difficulties of the Federation and the banks, the Chamber finds that the measures do not strike a "fair balance" between that interest and the protection of the applicants' property rights and that they, thus, fall outside the Federation's margin of appreciation.

193. In conclusion, there has been a violation by the Federation of Bosnia and Herzegovina of the applicants' right to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention.

2. Article 6 of the Convention

194. The applicants complain that they have not had a fair hearing under Article 6 of the Convention. Paragraph 1 of that Article reads, in so far as relevant, as follows:

> "*in* the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing within a reasonable time by an independent and impartial tribunal . . ."

195. The Chamber has noted above (paragraphs 155 and 156) that there have been certain delays in the domestic proceedings due, *inter alia,* to the Municipal Court's decisions to postpone the examination of the applicants' cases. Partly for this reason, the Chamber has concluded that the domestic remedies have not been effective. However, although the justification for some of the delays may be questioned, the Chamber considers, in view of its examination of the applications under Article 1 of Protocol No. 1 to the Convention and the findings of violations of that provision (paragraphs 169 and 193), that it is not necessary to examine the applicants' complaints under Article 6 of the Convention.

VII. REMEDIES

196. Under Article XI(l)(b) of the Agreement the Chamber shall address the question of what steps are to be taken by the respondent Party to remedy breaches of its obligations under the Agreement. In this respect, the Chamber may consider issuing orders to cease and desist, awarding monetary relief (including pecuniary and non-pecuniary injuries) and prescribing provisional measures.

197. All the applicants claim compensation for their foreign currency savings together with the interest accrued on those savings. They also request that they be awarded default interest as well as their legal costs and expenses for the preparation of the writs to the Municipal Court and the applications to the Chamber 8hd the representation at the hearings of these institutions.

198. Mr. Poropat claims compensation of DEM 2,854.28 for the savings he had on 31 March 1992, apparently based on the exchange rates prevailing at the time when the compensation claim was calculated (10 March 1999) and without any reduction having been made for the money withdrawn in 1994. He further claims interest for the period from 31 March 1992 to 24 December 1996 in the amount of DEM 2,282.42 and default interest for the period from 24 December 1996 to 10 March 1999 in the amount of DEM 5,092.68. The total of these three items is thus DEM 10,229.38. For legal costs and expenses he claims a total of KM 462, of which KM 198 relate to the domestic court proceedings and KM 264 to the proceedings before the Chamber.

199. Ms. Poropat claims compensation of USD 558.31 and DEM 520 for the savings she had on 31 January 1992. She further claims interest for the period from 31 January 1992 to 24 December 1996 in the amounts of USD 642.06 and DEM 598 and default interest for the period from 24 December 1996 to 10 March 1999 in the amounts of USD 996.15 and DEM 927.79. The total of these claims is thus USD 2,196.52 and DEM 2,045.79. For legal costs and expenses she claims a total of KM 462, of which KM 198 relate to the domestic court proceedings and KM 264 to the proceedings before the Chamber.

200. Ms. Seremet claims compensation of DEM 12,697 and ATS 2,629.46 for the savings she had on 17 February 1992. She further claims interest for the period from 17 February 1992 to 16 July 1997 in the amounts of DEM 14,728.52 and ATS 3,050.17 and default interest for the period from 16 July 1997 to 10 March 1999 in the amounts of DEM 20,914.49 and ATS 4,331.25. The total of these claims is thus DEM 48,340.01 and ATS 10,010.88. For legal costs and expenses she claims a total of KM 990, of which KM 198 relate to the domestic court proceedings and KM 792 to the proceedings before the Chamber.

201. Mr. Hrelja claims compensation of DEM 11,586 for the savings he had on 31 March 1992, apparently calculated on the same basis as Mr. Poropat's compensation claim. He further claims interest for the period from 31 March 1992 to 4 September 1997 in the amount of DEM 13,555.62 and default interest for the period from 4 September 1997 to 10 March 1999 in the amount of DEM 18,344.82. The total of these three items is thus DEM 43,486.44. For legal costs and expenses he claims a total of KM 990, of which KM 198 relate to the domestic court proceedings and KM 792 to the proceedings before the Chamber.

202. The respondent Parties have not submitted any observations on the above claims.

203. The Chamber recalls that it has found both respondent Parties to have violated the applicants' right to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention in regard to their old foreign currency savings (paragraphs 169 and 193 above). The Chamber notes that, under the Framework Law on Privatisation of Enterprises and Banks adopted in July 1999, the competence for the regulation of issues relating to these savings presently rests with the Entities. Moreover, the Federation of Bosnia and Herzegovina has, since November 1997, enacted various laws that directly affect these savings. In these circumstances, the Chamber finds it appropriate to order only the Federation to remedy its violation of the applicants' rights.

204. The violation for which the Federation has been found responsible relates to certain aspects of the privatisation programme. The Chamber has found above

(paragraph 192) that some of the measures applied in that programme fail to strike a "fair balance" between the general interest and the protection of the property rights of the applicants as holders of old foreign currency accounts. The Federation should therefore be ordered to amend the privatisation programme so as to achieve that balance. The Chamber has pointed out several shortcomings in the programme, in particular the limited, two-year, validity of the privatisation certificates and the unequal treatment of cash and certificates (see paragraphs 186-188 above). It has also noted the uncertainty as to the future status of the foreign currency claims that have not been registered in the Unique Citizen's Account and the claims that have been so registered but are not used in the privatisation process (see paragraphs 185 and 189 above). These are issues that will have to be solved by the Federation in amending the privatisation programme. However, the Chamber considers that it is for the Federation to find, within its margin of appreciation, the appropriate means to achieve the required "fair balance" of interests.

205. With respect to the applicants' claims for compensation for their foreign currency savings, the Chamber recalls that its findings of violations under Article 1 of Protocol No. 1 to the Convention are not directly based on the applicants' inability to withdraw money from their savings accounts. Rather, the violations found concern the failure of Bosnia and Herzegovina to take adequate action in regard to the savings and the failure of the Federation of Bosnia and Herzegovina to strike a "fair balance" between the relevant interests in regulating this and related issues. Moreover, the Chamber recalls the above order that the Federation of Bosnia and Herzegovina shall amend the privatisation programme so as to achieve the required balance. For these reasons, the Chamber rejects the applicants' claims for compensation for their savings.

206. However, the Chamber finds that the applicants should be compensated for their legal expenses. It notes that the legal expenses have been calculated on the basis of the value of the respective applicants' savings. Having found above that the violations found in the present cases are not directly linked to the reimbursement of the savings and thus not to the value of the savings, the Chamber finds that such a differentiation of legal expenses is not relevant. Consequently, all of the applicants should be awarded the same amount. The Chamber- considers that the lower amount claimed by Mr. and Ms. Poropat - KM 462 - is more reasonable, especially in view of the fact that the cases before the Chamber have been considered jointly and all of the applicants have been represented by the same representative. Mr. and Ms. Poropat have claimed KM 132 for the representation at the Chamber's first hearing; the same amount should be added for the representation at the second hearing which took place after they submitted their compensation claims. The Chamber therefore awards each applicant KM 594 as compensation for legal expenses. This amount should be divided equally between the respondent Parties. Accordingly, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina should be ordered to pay to each applicant KM 297.

207. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina should report to the Chamber on the steps taken by them to comply with the above orders within six months from the date of delivery of this decision.

VIII. CONCLUSIONS

208. For the above reasons, the Chamber decides,

1. unanimously, to declare the applications admissible;

2. by 8 votes to 6, that Bosnia and Herzegovina has violated the applicants' right to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the European Convention on Human Rights by failing to take adequate action in regard to the old foreign currency savings to secure the applicants' rights under that provision, Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement,

3. unanimously, that the Federation of Bosnia and Herzegovina has violated the applicants' right to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention by taking measures in regard to their old foreign currency savings which place an individual and excessive burden on the applicants, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. by 10 votes to 4, that it is not necessary to examine the applicants' complaints under Article 6 of the Convention;

5. unanimously, to order the Federation of Bosnia and Herzegovina to amend the privatisation programme so as to achieve a fair balance between the general interest and the protection of the property rights of the applicants as holders of old foreign currency savings accounts;

6. by 8 votes to 6, to order Bosnia and Herzegovina to pay to each applicant, by 9 July 2000, 297 Convertible marks *(Konvertibilnih Maraka)* as compensation for legal expenses;

7. by 12 votes to 2, to order the Federation of Bosnia and Herzegovina to pay to each applicant, by 9 July 2000, 297 Convertible marks as compensation for legal expenses;

8. unanimously, to reject the remainder of the applicants' claims for compensation; and

9. unanimously, to order Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina to report to the Chamber, by 9 December 2000, on the steps taken by them to comply with the above orders.

(signed)	(signed)
Anders Mansson	Michèle PICARD
Registrar of the Chamber	President of the Chamber

In accordance with Rule 61 of the Chamber's Rules of Procedure, the following separate opinions are annexed to this decision:

Annex I	Partly dissenting opinion of Ms. Michèle Picard
Annex II	Partly dissenting opinion of Messrs. Giovanni Grasso and Viktor Masenko-Mavi
Annex III	Partly dissenting opinion of Mr. Dietrich Rauschning
Annex IV	Partly dissenting opinion of Mr. Jakob Möller on the remedies, joined by Messrs. Hasan Bali, Zelimir Juka, Viktor Masenko-Mavi and Mato Tadi
Annex V	Partly dissenting opinion of Messrs. Miodrag Paji and Vitomir Popovi6
Annex VI	Partly dissenting opinion of Mr. Andrew Grotrian

ANNEX I

PARTLY DISSENTING OPINION OF MS. MICHELE PICARD

I agree with the majority of the Chamber in the admissibility part of the decision that the State of Bosnia and Herzegovina has some responsibility for the management of the old foreign currency savings although the problem started before the war. Thus, the new State inherited the situation but did not create it. The then Republic enacted some general provisions on this matter after the entry into force of the General Framework Agreement, stating that the problem would be solved either through the public debt or in another way (Decision of 10 April 1996). These provisions showed that the problem could be solved within the competence of the State.

However, I disagree with the finding of the majority of the Chamber that there has been a violation of Article 1 of Protocol No. 1 to the Convention by the State of

Bosnia and Herzegovina. According to the majority of the members, the basis for the violation found is the failure of the State to take adequate action.

When assuming the responsibility to solve the issue in 1996, the Republic did not specify in which way it would be done. In the 1996 decision, it is provided that it could be solved either through the public debt or in another way "in consultation with the international community". Thereafter, it became clear that the transfer of the foreign currency claims to the public debt was not possible from a financial point of view and was not fair to other citizens of Bosnia and Herzegovina (see the opinion of M. Piljak, at paragraph 50 of the Chamber's decision). Considering the competencies of the State under the Constitution of Bosnia and Herzegovina, the only solution was then to solve the issue through the Entities which are responsible for the banking system.

According to the jurisprudence of the European Court of Human Rights, States enjoy a wide margin of appreciation in determining what is in the public interest. By deciding not to put the burden of the payment of the old foreign currency savings on the public debt, that is on the budget of the State of Bosnia and Herzegovina, the State took a decision which did not manifestly exceed its margin of appreciation. I would add that this decision was probably taken in cooperation with the international community which, at that time and still today, provides a large part of the budget of Bosnia and Herzegovina.

I think it is not within the competence of the Chamber to decide or even to appreciate what would have been the right solution in this context as long as the measure taken was not manifestly lacking any reasonable basis. On this point, the Chamber admits in paragraph 180 of the decision that "the measures have clearly been taken in the general interest" and notes the economic difficulties of the State and Federation of Bosnia and Herzegovina. Solving the problem through the privatisation process was one solution among others clearly within the margin of appreciation of the public authorities. It is only because the process of privatisation as applied does not strike a fair balance between the general interest and the protection of the applicants' rights that the Chamber has found a violation of Article 1 of Protocol No. 1 by the Federation. If the privatisation process had been rightly and fairly managed it is doubtful that the Chamber would have found a violation at all. Thus, it appears that it is only because the privatisation process has been badly conducted by the Federation that the State has violated the Convention. As I cannot accept this reasoning, I voted against the finding of a violation by the State.

(signed)
Michèle

CHAPTER XIII

THE RIGHT TO A SAFE ENVIRONMENT

Contents:

Bulankulama and Others v. *The Secretary, Ministry of Industrial Development and Others*

(S.C. Application No. 884/99 (F.R.))

The Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of an Application under Article 17 read with Article 126 if the Constitution.

Petitioners:
1. Tikiri Banda Bulankulama - No. 5. Kandakkulama, Kiralogama
2. Ratnayake Mudiyanselage Ranmenike - Palugasewa, Eppawela
3. Palitha Nissanka Bandara, Palugaswewa, Eppawela
4. Dissanayake Kiribandage Ranbanda, Eliyaivulwewa, Eppawela
5. Palihawadana Arachchige Kiribanda, Palugaswewa, Eppawela
6. Dissanayake Ukkubandage Seneviratne, "Polwatta", Ihala Siyambalawa, Eppawela
7. Ven. Mahamankadawala, Piyaratna Thero, Galkanda Purana Viharaya, Eppawela

Respondents:
1. The Secretary - Ministry of Industrial Development, No. 73/1. Galle Road, Colombo 3
2. Board of Investment of Sri Lanka, World Trade Centre, West Tower Echelon Square, Colombo 1
3. Geological Survey and Mines Bureau, No. 4, Denanayake Building, Dehiwela

4. Central Environmental Authority, Parisara Mawatha, Maligawatta, New Town, Colombo 10
5. Sarabhumi Resources (Private) Limited, No. 41, Janadhipathi Mawatha, Colombo 1.
6. Lanka Phosphate Limited, No. 63, Elbitigala Mawatha, Colombo 5
7. Geo-Resources Lanka (Private) Limited, No. 9, Abdul Caffoor Mawatha, Colombo 3
8. The Attorney-General, Attorney-General's Department, Hulftsdorp, Colombo 12

Before:
Amerasinghe, J.,
Wadugodapitiya, J
Gunasekera, J.

Counsel:
R. K. W. Goonesekere with Ruana Rajepakse and Asha Dhaasiri for the petitioners. K. Sripavan, D. S. G., with B. J. Tilakaratne, SSC and Anusha Navaratne, S.C., for the 1st to 3rd, 6th and 8th Respondents. Chulanie Panditharatne for the 4th respondent. Rosesh de Silva, P. C., with Harsha Amarasekera and Sarath Caldera for the 5th and 7th Respondents.

Argued on: 15.03.2000, 16.03.2000, 28.03.2000 and 30.03.2000
Final Written Submissions: 7 April 2000
Decided on: 2 June 2000

Amerasinghe, J.,

THE BACKGROUND

After Soil surveys conducted by as team of scientists at kiruwelhena, which had been selected as a prototype site of dry zone, high elevation laterite, the team informed the Director of Geological Survey about some peculiar weathered rock they had found. Early in 1971, during the Geological Survey of the Anuradhapura district, it was found that what had been supposed by the scientists during the soil surveys to be "high level fossil laterite" was really an igneous carbonatite apatite. The Department of Geological Survey had thus come to "discover" a deposit of phosphate rock occurring in the form of the mineral apatite at Eppawela in the Anuradhapura district.

Having regard to the policies of the Government at that time, it was decided in 1974 that the use of the Eppawela deposit should be entrusted to a Divisional Development Council (D. D. C.).

Although a trial order for the supply of 500 tons was placed by the Ministry of Industries and Scientific Affairs and the order was fulfilled within about four

months, no further orders for phosphate rock were placed. The D.D.C. project was later taken over by Lanka Phosphate Ltd, a company fully owned by the Government, which was set up by the Ministry of Industries.

In December 1992, a notice calling for proposals to establish a joint venture for the manufacture of phosphate fertiliser using the apatite deposit at Eppawela was published in local and foreign newspaper. Six proposals were received. A committee appointed by the Cabinet, after having considered an evaluation report, decided with the approval of the Cabinet to undertake negotiations with Freeport MacMoran Resource Partners of USA (hereinafter referred to as Freeport MacMoran). One of the factors that appeared to have been in favour of Freeport MacMoran was that it was "one of the leading phosphate fertiliser firms in the world." (p.4 page 2) Another was that "IMCO Agrico (sic), an affiliate of M/S. Freeport MacMoran, had done studies and worked on the utilisation of this particular phosphate deposit several years ago and therefore, they had the benefit of that research." (p.4 page 2)

The negotiating committee was assisted by representatives from various Government Departments and Ministries and by a team of expects.

The first round of negotiations was held from March 17-22, 1994. Thereafter, when the present Government took office, the Minister of Industrial Development, in a Memorandum dated January 28, 1995, reported to Cabinet the progress made and sought and obtained the approval of the Cabinet to continue with the negotiations. A second round of negotiations was held on March 27-31, 1995. "Major issues" relating to the availability of land for a plant at Trincomalee, and "the resettlement and payment of compensation to Mahaveli settlers presently living in the exploration area identified for the project", were discussed with local institutions and authorities (p.4).

On September 26, 1996, the Minister of industrial Development reported to Cabinet on the progress made and sought approval "for certain parameters in respect of some key issues which continued to remain unresolved." No information was furnished to Court on what these issues were and what had been decided. We were merely informed that Cabinet approval was received on October 2, 1996, and that the third round of negotiations was held on December 21, 1996. Thereafter, Freeport MacMoran submitted drafts of the Mineral Investment Agreement and other subsidiary agreements. These were studied by the negotiating committee and lawyers from the Department of the Attorney-General "on the basis of the parameters laid down by the Cabinet and the applicable laws."(p.4). The Freeport MacMoran Draft was returned to them with amendments. Freeport MacMoran then raised "several issues regarding the interpretation of the key parameters and also the language in the draft as amended by the Attorney General's Department." (P4) Subsequently, Freeport MacMoran met Her Excellency the President who thereupon directed Mr. B.C. Perera (Secretary to the Treasury), Hon. Sarath N. Silva (Attorney-General), Mr. K. Austin Perera (Secretary, Ministry of Industrial Development), Mr. Thilan Wijesinghe (Chairman/Director-General, Board of Investment of Sri Lanka), and Mr. Vincent Pandita (Senior Advisor, Board of Investment of Sri Lanka and Consultant, Ministry of Industrial Development) (p.4),

"to conduct one final round of negotiations and clear any outstanding issues along with the tests of the mineral Investment Agreement and subsidiary agreements" (p.4). The final round of negotiations was held from July 28 to August 4, 1997, and the final drafts of the Mineral Investment Agreement and subsidiary documents were agreed upon and initiated by the Secretary of the Ministry of Industrial Development and the representatives of Freeport MacMoran and IMC Agrico.

On May 17, 1998, the President of the National Academy of Sciences, Prof. V. K. Samaranayake, wrote to the President of Sri Lanka (with copies to the Minister of Science Technology and Human Resource Development and the Minister of Industrial Development) (p.10) stating that the Council of the Academy was of the view "that the proposed project in its present form is premature as some of the vital data relating to the actual size and quality of the mineral deposit have not been adequately surveyed and established. This shortcoming had also been highlighted in the Report of May 1995 of the Presidential Committee appointed by Your Excellency. The feasibility of the Project can be comprehensively appraised only when this vital data are available. Accordingly, we respectfully request Your Excellency to defer the grant of approval for the Project until a comprehensive appraisal is undertaken."

In the same letter, the President of the National Academy of Sciences stated that the Council had also examined other related issues and that the recommendations, including options, were elaborated in the report of the national Academy of Sciences which was forwarded to President of Sri Lanka.

In a newspaper article entitled "Exploitation of Eppawela rock phosphate deposit", (p10a), Prof. V. K. Samaranyake stated as follows:

> "The National Academy of Sciences is the highest multi-disciplinary scientific organisation in Sri Lanka. Its mandate includes, 'to take cognisance and report on issues in which scientific and technological considerations are paramount to the national interest', and 'to advise on the management and rational utilisation of the natural resources of the island so as to ensure optimal productivity, consistent with continued use of the biosphere on a long term basis taking into account the repercussions of using a particular resource on other resources and the environment as a whole, and to help in making use of resources of the country in national development."

Prof. Samaranayke went on to say: "Accordingly, the Academy studied the proposal from all angles and submitted its report to Her Excellency the President in May 1998. The project proposal was examined in relation to (a) the deposit and proposed rate of exploitation; (b) proposal to manufacture fertiliser locally; (c) environmental considerations; and (d) economic and social consideration."

On July 23, 1999, a committee of twelve scientists of the National Science Foundation Submitted a report under the title "The optimal use of Eppawela rock phosphate in Sri Lankan agriculture." (p12). Having observed that the proposal of the U.S. Mining Company "in the view of the Professional Associations in the country (e.g. The Institution of Engineers, the Institute of Chemistry, the National

Academy of Sciences and most individual scientists and engineers), is highly disadvantageous to the country and with highly adverse environmental impacts", the committee examined various proposals made and suggested options which in its view "are more advantageous to the country."

On October 8, 1999, the seven petitioners filed an application in this Court under Article 17 read with Article 126 of the Constitution. The Court (Fernando, Wadugodapitiya and Gunasekera, JJ.) on October 27, 1999, granted the seven petitioners leave to proceed with their application for declarations and relief arising from the alleged infringement of their fundamental rights guaranteed by Articles 12(1), 14(1)(g), and 14(1)(h) of the Constitution.

JURISDICTION

In the proposed agreement, it is acknowledged in the "Introduction" that: "The mineral resources contained in the territories of Sri Lanka constitute a part of the national wealth of Sri Lanka."

Learned counsel for the 5th and 7th respondents, with whom the Deputy Solicitor-General associated himself, submitted that the Government, and not this Court, is the "trustee" of the natural resources of Sri Lanka. "Thus, as long as the Government acts correctly the Court will not put itself in the shoes of the Government. That is to say the Court may or may not agree with the final outcome. However, if the Government has correctly acted as trustee the court will not interfere." It was further submitted that the petitions should be dismissed *in limine*, since the petitioners had invoked the fundamental rights jurisdiction of the Court in a matter that was "either a public interest litigation or breach of trust litigation."

I am unable to accept those submissions.

The Constitution declares that sovereignty is in the People and is inalienable. (Article 3). Being a representative democracy, the power of the People is exercised through persons who are for the time being entrusted with certain functions. The constitution states that the legislative power of the People shall be exercised by Parliament, the executive power of the People shall be exercised by the President of Sri Lanka, and the judicial power of the People shall be exercised, inter alia, through the Courts created and established by the Constitution (Article 4). Although learned counsel for the petitioners citing M.C. Mehta V. Kamal Nath, (1977) 1 S.C.C 388, agreed with learned counsel for the 5th and 7th respondents that the natural resources of the People were held in "trust" for them by the Government, he did not subscribe to the view that the Court had no role to play. In any event, he challenged the respondents' claim that the Government had in fact acted "properly" in discharging its role as "trustee".

The organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the Constitution but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of

resources in the process of development, which the Mahavamsa, 68.8-13, sets forth in the following words:

> "Having thus reflected, the King thus addressed his officers.
>
> In my Kingdom are many paddy field's cultivated by means of rain water, but few indeed are those which are cultivated by perennial streams and great tanks.
>
> By rocks, and by many thick forests, by great marshes is the land-covered
>
> In such a country, *let not even a small quantity of water obtained by rain, go to the sea without benefiting man*
>
> Paddy fields should be formed in every place, excluding those only that produce gems, gold- and other precious things.
>
> It does not become persons in our situation to live enjoying our on ease, and unmindful of the interests of the people." Translation by Mudaliyar L. de Zoysa, Journal of the Royal Society (C. B.), Vol. III, No. IX. (The emphasis is mine).

In the case concerning the Gabcikovo-Nagimaros project (Hungary/Slovakia), - the Danube case- 1997 General List No. 92, September 25, 1997, before the International Court of Justice, the Vice-President of the Court, Judge C.G. Weeramantry, referred at length to the ancient irrigation works of Sri Lanka which, he said, "embodied the concept of development par excellence". He said:

> "Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century BC."

The ancient chronicles record that when the King (Devanampiya Tissa, 247-2O7 BC) was on a hunting trip (around 223 BC), the Arahat Mahinda, son of the Emperor Asoka of India, preached to him a sermon which converted the King. Here are excerpts from that sermon: "Great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it."

The juxtaposition in this heritage of the concepts of development and environmental protection invites comment immediately from those familiar with it. Anyone interested in the human future would perceive the connection between the two concepts and the manner of their reconciliation. Not merely from the legal perspective does this become apparent, but even from the approaches of other disciplines.

Thus Arthur C. Clarke, the noted futurist, with the vision that has enabled him to bring high science to the service of humanity, put his finger on the precise legal problem we are considering when he observed: "the small Indian Ocean island . . . provides textbook examples of many modern dilemmas: development versus

environment", and proceeds immediately to recapitulate the famous sermon, already referred to, relating to the trusteeship of land, observing: "For as King Devanampiya Tissa was told three centuries before the birth of Christ, we are its guardians not its owners." The task of the law is to convert such wisdom into practical terms.

I have not been able to find the sermon referred to. However Tissa, who depended on the support of Emperor Asoka, and even added to his name the title of his patron, "Devanampiya", would have had little or no hesitation in accepting the advice of Asoka's emissary, Mahinda. The subject of land tenure in Sri Lanka, including the status, claims, and rights of the Monarch with regard to the soil, is an extremely complex one as, for instance, the debates on various matters between H.W. Codrington and Julius de Lanerolle showed. (See Journal of the Royal Asiatic Society (Ceylon Branch), Vol. XXXIV, p. 199 sq, p. 220 sq., p. 226 sq.) For the present limited purpose, what I do wish to point out is that there is justification in looking at the concept of tenure, not as a thing in itself, but rather a way of thinking about rights and usages about land.

H.W.Codrington, Ancient Land Tenure and Revenue in Ceylon, (pp 5-6), refers to the fact that the King was bhupati or adhipati – "lord of the earth", "protector of the earth" or "lord adhipati of the fields of all". He quotes Moreland with approval in support of the view that at first, the question of ownership' was of little or no significance. Moreland wrote as follows: "Traditionally there were two parties, and only two, to be taken into account; these parties were the ruler and the subject, and if a subject occupied land, he was required to pay a share of its gross produce to the ruler in return for the protection he was entitled to receive. It will be observed that under this system the question of ownership of land does not arise: the system is in fact antecedent to that process of disentangling the conception of private right from political allegiance which has made so much progress during the last century, but is not even now fully accomplished . . .". Later, grantees, in general, it seems were given the enjoyment of lands for services rendered or to be rendered in consideration of their holdings, or lands were given for pious and public purposes unrelated to any return, For their part, grantees were under an obligation to make proper use of the lands consistent with the grant or, in default, suffer their loss or incur penalties.

The public trust doctrine, relied upon by learned counsel on both sides, since the decision in Illinois Central R. Co. v. Illinois, 146 U.S. 387 at 452, 135 S. Ct. 110 at 118 (1892), commencing with a recognition of public rights in navigation and fishing in and commerce over certain waters, has been extended in the United States on a case by case basis. Nevertheless, in my view, it is comparatively restrictive in scope and I should prefer to continue to look at our resources and the environment as our ancestors did, and our contemporaries do, recognising a shared responsibility.

The Constitution today recognises duties both on the part of Parliament and the President and the Cabinet of Ministers, as well as duties on the part of "persons", including juristic persons like the 5th and 7th respondents. Article 2.7(14) states that "The State shall protect, preserve and improve the environment for the benefit of the community." Article 28 (f) states that the exercise and enjoyment of rights and freedoms (such as the 5th and 7th respondents claimed in learned counsel's

submissions on their behalf to protection under Article 12 of the Constitution relating to equal protection of the law) "is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka to protect nature and conserve its riches."

The loose use of legal terms like "trust" and "trustee" is apt, as this case has shown, to lead to fallacious reasoning. Any question of the legal ownership of the natural resources of the State being vested in the Executive to be held or used for the benefit of the people in terms of the Constitution is at least arguable. The Executive does have a significant role in resource management conferred by law, yet, the management of natural resources has not been placed exclusively in the hands of the Executive. The exercise of Executive power is subject to judicial review. Moreover, Parliament may, as it has done on many occasions, legislate on matters concerning natural resources, and the Courts have the task of interpreting such legislation in giving effect to the will of the people as expressed by Parliament.

In any event, the issue before me is not the question whether this Court or the "Government" is a "trustee", and whether there has been a breach of trust, but whether in the circumstances of the instant case the rights of the petitioners guaranteed by Articles 12(1) 14 (1) (g) and 14(1) (h) of the Constitution have been violated. And in that regard the jurisdiction of this Court is put beyond any doubt by Article 126(1) of the Constitution which states, among other things, that the Supreme Court has "sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right." The Court is neither assuming a role as "trustee" nor usurping the powers of any other organ of Government. It is discharging a duty which has in the clearest terms been entrusted to this Court, and this Court alone, by Article 126 (1) of the Constitution.

Learned counsel for the 5th and 7th respondents submitted that, being an alleged "public interest litigation" matter, it should not be entertained under provisions of the Constitution and should be rejected. I must confess surprise, for the question of "public interest litigation" really involves questions of standing and not whether there is a certain kind of recognised cause of action. The Court is concerned in the instant case with the complaints of individual petitioners. On the question of standing, in my view, the petitioners, as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka – rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners' fundamental rights ought to be considered. It is in that connection that the confident expectation trust that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners and future generations of Sri Lankans, becomes relevant.

MAY THE SEVEN PETITIONERS JOIN IN A SINGLE APPLICATION?

Learned counsel for the 5th and 7th respondents submitted that "several petitioners cannot join in one application in terms of Article 126 of the Constitution." Admittedly, Article 126 (2) refers to "any person", "such person" and "he may himself". However, the Court has not construed these phrases so as to preclude the joining of several petitioners where their individual rights are based on the same alleged circumstances; in fact, the practice of the Court points in the other direction. I therefore-hold that the petitioners are not non-suited on the ground of misjoinder.

IS THE APPLICATION OUT OF TIME?

The respondents submitted that the application must be rejected, since it has been made out of time. However, no indication was given by the respondents of the date from which the period of one month specified by Article 126(2) is to be reckoned. The respondents at the same time maintain that there can be no complaint of an infringement or imminent infringement of rights "unless and until the Development Plan is in place", for it is that document which would show what rights, if any, have been or are about to be in-fringed. If there has been no infringement or imminent infringement, it seems to me that the respondents are entitled to call for the dismissal of the petition on the ground that the petitioners have failed to establish their case.

It cannot, however, be maintained that the petition is too late, unless it is conceded that the case was ripe or mature for hearing. The petition cannot be premature and too late at the same time, for the latter position assumes that although the matter was ripe or mature for consideration, the petitioner failed to act within the prescribed time. A substantial part of the respondents' case was based on the submission that the petitioners' case was premature and "conjectural". I shall deal with the respondents' submissions in that regard later on, but for the present, in dealing with the threshold question of whether the petition is out of time, what I have already stated and what I shall state in the next paragraph, should, I think, be sufficient to meet the submission of the respondents.

In addition to pointing out the inconsistent positions of the respondents on the question under consideration, namely, whether the petition was out of time, the petitioners explained that there was considerable uncertainty about the status of the project in question, with "inconsistent signals" being given by the Government from time to time on that matter, both in response to public protests, and critical observations from scientists, including those of the National Science Foundation in their report to the Minister of Science and Technology in July 1999. The Minister had asked the National Science Foundation for advice, and having regard to the observations made by the Foundation, it was not unreasonably expected that the Government would not proceed with the project. There was such uncertainty about the matter that it might have been premature for the petitioners to come into Court earlier. However, when a newspaper report, (Document p13) dated September 26,

1999, announced that the proposed agreement relating to the project, which had been initiated in 1997, following negotiations that had gone on since 1994, was expected to be signed within two months, the petitioners filed their petition on October 8, l999. The impending or threatening danger of the violation of the petitioners' rights reached a sufficient fullness on September 26, 1994.

In the circumstances, I hold that the application was filed in time within the meaning of Article 126(2) of the Constitution.

LEAVE TO PROCEED WAS FOR INFRINGEMENT NOT FOR IMMINENT INFRINGEMENT

The petitioners were granted leave to proceed for the alleged infringement of Articles 12 (1), 14 (1) (g) and 14 (1) (h) and not for the alleged imminent infringement of their rights. The fact that leave to proceed was granted for "infringement" does not preclude the Court from considering whether there was an imminent infringement for *omne majus continet in se minus,* the greater contains the less. This Court, having granted leave to proceed for the alleged infringement of a fundamental right, and thereby being empowered by the Constitution to do the more important act of considering whether an infringement had taken place, cannot be debarred from doing the less important thing of considering whether there is an imminent infringement, for non *debet cui plus licet quod minus est non licere* or, as it is sometimes expressed, *cui licet quod majus non debet quod minus est non licere* - a doctrine founded on common sense, and of general application.

THE ALLEGED IMMINENT VIOLATION OF ARTICLES 14 (1) (G) AND 14 (1) (H) OF THE CONSTITUTION

Article 14 (1) (g) of the Constitution states that every citizen is entitled to the freedom to engage by himself or, in association with others, in any lawful occupation, profession, trade, business or enterprise. Article 14 (1) (h) states that every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka. The petitioners are citizens of Sri Lanka and residents of the area called Eppawela in the Anuradhapura District in the North Central Province. The first to fifth petitioners are land owners and/or paddy and dairy farmers in the Eppawela area. The sixth petitioner is a teacher and the owner of an extent of coconut land in the Eppawela area. The first to sixth petitioners state that they are in danger of losing the whole or some portion of their lands and their means of livelihood if the proposed mining project is implemented. The seventh petitioner is the Viharadhipathi of the Galkanda Purana Viharaya where he has resided for over 35 years. He states that the Viharaya and the paddy lands that sustain it are in danger of being destroyed if the proposed mining project is implemented. The petitioners

complain of an imminent infringement of their fundamental rights guaranteed by Articles 14 (1) (g) and 14 (1) (h).

THE AREA AFFECTED

The petitioners' state that the initial exploration area will be 56 square kilometres with a ten kilometre buffer zone on each side, bringing to about 800 square kilometres the area potentially affected. They state that about 2,600 families or 12,000 persons, including themselves, are likely to be permanently displaced from their homes and lands.

There are only seven persons who have filed this application; but it must now become clearer why I said that their claims were linked to the collective rights of others and that the alleged infringement of the petitioners individual rights need to be viewed in the context of the rights guaranteed to them not only as falling within the meaning of "all persons", as for instance within the meaning of Article 12 (1) of the Constitution, but in particular as members of the citizenry of Sri Lanka.

The negotiating committee appointed by the President states in its report to the President (p4 at p5) that "the exploration area will cover approximately 56 sq miles (sic) of land situated in Eppawela in the Anuradhapura District", and that the Buffer Zone Area "will comprise of a land area extending to 10 kilometres from the boundaries of the exploration area". That is a misleading statement, for in terms of the Agreement the "exploration area" is far in excess of 56 square miles. Indeed, as we shall see, the President's committee accepts the fact that the exploration area was not absolutely limited to 56 square miles; it was contractually elastic and extendable.

I agree with learned Counsel for the respondents that there is as yet no "Agreement" *stricto sensu*. Article 21 of the proposed Mineral Investment Agreement (sometimes hereinafter referred to for the sake of convenience as the "Agreement") describing the "basic" rights of the Company, states, *inter alia*, as follows: "Without limitation on the other rights conferred on the Company by this Agreement, the Company shall have, and the Government hereby grants to the Company, subject to the other terms and conditions specified in this Agreement, the sole and exclusive right (a) to search for and explore for phosphate and other minerals in the Exploration Area . . . (b) to conduct pilot or test operations as appropriate at any location within the Contract Area (without limiting the Company's option of conducting such pilot or test operations entirely or partially at other locations; and (c) to develop and mine under Mining Licences any phosphate deposit (including phosphate minerals and Associated Minerals) found in the Exploration Area . . .".

Article 1 of the Agreement defines "Exploration Area" as "that certain area of land which forms part of the Contract Area and which initially covers approximately 56 sq kms of land and is set forth and described as the Exploration Area on Annexes 'B-I' and 'C-1' hereto in respect of which Exploration Licences have been issued under the Act to Lanka Phosphate and/or Geo Resources Lanka (Pvt.) Ltd., as such

area may be reduced or extended as specifically provided for in this Agreement." "Exploration" is defined in the Agreement as "the search for apatite and other phosphate minerals using geological, geophysical, and geochemical methods and by bore holes, test pits, trenches, surface or underground headings, drifts or tunnels in order to locate the presence of economic apatite or other phosphate mineral deposits and to find out their nature, shape and grade, and this term includes "Advanced Exploration" in terms of the Mining (Licensing) Regulations, No 1 of 1993. The verb "explore" has a corresponding meaning.

The various activities falling within the definition of "Exploration" is, in terms of the Agreement, not confined to an area of 56 square kilometres. That, in terms of the definition, is the area covered "initially", but one that may be "extended as specifically provided for in this Agreement". It is stated in Article 2.1 of the Agreement to be a "basic right" of the Company "to conduct pilot or test operations as appropriate at any location within the Contract Area without limiting the Company's option of conducting such pilot or test operations entirely or partially at other locations". So, Exploration may extend to the Contract Area. The Agreement defines "Contract Area" to mean "the lands included within the Exploration Area and the Processing Area as included within the Exploration Area and the Processing Area as described on Annexes 'B-1' and 'B-2' hereto and depicted on the maps set forth as Annexes 'C-1' and 'C-2' hereto, within which the activities of the enterprise are to take place, as from time to time reduced or extended in accordance with this Agreement."

"Processing Area" is defined in the Agreement to mean that certain area of land which forms part of the Contract Area and which is set forth and described as the Processing Area on Annexes "B-2" and "C-2" hereto, as such area may be amended, revised or replaced in accordance with the provisions of this Agreement, which area may be used for Processing, shipping, docking, terminal ling, storage, stockpiling and all other related activities and operations". "Processing" is defined in the Agreement as "the crushing, beneficiation, concentration or other treatment of phosphate minerals and Associated Minerals by physical, chemical or other process in connection with the manufacture of products but does not include the smelting and refining of metals. The verb 'process' has a corresponding meaning."

Thus, in terms of the Agreement, the activities falling within the definition of "Exploration", may take place, not only within the 56 square kilometres, not only within the "Exploration Area", but also within the "Processing Area" which even includes Trincomalee. In fact, the report of the Presidents Committee states at p. 6 that the "Processing Area will be Trincomalee where the processing plant, warehouse, dock, terminal and shipping are located".

It might be noted that in terms of Article 2.5, if the Processing Area identified at the time of the signing of the Agreement was found to be unsuitable after the feasibility study, the Government pledges to use "its best efforts" to locate other lands that are suitable.

Article 2.4 of the Mineral Investment Agreement states as follows:

> "Notwithstanding the existence of this Agreement and the fact that the Company will control a significant area of land for the exploration for and possible development of phosphate mineral deposits as a result of this Agreement, the Company shall remain eligible to apply for and obtain Exploration and Mining Licences on lands outside the Exploration Area . . . In the event the Company does obtain Exploration and/or Mining Licences . . . covering lands within the Buffer Area such lands shall be added to the Exploration Area and treated in all respects as part of the Exploration Area (and Mining Area, if a Development Plan is approved) and as licences which are subject to the provisions of this Agreement."

The report by the President's Committee states: "The Company will have a right to extend their activities into the buffer zone as well, if found necessary." There is no definition in the Agreement of "Buffer Zone", however, the report of the President's Committee states at p. 6 that "Buffer Zone Area" "will comprise a land area extending to 10 kilometres from the boundaries of the exploration area. The Company will have a right to extend their exploration activities into the buffer zone as well, if found necessary."

Indeed, (1) since the "Exploration Area" in terms of the Agreement, as we have seen, extends to the "Processing Area", and (2) since in terms of Article 2.1 of the Agreement it is acknowledged that the Company shall have the "basic" right not only to conduct pilot or test operations at any location within the Contract Area but without limiting the Company's option of conducting such pilot or test operations entirely or partially at other locations, the area of operation, even at the "Exploration" stage is very vast indeed and extendable, in terms of the Agreement, in "the Company's option".

Reference is made to the reduction or extension of exploration or Processing Areas, however, reduction in terms of Article 6.3 is a matter for the company to decide. The Government has no say in the matter. Regardless of maps demarcating the "Exploration Area" drawn on the basis of what Government officials were given to understand, the terms of the Agreement leave the area of "Exploration" wide and practically unrestricted. No exploration may be contemplated in any area outside the areas demarcated in the maps, but the terms of the agreement made "Exploration Area" at least an arguable matter. If the proposed agreement is signed, it would leave the resolution of a dispute on that matter to be settled by arbitration in terms of Article of the Agreement.

SETTLERS AND THE AFFECTED AREA

In their final written submissions on behalf of the lst-3rd, 6th and 8th respondents, made after the oral hearing, learned counsel submitted that: "During the exploration period, the inhabitants of the area will not be displaced nor their lands will be affected." A map (Document X), prepared by the Director of the Geological Survey and Mines Bureau, was annexed to the submission under the caption. "The area

reserved for mineral explorations up to [the] 31st July 1999." The map is a map of Sir Lanka showing three areas of demarcation:

> "(1) The area of 56 sq. km reserved for the proposed phosphate project;
>
> (2) Areas reserved presently for mineral explorations (8514 sq. km.);
>
> (3) The areas where detailed explorations have been carried out during the past three years (1839 sq.km.). Neither any complaints or damage to the environment have been received nor has any person been displaced due to exploration activities." (The emphasis is mine).

That map was not produced until after the conclusion of the oral submissions. When and why was it prepared? On the basis of Document X, the Deputy Solicitor-General said: "One could see from 'X' that the whole of Chilaw town has been part of the exploration area (sic). Therefore, it is respectfully submitted that no harm will occur either to the inhabitants of the area or to the environment during the exploration period. In the circumstances, it is respectfully urged that the application of the petitioner at this moment is pre-mature."

What is the fate of Chilaw and other areas referred to in document X? Was the agenda of the Geological Survey and Mines Bureau made known to the people of the affected areas? The Deputy Solicitor-General has not stated that the people of the areas demarcated in Document X have been made aware of the intentions of the Geological Survey and Mines Bureau and, in the circumstances, his submissions that the people living within the proposed exploration areas in document X have made no protests, and that therefore the petitioners cannot object to exploration as unsound, for they are not comparable situations. Has it been publicly announced that exploration, as defined in the proposed agreement, will be carried out in Chilaw and other areas shown in Document X?

In his affidavit, the 1st respondent states, 4. (a) "The apatite deposits were discovered in 1971 and part of the deposit is to the North of the Jaya Ganga, which consist of Crown lands (sic.) only; (b) the area to the south of Jaya Ganga has been excluded from the Mahaweli Settlement Scheme and reserved for the apatite/Phosphate Project in view of the said discovery in 1971. Accordingly, there are no legal settlements in the area." This, as we shall see is flatly contradicted by Article 17.3 of the proposed agreement which I have quoted below. At the hearing, he produced a map through the Deputy Solicitor-General. With his affidavit he submitted a Plan of "the known deposit area" prepared by the Geological Survey Department and stated that the 7th petitioner's temple was "not within the known deposit area".

According to the map, there do not appear to be inhabitants on what is marked as the "Known Deposit Area", south of what is marked as the "Kalaweva R.B. Main Channel", which the Deputy Solicitor-General confirmed is the Jaya Ganga referred to by the 1st respondent. Learned counsel, for the 5th and 7th respondents and the Deputy Solicitor-General stated that no one was living on the reserve and that, therefore, on the known data, there will be no relocation.

However, the question as far as the 7th petitioner and the other petitioners are concerned is not whether their lands were on the "known deposit area", but whether they were within the "Exploration Area", including the area south of the Jaya Ganga. Having regard to the Grid map (p.6 and 5 R2), the petitioners' lands are in the fol1owing squares and fal1 within the exploration area: 157332 (1st petitioner); 157329 (2nd petitioner); 157329 (3rd petitioner); 157327/156327 (4th petitioner); 157329 (5th petitioner); 157327/158327 (6th petitioner.); 157328 (7th petitioner).

The 1st respondent suggested that, in view of the impending phosphate project, no settlers were located under the Mahaweli project in the area earmarked for the phosphate project. However, in the map furnished to us, there are "Mahaweli Settlers" within the demarcated "Exploration Area" south of what is marked as the "Ka1awewa Main R.B. Channel". Indeed, the map it seems had been prepared for the very purpose of identifying Mahaweli Settlers, who are obviously not, as the 1st respondent suggested, illegal occupants of lands. The caption of the map is "Phosphate Project at Eppawela - Area falling within system H of Mahaweli Project". Another map produced by the Deputy Solicitor-General - the "Buffer Area Map" which is a grid map - shows another "Known Deposit" north of what is marked as the "Kalawewa Main P.B. Channel". When that map is read with the "Phosphate Project at Eppawela etc. Map", Mahaweli Settlers appear to be living in that area as well.

Learned counsel for the 5th and 7th respondents submitted that "there are no persons living in the Exploration Area", and that therefore there will be no need for relocation, and that no viharayes, homes or villages will be damaged. He stated that: "As at present, in terms of the known given reserves and inferred reserves, no one at all will be relocated. Until the feasibility report is done, there will be no way at all in finding out whether in terms of this project anybody will be relocated." The Deputy Solicitor-General stated that the application of the petitioners was premature, for the deposits had not been identified and exploration had not been commenced. It was only after the feasibility study that the persons affected and extent of environmental damage could be assessed.

From the point of view of imminent infringement as distinguished from infringement, their submissions are not supported by the evidence provided by the maps submitted to us especially when read with the definition and flexible description of "exploration area" in the Agreement referred to above.

Learned counsel's submissions, as well as the assertions of the 1st respondent in his affidavit, are also at variance with the report of the Presidents Committee. At pp 3-4 of that report, attention is drawn to the fact that during the first round of negotiations conducted by the negotiating committee previously appointed by the Cabinet, one of the "major issues" that had to be discussed with "local institutions and authorities" "related to the resettlement and payment of compensation of Mahaweli settlers presently living in the exploration area identified for the project". The President's Committee notes that: "Discussions have also been held with the Mahaweli Authority of Sri Lanka and will help to determine an exploration area which will least disturb the settlements. However, where resettlement has to take

place, consequent to displacement, adequate compensation will be paid to the settlers and the costs will be met by the Joint Venture Company."

Article l7.3 of the proposed agreement acknowledges both the fact that there are settlers south of the Jaya Ganga and the fact that they and other persons may be affected by mining operations. The Article shows not only that the petitioners and others may be affected but that if they are, the paramount consideration will be the Interests of the Company rather than those of the occupants of the affected areas.

Article 17.3

> "The Government and the Company acknowledge that if Mining is conducted within the portion of the Exploration Area located south of the Mahaweli District Authority's main canal which flows through the Exploration Area, the occupants of such land may be directly affected. Occupied areas are indicated on the map attached hereto and made a part hereof as Annex 'K'. To the extent that this area is included within the Mining Area and constitutes part of the area to be mined under the Company's Development Plan which is approved by the Government in accordance with the procedures set forth in Article VII, and the Company determines that it is necessary to relocate such occupants in order to accommodate Mining such area, then the Company will pay the costs of such relocations and the Government will use its best efforts to facilitate the relocation of any inhabitants of such land as requested by the Company in a manner which does not create an undue financial burden on the Company or delay the Company development and operation of the Mining Area. The Government will also use its best efforts to coordinate with the Mahaweli Authority and any other Government authority having jurisdiction over such lands in order to implement such relocations in an orderly and efficient manner, to minimize or eliminate the settlement within this area, and to cause the removal at minimal cost the Company of squatters having no legal or possessory rights. In connection with the foregoing the Government shall use all reasonable efforts to minimize or eliminate the settlement within this area of new inhabitants during the term of this Agreement.
>
> As to other parts of the Mining Area where the Company determines that 'resettlement' is necessary, the Government and the Company acknowledge that only small numbers of persons inhabit such lands. As to these other lands where relocation is determined to be necessary by the Company, the same relocation provisions as set forth above will apply and the Government will utilize its best efforts to minimize or eliminate any settlement of persons or families on such other lands during the term of this Agreement.
>
> In the event that the Company wishes to relocate persons in occupation or possession of private land and not within the scope of the relocation specifically provided for above in this section 17.3, such relocation shall be effected on terms to be agreed between the Company and the owners of such private land." (The emphasis is mine).

Apart from the Mahaweli settlers in the more recent villages established as part of the Mahaweli Development System 'H' project, there are residents of numerous ancient villages (purana gam), both in the "Exploration Area" and the Buffer Zone. Admittedly, the scale of displacement will depend on the feasibility study. That does not mean that at the present time it can be confidently asserted, as learned counsel for the respondents did, that no relocation will take place, nor it can it be denied that some displacement is likely, a conclusion, as we have seen, that understandably troubled the negotiating committee appointed by the Cabinet, although they seem to have been preoccupied with the fate of the Mahaweli settlers.

PETITIONERS' FEARS UNFOUNDED?

Learned counsel for the 5th and 7th respondents analysed the Agreement and said there were five stages in the project: (a) exploration; (b) feasibility study; (c) construction; (d) operating; (e) marketing. Mining, which could cause damage, he said, "is done only at the operating stage". There was no need to feel any apprehension at the Exploration and Feasibility Study stages, which is what the signing of the proposed Agreement would lead to. It is only when the exploration and feasibility studies are done, the approval of all the statutory authorities are obtained, and the Secretary accepts the feasibility report, that the Company will be permitted to proceed to the construction and mining phases of the project. Exploration, he said, "only means search and location of the presence of economic apatite and other phosphate mineral deposits and to find out their nature and grade". The Deputy Solicitor-General expressed a similar view.

The exploration contemplated by the respondents may, perhaps, be of a non-intrusive nature. However, the definition of "exploration" in the proposed Agreement, as we have seen, includes the search for certain minerals, and their location, nature and grade, *inter alia*, by making "boreholes, test pits, trenches, surface or underground headings, drifts or tunnels." Mining may have comparatively more devastating consequences, but exploration can scarcely be said to be so harmless as to cause the occupants of the exploration area no reasonable apprehension of imminent harm to their homes and lands. In the circumstances, the petitioners can hardly be blamed for not sharing the optimistic submission of learned counsel for the 5th and 7th respondents that exploration "can do no harm whatever to anyone".

The petitioners express concern not only about the harm that may be caused at the stage of exploration, but also at all stages of the project and by the total effect of the project as described in the proposed agreement. Admittedly, there is as yet no formally executed agreement. Yet the document may have caused reasonable apprehension leading to the application of the petitioners, for (a) it has been initiated after a "final" round of negotiations between the parties to a proposed agreement; and (b) provides for each and every one of the "five stages" of the project referred to by learned counsel for the fifth and seventh respondents in his analysis of the

Agreement. The petitioners' case is that, in the circumstances, the totality of the proposed agreement must be considered in deciding whether there is an imminent infringement of their constitutional rights.

There is nothing in the proposed agreement that supports the view that the signing of the proposed agreement will "only result in exploration and feasibility study". It is a comprehensive, all embracing document.

THE PROPOSED ACTIVITIES UNDER THE AGREEMENT

Following the exploration stage, during which the Company will locate the presence of economic apatite or other phosphate mineral deposits and find out their nature, shape and grade, a study would be made "to determine the feasibility of commercially developing the phosphate deposit or deposits identified by the Company" (Article 7.2). This is to be followed by the construction of "the mine, fertiliser processing plant and associated facilities" (Article 8.1). Article 9.4 states that: "The Enterprise facilities shall include, among other things, the mine and related processing facilities, the fertiliser processing plant and associated facilities and may include port facilities, rail, road and pipeline transportation facilities, storage facilities, communication facilities, power supply and distribution facilities, gypsum and other waste disposal facilities, repair and maintenance facilities, temporary or desirable in connection with the operation of the Enterprise . . ."
The next stage is the "operating period" when mining takes place. Article 9.1 states: "As the construction of the enterprise facilities are progressively completed," the Company will "commence the operation of such facilities on the mining and processing areas and the conduct of all other activities contemplated by the Enterprise and shall achieve commercial production by no later than two years following the end of the construction period, and the Company abides by its obligations under this Agreement and Applicable Law". "Operating Period" is defined in the Agreement to mean

> "the period commencing on the day following the end of the Construction Period and continuing for so long as the Company shall continue to conduct operations with respect to any phosphate mineral reserve within the Exploration and/or Mining Area and, provided the Company has not permanently abandoned or terminated its operations and given notice thereof to the Secretary, for a period of not less than 25 years following the commencement of Commercial Production, or such longer period as the Secretary, on the written application of the Company, may approve."

Finally, the product will be sold in the market. This is dealt with in Article X.

SUSTAINABLE DEVELOPMENT

In the introduction to the proposed Mineral Investment Agreement, it is stated: "The Government seeks to advance the economic development of the people of Sir Lanka and to that end desires to encourage and promote the *rational exploration and development* of the phosphate mineral resources of Sri Lanka." (The emphasis is mine.)

Undoubtedly, the State has the right to exploit its own resources pursuant, however, to its own environmental and development policies. (cf. Principle 21 of the UN Stockholm Declaration (1972) and Principle 2 of the UN Rio De Janeiro Declaration (1992). Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration). Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration). In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as "soft law". Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular, in their decisions.

During the hearing, learned counsel for the 5th and 7th respondents, submitted that the project must go ahead because the people would otherwise "starve". In his written submissions he stated that as "trustee of the natural resources of the country . . . the Government cannot sit back and do nothing. That would be a sin of omission and would be as such a breach of trust as if the Government did act wrongly . . . It is common ground that the phosphate has to be developed. All the experts are agreed that the phosphate cannot be permitted to lie underground."

While, as I must on account of its extravagance, reject learned counsel's claim that people would "starve" if the project is not proceeded with, it might be pointed out that there seems to be no disagreement that the phosphate deposit should be utilised. Indeed, a hypothesis has been advanced that the Eppawela deposit was not "discovered" in 1971, but was known to our rulers and people for thousands of years and shared the thought that the deposit should be utilised. The difference between them and us is how this should be done. The ingenuity of the rulers and people of Sri Lanka in times gone by, it is suggested, had created a stable and sustainable agricultural development system harnessing the key natural resources available within their natural habitat, including the Eppawela deposit. The natural processes of

weathering, microbial activity and precipitation might have released plant nutrients which were carried overland by flowing into the reservoirs, channels and rivers as well as permeating into the soil matrix and possibly reaching underground aquifers. (See Ivan Amarasinghe, *Eppawala: Contribution to Nutrient Flows in the Ancient Aquatic Ecosystems of Rajarata*).

In 1974, it was decided to use the Eppawela deposit through a District Development Council. The D.D.C. was an organisation aimed at harnessing resources at "grass-roots" level, utilising locally available resources with the minimum use of foreign or imported expertise, techniques and technology, and providing maximum employment opportunities and the most favourable benefits to the locality. The annual production of the Eppawela D.D.C. project was to be 50,000 tons, and at that rate of extraction, it was estimated that the deposit would serve the country for a very long time, perhaps a thousand years. Moreover, the D.D.C. project was designed to quarry the phosphate and not to mine it, and such quarrying operations were to be far from the Jayaganga.

It has been the policy of successive governments during the past three decades that the Eppawela mineral deposit should be put to use. In fact, Lanka Phosphate Ltd., the 6th respondent, under a license issued by the Geological Survey and Mines Bureau, has been mining about 40,000 metric tons of rock per annum for crushing and marketing to enterprises making fertiliser. That modest operation, the petitioners explain, caused them no concern. However, in view of the escalation of the amount to be mined under the proposed agreement to 26.1 million metric tons within thirty years from the date of the signing of the agreement, the petitioners fear (a) that existing supplies will be exhausted too quickly; and (b) that the scale of operations within the stipulated time frame will cause serious environmental harm that would affect their health, safety, livelihood as well as their cultural heritage. The petitioners do not oppose the utilisation of the deposit. However, they submit that the phosphate deposit is a "non-renewable natural resource that should be developed in a prudent and sustainable manner in order to strike an equitable balance between the needs of the present and future generations of Sri Lankans."

In my view, due regard should be had by the authorities concerned to the general principle encapsulated in the phrase "sustainable development", namely that human development and the use of natural resources must take place in a sustainable manner.

There are many operational definitions of "sustainable development", but they have mostly been variations on the benchmark definition of the United Nations Commission on Environment and Development chaired by Gro Harlem Bruntland, Prime Minister of Norway, in its report in 1987: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

Some of the elements encompassed by the principle of sustainable developments that are of special significance to the matter before this Court are (1) the conservation of natural resources for the benefit of future generations - the principle of inter-generational equity; (2) the exploration of natural resources in a

manner which is "sustainable", or "prudent" - the principle of sustainable use; and (3) the integration of environmental considerations into economic and other development plans, programmes and projects - the principle of integration of environment and development needs.

International Standard setting instruments have clearly recognised the principle of inter-generational equity. It has been stated that humankind bears a solemn responsibility to protect and improve the environment for present and future generations. (Principle 1, Stockholm Declaration). The natural resources of the earth including the air, water, land flora and fauna must be safeguarded for the benefit of present and future generations. (Principle 2, Stockholm Declaration). The non-renewable resources of the earth must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind. (Principle 5, Stockholm Declaration). The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generation. (Principle 3, Rio De Janeiro Declaration). The inter-generational principle in my view, should be regarded as axiomatic in the decision-making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged.

Judge C.G. Weeramantry, in his separate opinion in the Danube case (Hungary v. Slovakia), (supra), referred to the "imperative of balancing the needs of the present generation with those of posterity." Judge Weeramantry referred at length to the irrigation works of ancient Sri Lanka, the philosophy of not permitting even a drop of water to flow into the sea without benefiting humankind, and pointed out that sustainable development had been already consciously practiced with much success for several millennia in Sri Lanka. Judge Weeramantry said: "The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. It translated well into environmental attitudes. '*Alienum*' in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach."

Contemporary law makers of Sri Lanka too have been alive to their responsibilities to future generations. Thus, section 17 of the National Environmental Act makes it a mandatory duty for the central Environmental Authority to "recommend to the Minister the basic policy on the management and conservation of the country's natural resources in order to obtain the optimum benefits there from and to preserve the same for future generations and the general measures through which such policy may be carried out effectively."

The call for sustainable development made by the petitioners does not mean that further development of the Eppawela deposited must be halted. The Government is not being asked, to use learned counsel's phrase, to "sit back and do nothing."

In my view, the human development paradigm needs to be placed within the context of our finite environment, so as to ensure the future sustainability of the mineral resources and of the water and soil conservation ecosystems of the

Eppawela region, and of the North Central province and Sri Lanka in general. Due account must also be taken of our unrenewable cultural heritage. Decisions with regard to the nature and scale of activity require the most anxious consideration from the point of view of safeguarding the health and safety of the people, naturally, including the petitioners, ensuring the viability of their occupations, and protecting the rights of future generations of Sri Lankans.

According to the Geological Survey Department (presently the Geological Survey and Mines Bureau), the 3rd respondent, the Eppawela deposit is said to have a proven reserve of 25 million metric tons and an inferred reserve of another 35 million metric tons. However, as a Director of the 5th respondent, Mr. Garry L. Pigg, and a Director of the 7th respondent, Mr. U.I. De Silva Boralessa, state in their affidavits, "the actual extent of the phosphate reserves in Sri Lanka is not known today", and it would take exploration to discover the new reserves which would move the inferred reserves into the proven category." The Secretary of the Ministry of Industrial Development, Mr. S. Hulugalle, in his affidavit, states that: "Only 26.l million metric tons of rock phosphate will be mined over the entire 30 year project period and the deposit contains 25 million metric tons proved reserve and 35 million metric tons of inferred reserve. Therefore after the 30 year period there would still be a substantial amount of phosphate reserve." The Deputy Solicitor-General stated as follows: "If the Mining Licence is given in terms of the Mines and Minerals Act No. 33 of 1992, the project company will only be entitled to mine 26.l million metric tons for the entire 30 year period. This amount when compared with the 'available resource' at Eppawala is somewhat negligible."

How could it be asserted with any degree of confidence at this time, when no exploration has taken place that only a comparatively "negligible" quantity of the available deposits will be extracted so that at the end of the 30 year project period there would remain a "substantial" amount of phosphate? As Mr. Pigg and Mr. De Silva Boralessa, quite correctly in my view, point out, until exploration, we really do not know what the reserves are, except for the already proven reserve of 25 million metric tons.

The National Academy of Sciences in its report (Pl0) points out that in May 1995, a Committee of five scientists and two economists appointed by the president of Sri Lanka recommended that a more comprehensive geological reserve evaluation be undertaken in the light of recent research findings so that government can make a decision on the rate of exploitation of such reserves. The decision on the rate of exploitation should be made taking into account the important concerns about the use of the resources in a manner that future generations can also benefit". No such survey has been done, although it should, for reasons I shall presently explain, have been done before the negotiating committee appointed by the President to conduct the final round of negotiations recommended the signing of the proposed agreement. The National Academy of Sciences calls attention to the fact that if after exploration is carried out under the proposed agreement it is found that the inferred reserves are less than presently anticipated, there is no provision in the proposed agreement to slow down the exploitation rate with the result that almost all of the national

reserves could very well be exhausted at the end of the 30 years. The importance of giving effect to the recommendation of the President's Committee which reported in May 1995 that a comprehensive geological evaluation should be done so that more certain information would be available on the *quantity* and *quality* of the phosphate at Eppawela cannot be overstated, for on it would depend reliable conclusions being reached on how best in the national interest the mineral resource should be utilised, from the point of view of the rate of extraction, having regard to considerations of sustainable development and the feasibility of alternatives, such as the production of single super phosphate fertiliser to meet only local requirements rather than producing Di-ammonium phosphate. It is also important from the point of view of accurately assessing the Government's contribution. In terms of article 2.l6 of the proposed agreement Lanka phosphate is given a ten per cent holding. What if the exploration reveals a deposit that in terms of quantity and quality exceed the current assumptions? The Government's contribution would then have been underestimated. And so, even if the geological survey is to be undertaken as a part of the proposed agreement, is it in the best interests of the country to limit the shareholding to ten per cent at this stage merely on the basis of a pessimistic guesstimate when better information can be had, and ought, on so important a matter, to be required and had before policy decisions are taken, let alone binding contracts being entered into?

The National Science Foundation's Committee stated as follows: "Mining of rock phosphate should be done at a controlled rate (e.g. 350,000 mt per year) so that the present deposit could be utilised by several generations. However, if more deposits are found, the rate of exploration could be revised, *the guideline being that the ore should last at least 200 years for use in Sri Lanka's Agriculture*"(The emphasis is mine).

Let us look at the matter in the context of the optimistic scenario predicted by the Secretary of Industrial Development and the Deputy Solicitor-General with regard to the quantum of deposits. Assuming that 26.1 million metric tons will be mined within the 30 year project period, and that the deposits will not be exhausted, is it prudent to enter into the proposed agreement from the point of view of the long term, future interests of the country, having regard to the fact that phosphate is a non- renewable resource? The report of the National Science Foundation (P12) points out that the Eppawela deposit is of considerable value to Sri Lanka because phosphate deposits are non-renewable arid dwindling resources in the world like fossil fuel, and should be "wisely utilised." Citing Herring and Fantel's landmark study, the National Science Foundation points out that, on the basis of current information, the world-wide phosphate reserves will be exhausted in 100-150 years. Herring and Fantel state as follows:

> "the ineluctable conclusion in a *world of continuing phosphate demand* is that society, to extend phosphate rock reserves and reserve base beyond the approximate 100 year depletion in date must find additional reserves and/or reduce the rate of growth of phosphate demand in the future. Society must: (1) increase the efficiency of use of known resources of easily minable phosphate rock; (2) discover new, economically-minable

> resources; or (3) develop the technology to economically mine the vast but currently uneconomic resources of phosphate that exist in the world. Otherwise, the future availability of present cost phosphate, and the *cost or availability of world food will be compromised, perhaps substantially* . . ." (The emphasis is mine).

Adverting to learned counsel's submission about starvation, one might ask, should the lives of future generations of Sri Lankans be jeopardised?

The National Science Foundation states that "The irrefutable conclusion is that the Eppawela rock phosphate deposit should be exclusively reserved for the country's use for generations to come . . .". It indicates alternative methods to ensure the use of the deposit to meet the fertiliser demands of the country while conserving the reserves for the use of future generations. The Secretary of the Ministry of Industrial Development has misunderstood the matter in making his averments in paragraphs 18(c) and 19(b) of his affidavit. It was no one's case that the New Zealand proposal should have been considered in deciding upon responsive bids to the Government's call for tenders. What is asserted is that at some time, in considering policy options, the Government ought to have taken or ought to take the New Zealand proposal into account as being more appropriate (having regard to the inter-generational principle and environmental considerations) in the matter of the development of the Eppawela phosphate deposit before adopting the course of action decided upon by the Government as expressed in the proposed agreement.

The Secretary of the Ministry of Industrial Development in affidavit stated that: "With the development of technology and market conditions, a mineral deposit may also cease to be a re-source as has happened to the tin industry in the world with advent of plastic . . .". Sustainable development requires that non-renewable resource like phosphate should be depleted at only at the rate of creation of renewable substitutes. What is the known renewable substitute for phosphate? Herring and Fantel, as we have seen, refer to a "continuing phosphate demand." Does the first respondent assume that plants will need no phosporous? On that matter, Prof. O.A. Illeperuma of the Department of Chemistry, University of Peradeniya, with some asperity, had this to say (p.11):

> "There are some wisecracks who say that scientists will develop new plants which will grow without phosporous. Anyone with even a rudimentary knowledge of science knows that phosporous is an essential component of our bone structure and when such varieties of cash crops are indeed possible then we will have humans with no bones who will probably move around like jellyfish!"

If in fact the optimistic views of the Secretary of the Ministry of Industrial Development and the Deputy Solicitor-General are confirmed by exploration learned counsel for the petitioners submitted that it does not necessarily follow that at the end of the thirty years after the signing of the proposed agreement, the Government of Sri Lanka will be in control of the mining operations. I find myself in agreement with that submission of learned counsel for the petitioners, for the

proposed agreement defines "operating period" to be "a period of not less than 25 years following the Commercial Production, or such longer period as the Secretary, on the written application may approve." Article XXX of the proposed agreement states, *inter alia,* that the agreement "will continue in force until the later to occur of the following dates: (a) the date which is 30 years following the date of the signing of this agreement, or (b) the date on which the Operating Period expires. The Company may request the extension of this agreement on terms to be negotiated . . .". If the Secretary approves the application of the Company for the extension of the Operating Period, he thereby extends the Operating Period; there is then no need for the Company to apply for the extension of the agreement on terms to be negotiated.

The petitioners also state that the Eppawela deposit is an agriculturally developed area, which is also the location of many historical viharas and other places of archaeological value. It is also the area of the Jaya Ganga/Yoda Ela scheme which is considered to be among the greatest examples of Sri Lanka's engineering skills and forms an important part of the irrigation network of the North Central Province. They allege that over 20 new and ancient irrigation tanks and about 100 kilometres of small irrigation canals are in danger of being destroyed. Five kilometres of the Jaya Ganga, they say, will be affected which could adversely affect the entire irrigation system of the North Central Province in which it is an important link. The petitioners further allege that a factory for the production of phosphoric acid and sulphuric acid which are highly polluting substances will be constructed at Trincomalee using a 450 acre land next to Trincomalee Bay. The petitioners also allege that the environmental pollution resulting from the said project will be massive and irreversible and will render the affected area unusable in the foreseeable future. Waste products from the large-scale mining of phosphate as envisaged by the project include phospho-qypsum and other radio-active substances, while the mining operation will leave behind large pits and gullies which will provide a breeding ground for mosquitoes and lead to the spread of dangerous diseases such as malaria and Japanese encephalitis. The petitioners further state that the past record of environmental pollution by Freeport MacMoran arid IMCO Agrico (the major share-holder in the 5th respondent company) is notorious even in their own home country, namely, the United States of America.

The National Academy of Sciences of Sri Lanka (see below) also makes critical comments about the past experience of Freeport MacMoran.

With regard to the gypsum as a by-product, the first respondent in his affidavit states: "The project is expected to produce approximately 1.2 metric tons *(sic.)* of phospho-gypsum per annum as a by-product." He suggests that rather than being a problem, it would be a boon for which we should be thankful, for a part of this, he says, could be sold to local cement manufacturers and used in the manufacture of "plier and boards". Have market studies been done? Gypsum may pose no danger if the quantities are manageable. The scale of operation is important if the by-products are to be utilised without causing environmental damage. Could the amount of gypsum produced be absorbed by the cement manufacturers and others having regard to the fact that, according to the Academy of Sciences, there will be "a

million *metric tons of phospho-gypsum*"? The National Science Foundation in its Executive Summary states: "The US Mining Company proposal is not environment friendly: Mountains of phospho-gypsum will accumulate polluting the environment." Mr. Thilan Wijesinghe, in his letter dated March 30, 1998 (P7) notes that 1.2 million metric tons per annum of rock phosphate would be mined and processed." The 1st respondent seems to have been confused about the amount of rock phosphate to be mined and processed and the amount of phospho-gypsum left behind. If the gypsum is not in fact absorbed in the way envisaged by the first respondent, is it to lie somewhere? Not everyone is willing to form opinions on grounds admittedly inaccurate or insufficient Prof. O. A. Illeperuma stated as follows (P11): "This may not be a problem for large countries such as USA where phospho-gypsum mountains are visible dotting the Florida landscape, since open and barren land is available in large countries such as the U.S.A Sri Lanka on the other hand, is one of the most overcrowded countries in the world where even finding a site to dump domestic garbage has become a serious problem." The evidence before us points to the fact that the quantity of phospho-gypsum would grossly exceed the assimilative capacity of the environment.

In the circumstances would the gypsum end up in the sea? The minutes of the meeting held on January 22, 1998 state as follows: "Mrs Priyani Wijemanne, GM/MPP highlighted the possible impacts on marine eco-systems at the Trincomalee site requested that those should be carefully looked into during Environmental Impact Assessment Stage and submitted a report to the Chairman on issues that should be addressed."

I do not know what Ms. Wijemanne said in her report, but attention is drawn, especially of the 4th respondent in applying the National Environmental Act and the regulations framed there under, to the principles of the Stockholm Declaration: "The discharge of toxic substances or of other substances . . . in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon eco-systems. The just struggle of the peoples of all countries against pollution should be supported." (Principle 6). "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea." (Principle 7). It might be noted, particularly by the 4th respondent, that Principle 15 of the Rio De Janeiro Declaration marked a progressive shift from the preventive principle recognised in Principles 6 and 7 of the Stockholm Declaration which was predicated upon the notion that only when pollution threatens to exceed the assimilative capacity to render it harmless, should it be prevented from entering the environment. Principle 15 of the Rio De Janeiro Declaration stated: "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The precautionary principle acts to reverse the assumption in the

Stockholm Declaration and, in my view, ought to be acted upon by the 4th respondent. Therefore if ever pollution is discerned, uncertainty as to whether the assimilative capacity has been reached should not prevent measures being insisted upon to reduce such pollution from reaching the environment.

The National Academy of Sciences states in its report as follows:

> "Assuming that the ore reserves are as high as envisaged, and that the ore has a high content of iron and aluminum impurities, di-ammonium phosphate with its high phosphorous content and also containing some nitrogen is a good value added product for the export market. However the high technology required will include setting up ammonia, phosphoric acid and sulphuric acid manufacturing plants, which together with the liquid processing technology involved can lead to serious environmental hazards including the production of high toxic waste by products and release of toxic pollutants to water bodies and the atmosphere.
>
> If the economically exploitable ore reserves are not much higher than 50 million metric tons, and 70 per cent of this is high quality, it might be more prudent to follow the advice of our scientists and accept the New Zealand Fertilizer Group's proposition (estimated to cost $20 million US Dollars) to produce 150,000 metric tons of single super-phosphate per year to meet only local requirements even if in the short term it may appear to give less monetary benefits. This will preserve our ore reserves for a much longer period, involve simpler technology, leave no environmentally hazardous waste by-products such as a million metric tons of phospho-gypsum, and there will be no need for ammonia and phosphoric acid plants which produce toxic effluents. Of course the lower grade…single super-phosphate would lose out on high transport cost per unit nutrient and may leave little export demand. Furthermore, under our free market liberal economy, locally produced single super-phosphate may be more expensive to our farmers than imported high phosphorous content fertiliser such as triple super-phosphate on unit nutrient value basis unless the local product is given fiscal protection. The decision on what fertiliser should be produced locally must await the results of the comprehensive exploration phase."

The report adds as follows:

> "Mining and processing of the products as envisaged will be an operation of unprecedented magnitude in Sri Lanka, and the potential environmental impacts could be equally drastic. At the mining site there will be severe disturbances to the eulogy of the area through, among others, the mining operation itself, the lot infrastructural activities and the discharge of pollutants to the atmosphere. At the processing site, the effluents and other pollutants that will be discharged would pose severe environmental threats unless adequate counter measures are adopted. Although the proposed arrangement with the prospector has provision to the effect that the operations will be carried out with due respect to the laws of the country, and the National Environment Act does contain provisions to

> guard against adverse environment impacts, we are of opinion that for an operation of this magnitude additional safeguards should be adopted. This is particularly important as mining prospectors the world over are notorious for creating environmental disasters, and Freeport MacMoran is no exception. In fact, according to media reports Freeport MacMoran, one of the largest fertiliser manufacturing companies in the world, has the dubious distinction of being also No. 1 polluter in the USA. It has also had a poor record in Indonesia and in the South Pacific island of New Guinea It would also be prudent to check on the company's credibility pertaining to environmental matters by calling for the relevant reports from USA, New Guinea and Indonesia before project approval . . . Through study of such reports, we would be in a better position to insist on the incorporation of stronger and more effective measures in the Agreement to ensure environmental safety. It should be expressly stated in the Agreement that mining operations and the processing should be carried out in accordance with the environment standards set by the Government of Sri Lanka. The Agreement should also specifically state that the ecological restoration of the areas affected by the mining must be carried out by the prospector at his own cost progressively during the period of mining operations and as directed by the Government of Sri Lanka. The agreement must be explicit that failure to observe these environmental protection measures could result in the termination of the project. We draw special attention to the fact that the Jaya Ganga which is within the area to be mined has been regarded as a wonder of the ancient world and a cultural monument to be preserved by UNESCO's World Heritage Convention. (D. L. O. Mendis, *The Island,* 14 April 1998)."

The petitioners assertions with regard to apprehended harm from the proposed project also finds support in the report of the National Science Foundation (P 12) which stated that the project.

> "In the view of many of the professional Associations in the country, e.g. The Institution of Engineers, Institute of Chemistry, the National Academy of Sciences and most individual scientists and engineers is highly disadvantageous to the country and with highly adverse environmental impacts."

The report adds:

> "The proposal of exploitation of the apatite mine is beset with many problems. Mines always cause damage to [the] environment and minimisation of such damage must be examined at length. Further, [the] Eppawela phosphate ore is located in an agriculturally developed system, in an area of extreme historical importance and of archaeological value in the proximity of [national] monuments close to the Cultural Triangle sites with the Sri Mahabodhi and Ruwanweli Saya. Within the bounds of [the] mining area are many ancient villages, which will be adversely affected. The immediate threat to the Jaya Ganga or Yoda Ela cannot be over looked. If the mining of the ore damages the Jaya Ganga, it denigrates Sri

> Lankan history. Jaya Ganga is an engineering marvel that must be preserved for eternity as the heritage of mankind just as the Taj Mahal, the Pyramids or Ruwanweli Saya are preserved for posterity."

The Eppawela project, as the petitioners, the National Science Foundation and the National Academy of Sciences point out, is in an area of historical significance. If I might adopt the words of Martha Prickett Fernando in her comments on another proposed project - the augmentation of the Malala oya basin from Mau ara, "Unless development activities in areas like this project are accompanied by proper EIA studies and [proposals for] mitigation of the [adverse impacts on] archaeological resources that will be damaged, vast numbers of sites - in fact, much of Sri Lanka's unrenewable cultural heritage and the raw data for all future studies on ancient Sri Lanka will be destroyed without record, and an accurate understanding of life in ancient Sri Lanka will remain forever wrapped in myth and hypothesis." In that connection, the words of D.D. Kossambi *(The Culture and Civilization* of A*ncient India)* come to mind: "To learn about the past in the light of the present is to learn about the present in the light of the past."

Ignorance of vital facts of historical and cultural significance on the part of persons in authority can lead to serious blunders in current decision making processes that relate to more than rupees and cents. The first respondent, the Secretary to the Ministry of Industrial Development, paragraph 13 of his affidavit states as follows: "The southern part of the Yoda Ela has been abandoned *after the construction of Jaya Ganga in 1980's under the Mahaweli Scheme.*" (The emphasis is mine). Judicial restraint prevents me from suggesting why he might, perhaps, have thought it was called "Jaya" Ganga.

The Kalaweva, which helped to supplement the supply of water to Anuradhapura and the area around that great and ancient city, was constructed by King Dhatusena (455-473 AD) and it is, therefore supposed, though not conclusively established, that Dhatusena also built the Jaya Ganga which augmented the tanks at Anuradhapura and its environs such as Tissa, Nagara and Mahadaragatta, apart from irrigating a large area of land of about 180 square miles. (See K.M de Silva, *History of Sri Lanka,* p. 30; R.L. Brohier, A*ncient Irrigation Works in Ceylon,* Part II, pp 7 – 8.)

The maps produced show that the Jaya Ganga passes through the Eppawela phosphate deposit region. It was, as Brohier says, a part of "an ingenious net-work of irrigation channels in this district . . . which, apart from affording edification to future generations, are monuments of the power and beneficence of the ancient rulers of Ceylon." Whether it was built by Dhatusena or not, according to Chapter 79.58 of the Mahawamsa, Parakrambahu I (1153-1186 AD) "had the ruined canal called Jayaganga restored. It branched off from Kalavapi and flowed to Anuradhapura." It is a 54 1/2 mile long contour channel that starts from sluice in the bund of the Kala wewa and ends in the Tissa Wewa and Basawakulama tank in the ancient city of Anuradhapura. Assuming that some people not only do not know the basic facts of history, but might also be ignorant of elementary geography so as not to be able to read the maps that were produced, it might be explained that the

function of the Jaya Ganga in ancient times appears to be twofold: to intercept the drainage from the land to the east and issue it to cascades of smaller village tanks to the west, in the basin of the Kala oya; and, by trans-basin diversion, to augment the Anuradhapura city tanks and provide irrigation water in the adjacent Malwatu oya basin. Brohier states that this ancient canal, which had again been restored in 1885-1888,

> "had a gradient for the first 17 miles of only six inches per mile . . . Such an ingenious memorial of ancient irrigation skill cannot be passed over without a reference to its peculiar features. It needs to be explained that the Jaya Ganga follows the high ground between the reservoir which serves as its source of supply and the Tissawewa. By this means it intercepts all the drainage between Elagmuwa and the western watershed of the Malwatuoya which otherwise would run to waste and it irrigates the country below the canal by most perfect system of irrigation. In each of the valleys on its course the water is diverted by channels into little village tanks or chains of tanks the lower down receiving the overflow from the tanks placed higher in each chain.
>
> The scheme was so perfect that the ancient canal afforded irrigation facilities over approximately 180 square miles of country on the east of the Kala-oya, between Kalawewa and Anuradhapura. It today feeds no less than 60 village tanks and provides a reliable source of drinking water to more than 100 villages and to the town of Anuradhapura.
>
> There is under such circumstances, little reason to dispute that the Jaya-ganga must have been of incalculable benefit to Nuwarakalawiya in the days of the Sinhalese kings, inasmuch as the restoration of the work is today but too aptly described as 'the grandest experiment in irrigation ever undertaken in modern Ceylon.'"

The Jaya Ganga, which the petitioners, as well as the National Academy of Sciences and the National Science Foundation, have drawn attention to, is not merely a water course or transportation canal corridor, or even "an amazing technological feat", as Prof. K.M. De Silva describes it; it is also an integral part of a human-made water and soil conservation ecosystem. Its preservation is therefore not only of *interest* to the literati at a higher plane, as a matter concerning the heritage of humankind that must be preserved, but also, at the more mundane level of the petitioners and thousands of others like them who depend on the continued and efficient functioning of that ecosystem *for the pursuit of their occupations and indeed for sustaining their very lives,* a matter of grave and immediate personal concern.

The respondents and their learned counsel submit that environmental concerns have been sufficiently addressed in the proposed agreement.

The 1st respondent in his affidavit stated that exploration and mining licences cannot be issued in respect of archaeological reserves. Plants for the production of phosphoric acid and sulphuric acid cannot be constructed before compliance with the Environmental Impact Assessment process prescribed by the National Envi-

ronmental Act. If and when the Agreement is entered into, the Project Company is required to carry out exploration and feasibility studies after which the project is required to submit itself to the EIA process before mining is commenced. A detailed Mine Restoration Plan and a Mine Restoration Bond are required.

Moreover the Company is required to comply with the requirements of the Mines and Minerals Act, the National Environmental Act and the Mahaweli Authority Act and to conduct its operations so as to minimise harm to the environment, protect natural resources, dispose of waste in a manner consistent with good waste disposal practices and in general to provide for the health and safety of its employees and the local community and also be responsible for the "reasonable preservation of the natural environment within which the Project Company operates." The 1st respondent further stated that the Government is empowered to suspend the operations of the Company "if it determines that severe environmental damage associated with the Company's violation of applicable law is resulting from the Company's operations which the Company has failed to remedy." Attention is drawn to the maintenance of an Environment Restoration Escrow Account, the requirement to furnish a Mines Restoration Bond which, he states, "would be adequate to cover any environmental damage and to affect the necessary restoration work." In his opinion, since there are adequate safeguards in the proposed agreement "to make the Company responsible to take necessary steps to minimise and rehabilitate any damage to the environment and local community", the 1st respondent concludes that "it is premature to form an opinion on the nature and extent of the environmental damage which may take place due to this project."

The Directors of the 5th and 7th respondents stated in their affidavits that in the introduction to the agreement it is stated as follows: "(D) In the process of developing mineral resources, the Government gives high priority to the protection of the environment and avoidance of waste and misuse of its resources. (F) The Company [5th Respondent] is ready and willing to proceed in these undertakings, and to assume the risks inherent therein in exchange for the rights and benefits herein provided, all pursuant to the terms and conditions set forth in the agreement." It is stated that until the Environmental Impact Assessment and Feasibility study are done, the concerns set out in the petition cannot be satisfactorily addressed. The Exploration Licences issued to the 6th and 7th respondents are subject to the rights of the owner or occupant of the land covered by the licence and to the provisions of the Mines and Minerals Act and the regulations made there under. They state that they would bring to bear current technology for both phosphoric and sulphuric acid which have mitigated very nearly all of the pollution aspects of such plants. All this will be subject to the EIA and Feasibility Study. They submitted the IMC Global Environmental, Health and Safety Standards and Guidelines Manual in support of their averment that the Board of Directors of IMC had adopted a very specific and enforceable policy towards environmental, health and safety policies. They state that with the merger of MacMoran Inc. into IML-Global Inc., Freeport MacMoran ceased to exist. This was a part of the consolidation occurring in the fertiliser industry at the time and not an attempt to hide the former Freeport MacMoran Inc.'s

involvement in Sri Lanka on the project. What troubles the petitioners is that although Freeport MacMoran with a bad record on pollution has ceased to exist, its spirit roams doing important things, such as seeing the President. (see P4) and initiating the final draft of the proposed agreement. While liabilities are placed on Sarabbumi, a small local company, whereas the decision to accept the tender was based on the size and capacity of the multi-national giant Freeport MacMoran.

Learned counsel for the respondents submitted that in terms of Article VII of the proposed agreement, there has to be a feasibility study and a report thereon. The report must have a section reporting the results of environmental impact studies as described in Annex E to the agreement. The section of the report will be prepared by an appropriately qualified internationally recognised independent consulting firm approved by the Government. The study must meet the requirements of Article 25. Article 25.2 provides as follows:

> "The Company shall include in the Feasibility Study an environmental study in relation to all enterprise activities in accordance with Applicable Law, and shall also identify and analyse as part of the Feasibility Study the potential impact of the operations on land, water, air, biological resources and social, economic, culture and public health. The environmental study wills also outline measures which the Company intends to use to mitigate adverse environmental impacts of the Enterprise (including without limitation disposal of overburden and tailings and control of phosphate and fluorine emissions) and for restoring and rehabilitating the Contract Area and any Project Areas at the termination of this Agreement. The Feasibility Study shall provide an estimate of the cost of such restoration and rehabilitation. The Feasibility Study shall also include procedures and schedules relating to the management, monitoring, progressive control, corrective measures and the rehabilitation and restoration of all Contract Areas and Project Areas in relation to all adverse effects on the environment as are identified in the Feasibility Study. The Study will also provide an estimate of the cost of such activities."

Article 25.1 provides as follows:

> "The Company shall in relation to all matters connected with the Enterprise comply with the Mines and Minerals Act, No. 33 of 1992, the National Environmental Act, No.47 of 1980 (as amended by Environmental Act, No. 56 of 1988, the Mahaweli Authority of Sri Lanka Act, No.23 of 1979, the Regulations made there under and all other Applicable Law and generally prevailing standards for mining operations. Without in any way derogating from the effect of the above mentioned Applicable Law and mining Standards, the Company shall conduct all its operations under this Agreement so as to minimise harm to the environment (including but not limited to minimising pollution and harmful emissions), to protect natural resources against unnecessary damage, to dispose of waste in a manner consistent with good waste disposal practices, and in general to provide for the health and safety of its

> employees and the local community. The company shall be responsible for reasonable preservation of the natural environment within which the Company operates and for taking no acts without Government approval which may block or limit the further development of the resources outside the mining and processing areas . . ."

Learned counsel for the respondents submitted that until the feasibility study is done and the development plan is prepared, there is no way of finding out the location of the mine and method of mining and whether in terms of the project anybody will be relocated. In terms of the agreement, after the preparation and submission of the feasibility study, if the Company decides to proceed to proceed with construction, it must submit a development plan with its application for construction to the Secretary, who may withhold approval for proceeding with the project.

In terms of Article 7.7, "if and only if the Secretary determines that implementation of the Development Plan together with any modifications thereof which may be reflected in the Company's application to construct and operate: (a) will not result in *efficient development* of the mineral resource, (b) is likely to result in *disproportionately and unreasonably* damaging the surrounding Environment, (c) is *likely to unreasonably limit* the further development potential of the mineral resources within the Mining Area, or (d) is *likely to have a material* adverse effect on the socio-political stability in the area *which is not offset by the potential benefits of the project* or by mitigating measures incorporated into the Development Plan. The decision shall not be unreasonably delayed and, in light of significant expenditure of time, effort and money which will have been undertaken by the Company, approval shall be granted in the absence of *significant and overriding justification*." The Article goes on to state that if the Secretary has any objections or suggestions, they should be communicated to the Company, and in the event of any mutually acceptable resolution not being reached, the Company may refer the matter to arbitration under Article XX as to whether the Secretary had "substantial cause for withholding approval of the Feasibility Study Report, Development Plan and application to construct and operate, and if substantial cause is determined to have not existed, the Secretary shall promptly issue his (her) approval of such Report, Plan and application . . ." (The emphasis is mine).

Learned counsel for the 5th and 7th respondents submitted that if the Secretary wrongfully approved the feasibility study, it is "only at that stage, if at all" persons will be able to challenge matters in Court. How would the petitioners know after the Feasibility Study or Development Plan that they are likely to be affected, for in terms of Article 7.9, subject to the provisions of Article 5.5, the Feasibility Study and Development Plan are to be treated as "confidential". The Government may in terms of Article 5.5. disclose "data and information which the Government determines in good faith is necessary to disclose to third parties in order to protect the national interests of Sri Lanka", but what is the guarantee that the Government will release the Feasibility Study and Development Plan when they are available? The petitioners and other persons who may be affected will probably be no better in formed than they were at the time of making this application. In my view, the

petitioners decided wisely in coming before the Court when they did. Moreover, who may seek judicial review if damage is caused to a cultural monument or the cultural monument or cultural heritage landscape of Jaya-ganga? Further, in my view, the words emphasised are so vague as to confer a practically unlimited discretion on the Secretary. They are so broadly framed so as to make judicial review very difficult indeed. In any event, what is the remedy available to anyone, if the Secretary's decision is pursuant to an arbitral award?

Learned counsel for the respondents stated that, since the proposed agreement expressly provides for compliance by the Company with Applicable Law, including the Mines and Minerals Act and the National Environmental Law and the regulations made there under, and since the Company will be subject to the "stringent" requirements of the licences issued for exploration and mining, the fears of the petitioners are unfounded and "conjectural". Section 30 (1) of the Mines and Minerals Act states that no licence shall be issued to any person to explore for or mine any minerals upon, among other places, "any land situated within such distance of a lake, stream or tank or bund within the meaning of the Crown Lands Ordinance (Chapter 454), as may be prescribed, without the approval of the Minister and the Minister in charge of the subject of Lands"; "any land situated within such distance of a catchment area within the meaning of the Crown Lands Ordinance (Chapter 454) as may be prescribed without the approval of the Minister and the Minister in charge of the subject of Lands." Section 31 of the Mines and Minerals Act provides that no licence shall be issued to any person to explore for, or mine any mineral upon "(a) "any land situated within such distance of any ancient monument situated on State land or any protected monument, as is prescribed under section 24 of the Antiquities Ordinance (Chapter 188); and (b) any land declared by the Archaeological Commissioner to be an archaeological reserve under section 33 of the said Ordinance."

One wonders whether the provisions of the Mines and Minerals Act relating to lakes, streams and bunds and catchment areas as defined by reference to the Crown Lands Ordinance sufficiently protect the water and soil conservation ecosystem of the area affected by the proposed project. No evidence was placed before this Court as to whether any land in the exploration, mining, contract or project areas has been prescribed under the law as being land within prescribed distances from ancient monuments and what land has been declared to be an archaeological reserve. Moreover, no provision exists for the preservation of a cultural heritage landscape, like the Jaya Ganga, as distinguished from a monument, lest there be some dispute about the word "monument": No laws can expressly provide for all situations. However, the legislature has foreseen the need to provide against omissions and stated in section 30 (2) as follows:

> "In addition to any other condition that may be prescribed under this Act, the Minister or the Ministers . . . may, in granting approval for a licence under subsection (1), lay down such further conditions, as may be determined by such Minister or Ministers. Where approval is granted

> subject to any further conditions, the Bureau shall cause such conditions to be specified in the licence."

At the present time, when there has been no Feasibility Study and no Development Plan, and, moreover, when there is no guarantee that such study and plan will ever be made known to them, how could the petitioners feel assured that their individual and collective rights will be protected? There may be conditions that may be prescribed under section 30 (2) of the Mines and Minerals Act to safeguard their interests and the interests of the people of Sri Lanka, and indeed of humankind. But how is this possible without a proper evaluation of the project? A report from an "appropriately qualified", "internationally recognized independent environmental firm selected by the Company and approved by the Government", is of little or no use to the petitioners and concerned members of the public, having regard to the provisions in the proposed agreement regarding "confidentiality."

For the reasons set out above, I am of the view that there is, within the meaning of the Constitution, an imminent infringement of the petitioner's rights guaranteed by Articles 14 (1) (g) and (h) of the Constitution.

ALLEGED VIOLATION OF ARTICLE 12 (1) OF THE CONSTITUTION.

The Chairman/Director General of the 2nd respondent in a letter dated March 30, 1998 (P7) quotes the following from the Executive Summary of the report of the President's Committee dated the 9th of May 1995: "Any large-scale venture has the potential to cause an adverse environmental impact, yet it could generate substantial revenue to the country. It is also recommended that the rigorous EIA procedures laid down by the law be followed before any joint venture proposal is implemented because of the possible environmental risks associated with projects of this nature."

Learned counsel for the respondents submitted that Article XXV of the proposed agreement obliges the Company to comply with the National Environmental Act No. 47 of 1980 as amended by Act, No. 56 of 1988 and the regulations made there under. In the circumstances, the Company is obliged to submit an Environmental Impact Assessment in terms of Part IV C of the Act.

The proposed agreement makes no reference to the preparation or submission of any Environmental Impact Assessment as required by the National Environmental Act and the regulations made there under. What the proposed agreement does, as we have seen, is to provide for an environmental study to be prepared by an international firm, selected by the Company and approved by the Government, as a part of its Feasibility Study. (Article 7.6) "Feasibility Study" is defined in the proposed agreement as "a study to determine the feasibility of commercially developing any deposit or deposits identified by the Company during the Exploration Period, including the items set forth in Annex "E". Annex "E" states that the Feasibility Study shall include "Environmental impact and monitoring studies into the likely effects of the operations of the Enterprise on the Environment (such studies to be carried out in consultation with an appropriately qualified

independent consultant and under the terms of reference set out in Article XXV of this Agreement." (But of cf. Article 7.6 where the study is to be "conducted by an internationally independent environmental consulting firm . . .")

Not surprisingly, therefore, although both the Deputy Solicitor-General and learned counsel for the 5th and 7th respondents agreed that an Environmental Impact Assessment was a requirement of the law, they were unable to agree when that assessment was to be made, and what its significance was in the context of the proposed agreement.

Firstly, therefore, in terms of Principle 17 of the Rio De Janeiro Declaration, there is no Governmental Impact Assessment subject to "a decision of a competent national authority". Nor is the approval of such an authority in terms of the National Environmental Act contemplated by the proposed agreement. What does exist in the proposed agreement is an assurance that the "Applicable Law", including the provisions of the National Environmental Act, will be complied with.

According to the Deputy Solicitor-General, the Company's application to construct and operate the facility had to be made "after obtaining the approval for the feasibility report, inclusive of the EIA, and the Development Plan . . .". He stated that "In the event the Project Approving Agency refuses to grant approval for the project, the project company will have to abandon the project subject to a right of appeal to the Secretary of the Ministry of Environment. Moreover, if the project is approved after a hearing had been given to the public, the persons who are aggrieved will have an opportunity to come before the Court to have the decision quashed. There are instances where the public have invoked the jurisdiction of the Supreme Court and the Court of Appeal to suspend development projects such as the project pertaining to the Southern Expressway and the Kotmale Power Project."

According to learned counsel for the 5th and 7th respondents, "in the first place, after the feasibility report is prepared and the development plan is prepared, this project will be submitted to the project approving agency, in this case the Central Environmental Authority. The C.E.A., that is the Statutory authority, may or may not give its approval. If it does not give its approval, the matter ends there." "The permission and approval of the statutory authorities, including the CEA, is essential. If that is not obtained, the project comes to an end." "If there is a threat to the environment or to the people, the Central Environmental Authority will not permit the project to go ahead. The C.E.A. is the statutory authority vested by law to determine the matter." "The Central Environmental Authority can refuse to permit the project. That is final." If the Central Environmental Authority does give its approval, the feasibility study, development plan and the report of the international firm on environment, he said, is submitted to the Secretary of the Ministry of Industries, who may refuse it on the grounds specified in the proposed agreement. "It is only after the feasibility study inclusive of the Development Plan (sic.) is approved by all the statutory authorities including the Central Environmental Authority that the next stage will commence. The next stage is the construction stage." Referring to the Environment Impact Assessment and the requirements under the National Environmental Act and the respondents framed there under, learned

counsel for the 5th and 7th respondents gave the assurance that "all those steps will be followed after the feasibility study is submitted to the C.E.A.. Therefore the public will have every right of protest after the feasibility study report is submitted to the C.E.A." As we shall see, the submissions of learned counsel on that matter were, having regard to the statutory requirements of the National Environmental Act and the regulations framed there under, seriously flawed.

Learned counsel for the 5th and 7th respondents inquired whether, after bringing in scientific and technical expertise not available in this country, and investing U.S.$ 15 million not available for investment by the Government, it was too much for the 5th respondent to pray that it be permitted to proceed with the construction in the event of the statutory authorities granting approval, and the Secretary accepting the Feasibility Report and Development Plan. Learned counsel for the 5the and 7th respondents said: "Equity, righteousness and fairplay demands that the rights of all parties be equally protected; for all persons are equal before the law and such persons include the 5th and 7th respondents." The petitioners' state that their rights of equal protection under the law are in imminent danger of being infringed.

Learned counsel for the 5th and 7th respondents on the other hand submitted that the Court should not intervene "at this stage", for "the proceeding of the project", meaning probably the signing of he proposed Agreement, "will only result in (a) exploration, (b) feasibility study." He stated that "the only comfort (sic.) the 5th and 7th respondents needs and the only comfort (sic.) the 5th respondent gets from this Agreement is that after the exploration and feasibility study is done, and if (a) the statutory authorities grant permission; (b) the Secretary accepts the feasibility report, that the 5th respondent will be permitted to mine subject to the terms and conditions of the Agreement and that they be permitted to mine as set out in the feasibility report subject to the approval of the Statutory Authority."

The proposed agreement is so framed that it generously strengthens, assists, supports, aids and abets the Company's designs in respect of all of the matters referred to in the analysis of learned counsel in dealing with the various stages of the project. Article 17.3 I have quoted above is one example. There are others. E.g. see Articles 2(2) (b) (i) and (iii) and (iv) and (v), 6 (f), 68.2; 9.3; 9.4; 9.7; 16.5; 16.6; 17.1; 17.6; 27.7. Once the proposed agreement is signed and converted into a formal, binding contract, there is little else the Government can do except, under Article 20.1, to resort to arbitration. And there will be much less the petitioners, or for that matter any one else, who may be adversely affected, will be able to do. The Deputy Solicitor-General submitted that persons who are aggrieved will have an opportunity to come before the Court. There may be legal rights on paper; but how many individual people, including the petitioners, if and when they are adversely affected by the proposed project will be able to afford the luxury of litigation? If they are in fact adversely affected what are the chances that they will be adequately compensated? The liabilities will not be those of the multi-nation-al giant whose standing in the world's fertilizer business scene it is said was a decisive factor in their selection (see P4 at p. 2 and also Cf. at p. 5), but of Sarabhumi Resources (

Private) Ltd. a locally incorporated limited liability Company which presently has an issued share capital of only Rs. 58,000/.

Moreover, learned counsel for the petitioners drew attention to the inadequacy of the protection afforded by Articles 25.1 and 25.3 of the proposed agreement with regard to the repair of environmental damage. The petitioners did not share the belief expressed by the first respondent in his affidavit on the adequacy of the safeguards by way of the proposed Environmental Compliance Bond and Environmental Restoration Escrow Account and the undertakings given with regard to environmental compliance and restoration. It seems to me that the provisions in the proposed agreement on the matter are the product of outdated mainstream economic thought: They appear to be based on the views of persons who at best nominally recognise the environment or have considerable difficulty in placing a "value" on it. Today, environmental protection, in the light of the generally recognised "polluter pays" principle (e.g. see Principle 16 of the Rio Declaration), can no longer be permitted to be externalised by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. The costs of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of a project. "This is a matter the Central Environmental Authority must take into account in evaluating the proposed project and in prescribing terms and conditions.

The signing of the proposed agreement may, in the circumstances, please, and even delight the Company, but there is justification for examining the project as a whole at this stage in deciding whether those dangers referred to by the petitioners might be permitted to hang threateningly over their heads and ready to overcome them in the event of the signing of the proposed agreement and the execution of the project.

Fairness to all, including the petitioners and the people of Sri Lanka as well as the 5th and 7th respondents, rather than the Company's "comfort", should be our lodestar in doing justice.

In terms of Part (I) (6) of the Order of the Minister on the 18th of June 1993 made under section 23 z of the National Environmental Act (vide Gazette Extraordinary of 24.06.1993), the proposed project, since it related to mining and mineral extraction either concerned with inland deep mining and mineral extraction involving a depth exceeding ten hectares, is a "prescribed project" within the meaning of section 23 z of the National Environmental Act. As such, in terms of section 23 AA of the National Environmental Act, it is a project that must have had the approval of a project approving agency.

Project approving agencies were, on the 18th of June, 1993 (Gazette Extraordinary, 24.06. 1993) under powers vested in him, designated by the Minister under section 23 Y of the National Environmental Act, and includes the Central Environmental Authority. Learned counsel for the petitioners, for stated reasons, urged that the Project Approving Agency in respect of the project relating to the case

before us ought to be the Central Environmental Authority. Learned counsel for the 5th and 7th respondents in his oral submissions, and may times in his written submissions, stated or implied that the relevant project approving agency was the Central Environmental Agency. However, at one place he submitted that the preparation of the TOR (Terms of Reference), co-ordination and all activities would be undertaken by the C.E.A. acting with (sic.) the PAA." According to the minutes of a meeting held on the 22nd of January 1998, submitted by learned counsel for the 5th and 7th respondents,

> "During the discussion, it was emphasised that as this is the single largest investment which covers mining, transportation and manufacturing of phosphate fertiliser consisting of by-products, it is difficult to process this project as required under the EIA regulation by one single Project Approving Agency (PAA). Therefore it was suggested that the preparation of TOR (Terms of Reference) and co-ordination of all activities would be undertaken by the C.E.A. acting as the PAA. Assessment of the EIAR under main subsections of the project, i.e., mining, transportation and industry would be carried out simultaneously by GS & MB, Ministry in Charge of Transport and the CEA respectively. This mechanism would be drawn up at the next meeting of the concerned agencies."

This Court has no evidence as to what happened at "the next meeting", if there was such a meeting. I shall, for the purposes of this judgement assume that the decision to make the CEA the project approving agency stands. But in addition to the tentative decision on the modalities of co-operation between concerned agencies and the Central Environmental Authority acting as the Project Approving Agency, according to the minutes, it was also decided as follows at that meeting:

> "As the exploration area falls within the jurisdiction of various government agencies, it was suggested that these agencies too would wish to incorporate additional conditions if any to the exploration licence. Director/GS & MB agreed to convene a further meeting with officials of the FD, DWLC, MASL, BOI, and CEA for this purpose."

It was stated at the meeting that "a project proposal and an exploration plan have been prepared by the project proponent. Hence Mr. Udaya Boralessa was requested to submit 10 copies of the proposal and 05 copies of the exploration plan to the CEA, for distribution among concerned agencies." Were the copies received and distributed? Were there any responses? This Court does not know, for no evidence was placed before it on those matters.

That meeting, I might observe, in passing, was attended by the representatives of several government ministries, departments and agencies, and by Mr. S.Usikoshi and by Mr. Udaya Boralessa. According to the evidence on record, Mr. Usikoshi was the General Manager of Tomen Corporation which holds 25% of the shares in the project company and Mr. Udaya Boralessa was the Managing Director of Novel

Int. and represented IMC – Agrico. Which holds an initial equity of 65% in the 5th respondent. He is a Director of the 7th respondent.

According to the minutes of the meeting submitted by learned counsel for the 5th and 7th respondents, the meeting was chaired by the Director-General of the Central Environmental Authority who is supposed to have stated "the objectives of the meeting". Why was the meeting held? Was there an application for the approval of the project? On what date was such application made? If an application for the approval of the project was made to the CEA or to any other project approving agency, why was no reference whatsoever made either in the pleadings or oral or written submissions of counsel for the respondents? Why as stated in the minutes of the meeting, was Mr. Boralessa "invited . . . to make a presentation on the proposed project for the information of participants", if there was no project proposal before the Central Environmental Authority at the time?

In terms of the National Environmental (Procedure for approval of projects) Regulations No.1 of 1993 (Government Gazette Extraordinary of the 24th of June 1993), hereinafter referred to as the "NEA regulations", when the project proponent had the goal of undertaking the mining project at Eppawela and was actively preparing to make a decision in achieving that goal (see the definition of "project" in the NEA regulations), such proponent should have made an application to the Central Environmental Authority (CEA) for approval of the project as early as possible. The project proponent might then have been required to submit to the CEA preliminary information about the project, including a description of the nature, scope and location of the proposed project accompanied by location maps and other details. (see the definition of "preliminary information" in the NEA regulations). Such preliminary information would then have been subjected to "environmental coping", that is, among other things, determining the range and scope of proposed actions, alternatives and impacts to be discussed in an Initial Environmental Examination Report or Environmental Impact Assessment. (See the definition of "environmental scoping" in the NEA regulations). A matter of significance is that in the process of "scoping" a project approving agency, such as the Central Environmental Authority, is by law empowered to "take into consideration the views of state agencies and the public." (NEA regulation 6(ii)). Having regard to the concerns expressed from time to time, the Central Environmental Authority might have exposed themselves to a charge of being remiss in the duties of a project approving agency had they failed to invite and consider the views of the public. The purpose of all this was to set the Terms of Reference (ToR) either for an initial environmental examination report or an environmental impact assessment (EIA). With regard to the procedures to be followed in case the approval or rejection of a project based upon an initial environmental examination report, attention is drawn to section 23 of the National Environmental Act read with regulations 6-9 framed there under.

The Central Environmental Authority was the 4th respondent in this case and was represented by learned counsel. However, no affidavits were filed by the 4th respondent nor were any oral or written submissions made on behalf of the 4th

respondent. The central Environmental Authority, the fourth respondent, should nevertheless in carrying out its duties imposed under the Order made in this judgement, have due regard to and give effect to the law, including the principles laid down at acknowledge by the Supreme Court in the matter before this Court.
It was assumed by all the other respondents and the petitioners that what would be required by the 4th respondent for the purpose of considering whether the proposed project should be approved or not was an Environmental Impact Assessment, and that if an application had been made to the Central Environmental Authority for approval of the project, that Authority would in all probability, after the process of "scoping" referred to above, which might, as we have seen, included taking account of the views of state agencies and the public, have called for an Environmental Impact Assessment from the project proponent on the basis of the Terms of Reference determined by the Central Environmental Authority.

Attention is drawn, particularly that of the Central Environmental Authority, the fourth respondent, to Principle 17 of the Rio De Janeiro Declaration which stated as follows: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." This is an important procedural rule designed to facilitate the preventive (Principles 6 & 7 of Stockholm) and precautionary (Principle 15 of Rio) principle already mentioned above. I should like to remind the persons concerned, especially the Central Environmental Authority, that an environmental impact assessment exercise can identify the potential threats of a proposed activity or project, and that this information can then be used to modify the proposed activity in order to take these threats into account. Remedial measures can also be introduced in order to mitigate or reduce any perceived detrimental impacts of the project. In this sense, therefore, an environmental impact assessment exercise contemplated by the National Environmental Act can be instrumental in establishing exactly which areas of the proposed project, or activity require precautionary or preventive measures in order to ensure the overall environmental viability of the project.

Where the Central Environmental Authority has required an Environmental Impact Assessment, the law requires such Authority to determine whether the matters referred to by the Terms of Reference have been addressed by the project proponent, and if the assessment is determined to be inadequate, the Central Environmental Authority is obliged to require the project proponent to make necessary amendments and to re-submit the assessment. Upon receipt of the report relating to the assessment the Central Environmental Authority is required by law *by "prompt notice published in the Gazette and in one national newspaper published daily in the Sinhala, Tamil and English Languages*" to "*invite the public to make written comments, if any, thereon to the Central Environmental Authority.*" The law requires that such notification "*shall specify the times and spaces at which the [assessment] report shall be made available for public inspection.*" The Central Environmental Authority is requires by law to make available copies to any person interested to enable him or her to make copies. The law provides that *any member of*

the public may within thirty days of the notification published in the Gazette or newspapers referred about, make his (sic.) comments thereon to the Central Environmental Authority. Since section 23 BB (3) refers to making "his or its comments", having regard to the objects and scheme of the National Environmental Act, in my view, includes comments from statutory or other legal persons, as well other organisations, whether incorporated or not and regardless of questions of legal personality, and by any individual, regardless of gender.

I might observe, in passing, that it is time, indeed it is high time, that the laws of this country be stated in gender-neutral terms and that laws formulated in discriminatory terms should not be allowed to exist, although protected for the time being as "existing law" within the meaning of Article 16 of the Constitution. The argument advanced that the provision in the law relating to the interpretation of statutes that "his" includes "her" is clearly insufficient: it displays, in my considered opinion, a gross ignorance or callous disregard of such a matter of fundamental importance as the fact that there are two species of humans.

Where it considers appropriate in the public interest, and in the circumstances of this case, I cannot think that the Central Environmental Authority, having regard to what has been stated above, would really have had any real choice in the matter, the Authority is by law obliged to afford all those who made comments on opportunity to be heard in support of such comments. The Central Environmental Authority legally obliged to have regard to such comments, submissions and any other materials, if any, elicited at a hearing in determining whether to grant its approval for the project. Upon completion of the period prescribed by law for public inspection or public hearing, if held, the Central Environmental Authority is, (having regard to the provisions of section 23 BB, regulation 12 of the NEA regulations and the *audi alteram partem* rule – hear the other side) required by law to forward the comments it received and the representations made at any hearing to the project proponent for respondents. The project proponent is required to respond in writing to the Central Environmental Authority. Upon receipt of such responses, the Central Environmental Authority is by law required, either to grant approval for the implementation of the project, subject to specified conditions, if any, or to refuse approval for the implementation of the project, with reasons for doing so. If approval is granted, the law requires the Central Environmental Authority to publish *in the Government Gazette and in one national newspaper published daily in the Sinhala, Tamil and English Languages the approval as determined.* Further, if approval is granted, there must be a plan of the Central Environmental Authority to monitor the implementation of the project. (See section 23 BB of the National Environmental Act and the NEA regulations 10-13.) Where the Central Environmental Authority is its roles as the project approving agency refuses to grant approval for a project submitted to it, the person or body of persons aggrieved have a right of appeal against such decision to the Secretary to the Ministry responsible for the administration of the National Environmental Act and the Central Environmental Authority created under it.

There are also other project approving agencies designated by the Minister, but the Central Environmental Authority is, the final authority in respect of the environmental matter. (See also NEA regulations 6. (ii), 13, 14, 17 (ii) and 18).

As we have seen, learned counsel for the respondents were all in my view, correctly, agreed that if that Central Environmental Authority refuses to approve the project, that is an end of the matter, subject, of course, to the right of appeal.

These salutary provisions of the law have not been observed. In terms of the proposed agreement, although there is an undertaking to comply with the laws of the country, which in my view, is an unnecessary undertaking, for ever person, natural or corporate must in our society which is governed by the rile of law, comply with the laws of the republic. What is attempted to be done is to contract out of the obligation to comply with the law. The Articles of the proposed agreement dealing with matters concerning environmental issues, read with the provision on confidentiality, in my view, attempt to quell, appease, abate, or even, under the guise of a binding contract, to legally put down or extinguish, public protests. Leaned counsel for the 5th and 7th respondents states that Sri Lanka "does not possess the scientific knowledge or the technical know-how or the finances to develop this natural reserve." I cannot accept the assertion that Sri Lanka does not have scientists who can guide the country. Picking on "yes" persons, or persons who might be suspected to be so, as in terms of Article 7.6 of the proposed arrangement, is another matter, and that is why conforming to the law, as laid down by the National Environmental Act and the regulations framed there under is of paramount importance. As of for funding, that would no doubt depend on the nature of the project to be undertaken and the identification of sources of assistance appropriate for the chosen level of operation. Quite different consideration will apply if the decision after due investigation and debate will be to produce a quantity of single super phosphate for local use rather that producing Diammonium phosphate for export.

If the genuine intention was, as claimed by the respondents, to comply with the requirements of the law, it was, in my view, unnecessary to refer in the proposed agreement to a study relating to environmental matters as a part of its feasibility report. The law is clearly laid down in the National Environmental Act and the regulations framed there under. What was being attempted by the proposed agreement was to substitute a procedure for that laid down by the law. It was assumed that by a contractual arrangement between the executive branch of the government and the Company, the laws of the country could be avoided. That is an obviously erroneous assumption, for no organ of Government, no person whomsoever, is above the law.

In his letter to Mr. Sarath Fernando dated March 30, 1998 (P7), Mr. Thilan Wijesinghe, the Director/Chairman of the 2nd respondent, who was also a member of the Committee appointed by the President in 1997 to conduct the final round of negotiations, stated that "That Mineral Investment Agreement initiated by the FMRP and the Government incorporates most of the recommendations of" the President's Committee which reported on the 9th of May 1995. The report of the Committee of

the President on the 9th May 1995 was not submitted to this Court. We can only go by Mr. Wijesinghe's account of the 1995 recommendations. And going by the account there was a failure to incorporate some of the most important recommendations of the Committee reporting on May 9th 1995, e.g. the need for a comprehensive geological evaluation and adherence to the rigorous EIA procedures. I am not for a moment suggesting that either Mr. Wijesinghe or any member of the final negotiating Committee appointed by the President acted except in good faith. It might have been supposed that so long as the geological survey fitted into the exploration process and the environmental studies proposed in the draft agreement formed a part of the Feasibility Study, all was well. It was not. Learned counsel for the 5th and 7th respondents said that the final round of negotiations and who examined the proposals were "the most responsible and highest ranking officers of the country." I accept learned counsel's estimation without any hesitation, but I am constrained in the words of Horace to say, *Indignor quandoque bonus dormitate Homerus* – But if Homer, usually good, nods for a moment, I think it a shame.

In its "Guide for Implementing the EIA Process, No. 1 of 1998 (P20), issued by the Central Environmental Authority, it is stated as follows: "That purposes of environmental impact assessment (EIA) are to ensure that developmental options under consideration are environmentally sound and sustainable and that environmental consequences are recognised and taken into account early in project design. EIAs are intended to foster sound decision making, not to generate paperwork. The EIA process should also help public officials make decisions that are based on understanding environmental consequences and take actions that protect, restore and enhance the environment."

The proposed agreement plainly seeks to circumvent the provisions of the National Environmental Act and the regulations framed there under. There is no way under the proposed agreement to ensure a consideration a development options that were environmentally sound and sustainable at an early stage in fairness both to the project proponent and the public. Moreover, the safeguards ensured by the National Environmental Act and the regulations framed there under with regard to publicity have been virtually negated by the provision in the proposed agreement regarding confidentiality. I would reiterate what was said by this Court in Gunaratne v. Homagama Pradeshiya Sabha, (1998) 2 Sri L.R. p.11, namely, that publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved.

Access to information on environmental issues is of paramount importance. The provision of public access to environmental information has, for instance, been a declared aim of the European Commission's Environmental policy for a number of years. Principle 10 of the Rio Declaration calls for better citizen participation in environmental decision-making and rights of access to environmental information, for they can help to ensure greater compliance by States of international environmental standards through the accountability of their governments. Principle 10 states as follows: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual

shall have appropriate access to information concerning the environment that is held by public authorities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

In the matter before this Court, the proposed agreement makes no mention of an environmental impact assessment in terms of the National Environmental Act. The respondents stated that under its undertaking in the proposed agreement to comply with the applicable laws, it would have submitted an environmental impact assessment, in due course, if it had been required to do so. In fact, learned counsel of the 5th and 7th respondents gave undertaking that it would provide such an assessment. However, the law, for good reasons, as I have endeavoured to explain, requires the prescribed procedures to be followed. The times prescribed are vital. Project proponents cannot decide when, if ever they will comply with the law. There are many things that have to be done at the very earliest of stages for every good reasons. There is also a prescribed time if and when an environmental impact assessment has to be done. The parties to the proposed agreement attempted to substitute an extraordinary procedure for the proposed project. Such a procedure contravened the provisions of the National Environmental Act, and the regulations made there under and the guidelines prescribed by the National Environmental Authority. Thereby, reinforced by the confidentiality provisions of the proposed agreement, the proposed agreement effectively excluded public awareness and participation, as contemplated by our legislature as well as by Principle 10 of the Rio Declaration. The proposed agreement ignores the Central Environmental Authority as the project approving agency, although it was admitted by the petitioners and the respondents that the Central Environmental Authority in this matter was the project approving agency, and substitutes in its place the Secretary to the Minister to whom the subject of minerals and mines is assigned for the purpose of approving the environmental study contemplated by the proposed agreement. Such Secretary is not a project approving agency in terms of the National Environmental Act: Nor is he or she therefore a "national authority" within the meaning of Principle 17 of the Rio Declaration. A "national authority" is an authority recognized by the law of a concerned State. In the event, having regard to the undertaking given in Article 27.7 (b) that "The Government shall render all reasonable assistance to the Company to obtain all approvals, consents, grants, licences and other concessions as may be reasonably be required from any Government Authority", what comfort may the petitioners derive? They are, in my view, entitled to be apprehensive that even if there was an environmental impact assessment submitted tot he Central Environmental Authority, such authority may not have been able to act impartially and independently. Of what use are biased decisions or decisions, reasonably suspected to have been made under pressure? Further, although the law of Sri Lanka provides for the judicial review of the acts of administrative authorities, and Principle 10 of the Rio Declaration calls for effective access to judicial and administrative proceedings, the proposed agreement

substitutes arbitration for such proceedings, in which, of course, the public have no role.

For the reasons given, in my view, the proposed agreement seeks to circumvent the law and in its implementation is biased in favour of the Company as against the members of the public, including the petitioners. I am therefore of the view that the petitioners are entitled to claim that there is an imminent infringement of their fundamental rights under Article 12(1) of the Constitution.

OVERALL ECONOMIC BENEFITS

The respondents submitted that the proposed agreement if implemented would be highly beneficial to Sri Lanka and that "when one balances the purported complaints as are contained in the petition against the overall benefit that would accrue to Sri Lanka, the petitioners' application cannot succeed in law."

The Director of the 5th respondent, Mr. Garry L. Pigg, and the Director of the 7th respondent, Mr. U.I. De S. Boralessa, state in their affidavits that the proposed project would result in economic benefits to Sri Lanka which they specify. The report of the Committee appointed by the President (P4) lists numerous financial benefits.

Learned counsel for the petitioners, however, submitted that the Eppawela project governed by the proposed agreement will not only be an environmental disaster but an economic disaster as well. They relied on the analysis of the social and economic considerations by Prof. V.K. Samaranayake (P10) (a); the comments of Prof. Tissa Vitarana (P9); the comments of Prof. O.A. Illeperuma (P11); the report of the National Academy of Sciences (P10); the report of the National Science Foundation (P12); and the financial analysis by Premily Canagaratna (P17).
A study of the material submitted by the petitioners shows that the question of benefits is a highly controversial matter, but one that must be gone into, for our democratic republic sets great store by the discovery of truth in matters of public importance in the market place of ideas by vigorous and uninhibited public debate. In the debate, perhaps, we need to consider whether income and economic growth on which the respondents lay great emphasis, are the sole criteria for measuring human welfare. David Korten, the Founder President of the People-Centred Development Forum, once observed:

> "The capitalist economy [as distinguished from Adam Smith's concept of a market economy] has a potentially fatal ignorance of two subjects. One is the nature of money. The other is the nature of life. This ignorance leads us to trade away life for money, which is a bad bargain indeed. The real nature of money is obscured by the vocabulary of finance, which is doublespeak . . . We use the terms 'money', 'capital', 'assets' and 'wealth' interchangeably – leaving no simple means to differentiate money from real wealth. Money is a number. Real wealth is food, fertile land, buildings or other things that sustain us. Lacking language to see

> this difference, we accept the speculator's claim to 'create wealth', when they expropriate it . . . Squandering real wealth in the pursuit of numbers is ignorance of the worst kind. The potentially fatal kind."

It is unnecessary for the purposes of the task in hand to enter into the matter of the alleged beneficial nature of the proposed agreement: The petitioners case is that there is an imminent infringement of their fundamental rights guaranteed by Articles 1291), 14(1) (g) and 14 (1) (h). I have stated my reasons for upholding their complaints. The "balancing" exercise referred to by learned counsel has been already done for us and the Constitution sets out the circumstances when any derogations and restrictions are permissible. Article 15 (7) of the fundamental rights declared and recognised by Articles 12 & 14 are "subject to such restrictions as may be prescribed by law", among other things, for "meeting the just requirements of the general welfare of a democratic society." In the light of the available evidence, I am not convinced that the proposed project is necessary to meet such requirements. In any event, the circumstances leading to the imminent infringements have not been "prescribed by law" but arise out of a mere proposed contract, and therefore do not deserve to be even considered as permissible.

ORDER

For the reasons set out in my judgement, I declare that an imminent infringement of the fundamental rights of the petitioners guaranteed by Articles 12 (1), 14 (1) (g) and 14 (1) (h) has been established.

There is no assurance of infallibility in what may be done; but, in the national interest, every effort ought to be made to minimise guesswork and reduce margins of error. Having regard to the evidence adduced and the submissions of learned counsel for the petitioners and respondents, in terms of Article 1254 (4) of the Constitution, I direct the respondents to desist from entering into any contract relating to the Eppawela phosphate deposit up to the time.

> (1) a comprehensive exploration and study relating to the (a) locations, (b) quantity, moving inferred reserves into the proven category, and (c) quality of apatite and other phosphate minerals in Sri Lanka is made by the third respondent, the Geological Survey and Mines Bureau, in consultation with the National Science Foundation, and the results of such exploration and study are published; and
>
> (2) any project proponent whomsoever obtains the approval of the Central Environmental Authority according to law, including the decisions of the superior Courts of record of Sri Lanka.

I make further order that (1) the State shall pay each of the petitioners a sum of Rs. 25,000 as costs; (2) the fifth respondent shall pay each of the petitioners a sum of Rs, 12,500 as costs;

(3) the seventh respondent shall pay each of the petitioners Rs. 12,500 as costs.

JUDGE OF THE SUPREME COURT

WADUGODAPTIYA, J.
I agree.

JUDGE OF THE SUPREME COURT
GUNASEKERA, J.
I agree.

JUDGE OF THE SUPREME COURT

CHAPTER XIV

THE RIGHT TO SOCIAL SECURITY

Contents:

Dietmar Pauger v. *Austria*

(Communication No. 716/1996)

The Human Rights Committee

Views adopted on 25 March 1999 at the sixty-fifth session.[*]

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

Meeting on 25 March 1999,

Having concluded its consideration of communication No.716/1996 submitted to the Human Rights Committee by Mr. Dietmar Pauger under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Dietmar Pauger, an Austrian citizen and widower of a former school teacher in the Austrian civil service. He claims to be a

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, Mr. Abdallah Zakhia.

victim of a violation by Austria of article 26 of the International Covenant on Civil and Political Rights. The present communication is a follow-up to a previous complaint the author had submitted to the Human Rights Committee for consideration under the Optional Protocol.

THE FACTS AS SUBMITTED BY THE AUTHOR

2.1 The author's first wife, a school teacher in the State party's civil service in the region of Styria (Steiermark), died on 23 June 1984. With effect of November 1985, the author was entitled to a widower's pension, which was calculated on the basis of the transitional provisions of the Eighth Amendment to the Austrian Pensions Act (Pensionsgesetz). Until January 1995, this Amendment only provided for a reduced widower's pension, amounting to two thirds of the full pension entitlement. Widows, however, were entitled to the full pension.

2.2 The author initiated proceedings with a view to securing a full widower's pension; before the State party's Constitutional Court, he contended that the provisions of the Eighth Amendment to the Austrian Pensions Act were discriminatory and, therefore, unconstitutional. The Constitutional Court ruled that the transitional provisions reflected continuing changes in society with respect to the principle of equality of sexes and dismissed the author's appeal on 3 October 1989.

2.3 The author subsequently submitted a communication to the Human Rights Committee, alleging a violation of article 26 of the Covenant. Communication No. 716/1996. On 30 March 1992, the Committee found that the award of a reduced widower's pension to the author, calculated on the basis of the transitional provisions of the Eighth Amendment to the Pensions Act, constituted unlawful discrimination on the grounds of sex, in violation of article 26 of the Covenant. According to the author, the State party's authorities have failed to readjust and re-calculate his pension entitlements, in spite of the findings of the Committee of 30 March 1992.

2.4 On 4 October 1991, the author remarried. Under Section 21 of the Austrian Pensions Act, Mr. Pauger was entitled to a one-time lump-sum payment (Abfindungszahlungen) in the amount of 70 monthly pension payments to which he was entitled at the time of his re-marriage, and which replaced his previous pension entitlements. The Styria Regional Education Board (Landesschulrat) accordingly commuted the author's entitlement to a widower's pension and awarded a lump-sum payment of AS 423,059, calculated on the basis of his reduced pension entitlements.

2.5 On 8 November 1991, Mr. Pauger appealed against the decision of the Styria Regional Education Board, arguing that the calculation of the lump-sum should be

based on his full pension entitlement. On 9 January 1992, the regional government of Styria dismissed the appeal.

2.6 The author further appealed this decision to the Supreme Administrative Court (Verwaltungsgerichtshof) of Austria. On 28 September 1993, the Court found that the one-time lump-sum payment had to be considered as a single payment of the monthly instalments the applicant would receive in the years following his remarriage. As the author would have been entitled to a full pension from 1 January 1995 onwards, the 70 monthly instalments had to be calculated differently depending on the dates of reference. Those instalments corresponding to pension payments before 1 January 1995 had to be calculated on the basis of reduced pension entitlements, and the remainder on the basis of full pension entitlements. In January 1994, the lump-sum payment was recalculated by the Styria Regional Education Board on the basis of the criteria laid down by the Supreme Administrative Court, and raised to AS 500,612.

2.7 Not satisfied with this solution, the author filed a complaint with the European Commission of Human Rights Application No. 24872/94. By decision of 9 January 1995, the European Commission held that the author's application concerned essentially the same issues as his previous communication under the Optional Protocol to the Human Rights Committee, namely discrimination, both in as much as his claim to a widower's pension and the applicability of the transitional provisions of the Eighth Amendment to his pension entitlements was concerned. The Commission concluded that the "same matter" had already been submitted to (and decided by) another procedure of international investigation or settlement, and dismissed the author's application pursuant to article 27, paragraph 1(b), of the European Convention on Human Rights and Fundamental Freedoms.

2.8 On the requirement of exhaustion of domestic remedies, the author explains that he did not apply to the Constitutional Court for redress, because he considered that such an action would inevitably fail in the light of the Constitutional Court's decision on essentially the same matter of 3 October 1989. He therefore submits that all available domestic remedies have been exhausted.

2.9 As to the reservation to article 5, paragraph 2(a), of the Optional Protocol entered by Austria upon ratification of the Protocol, pursuant to which the Committee is precluded from considering a communication if the same matter has been examined by the European Commission on Human Rights, Mr. Pauger contends that his case was declared inadmissible on the ground that the Commission considered that it lacked competence to examine the matter, and that in contrast to other cases, the alleged violations of the European Convention were not even considered by the Commission. He argues that the Commission's decision to declare his case inadmissible cannot be regarded as an "examination" of the "same matter", within the meaning of the reservation to article 5, paragraph 2(a), of the Optional

Protocol entered by Austria, and that the Human Rights Committee is not precluded from considering his case.

THE COMPLAINT

3. It is submitted that the lump-sum payment of AS 500,612 finally awarded by the Styria Regional Education Board is AS 133, 976 less than would be a lump-sum payment calculated on the basis of full pension entitlements a widow would be able to claim. The author contends that this constitutes sex-based discrimination against him, in violation of article 26 of the Covenant.

STATE PARTY'S ADMISSIBILITY OBSERVATIONS AND AUTHOR'S COMMENTS

4.1 By a submission of 11 October 1996, the State party invokes its reservation to article 5, paragraph 2(a), of the Optional Protocol, pursuant to which the Committee may only consider a communication if it has ascertained that the same matter has not been examined by the European Commission of Human Rights. In the instant case, it is said to be clear that the European Commission was seized of the "same matter".

4.2 The State party rejects the author's view that since the European Commission did not deal with the merits of his claim and declared his case inadmissible on the ground that the Human Rights Committee had already examined the "same matter", the complaint had not been "examined" and that the reservation accordingly does not apply. The State party explains that "the purpose of the reservation is to ensure that where the European Commission has been seized of a matter, whatever the Commission's decision may have been, the UN Human Rights Committee cannot be seized of the same matter. The reasons why the reservation was entered were (a) to avoid subjecting the European Commission to review by another international organ and (b) to avoid the emergence of diverging case-law of different international organs. These aims of the reservation refer to all types of decisions issued by the European Commission".

4.3 It is noted that in its January 1995 decision, the European Commission examined the case with reference to the Human Rights Committee's Views of 30 March 1992 and found that the author's communication to the Human Rights Committee and his case before the Commission essentially concerned the same issue. Austria therefore concludes that the reservation to article 5, paragraph 2(a), of the Optional Protocol applies, and that the Committee has no jurisdiction to consider the present case.

4.4 Subsidiarily, the State party argues that the case constitutes an abuse of the right of submission within the meaning of article 3 of the Optional Protocol: the legal

issue is the same as that in two previous cases examined by two international instances of investigation or settlement and has already been settled.
5.1 In his comments, the author considers that the Committee's Views of March 1992 only decided his case up to that moment in time and did not give the State party a right to violate his rights under the Covenant thereafter. Therefore, it must be admissible to introduce a new communication alleging sex-based discrimination since March 1992. And if this (new) complaint is deemed inadmissible under the European Convention of Human Rights by the European Commission, then the Human Rights Committee should be allowed to consider the complaint - otherwise, no international instance would be competent. Mr. Pauger thus contends that his communication should be deemed admissible.

5.2 The author further argues that the Austrian reservation to article 5, paragraph 2(a), of the Optional Protocol does not apply in his case, because the European Commission merely declared his complaint inadmissible, without examining the merits of his claims. To his mind, the aims of the Austrian reservation advanced by the State party - to avoid subjecting the European Commission to review by another international body and to avoid the emergence of diverging case-law of different international bodies - would not be contradicted if the Human Rights Committee declared his complaint admissible.

5.3 According to the author, the European Commission's ratio decidendi of 9 January 1995 has no relevance to his case before the Committee. He further disagrees with the Commission's opinion that the present communication concerns the "same matter" as that already examined by the Committee in the Views of March 1992, given that the present communication is based on facts which occurred since that date.

5.4 The author refutes the contention that his complaint is an abuse of the right of submission. Rather, he argues, it is the State party which has abused its authority, since it took no measures to remedy the violation of article 26 found by the Committee. On the contrary, some Government officials publicly disavowed the Committee's Views, which makes it necessary, in the author's opinion, to examine the matter once again.

THE COMMITTEE'S ADMISSIBILITY DECISION

6.1 At its 60th session, the Committee considered the admissibility of the communication.

6.2 The Committee noted the author's argument that a further complaint to the Constitutional Court of Austria would be futile in his situation, as the Constitutional Court had already adjudicated on basically the same issue in its judgment of 3

October 1989. The State party had not challenged the author's argument in this respect. The Committee concluded that the requirements of article 5, paragraph 2(b), of the Optional Protocol had been met.

6.3 With respect to the author's claim under article 26, the Committee noted that the author's complaint submitted to the European Commission on Human Rights was based on the same events and facts as the complaint he now submitted under the Optional Protocol. It recalled that in respect of article 5, paragraph 2(a), of the Optional Protocol, Austria entered the following reservation upon ratification: "The Republic of Austria ratifies the Optional Protocol . . . on the understanding that, further to the provisions of article 5(2) of the Protocol, the Committee . . . shall not consider any communication from an individual unless it has ascertained that the same matter has not been examined by the European Commission of Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms".

6.4 In the instant case, the Committee was seized of the "same matter" as the European Commission had been. As to whether the European Commission had "examined" the matter, the Committee began by noting that the Commission declared the author's complaint inadmissible on the basis of article 27, paragraph 1(b), of the European Convention, because it considered in turn to be seized of the "same matter" as had been before the Human Rights Committee in the author's first complaint to the Committee (communication No. 716/1996). The Committee observed that the European Commission had declared the author's application inadmissible on procedural grounds, without examining in any way the merits of the author's claim. In so doing, it had acknowledged that there were some differences in the author's first application to the Human Rights Committee and his subsequent application to the European Commission, but that the two cases concerned "essentially the same issue". On this basis, the Committee considered that the European Commission did not "examine" the author's complaint, since it declared it inadmissible on procedural grounds, which related to the earlier examination of the same issue by the Human Rights Committee.

6.5 In the light of the above considerations, the Committee was of the opinion that it was not precluded by the Austrian reservation to article 5, paragraph 2(a), of the Optional Protocol, from considering the present communication.

7. On 9 July 1997, the Human Rights Committee therefore decided that the communication was admissible in so far as it appeared to raise issues under article 26 of the Covenant.

STATE PARTY'S SUBMISSION ON THE MERITS AND THE AUTHOR'S COMMENTS

8. By submission of 19 February 1998, the State party submits that the legal rules originally relevant to the author's case were transitional provisions which have ceased to be operative, so that by now the equal status of widows and widowers in the provisions of Austrian pension law applicable to the author's case is fully established.

9. In his comments, the author states that the State party's submission has no relevance to his complaint. Furthermore, he challenges the State party's submission as factually incorrect, since equal treatment only exists for those pensions that have their origin in a date after 1 January 1995. For pensions originating before, unequal treatment continues according to the author, since the Constitutional Court has allowed a more beneficiary pension for women on the basis of legitimate expectation.

EXAMINATION OF THE MERITS

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The question before the Committee is whether the basis of calculation of the lump-sum payment which the author received under the Pension Act is discriminatory. The lump-sum payment, consisting of 70 monthly instalments, was calculated partly, i.e. until 31 December 1994, on the basis of the reduced pension. The Committee upholds its views concerning communication No. 716/1996, that these reduced pension benefits for widowers are discriminatory on the ground of sex. Consequently, the reduced lump-sum payment received by the author is likewise in violation of article 26 of the Covenant, since the author was denied a full payment on equal footing with widows.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Pauger with an effective remedy, and in particular to provide him with a lump-sum payment calculated on the basis of full pension

benefits, without discrimination. The State party is under an obligation to take measures to prevent similar violations.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to translate and publish the Committee's Views.

[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.]

Vos v. *the Netherlands*

(Communication No. 786/1997)

Human Rights Committee

Views adopted on 26 July 1999 at the sixty-sixth session.[*]

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

Meeting on 26 July 1999,

Having concluded its consideration of communication No. 786/1997 submitted to the Human Rights Committee by Mr. A. P. Johannes Vos under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Mr. Antonius Petrus Johannes Vos, a married Dutch citizen born on 24 September 1919. He claims to be a victim of a violation by the Netherlands of article 26 of the Covenant.

THE FACTS

2.1 On 24 September 1984, the author was awarded a pension under the Algemene Burgerlijke Pensioenswet (ABP, General Law on Civil Service Pensions).

2.2 In the Netherlands, civil servants are covered by both the ABP pension scheme and by the general pension scheme (AOW). The AOW pension is fixed by reference to the minimum wage and paid in full after 50 years' insurance. The ABP pension is equal to 70% of the pensioner's last salary and is paid in full after 40 years of service.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.3 Before 1985, a married man was entitled under the AOW to a general pension for a married couple equal to 100% of the minimum wage. Unmarried persons of either sex were entitled to a general pension equal to 70% of the minimum wage. A married woman had no entitlement in her own right. To prevent overlapping of the AOW pension and the ABP pension, the AOW pension was incorporated into the ABP pension, that is to say it was regarded as forming part of the ABP pension. In practice, the ABP deducted the amount of the general pension from the civil service pension. The maximum amount of general pension to be incorporated was 80% (2% for each year of service). For married women civil servants, the incorporation was calculated by reference to the amount of the general pension of an unmarried woman, and the deduction was thus a maximum of 80% of 70% of the minimum wage.

2.4 On 1 April 1985, married women became entitled in their own right to a pension under the AOW. Married persons then received each a pension equal to 50% of the minimum wage. The ABP scheme was amended accordingly, as of 1 January 1986. Between 1 April 1985 and 1 January 1986 a transitional scheme applied. As of 1 January 1986, pensions under the ABP are calculated in accordance with a "franchise" system, which is applied equally to men and women civil servants. However, for pension entitlements relating to periods of service before 1 January 1986 the old incorporation scheme continues to apply.

2.5 On 29 November 1990, following the publication of a decision of the Public Servants' Court (*Ambtenarengerecht*) of 28 February 1990 concerning a similar matter, the author filed a complaint against the incorporation of his general pension into his civil service pension as discriminatory. The decision on the author's complaint was deferred awaiting the outcome of the procedure in the similar case (Beune. v. ABP).

2.6 The Centrale Raad van Beroep (Central Council of Appeal, the highest court in these matters) asked the Court of Justice of the European Communities for a preliminary ruling on the calculation of the pension entitlements. By judgement C-7/93, of 28 September 1994, the Court held that the different calculations of the pensions awarded to married men and to married women were in violation of article 119 of the EEC Treaty. At the same time the Court held that only civil servants who had filed a claim under national law before 17 May 1990[1] could invoke the direct effect of article 119 for the purpose of requiring equality of treatment with regard to the payment of the ABP pensions. Following the Court's judgement, the Centrale

[1] The date is the date of the judgement by the Court of Justice of the European Communities in the Barber case (C-262/88). In the so-called Barber Protocol (Protocol No. 2 on Article 119 of the EEC Treaty) the member States of the European Union agreed that "benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990", except in cases initiated before that date.

Raad van Beroep on 16 February 1995 decided the case of Beune v. ABP accordingly, restricting compensation for discrimination in these matters to claims filed before 17 May 1990.

2.7 The author's complaint was subsequently dismissed on 12 June 1995, since he had submitted his claim on 29 November 1990, that is after the cutoff date established by the European Court. His request for revision was rejected on 30 June 1995. The District Court of The Hague rejected his appeal on 19 June 1996. The author did not appeal this decision to the Centrale Raad van Beroep, because of the high costs involved and counsel's opinion that a further appeal would have no chance of success in the light of the European Court's decision and the judgement by the Centrale Raad van Beroep of 16 February 1995.

THE COMPLAINT

3. The author, who is married, claims that the different basis for calculation of the incorporation of the general pension into the civil service pension for married men and married women is since 1 April 1985 (when married women became entitled to their own general pension) in violation of article 26 of the Covenant, and that the limitation of the remedy, as set out by the judgement of the European Court of Justice, is also discriminatory. The author submits that since 1 April 1985 he receives 50% of a full AOW pension for married couples, but that, because his entitlement to a civil service pension dates from 1984, this pension is still, at present, calculated by incorporating 80% of the full AOW pension, whereas the pension of married women civil servants is calculated by incorporating 80% of half of the AOW pension. He thus receives a smaller pension from the ABP than female civil servants (pensioners) who are married.

STATE PARTY'S OBSERVATIONS

4.1 By note of 16 March 1998, the State party challenges the admissibility of the communication for non-exhaustion of domestic remedies, since the author failed to appeal the judgement of the District Court to the Centrale Raad van Beroep. The State party also notes that the author based his case in the domestic proceedings on article 119 of the Treaty of the European Community, not on article 26 of the Covenant.

4.2 By submission of July 1998, the State party addresses the merits of the communication. It refers to the Committee's jurisprudence and states that the decisive question is whether a specific distinction is to be considered discriminatory. According to the State party, this is the case only when the parties concerned find themselves in a comparable situation and when the distinction is based on

unreasonable and subjective criteria. The State party recalls that before 1 April 1985 married men and married women were not in a comparable situation with regard to the incorporation of the general pension in their civil service pension since married women had no entitlement in their own right to the general pension. The ABP scheme applied equally to married men and married women civil servants with regard to entitlement over periods of service after 1 January 1986.

4.3 According to the State party, the only period of time during which married men and married women were entitled to the same general pension, but had the incorporation into the civil service pension calculated differently, was between 1 April and 31 December 1985. The State party explains that this period of eight months was a transitional one, since the preparations for the introduction of new legislation had not yet been completed. For this reason and to achieve as fair a solution as possible, it was decided to equate married women civil servants with unmarried civil servants in respect of entitlements built up between 1 April 1985 and 31 December 1985. The State party is of the opinion that, in the particular circumstances, this does not constitute discrimination.

AUTHOR'S COMMENTS

5.1 In his comments on the State party's observations, the author notes that his claim was rejected in the domestic proceedings on the basis of a recent judgement of the Centrale Raad van Beroep, and that a further appeal to the CRVB would have been futile. He also refers to his appeal of 7 August 1995 to the Court in which he refers not only to article 119 of the Treaty, but also in general to norms of non-discrimination and the Universal Declaration of Human Rights.

5.2 As to the merits, the author observes that the Court of Justice of the European Communities has decided that the different basis for calculation of the incorporation of the general pension into the civil service pension for married men and married women constitutes discrimination. He notes that his pension is still being calculated on this basis and that therefore the discrimination continues.

5.3 The author states that financial grounds cannot justify discrimination. The author requests the Committee to find that the limitation of the remedy established by the Court of Justice of the European Communities constitutes discrimination against him, and that the consequential failure of the Dutch authorities to remedy the situation also constitutes discrimination.

ISSUES AND PROCEEDINGS BEFORE THE COMMITTEE

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies. With regard to the State party's argument that the author failed to appeal to the Centrale Raad van Beroep, the Committee notes that the judgement of the District Court in the author's case followed a recent judgement by the Centrale Raad van Beroep in a similar case as the author's. In the circumstances, the Committee is of the opinion that an appeal to the Centrale Raad van Beroep was not an effective remedy for the author and the requirement of article 5(2)(b) therefore does not preclude the Committee from considering the present communication. With regard to the State party's argument that the author failed to invoke article 26 of the Covenant before the national courts, the Committee notes from the text of the author's appeal that he invoked general norms of non-discrimination, including the Universal Declaration of Human Rights. The Committee recalls its jurisprudence[2] that for purposes of article 5, paragraph 2(b) of the Optional Protocol the author has to invoke before the domestic instances the substantive right he claims to be violated, but that it is not necessary that he invoke the specific article of the Covenant in which the substantive right is embodied. The State party has not raised any other objections and accordingly the Committee finds the communication admissible and proceeds without delay to a consideration of its merits.

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether Mr. Vos is a victim of a violation of article 26, because the calculation of the incorporation of his general pension into his ABP pension is different for him as a married man than for married women, as a consequence of which he receives less pension than a married woman.

7.3 The Committee notes that the European Court of Justice has already decided that the difference in calculation is in violation of article 119 of the EEC Treaty, which prohibits any discrimination with regard to pay as between men and women.

[2] See, *inter alia,* the Committee's decision dated 30 March 1989 in case No. 273/1988 (B.d.B v. The Netherlands) para. 6.3 (CCPR/C/35/D/273/1988/Rev.1).

7.4 The State party has explained that the difference in calculation of the pension is a leftover of the initial different treatment between married men and married women with regard to the general pension, which was abolished in 1985 by amending the general pension legislation. The Committee recalls its jurisprudence that, when a State party enacts legislation, such legislation must comply with article 26 of the Covenant. Once it equalled general pensions for married men and women, it would have been open to the State party to change the General Law on Civil Service Pensions (Algemene Burgerlijke Pensioenwet) in order to prevent the difference in calculation of civil service pensions for married men and married women who as of 1 April 1985 enjoyed equal rights to the general pension. The State party, however, failed to do so and as a result a married man with pension entitlements of before 1 January 1986 has a higher percentage of general pension deducted from his civil service pension than a married woman in the same position.

7.5 The State party has argued that no discrimination has occurred since at the time when the author became entitled to a pension, married women and married men were not in a comparable position with regard to the general pension. The Committee notes, however, that the issue before it concerns the calculation of the pension as of 1 January 1986, and considers that the explanation forwarded by the State party does not justify the present difference in calculation of the pension of married men and married women with civil service pension entitlements of before 1986.

7.6 In this context, the Committee notes that the courts in the Netherlands, following the opinion by the European Court of Justice, have limited a remedy for the discrimination to those persons who filed their claim before 17 May 1990, in accordance with the law of the European Communities. The Committee observes that what is at issue in the instant communication under the Optional Protocol to the International Covenant on Civil and Political Rights is not the progressive implementation of the principle of equality between men and women with regard to pay and social security, but whether or not the application to the author of the relevant legislation was in compliance with article 26 of the Covenant. The pension paid to the author as a married male former civil servant whose pension accrued before 1985 is lower than the pension paid to a married female former civil servant whose pension accrued at the same date. In the Committee's view this amounts to a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Vos with an effective remedy, including compensation.

The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized
in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to translate and publish the Committee's Views.

[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.]

CHAPTER XV

OTHER

Contents:

COMPLAINT No. 1/1998 BY THE INTERNATIONAL COMMISSION OF JURISTS AGAINST PORTUGAL

COUNCIL OF EUROPE

European Committee of Social Rights
Comité européen des Droits sociaux

DECISION ON THE MERITS

The European Committee of Social Rights, committee of independent experts of the European Social Charter established under Article 25 of the European Social Charter (hereafter referred to as "the Committee"), during its 163rd session attended by:

Messrs.	Matti MIKKOLA, President
	Rolf BIRK, Vice-President
	Stein EVJU, Vice-President
Ms	Suzanne GREVISSE, General Rapporteur
Messrs.	Konrad-GRILLBERGER
	Tekin AKILLIOGLU
	Nikitas ALIPRANTIS
	Alfredo Bruto DA COSTA
Ms.	Micheline JAMOULLE

Other

Assisted by Mr Régis Brillat, Secretary to the Committee

In the presence of Mme ANCEL-LENNERS, observer of the International Labour Organisation

After having deliberated on 30 June, 8 and 9 September 1999;

Delivers the following decision adopted on 9 September 1999;

PROCEDURE

1. On 10 March 1999, the Committee declared the complaint admissible by the appended decision.

2. In accordance with Article 7 paras. 1 and 2 of the Protocol providing for a system of collective complaints and with the Committee's decision of 10 March 1999 on the admissibility of the complaint, the Secretary to the Committee communicated on 12 March 1999 the text of its admissibility decision to the Portuguese Government, to the International Commission of Jurists (ICJ), to the Contracting Parties to the Protocol as well as to the European Trade Union Confederation (ETUC), the Union of the Confederations of Industry and Employers of Europe (UNICE) and the International Organisation of Employers (IOE), inviting them to submit their observations on the merits of the complaint. The Secretary to the Committee also communicated the text of the decision to the Contracting Parties to the Charter for their information.

3. The Portuguese Government submitted its observations on the merits along with four appendices on 29 March 1999. The ETUC submitted observations on 28 May 1999, following an extension of the time limit. The complainant Organisation submitted its observations along with one appendix on 7 June 1999 following an extension of the time limit. The Portuguese Government submitted supplementary observations along with an appendix on 29 June 1999, following an extension of the time limit.

4. In accordance with Article 7 para. 3 of the Protocol, each party received the observations of the other, as well as those of the ETUC.

5. The Portuguese Government and the ETUC suggested in their observations that the Committee organise a hearing in accordance with Article 7 para. 4 of the Protocol. On the basis of Article 10 of the rules of procedure, the Committee did not consider it necessary to organise such a hearing.

SUBMISSIONS OF THE PARTICIPANTS IN THE PROCEDURE

a) The complainant Organisation

6. The ICJ requests the Committee to declare that Portugal is in violation of Article 7 para. 1 of the Charter, which reads as follows:

> "With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake:
>
> 1. to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education,"

It alleges, as stated in the second paragraph of the admissibility decision, that "notwithstanding the statutory provisions adopted and the measures taken by Portugal to prohibit child labour and to ensure that this rule is enforced, a large number of children under the age of 15 years continue to work illegally in many economic sectors, especially in the north of the country. It further maintains that the Labour Inspectorate, which is the principal body for supervising compliance with the legislation on child labour, is not in a position to perform its functions effectively. It states that the working conditions imposed on these children are harmful to their health. It recalls that states which are bound by Article 7 para. 1 of the Social Charter are required not just to set the minimum age of admission to employment at 15 but also to take the necessary measures to ensure satisfactory application of this rule. Moreover, it recalls that the prohibition on employing children under the age of 15 also applies to children working in family businesses".

7. The ICJ relies on various documents, including a report published by a non-governmental Organisation in 1992,[1] which estimates that, at that time, 200,000 children under the age of 15 worked in poor conditions which affected their health. It adds that the Labour Inspectorate has often been the target of allegations of corruption or simply lack of motivation and efficiency.

b) The Portuguese Government

8. In its observations on the merits of the complaint, the Government recalls firstly that Portugal has ratified many international conventions concerning the prohibition of child labour, which demonstrates its firm political intention to implement all of the provisions and principles of these conventions. It has ratified all of the provisions of the European Social Charter, including Article 7 which guarantees the right of children and adolescents to protection. It is one of the first states to have

[1] [Suzanne Williams, Child Workers in Portugal, no 12 in Child Labour Series, London, Ant-Slavery lntematonal, 1992.]

ratified the Protocol providing for a system of collective complaints. It has also ratified the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights of the United Nations, of which Article 24 and Article 10 para. 3 respectively concern the protection of minors. It has in addition ratified the United Nations Convention on the Rights of the Child as well as International Labour Organisation Convention No. 138 on minimum age, 1973.

9. The Government considers that this places it in an unfavourable position in relation to states that have not ratified the above-mentioned instruments and, in particular, to Contracting Parties to the Charter that have not accepted Article 7 in its entirety and who are consequently not subject to any international supervision in this area.

10. The Government then proceeds to analyse the evidence provided by the complainant organisation. It maintains that some of the appendices should not be taken into account as they contain evidence relating to the period 1994-95, covered by Recommendation R Ch S(98) 5 of the Committee of Ministers. The Committee should only consider, according to the Government, those appendices which contain evidence dating from after the Recommendation.

11. It asserts that in any event the statistics on child labour in these documents are not reliable. It relies on the results of the statistical survey carried out in October 1998 (the period of reference being the last week of September) in collaboration between the statistics department of the Portuguese Ministry of Labour and the International Labour Organisation (statistical service and the International Programme on the Elimination of Child Labour (IPEC)). In its view, the Committee should in the present case take account of the information and statistics on child labour produced by this survey only.

12. The Government explains the methodology chosen for the survey. Covering 26,569 families, the survey recorded the statements of heads of household and of children. All minors from the age of 6 up to and including 15 years performing an activity which contributed to the national product for more than one hour per week were considered by the survey as children performing an economic activity. The survey did not distinguish between the “light work” permitted by the Charter under Article 7 para. 1 and prohibited work.

13. The Government then presents the results of the survey, which found that:

- 46.6% of the children who declared that they performed an economic activity were 13 or 14 years old;

- 90.8% of the children aged between 6 and 14 years who declared that they performed an economic activity did so as unpaid family members while 9.8% were paid workers;
- Among the unpaid family members, 93.6% attended school and 6.4% had left, of which 3.1% had completed compulsory education. 68% of the paid workers aged between 6 and 14 years attended school;
- 66% of the children aged between 6 and 14 years who declared that they performed an economic activity worked in the agricultural sector, 9.6% in restaurants, 9.2% in retail, 7.1% in manufacturing, 2.7% in construction and 5.5% in other activities
- 73.6% of the children aged between 6 and 14 years who declared that they performed an economic activity in the agricultural sector worked on average for three hours or less daily; 21.9% worked for between four and six hours and 4.5% of these children worked more than six hours. 58.1% of the children engaged in manufacturing worked on average for three hours daily or less; 22.6% worked for between four and six hours and 19.4 % worked for more than six hours. 33.3% of children engaged in construction worked on average for three hours or less daily; 33.3% worked for between four and six hours and 33.3% worked for more than six hours per day. 60% of children engaged in retail worked on average for three hours or less daily; 14.3% worked for between four and six hours and 10% worked for more than six hours. 69% of children engaged in the hotel and restaurant sector worked on average for three hours or less daily; 14.3% worked for between four and six hours and 16.7% worked for more than six hours. Lastly, 68.4% of these children worked on average for three hours or less daily across all sectors.

14. In the Government's view, the results of the survey show that the number of children aged between 6 and 14 years, who are covered by Article 7 para. 1 of the Charter, who performed an economic activity during the reference period of the survey, is relatively small and far below that alleged in the complaint. This number is between 12,000 (according to statements made by parents) and 27,500 (according to statements made by children, of whom 25,000 performed unpaid work as part of the household economy and 2,500 performed paid work. The Government maintains that unpaid activity within the family does not come within the scope of Article 7 para.l. The only family work covered by this provision is that performed in family businesses and the work of domestic employees, which are different from helping out the family. It asserts that the results of the survey prove that child labour in Portugal occurs almost completely within the context of helping out the family. It adds that in any event the activities performed in this setting are "light work, occasional or for a short duration which does not affect the completion of compulsory education", i.e. this is "light work" authorised by Article 7 para. 1. It considers that just the 2,500 children who, according to the survey, performed a paid activity worked in conditions which were incompatible with the requirements of

Article 7 para. 1, as work performed by children as part of helping out the family constitutes a different problem which comes under Article 7 para. 10 of the Charter.

15. The Government describes the measures to combat child labour taken since 1995 (the measures adopted beforehand have already been assessed by the European Committee of Social Rights as part of its examination of national reports).

It stresses that combating child labour is considered to be a priority by the Government as, well as the social partners (Programme of the Thirteenth Government, strategic cooperation agreement of December 1996, creation of the Plan to Eliminate the Exploitation of Child Labour and the National Council Against the Exploitation of Child Labour). It states that a bill to extend to the self-employed sector the prohibition on child labour under the age of sixteen and another to increase the sanctions applicable in cases of illegal work, non-compliance with compulsory schooling or with the legislation and rules concerning light work are currently before the National Assembly. It also lists many measures adopted to combat academic failure and "dropping out", to combat poverty and social exclusion (introduction in 1996 of the minimum income benefit, the payment of which is linked to attendance at school by the children of the families in receipt of benefit) as well as measures in the fields of social security and employment (for example, linking the level of family benefit to family income).

16. The Government further contests the ICJ's allegation that the Labour Inspectorate is incapable of carrying out effective supervision. It points to improvements in the staffing levels and training of labour inspectors. It recalls that they make many unannounced visits which focus specifically on the detection of illegal child labour, and request trade unions, non-governmental organisations and schools to inform it of any cases of illegal child labour, failure to attend school or "dropping out" which they may be aware of. Labour inspectors have the authority to inspect the home of the employer, since the legislation on child labour applies to declared work in the home. The Government stresses however that the Labour Inspectorate cannot make inspection visits to private dwellings where children work illegally. This is the responsibility of other public services such as the educational, health, social security, employment and vocational training services.

17. The Government criticises vigorously the allegations of bribery and corruption made against the Labour Inspectorate in the complaint. It observes that no evidence is produced in support of these allegations. It states that no complaint or allegation of corruption has ever been made against labour inspectors.

18. In conclusion, the Government affirms that although some instances of child labour still exist within the state, it would be unfair to conclude that the situation in Portugal fails to comply with Article 7 para. 1 in the light of the measures implemented to eradicate this problem.

c) The European Trade Union Confederation (ETUC)

19. In its observations, the ETUC recalls that it places great importance on the Charter in general and on the new developments in the supervisory system in particular. It wishes to contribute to the Charter becoming a living instrument to strengthen basic social rights in practice.

20. It invites the Committee to give a clear interpretation of Article 7 para. 1 which covers all areas of activity without exception, including activities carried out within the family (apart from domestic chores in the proper sense).

21. As to the situation in Portugal, the ETUC recalls that in 1974 trade unions carried out a review of the social situation, underlining the seriousness of child labour. It notes that in recent years legislative and practical measures have improved the effectiveness of the struggle against child labour, as demanded by trade union organisations.

22. The ETUC nonetheless takes the view that in spite of the efforts deployed by the Portuguese Government, the situation still fails to comply in practice with the requirements of Article 7 para. 1.

ASSESSMENT OF THE COMMITTEE

23. The Committee acknowledges firstly the legal obligation assumed by the Government in accepting all of the European Social Charter and, more particularly, all of the paragraphs of Article 7, as well as in ratifying the Protocol providing for a system of collective complaints. It observes that to date, few states have accepted as many international commitments under the Charter.

24. It observes however that the examination of the present complaint does not entail any comparison between the case of Portugal and that of the other states which have ratified the Charter, nor any assessment of the situation in these states in respect of Article 7 para. 1.

25. The Committee recalls the aim and scope of Article 7 para. 1 of the Charter as specified in its Conclusions in examining national reports.

26. This provision prohibits child labour under the age of fifteen, with certain exceptions. It aims to ensure the protection of children and adolescents against the risks associated in performing work which may have negative repercussions on their health, their moral welfare, their development and their education (Conclusions V, p. 55).

Other

27. The prohibition relates to:

- all economic sectors and all types of enterprises, including family businesses, as well as all forms of work, Whether paid or not (see in particular Conclusions Vil, p. 41),
- agricultural and domestic work, which the Committee has declared cannot be automatically considered to be light work within the meaning of this paragraph (Conclusions 1, p. 42),
- home-working and sub-contracting.

28. Work within the family (helping out at home) also comes within the scope of Article 7 para. 1 even if such work is not performed for an enterprise in the legal and economic sense of the word and the child is not formally a worker. Although. the performance of such-work by children may be considered normal and even forming part of their education, it may nevertheless entail, if abused, the risks that Article 7 para. 1 is intended to eliminate. The supervision required of states must, in such cases, as the Portuguese Government itself observes, concern not just the Labour Inspectorate but also the educational and social services.

29. If Article 7 para. 1 provides for an exception to the prohibition on work under the age of fifteen years in respect of "prescribed light work", this can only mean work which does not entail any risk to the health, moral welfare, development or education of children. The light nature of the work is assessed on the basis of the circumstances of each case.

30. The nature of the work is a determining factor. Work which is unsuitable because of the physical effort involved, working conditions (noise, heat, etc.) or possible psychological repercussions may have harmful consequences not only on the child's health and development, but also on its ability to obtain maximum advantage from schooling and, more generally, its potential for satisfactory integration in society. In order to comply with Article 7 para. 1, states are therefore required, under the supervision of the Committee, to define the types of work which may be considered light, or at the very least to draw up a list of those which are not.

31. Work considered to be "light" in nature ceases to be so if it is performed for an excessive duration. States are therefore required to set out the conditions for the performance of "light work", especially the maximum permitted duration and the prescribed rest period so as to allow supervision by the competent services. Even though it has not set a general limit on the duration of permitted light work, the Committee has considered that a situation in which a child under the age of fifteen years works for between twenty and twenty-five hours per week during school term (Conclusions 11, p. 32), or three hours per school day and six to eight hours on week days when there is no school is contrary to the Charter (Conclusions IV, p. 54).

32. Finally, the Committee recalls that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact. In this regard, it considers that the satisfactory application of Article 7 cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised (see for example Conclusions XIII-3, pp. 283 and 286). It considers that the Labour Inspectorate has a decisive role to play in effectively implementing Article 7 of the Charter.

33. In the light of these principles, the Committee notes first that, according to the information provided by the Government and mentioned by the Committee in Conclusions XIII-5, in Portugal only young people who are already aged fifteen (as of 1 January 1997) and who have completed compulsory schooling of nine years may be employed in light work. Accordingly, any work, including light work, performed by a child under the age of fifteen is illegal. The statutory measures adopted in Portugal to implement Article **7** para. 1 are rigorous, which the Committee can only welcome.

34. However, the Committee observes from the evidence contained in the file that in Portugal, children under the age of fifteen actually perform work. It notes that the Government does not dispute this. In order to seek to establish the exact dimensions of this problem and its characteristics, it may take account of all information submitted by the parties, whatever the period it relates to. In the present case, it considers it sufficient to rely on the results of the 1998 survey which provides the most recent evidence and the validity of which is not disputed by the International Commission of Jurists, even if its interpretation of the results differs from that given by the Government.

35. It emerges from this survey that in September 1998 several thousand children under the age of fifteen years performed work in breach of the requirements of Article 7 para.1 of the Charter and Portuguese law. The Committee considers in particular that the 25,000 children who, out of an estimated total of 27,500, performed unpaid work as part of helping out the family must be taken into account under Article 7 para. 1.

36. The Committee notes further that, according to the survey, a not insignificant number of children under the age of fifteen years who declared that they performed an economic activity work in the agricultural (66%), manufacturing (7.1 %) and construction (2.7%) sectors. These sectors may, by their very natures, give rise to certain types of work which may have negative consequences on the children's health as well as on their development.

37. The Committee observes lastly that, taking all sectors together, the duration of work declared exceeds that which may be considered compatible with children's health or schooling: 31.6% of the children concerned worked on average for more

than 4 hours per day across all sectors. This percentage is particularly high in the construction sector and the manufacturing sector where, respectively, 66.6% and 42% of the children concerned worked on average for more than four hours per day. The Committee notes that among the children aged between 6 and 14 years who performed paid work, just 68% attended school.

38. With particular regard to child labour as part of helping the family out, which occurs mainly in agriculture and the restaurant sector, according to the Government, the Committee has no reason to presume that by its nature or the conditions in which it is performed (duration, working hours) it can in all cases be considered light work within the meaning of Article 7 para.1.

39. The Committee then considers whether the measures taken by the Government rectify the situation criticised.

40. It acknowledges that the Government, especially in recent years, has taken many legal and practical measures to combat child labour, tackling its many diverse and complex causes. These measures have brought about a progressive reduction in the number of children working illegally, an improvement which is not in dispute. However, it is clear that the problem has not been resolved.

41. The Committee acknowledges that many measures have been taken by the Government to increase the efficiency of the Labour Inspectorate. It observes that in 1997 labour inspectors carried out 1,462 visits in enterprises and found 167 children under the age of 16 years working illegally there. In 1998, they carried out 2,475 visits in enterprises and found 191 cases of children under the age of 16 working illegally. The Committee considers that, in the light of the results of the 1998 survey and the fact that the existing legislation and rules cover family businesses, these figures are modest.

42. As regards the allegation of the ICJ that the Labour Inspectorate is corrupt, which is vigorously disputed by the Government, it is not supported by evidence.

43. Finally, as the Government recognises, efforts must be maintained to increase the effectiveness of supervision of children's work within the family and in private dwellings. The Committee is aware of the difficulty of this task, which involves the Labour Inspectorate or the educational and social services as appropriate.

44. The Committee considers that the other arguments advanced by the parties are secondary and do not modify its assessment of the situation.

CONCLUSION

45. The Committee concludes that the situation in Portugal is not in conformity with Article 7 para. 1.

Suzanne GREVISSE Matti MIKKOLA Régis BRILLAT
Rapporteur President of the Committee Secretary to the Committee

In accordance with Rule 30 of the Committee's Rules of Procedure, a dissenting opinion of Mr Alfredo BRUTO DA COSTA is appended to this decision.

DISSENTING OPINION OF Mr Alfredo BRUTO DA COSTA

1. The establishment of the collective complaints system (Additional Protocol of 9 Nov. 1995) presupposes that the complainant Organisation is capable of supplying the Committee with information and/or evidence that would not be available through the reporting system.

In the present case, however, the European Committee of Social Rights built up its entire argument without drawing on any piece of information or evidence provided by the International Commission of Jurists (ICJ). In this sense, notwithstanding the fact that the ICJ was recognised "as having particular competence" in the matter, the complaint must be seen as without merit.

Thus, the complaint objectively served as a mere pretext for the Committee to arrive at a "negative" conclusion based on information gathered elsewhere (specifically supplied by the Portuguese Government). Thus, the Committee supplied the complaint with the argument that it lacked, and made an improper use of the system of collective complaints.

2. By adopting a conclusion focused on the "situation in Portugal", the Committee did not respond to what is demanded from it in Article 8 of the Additional Protocol. The article refers to a conclusion "as to whether or not the Contracting Party concerned has ensured the satisfactory application of the provision", which relates more to the performance of the Contracting Party than to the actual situation. Furthermore, the term "satisfactory" admits a certain flexibility that the assessment of the compliance in terms of "yes or no" does not.

3. The Committee adopts a static and narrow concept of "legality", ignoring the natural and unavoidable viscosity of social changes, and the need of taking account of the dynamic aspect of social problems. Hence the fact that the progress achieved

in the area (child work) in Portugal is mentioned but is not property evaluated by the Committee.

Indeed, of all information on the quantitative dimension of the problem mentioned in the "various documents" provided by the ICJ, the Committee only quotes the number of 200 000 working children in 1992.On the other hand, it refers to the number of 27 500 working children that, according to a survey undertaken by the Portuguese Government, existed in 1998. The Committee did not take sufficient account of the dramatic fall from 200 000 to 27 500 working children (a decrease of around 86%) over a period of 6 years in terms of assessing whether or not the Contracting Party has ensured a "satisfactory application of the provision". Rather, the conclusion seems to go no further than observing that "the problem has not been solved" and, therefore, that the situation is not in conformity with the article concerned.

4. It is regrettable that, in the context of a discussion on social rights, the Committee has no word for criticism to the International Commission of Jurists, after verifying that the allegation of the ICJ that the Labour Inspectorate is corrupt "is not supported by evidence".

In conclusion:

- the conclusion of the Committee is not in compliance with Article 8 of the Additional Protocol;
- the complaint did not supply the Committee with any piece of information or evidence that was relevant for supporting its conclusion;
- objectively, the Committee made improper use of the system of collective complaints;
- and finally, the Committee adopted a narrow and static concept of legality, unsuited to the purpose of legally assessing social situations and problems.

Kitok* v. *Sweden

(Communication No. 197/1985)

Human Rights Committee

Views adopted on 27 July 1988 at the thirty-third session.

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

Meeting on 27 July 1988,

Having concluded its consideration of communication No. 197/1985, submitted to the Committee by Ivan Kitok under the Optional Protocol to the International Covenant on Civil and Political Rights,

Adopts the following views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication (initial letter dated 2 December 1985 and subsequent letters dated 5 and 12 November 1986) is Ivan Kitok, a Swedish citizen of Sami ethnic origin, born in 1926. He is represented by counsel. He claims to be the victim of violations by the Government of Sweden of articles 1 and 27 of the Covenant.

2.1 It is stated that Ivan Kitok belongs to a Sami family which has been active in reindeer breeding for over 100 years. On this basis the author claims that he has inherited the "civil right" to reindeer breeding from his forefathers as well as the rights to land and water in Sörkaitum Sami Village. It appears that the author has been denied the exercise of these rights because he is said to have lost his membership in the Sami village ("sameby", formerly "lappby"), which under a 1971 Swedish statute is like a trade union with a "closed shop" rule. A non-member cannot exercise Sami rights to land and water.

2.2 In an attempt to reduce the number of reindeer breeders, the Swedish Crown and the Lap bailiff have insisted that, if a Sami engages in any other profession for a period of three years, he loses his status and his name is removed from the rolls of the lappby, which he cannot re-enter unless by special permission. Thus it is claimed that the Crown arbitrarily denies the immemorial rights of the Sami minority and that Ivan Kitok is the victim of such denial of rights.

2.3 With respect to the exhaustion of domestic remedies, the author states that he has sought redress through all instances in Sweden, and that the Regeringsrätten

(Highest Administrative Court of Sweden) decided against him on 6 June 1985, although two dissenting judges found for him and would have made him a member of the sameby.

2.4 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

3. By its decision of 19 March 1986, the Working Group of the Human Rights Committee transmitted the communication, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication. The Working Group also requested the State party to provide the Committee with the text of the relevant administrative and judicial decisions pertaining to the case, including (a) the decision of 23 January 1981 of the Länsstyrelsen, Norrbottens län (the relevant administrative authority), (b) the judgement of 17 May 1983 of the Kammarrätten (administrative court of appeal) and (c) the judgement of 6 June 1985 of the Regeringsrätten (supreme administrative court) with dissenting opinions.

4.1 By its submission dated 12 September 1986 the State party provided all the requested administrative and judicial decisions and observed as follows:

> "Ivan Kitok has alleged breaches of articles 1 and 27 of the International Covenant on Civil and Political Rights. The Government has understood Ivan Kitok's complaint under article 27 thus: that he through Swedish legislation and as a result of Swedish court decisions has been prevented from exercising his 'reindeer breeding rights' and consequently denied the right to enjoy the culture of the Sami. With respect to the author's complaint under article 1 of the Covenant, the State party observes that it is not certain whether Ivan Kitok claims that the Sami as a people should have the right to self-determination as set forth in article 1, paragraph 1, or whether the complaint should be considered to be limited to paragraph 2 of that article, an allegation that the Sami as a people have been denied the right freely to dispose of their natural wealth and resources. However, as can be seen already from the material presented by Ivan Kitok himself, the issue concerning the rights of the Sami to land and water and questions connected hereto, is a matter of immense complexity. The matter has been the object of discussions, consideration and decisions ever since the Swedish Administration started to take interest in the areas in northern Sweden, where the Sami live. As a matter of fact, some of the issues with respect to the Sami population are currently under consideration by the Swedish Commission on Sami issues (Samerättsutredningen) appointed by the Government in 1983. For the time being the Government refrains from further comments on this aspect of the application. Suffice it to say that, in the Government's opinion, the Sami do not constitute a 'people' within the meaning given to the word in article 1 of the Covenant . . . Thus, the Government maintains that article 1 is not applicable to the case. Ivan Kitok's complaints therefore should

be declared inadmissible under article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights as being incompatible with provisions of the Covenant."

4.2 With respect to an alleged violation of article 27, the State party

"admits that the Sami form an ethnic minority in Sweden and that persons belonging to this minority are entitled to protection under article 27 of the Covenant. Indeed, the Swedish Constitution goes somewhat further. Chapter 1, article 2, fourth paragraph, prescribes: 'The possibilities of ethnic, linguistic or religious minorities to preserve and develop a cultural and social life of their own should Chapter be promoted. Chapter 2, article 15, prescribes: No law or other decree may imply the discrimination of any citizen on the ground of his belonging to a minority on account of his race, skin colour, or ethnic origin. The matter to be considered with regard to article 27 is whether Swedish legislation and Swedish court decisions have resulted in Ivan Kitok being deprived of his right to carry out reindeer husbandry and, if this is the case, whether this implies that article 27 has been violated? The Government would in this context like to stress that Ivan Kitok himself has observed before the legal instances in Sweden that the only question at issue in his case is the existence of such special reasons as enable the authorities to grant him admission as a member of the Sörkaitum Sami community despite the Sami community's refusal . . . The reindeer grazing legislation had the effect of dividing the Sami population of Sweden into reindeer-herding and non-reindeer-herding Sami, a distinction which is still very important. Reindeer herding is reserved for Sami who are members of a Sami village (sameby), an entity which is a legal entity under Swedish law. (The expression 'Sami community' is also used as an English translation of 'sameby'). These Sami, today numbering about 2,500, also have certain other rights, e.g. as regards hunting and fishing. Other Sami, however – the great majority, since the Sami population in Sweden today numbers some 15,000 to 20,000 – have no special rights under the present law. These other Sami have found it more difficult to maintain their Sami identity and many of them are today assimilated into Swedish society. Indeed, the majority of this group does not even live within the area where reindeer-herding Sami live. The rules applicable on reindeer grazing are laid down in the 1971 Reindeer Husbandry Act [hereinafter the 'Act']. The ratio legis for this legislation is to improve the living conditions for the Sami who have reindeer husbandry as their primary income, and to make the existence of reindeer husbandry safe for the future. There had been problems in achieving an income large enough to support a family living on reindeer husbandry. From the legislative history it appears that it was considered a matter of general importance that reindeer husbandry be made more profitable. Reindeer husbandry was considered necessary to protect and preserve the whole culture of the Sami . . . It should be stressed that a person who is a member of a Sami village also has a right to use land and water belonging to other people for the maintenance of himself and his reindeer. This is valid for State

property as well as private land and also encompasses the right to hunt and fish within a large part of the area in question. It thus appears that the Sami in relation to other Swedes have considerable benefits. However, the area available for reindeer grazing limits the total number of reindeer to about 300,000. Not more than 2,500 Sami can support themselves on the basis of these reindeer and additional incomes. The new legislation led to a reorganization of the old existing Sami villages into larger units. The Sami villages have their origin in the old siida, which originally formed the base of the Sami society, consisting of a community of families which migrated seasonally from one hunting, fishing and trapping area to another, and which later on came to work with and follow a particular self-contained herd of reindeer from one seasonal grazing area to another. Prior to the present legislation, the Sami were organized in Sami communities (lappbyar). Decision to grant membership of these villages was made by the County Administrative Board (Länsstyrelsen). Under the present legislation, membership in a Sami village is granted by the members of the Sami village themselves. A person who has been denied membership in a Sami village can appeal against such a decision to the County Administrative Board. Appeals against the Board's decision in the matter can be made to the Administrative Court of Appeal (Kammarrätten) and finally to the Supreme Administrative Court (Regeringsrätten). An appeal against a decision of a Sami community to refuse membership may, however, be granted only if there are special reasons for allowing such membership (see sect. 12, para. 2, of the 1971 Act). According to the legislative history of the Act, the County Administrative Board's right to grant an appeal against a decision made by the Sami community should be exercised very restrictively. It is thus required that the reindeer husbandry which the applicant intends to run within the community be in an essential way useful to the community and that it be of no inconvenience to its other members. An important factor in this context is that the pasture areas remain constant, while additional members means more reindeers. There seems to be only one previous judgement from the Supreme Administrative Court concerning section 12 of the Reindeer Husbandry Act. However, the circumstances are not quite the same as in Ivan Kitok's case . . . The case that Ivan Kitok has brought to the courts is based on the contents of section 12, paragraph 2 , of the Reindeer Husbandry Act. The County Administrative Board and the Courts have thus had to make decisions only upon the question whether there were any special reasons within the meaning of the Act to allow Kitok membership in the Sami community. The County Administrative Board found that there were no such reasons, nor did the Administrative Court of Appeal or the majority of the Supreme Administrative Court . . . When deciding upon the question whether article 27 of the Covenant has been violated, the following must be considered. It is true that Ivan Kitok has been denied membership in the Sami community of Sörkaitum. Normally, this would have meant that he also had been deprived of any possibility of carrying out reindeer husbandry. However, in this case the Board of the Sami community declared that Ivan Kitok, as an owner of domesticated reindeer, can be present when calves are marked, reindeer

slaughtered and herds are rounded up and reassigned to owners, all this in order to safeguard his interests as a reindeer owner in the Sami society, albeit not as a member of the Sami community. He is also allowed to hunt and fish free of charge in the community's pasture area. These facts were also decisive in enabling the Supreme Administrative Court to reach a conclusion when judging the matter. The Government contends that Ivan Kitok in practice can still continue his reindeer husbandry, although he cannot exercise this right under the same safe conditions as the metiers of the Sami community. Thus, it cannot be said that he has been prevented from 'enjoying his own culture'. For that reason the Government maintains that the complaint should be declared inadmissible as being incompatible with the Covenant."

4.3 Should the Committee arrive at another opinion, the State party submits that:

"As is evident from the legislation, the Reindeer Husbandry Act aims at protecting and preserving the Sami culture and reindeer husbandry as such. The conflict that has occurred in this case is not so much a conflict between Ivan Kitok as a Sami and the State, but rather between Kitok and other Sami. As in every society where conflicts occur, a choice has to be made between what is considered to be in the general interest on the one hand and the interests of the individual on the other. A special circumstance here is that reindeer husbandry is so closely connected to the Sami culture that it must be considered part of the Sami culture itself. In this case the legislation can be said to favour the Sami community in order to make reindeer husbandry economically viable now and in the future. The pasture areas for reindeer husbandry are limited, and it is simply not possible to let all Sami exercise reindeer husbandry without jeopardizing this objective and running the risk of endangering the existence of reindeer husbandry as such. In this case it should be noted that it is for the Sami community to decide whether a person is to be allowed membership or not. It is only when the community denies membership that the matter can become a case for the courts. Article 27 guarantees the right of persons belonging to minority groups to enjoy their own culture. However, although not explicitly provided for in the text itself, such restrictions on the exercise of this right . . . must be considered justified to the extent that they are necessary in a democratic society in view of public interests of vital importance or for the protection of the rights and freedoms of others. In view of the interests underlying the reindeer husbandry legislation and its very limited impact on Ivan Kitok's possibility of 'enjoying his culture', the Government submits that under all the circumstances the present case does not indicate the existence of a violation of article 27. For these reasons the Government contends that, even if the Committee should come to the conclusion that the complaint falls within the scope of article 27, there has been no breach of the Covenant. The complaint should in this case be declared inadmissible as manifestly ill-founded."

5.1 Commenting on the State party's submission under rule 91, the author, in submissions dated 5 and 12 November 1986, contends that his allegations with respect to violations of articles 1 and 27 are well-founded.

5.2 With regard to article 1 of the Covenant, the author states:

> "The old Lapp villages must be looked upon as small realms, not States, with their own borders and their government and with the right to neutrality in war. This was the Swedish position during the Vasa reign and is well expressed in the royal letters by Gustavus Vasa of 1526, 1543 and 1551. It was also confirmed by Gustavus Adolphus in 1615 and by a royal judgement that year for Suondavare Lapp village . . . In Sweden there is no theory, as there is in some other countries, that the King or the State was the first owner of all land within the State's borders. In addition to that there was no State border between Sweden and Norway until 1751 in Lapp areas. In Sweden there is the notion of allodial land rights, meaning land rights existing before the State. These allodial land rights are acknowledged in the travaux_préparatoires of the 1734 law-book for Sweden, including even Finnish territory. Sweden has difficulty to understand Kitok's complaint under article 1. Kitok's position under article 1, paragraph 1, is that the Sami people has the right to self-determination . . . If the world Sami population is about 65,000, 40,000 live in Norway, 20,000 in Sweden, 4,000 to 5,000 in Finland and the rest in the Soviet Union. The number of Swedish Sami in the kernel areas between the vegetation-line and the Norwegian border is not exactly known, because Sweden has denied the Sami the right to a census. If the number is tentatively put at 5,000, this population in Swedish Sami land should be entitled to the right to self-determination. The existence of Sami in other countries should not be allowed to diminish the right to self-determination of the Swedish Sami. The Swedish Sami cannot have a lesser right because there are Sami in other countries . . ."

5.3 With respect to article 27 of the Covenant, the author states:

> "The 1928 law was unconstitutional and not consistent with international law or with Swedish civil law. The 1928 statute said that a non-sameby-member like Ivan Kitok had reindeer breeding, hunting and fishing rights but was not entitled to use those rights. This is a most extraordinary statute, forbidding a person to use civil rights in his possession. The idea was to make room for the Sami who had been displaced to the north, by reducing the number of Sami who could use their inherited land and water rights . . . The result is that there are two categories of Sami in the kernel Sami areas in the north of Sweden between the vegetation-line of 1873 and the Norwegian 1751 border. One category is the full Sami, i. e., the village Sami; the other is the half-Sami, i.e., the non-village Sami living in the Sami village area, having land and water rights but by statute prohibited to use those rights. As this prohibition for the half-Sami is contrary to international and domestic law, the 1928-1971 statute is invalid and cannot forbid the half-Sami from

> exercising his reindeer breeding, hunting and fishing rights. As a matter of fact, the half-Sami have exercised their hunting and fishing rights, especially fishing rights, without the permission required by statute. This has been common in the Swedish Sami kernel lands and was valid until the highest administrative court of Sweden rendered its decision on 6 June 1985 in the Ivan Kitok case . . . Kitok's position is that he is denied the right to enjoy the culture of the Sami as he is just a half-Sami, whereas the Sami village members are full Sami . . . The Swedish Government has admitted that reindeer breeding is an essential element in the Sami culture. When Sweden now contends that the majority of the Swedish Sami have no special rights according to the present law, this is not true. Sweden goes on to say 'these other Sami have found it more difficult to maintain their Sami identity and many of them are today assimilated in Swedish society. Indeed the majority of this group does not even live within the area where reindeer-herding Sami live'. Ivan Kitok comments that he speaks for the estimated 5,000 Sami who live in the kernel Swedish Sami land and of whom only 2,000 are sameby members. The mechanism of the sameby . . . diminishes the number of reindeer-farming Sami from year to year; there are now only 2,000 persons who are active sameby members living in kernel Swedish Sami land. When Sweden says that these other Sami are assimilated, it seems that Sweden confirms its own violation of article 27. The important thing for the Sami people is solidarity among the people (folksolidaritet) and not industrial solidarity (näringssolidaritet). This was the great appeal of the Sami leaders, Gustaf Park, Israel Ruong and others. Sweden has tried hard, however, to promote industrial solidarity among the Swedish Sami and to divide them into full Sami and half-Sami . . . It is characteristic that the 1964 Royal Committee wanted to call the Lapp village 'reindeer village' (renby) and wanted to make the renby an entirely economic association with increasing voting power for the big reindeer owners. This has also been achieved in the present sameby , where members get a new Vote for every extra 100 reindeer. It is because of this organization of the voting power that Ivan Kitok was not admitted into his fatherland Sörkaitum Lappby. Among the approximately 3,000 non-sameby members who are entitled to carry out reindeer farming and live in kernel Swedish Sami land there are only a few today who are interested in taking up reindeer farming. In order to maintain the Sami ethnic-linguistic minority it is, however, very important that such are encouraged Sami to join the sameby."

5.4 In conclusion, it is stated that the author, as a half-Sami,

> "cannot enjoy his own culture because his reindeer-farming, hunting and fishing rights can be removed by an undemocratic graduated vote and as a I half-Sami he is forced to pay 4,000 to 5,000 Swedish krona annually as a fee to the Sörkaitum sameby association that the full Sami do not pay to that association. This is a stigma on half-Sami."

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee noted that the State party did not claim that the communication was inadmissible under article 5, paragraph 2, of the Optional Protocol. With regard to article 5, paragraph 2 (a), the Committee observed that the matters complained of by Ivan Kitok were not being examined and had not been examined under another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (b), the Committee was unable to conclude, on the basis of the information before it, that there were effective remedies in the circumstances of the present case to which the author could still resort.

6.3 With regard to the State party's submission that the communication should be declared inadmissible as incompatible with article 3 of the Optional Protocol or as "manifestly ill-founded", the Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 of the Covenant deals with rights conferred upon peoples, as such. However, with regard to article 27 of the Covenant, the Committee observed that the author had made a reasonable effort to substantiate his allegations that he was the victim of a violation of his right to enjoy the same rights enjoyed by other members of the Sami community. Therefore, it decided that the issues before it, in particular the scope of article 27, should be examined with the merits of the case.

6.4 The Committee noted that both the author and the State party had already made extensive submissions with regard to the merits of the case. However, the Committee deemed it appropriate at that juncture to limit itself to the procedural requirement of deciding on the admissibility of the communication. It noted that, if the State party should wish to add to its earlier submission within six months of the transmittal to it of the decision on admissibility, the author of the communication would be given an opportunity to comment thereon. If no further submissions were received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee would proceed to adopt its final views in the light of the written information already submitted by the parties.

6.5 On 25 March 1987, the Committee therefore decided that the communication was admissible in so far as it raised issues under article 27 of the Covenant, and requested the State party, should it not intend to make a further submission in the case under article 4, paragraph 2, of the Optional Protocol, to so inform the Committee, so as to permit an early decision on the merits.

7. By a note dated 2 September 1987, the State party informed the Committee that it did not intend to make a further submission in the case. No further submission has been received from the author.

8. The Human Rights Committee has considered the merits of the communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

9.1 The main question before the Committee is whether the author of the communication is the victim of a violation of article 27 of the Covenant because, as he alleges, he is arbitrarily denied immemorial rights granted to the Sami community, in particular, the right to membership of the Sami community and the right to carry out reindeer husbandry. In deciding whether or not the author of the communication has been denied the right to "enjoy [his] own culture", as provided for in article 27 of the Covenant, and whether section 12, paragraph 2, of the 1971 Reindeer Husbandry Act, under which an appeal against a decision of a Sami community to refuse membership may only be granted if there are special reasons for allowing such membership, violates article 27 of the Covenant, the Committee bases its findings on the following considerations.

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant, which provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

9.3 The Committee observes in this context that the right to enjoy one's own culture in community with the other members of the group cannot be determined in abstraction but has to be placed in context. The Committee is thus called upon to consider statutory restrictions affecting the right of an ethnic Sami to membership of a Sami village.

9.4 With regard to the State party's argument that the conflict in the present case is not so much a conflict between the author as a Sami and the State party but rather between the author and the Sami community (see para. 4.3 above), the Committee observes that the State party's responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged. As the State party itself points out, an appeal against a decision of the Sami community to refuse membership can only be granted if there are special reasons for allowing such membership; furthermore, the State party

acknowledges that the right of the County Administrative Board to grant such an appeal should be exercised very restrictively.

9.5 According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective measures are required to ensure the future of reindeer breeding and the livelihood of those for whom reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

9.6 The Committee has none the less had grave doubts as to whether certain provisions of the Reindeer Husbandry Act, and their application to the author, are compatible with article 27 of the Covenant.

Section 11 of the Reindeer' Husbandry Act provides that:

> "A member of a Sami community is:
>
> 1. A person entitled to engage in reindeer husbandry who participates in reindeer husbandry within the pasture area of the community.
>
> 2. A person entitled to engage in reindeer husbandry who has participated in reindeer husbandry within the pasture area of the village and who has had this as his permanent occupation and has not gone over to any other main economic activity.
>
> 3. A person entitled to engage in reindeer husbandry who is the husband or child living at home of a member as qualified in subsection 1 or 2 or who is the surviving husband or minor child of a deceased member."

Section 12 of the Act provides that:

> "A Sami community may accept as a member a person entitled to engage in reindeer husbandry other than as specified in section 11, if he intends to carry on reindeer husbandry with his own reindeer within the pasture area of the community. If the applicant should be refused membership, the County Administrative Board may grant him membership, if special reasons should exist."

9.7 It can thus be seen that the Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes Of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been

disproportionate to the legitimate ends sought by the legislation. It has further noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.

9.8 In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the ratio decidendi in the Lovelace case (No. 24/1977, Lovelace v. Canada), namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party. In this context, the Committee notes that Mr. Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.

R. T.* v. *France

(Communication No. 262/1987)

Human Rights Committee

Decision of 30 March 1989 adopted at the thirty-fifth session.

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

Meeting on 30 March 1989,

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication (initial submission dated 14 October 1987; further letters dated 30 June, 10 September and 20 October 1988) is R. T., a French citizen born in 1942, at present living at Sevran, France. He claims to be a victim of a violation by the French Government of articles 2, paragraphs 1-3, 19, paragraphs 2, 26 and 27 of the International Covenant on Civil and Political Rights.

2.1 The author states that he has taught the Breton language at a number of high schools in Paris for the past 10 years. The French authorities have allegedly tried to deny him the right to teach Breton and exerted pressure on him by, for example, reducing his salary. The author claims that there is no justification for this pressure, because over a million Bretons live in the Greater Paris area and there is a growing demand for the teaching of Breton among high school students.

2.2 The author states that he has taught only Breton over the past 10 years, and that he is the only teacher of the subject in the Paris Educational District. The French authorities have never officially recognized this fact and have instead classified him as a "teaching assistant" (adjoint d'enseignement) for English (which the author claims he has never taught) and an "auxiliary teacher" (maître auxiliaire) of Armenian (which he says he does not know). With effect from the school year 1987-1988, the French authorities are said to have attempted to force him to teach English. Upon his refusing to comply, the Paris Educational District apparently threatened to consider him as having abandoned his post, which would mean that he would not be entitled to unemployment benefits. Since the Academy has in the past discontinued the teaching of other regional languages such as Basque and Catalan, the author considers himself particularly threatened.

2.3 With regard to the requirement of exhaustion of domestic remedies, the author encloses copies of his correspondence with the competent educational authorities, which illustrate his attempts at reaching an amiable solution (recours amiables).

3. By decision of 15 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the provisional rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. The author was requested to clarify whether he had submitted his case to any administrative or judicial tribunal and, if so, with what result.

4.1 In his submission under rule 91, dated 30 June 1988, the author reiterates that the facts in his case testify to the desire of the French authorities to eliminate the teaching of the Breton language and adds that since his initial submission to the Committee, this issue has been raised by many members of the French National Assembly and of the European Parliament. With respect to his duties as a teacher, he states that he is required, in principle, to lecture 18 hours per week. Starting in 1982/83 he taught a full 18 hours a week at three high schools in the Greater Paris area, where he claims his work was constantly disrupted by administrative measures and delays of several months before permission to teach Breton was granted. For the year 1987/88 the educational authorities at first opposed the resumption of his teaching duties in September 1987. Finally, in December 1987, he was again permitted to give instruction in the Breton language, but only for 10 hours a week; 8 hours, which were allegedly guaranteed under an agreement with the Rectorate of the Paris Educational District, had been "arbitrarily eliminated". According to the author, the explanations advanced by the authorities for limiting the Breton classes to 10 hours per week cannot be justified.

4.2 The author claims that the decision to reduce severely the number of Breton classes is contrary to commitments made by the Minister of Education on 15 June 1987, when he stated that "the provisions in respect both of number of hours and of teaching posts made available to district rectors [concerning regional languages spoken in France] have been maintained for the academic year 1987/88". Moreover, officials of the Department of Education have allegedly asserted that there is no need to teach Breton to pupils in Paris. The author contends that this statement is at variance with the trend observed since the mid-1980s.

4.3 With respect to the requirement of exhaustion of domestic remedies, the author explains that his démarches, up to the time of his communication to the Committee, have been of an administrative nature. Since the change of Government in France in May 1988, he has written to the new Minister of Education denouncing the discriminatory measures described above. The author states that he has not submitted his case to an administrative tribunal or to any other judicial authority; he adds that this is an eventuality that he can no longer rule out.

Other

5.1 In its submission under rule 91, dated 5 August 1988, the State party objects to the admissibility of the communication on the grounds of non-exhaustion of domestic remedies and of incompatibility with the provisions of the Covenant.

5.2 With respect to the exhaustion of domestic remedies, the State party affirms that correspondence with associations or members of Parliament cannot be considered as remedies under French law and that only two letters addressed by the author to the Rector of the Paris Educational District and to the Minister of Education on 9 September 1987 and 8 October 1988, respectively, present some of the characteristics of an administrative remedy. Several judicial remedies would also have been open to the author with respect to his assignment to teach English since 1984. The State party explains that in order to have this measure revoked, he could have submitted an ex gratia appeal to a higher administrative authority. The advantage of such an appeal is that it may be based not only on the legally relevant facts of the case but also on considerations of equity and expediency. Furthermore, if he considered that any decision violated his rights, he could have sought a contentious remedy for abuse of power, requesting the administrative judge to annul the decision. Such an application should have been filed within two months after the date on which he was notified of the measure affecting him. But since the author did not respect the deadlines for pursuing this remedy, the decision became final.

5.3 The State party emphasizes that although it is no longer open to the author to have an administrative court annul the contested decision on grounds of illegality, this situation is entirely of his own making, and that his inactivity or negligence cannot be attributed to State organs: "The right to submit a communication to the Human Rights Committee cannot be used as a substitute for the normal exercise of domestic remedies in cases where such remedies have not been pursued purely through the fault of the interested party."

5.4 The State party further submits that the author could have brought his case before an administrative tribunal on the grounds of abuse of power, invoking violations of the Covenant resulting from the Minister of Education's explicit or implicit rejection of the author's request of 8 October 1987 for "resumption of Breton classes in Paris". Furthermore, although the author can no longer ask the courts to decide on the legality of the contested measure, he could still plead the damage caused to him by not having been given tenure as a teacher of the Breton language and lodge an appeal with a view to obtaining compensation for the damage he claims to have suffered. In conclusion, the State party contends that the author "did not exercise any of the jurisdictional remedies available to him".

5.5 Additionally, the State party submits that the communication should be declared inadmissible as incompatible with the provisions of the Covenant. With respect to the alleged violation of article 19, paragraph 2, of the Covenant, it claims that the author has failed to substantiate his complaint and that, on the contrary, each of his

submissions proves that he had every opportunity to make his position known. It further affirms that "freedom of expression" within the meaning of article 19 cannot be construed as including a right to exercise a specific teaching activity.

5.6 Concerning the alleged violation of article 26, the State party recalls that under applicable law and regulations, tenure as a teacher of Breton can only be granted if two conditions are met: (a) the existence of a body into which the person to be given tenure can be integrated; and (b) the existence of a budgeted post enabling a teacher with tenure to be remunerated. Since, at the time of consideration of the author's case, these two conditions were not met, the authorities could not comply with his request. This did not entail discrimination against him, but merely the application of the existing rules to his case.

5.7 With respect to the alleged violation of article 27 of the Covenant, the State party refers to the declaration made by the Government of France upon accession to the Covenant, which stipulates: "In the light of article 2 of the Constitution of the French Republic, . . . article 27 [of the Covenant] is not applicable as far as the Republic is concerned".

5.8 Finally, the State party contends that a violation of article 2 cannot be committed directly and in isolation, and that any violation of this provision can only be a corollary to the violation of another article of the Covenant. Since the author has not shown that he has been injured in respect of one of his rights protected by the Covenant, he cannot invoke article 2.

6.1 Commenting on the State party's submission under rule 91, the author, in a letter dated 10 September 1988, maintains that his allegations are well founded. He takes issue with the State party's contention that he has not been discriminated against and reiterates that obstacles to his teaching of the Breton language are frequent and numerous. Thus, the 1987/88 school year for him began in December and not in September, and half of his classes were discontinued contrary to earlier agreements. The situation for the years 1985/86 and 1986/87 is said to have been comparable. The author considers that "the deliberate intention to forbid or considerably hamper the teaching of an ethnic minority's language, constitutes a violation of cultural rights", and that it constitutes not only language discrimination but also job discrimination. With respect to article 27, he suggests that the State party cannot simply, because of a mere declaration be excused from respecting the rights of individuals belonging to an ethnic minority.

6.2 With respect to the requirement of exhaustion of domestic remedies, the author contends that the State party's argumentation on this point must fail, because the State party's submission itself demonstrates that he could not have challenged his tenure as an assistant teacher of English within two months after being given tenure in 1984. In particular, he explains that a small body of teachers of the Breton

language, in which he had aimed to be included, was only established subsequently, in 1986. Furthermore, he affirms that an administrative court could not order the educational authorities to give him tenure in Breton and that, in order for him to exhaust domestic remedies, it would have been necessary for the State party to provide him with the judicial means. He concludes that in the circumstances it was more reasonable for him to redouble his efforts to obtain tenure in Breton and not in English by way of petitions for review, rather than to allow himself "to be kept in a vicious and empty legislative and judicial circle". He submits that because of the way its legal system operates the State party has not afforded him the means to challenge its decisions on an equal footing with other citizens and in particular with colleagues who teach modern foreign languages. He suggests that he has not enjoyed equal and effective protection by the courts simply because he wants to continue teaching his own language, language of an ethnic minority in France.

6.3 By a further letter dated 20 October 1988, the author points out that since France acceded to the Covenant, no legislation that could enable the Breton minority to use its language without discrimination has been adopted by the National Assembly, and concludes that this constitutes a violation of article 2, paragraph 2, of the Covenant. He requests the Committee's opinion on whether the fact that France acceded to an international instrument that prohibits linguistic discrimination does not require it to modify its legislation so that Bretons may use their language at all levels.

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedures decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3. With regard to the State party's submission that the communication should be declared inadmissible pursuant to article 3 of the Optional Protocol as incompatible with the provisions of the Covenant, the Committee observes that the author cannot invoke a violation of his right to freedom of expression under article 19, paragraph 2, of the Covenant, on grounds of having been denied tenure as a teacher of the Breton language. With respect to the alleged violation of article 26, the Committee finds that the author has made a reasonable effort sufficiently to substantiate his allegations, for purposes of admissibility, that he has been a victim of discrimination on grounds of language. For reasons set out below, the Committee finds it unnecessary to pronounce on the French declaration concerning article 27 of the Covenant.

7.4 The Committee observes that the author has not pursued any domestic judicial remedies. It understands his assertion that he did not want to become engaged in "a

vicious and empty legislative and judicial circle" as an indication of his belief that the pursuit of such remedies would be futile, and takes note of his contention that, in the circumstances of the case, it was more reasonable for him to seek extra-judicial redress by way of petition for review of his situation to the educational authorities. The Committee observes that article 5, paragraph 2 (b), of the Optional Protocol, by referring to "all available domestic remedies", clearly refers in the first place to judicial remedies. Even if the author's contention were accepted that an administrative tribunal could not have ordered the educational authorities to grant him tenure as a teacher of the Breton language, the fact remains that the decision challenged by the author might have been annulled. The author has not shown that he could not have resorted to the judicial procedures which the State party has plausibly submitted were available to him, or that their pursuit could be deemed to be, a priori, futile. The Committee notes that he himself mentions that he does not rule out submitting his case to an administrative tribunal. It finds that, in the circumstances disclosed by the communication, the author's doubts about the effectiveness of domestic remedies did not absolve him from exhausting them, and concludes that the requirements of article 5, paragraph 2 (b), have not been met.

1. The Human Rights Committee therefore decides:

(a) The communication is inadmissible.
(b) This decision shall be communicated to the State party and to the author.

R. D. Stalla Costa v. *Uruguay*

(Communication No. 198/1985)

Human Rights Committee

Views adopted on 9 July 1987 at the thirtieth session.

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

Meeting on 9 July 1987;

Having concluded its consideration of communication No. 198/1985 submitted to the Committee by R. D. Stalla Costa under the Optional Protocol to the International Covenant on Civil and Political Rights;

Having taken into account all written information made available to it by the author of the communication and by the State party concerned;

adopts the following:

VIEWS UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL

1. The author of the communication (initial letter dated 11 December 1985 and three subsequent letters) is Ruben Stalla Costa, a Uruguayan lawyer, residing in Montevideo, who claims to be a victim of violations of articles 2, 25 (c) and 26 of the International Covenant on Civil and Political Rights.

2.1 The author states that he has submitted job applications to various governmental agencies in order to have access to and obtain a job in the public service in his country. He has allegedly been told that only former public employees who were dismissed as a result of the application of Institutional Act No. 7 of June 1977 are currently admitted to the public service. He refers in this connection to article 25 of Law 15.737 of 22 March 1985, which provides that all public employees who were dismissed as a result of the application of Institutional Act No. 7 have the right to be reinstated in their respective posts.

2.2 The author claims that article 25 of Law 15.737 gives more rights to former public employees than to other individuals, such as the author himself, and that it is therefore discriminatory and in violation of articles 2, 25 (c) and 26 of the International Covenant on Civil and Political Rights.

2.3 The author claims to have exhausted all internal remedies. He submitted an action for amparo on grounds of violation of his constitutional rights, in particular his right not to be discriminated against, before the Supreme Court of Justice in June 1985. The Supreme Court dismissed the case.

3. By its decision of 26 March 1986, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility of the communication.

4. In its submission under rule 91, dated 24 July 1986, the State party requested that the communication be declared inadmissible, explaining, inter alia, that Act No. 15,737 of 22 March 1985, which the author claimed was discriminatory, had been passed with the unanimous support of all Uruguayan political parties as an instrument of national reconstruction:

> "This Act . . . seeks to restore the rights of those citizens who were wrongfully treated by the de facto Government. In addition to proclaiming a broad-ranging and generous amnesty, it provides under article 25, that all public officials dismissed on ideological, political or trade-union grounds or for purely arbitrary reasons shall have the right to be reinstated in their jobs, to resume their career in the public service and to receive a pension. The right of any citizen to have access, on an equal footing, to public employment cannot be deemed to be impaired by virtue of this Act, the purpose of which is to provide redress. Lastly, so far as exhaustion of remedies is concerned, there is an irrefutable presumption that a right has been violated or claimed beforehand. This is not the case here, as the complainant does not have any such right but only the legitimate expectation, common to all Uruguayan citizens, of being recruited to the public service."

5. In his comments on the State party's submission, the author argues, inter alia, that "the enactment of Act No. 15.737 did not have the support of all the political parties . . . It is also asserted that article 25 seeks to provide redress and does not infringe the right to access on an equal footing to posts in the public service. I join in this spirit of reconciliation, like all people in my country, but redress will have to take the form of money".

6.1 In further observations, dated 10 February 1987, the State party elucidates Uruguayan legislation and practice regarding access to public service:

> "Mr. Stalla regards himself as having a subjective right to demand that a given course of action be followed, namely, his admission to the public service. The Government of Uruguay reiterates that Mr. Stalla, like any other citizen of the Republic, may legitimately aspire to enter the public service, but by no means has a subjective right to do so. For a subjective right to exist, it must be founded on an objective legal norm. Accordingly,

> any subjective right presumes the existence of a possession [bien] or legal asset [valor jurídico] attached to the subject by a bond of ownership established in objective law, so that the person in question may demand that right or asset as his own. In the case in question, Mr. Stalla has no such subjective right, since the filling of public posts is the prerogative of the executive organs of the State, of State enterprises or of municipal authorities. Any inhabitant of the Republic meeting the requirements laid down in the legal norms (age requirement, physical and moral suitability, technical qualifications for the post in question) may be appointed to a public post and may have a legitimate aspiration to be vested with the status of public servant, should the competent bodies so decide."

6.2 With regard to article 8 of the Uruguayan Constitution, which provides that "all persons are equal before the law, no other distinctions being recognized among them save those of talent and virtue", the State party comments:

> "This provision of the Constitution embodies the principle of the equality of all persons before the law. The Government of Uruguay wishes to state in this respect that to uphold Mr. Stalla's petition would unquestionably violate this principle by according him preference over other university graduates who, like Mr. Stalla, have a legitimate aspiration to secure such posts, without any distinction being made between them, other than on the basis of talent and virtue."

6.3 With regard to article 55 of the Uruguayan Constitution, which provides that "the law shall regulate the impartial and equitable distribution of labour", the State party comments:

> "This provision is one of the 'framework rules', under which legal measures will be enacted developing the established right to work (art. 53) and combining the existence of this right with good administration. It will not have escaped the Committee that it is obviously impossible for the Government of Uruguay, or of any other State with a similar system, to absorb all university graduates into the public service."

6.4 The State party further emphasizes the necessity of "provision for redress made in the legislation enacted by the first elected Parliament after more than 12 years of military authoritarianism, legislation which has made it possible to restore the rights of those public and private officials who were removed from their posts as a result of ideological persecution".

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

7.2 The Human Rights Committee therefore ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being

examined under another procedure of international investigation or settlement. Regarding the requirement of prior exhaustion of domestic remedies, the Committee concluded, based on the information before it, that there were no further domestic remedies which the author could resort to in the particular circumstances of his case. The Committee noted in that connection the author's statement that his action for amparo had been dismissed by the Supreme Court (see para. 2.3 above), as well as the State party's observation to the effect that there could be no remedy in the case as there had been no breach of a right under domestic law (see para. 4 above).

7.3 With regard to the State party's submission that the communication should have been declared inadmissible on the ground that the author had no subjective right in law to be appointed to a public post, but only the legitimate aspiration to be so employed (see para. 4 and the State party's further elaboration in para. 6.1 above), the Committee observed that the author had made a reasonable effort to substantiate his claim and that he had invoked specific provisions of the Covenant in that respect. The question whether the author's claim was well-founded should, therefore, be examined on the merits.

7.4 The Committee noted that the facts of the case, as set out by the author and the State party, were already sufficiently clear to permit an examination on the merits. However, the Committee deemed it appropriate at that juncture to limit itself to the procedural requirement of deciding on the admissibility of the communication. It noted that, if the State party should wish to add to its earlier submissions within six months of the transmittal to it of the decision on admissibility, the author of the communication would be given an opportunity to comment thereon. If no further explanations or statements were received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee would then proceed to adopt its final views in the light of the written information already submitted by the parties.

7.5 On 8 April 1987 the Human Rights Committee therefore decided that the communication was admissible and requested the State party, if it did not intend to make a further submission in the case under article 4, paragraph 2, of the Optional Protocol, so to inform the Committee, to permit an early decision on the merits.

8. By note dated 26 May 1987, the State party informed the Committee that, in the light of its prior submission, it would not make a further submission in the case.

9. The Human Rights Committee has considered the merits of the present communication in the light of all information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

Other

10. The main question before the Committee is whether the author of the communication is a victim of a violation of article 25 (c) of the Covenant because, as he alleges, he has not been permitted to have access to public service on general terms of equality. Taking into account the social and political situation in Uruguay during the years of military rule, in particular the dismissal of many public servants pursuant to Institutional Act No. 7, the Committee understands the enactment of Act No. 15.737 of 22 March 1985 by the new democratic Government of Uruguay as a measure of redress. Indeed, the Committee observes that Uruguayan public officials dismissed on ideological, political or trade-union grounds were victims of violations of article 25 of the Covenant and as such are entitled to have an effective remedy under article 2, paragraph 3 (a), of the Covenant. The Act should be looked upon as such a remedy. The implementation of the Act, therefore, cannot be regarded as incompatible with the reference to "general terms of equality" in article 25 (c) of the Covenant. Neither can the implementation of the Act be regarded as an invidious distinction under article 2, paragraph 1, or as prohibited discrimination within the terms of article 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted do not sustain the author's claim that he has been denied access to public service in violation of article 25 (c) or that he is a victim of an invidious distinction, that is, of discrimination within the meaning of articles 2 and 26 of the Covenant.

CHAPTER XVI

VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Contents:

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

Introduction

On the occasion of the 10th anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereafter 'the Limburg Principles'), a group of more than 30 experts met in Maastricht from 22-26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.

The participants unanimously agreed on the following guidelines which they understand to reflect the evolution of international law since 1986. These guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international levels.

I. The Significance of Economic, Social and Cultural Rights

1. Since the Limburg Principles were adopted in 1986, the economic and social conditions have declined at alarming rates for over 1.6 billion people, while they have advanced also at a dramatic pace for more than a quarter of the world's

population.[1] The gap between rich and poor has doubled in the last three decades, with the poorest fifth of the world's population receiving 1.4 percent of the global income and the richest fifth 85 percent. The impact of these disparities on the lives of people – especially the poor – is dramatic and renders the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity.

2. Since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the State and to rely on the market to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions and in an effort to attract investments from the multinational enterprises whose wealth and power exceed that of many States. It is no longer taken for granted that the realisation of economic, social and cultural rights depends significantly on action by the State, although, as a matter of international law, the State remains ultimately responsible for guaranteeing the realization of these rights. While the challenge of addressing violations of economic, social and cultural rights is rendered more complicated by these trends, it is more urgent than ever to take these rights seriously and, therefore, to deal with the accountability of governments for failure to meet their obligations in this area.

3. There have also been significant legal developments enhancing economic, social and cultural rights since 1986, including the emerging jurisprudence of the Committee on Economic, Social and Cultural Rights and the adoption of instruments, such as the revised European Social Charter of 1996 and the Additional Protocol to the European Charter Providing for a System of Collective Complaints, and the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988. Governments have made firm commitments to address more effectively economic, social and cultural rights within the framework of seven UN World Summits conferences (1992-1996). Moreover, the potential exists for improved accountability for violations of economic, social and cultural rights through the proposed Optional Protocols to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. Significant developments within national civil society movements and regional and international NGOs in the field of economic, social and cultural rights have taken place.

4. It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, States are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.

[1] UNDP, Human Development Report 1996, para. 29.

5. As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty. Building upon the Limburg Principles, [2] the consideration below relate primarily to the International Covenant on Economic, Social and Cultural Rights (hereafter 'the Covenant'). They are equally relevant, however, to the interpretation and application of other norms of international and domestic law in the field of economic, social and cultural rights.

II. The Meaning of Violations of Economic, Social and Cultural Rights

Obligations to Respect, Protect and Fulfil

6. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States; the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to *respect* requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to *protect* requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work, The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.

[2] The relevant Limburg Principles are the following: 70. A failure by a State Party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant. 71. In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State Party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights. 72. A State Party will be in violation of the Covenant, *inter alia*, if: a) it fails to take a step which it is required to take by the Covenant; b) it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right; c) it fails to implement without delay a right which it is required by the Covenant to provide immediately; d) it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet; e) it applies a limitation to a right recognised in the Covenant other than in accordance with the Covenant; f) it deliberately retards or halts the progressive realisation of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*; g) it fails to submit reports as required under the Covenant. 73. In accordance with international law each State Party to the Covenant has the right to express the view that another State Party is not complying with its obligations under the Covenant and to bring this to the attention of that State Party. Any dispute that may thus arise shall be settled in accordance with the relevant rules of international law relating to the peaceful settlement of disputes. The full text of the Limburg Principles was published in: UN Doc. E/CN.4/1987/17, *Annex; Human Rights Quarterly,* Vol. 9, 1987, pp. 122-135; *Review of the International Commission of Jurists*, No. 37, December 1986, pp. 43-55.

Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

Obligations of Conduct and of Result

7. The obligations to respect, protect and fulfil each contain elements of obligation of conduct and obligation of result. The obligation of *conduct* requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of *result* requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo international Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.

Margin of Discretion

8. As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realisation of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realisation of the rights in question. The State cannot use the 'progressive realisation' provisions in Article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognised in the Covenant because of different social, religious and cultural backgrounds.

Minimum Core Obligations

9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights (…). Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant.[3] Such minimum core obligations apply irrespective of

[3] See Committee on Economic, Social and Cultural Rights, General Comment No. 3 (Fifth session, 1990). UN Doc. E/1991/23, Annex III, para. 10

the availability of resources of the country concerned or any other factors and difficulties.

Availability of Resources

10. In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realisation of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.

State Policies

11. A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

Gender Discrimination

12. Discrimination against women in relation to the rights recognized in the Covenant, is understood in light of the standard of equality for women under the Convention on the Elimination of all Forms of Discrimination Against Women. That standard requires the elimination of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages.

Inability to Comply

13. In determining which actions or omissions amount to a violation of an economic, social and cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligations for reasons beyond its control has the burden of proving that this is the case. A temporary closure of an educational institution due to an earthquake, for instance, would be a circumstance beyond the control of the State, while the elimination of a social security scheme without an adequate replacement programme could be an example of unwillingness by the State to fulfil its obligations.

Violations through Acts of Commission

14. Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

(a) the formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;

(b) the active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;

(c) the active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;

(d) the adoption of legislation or policies which are manifestly incompatible with pre-exisiting legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights for the most vulnerable groups;

(e) the adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;

(f) the calculated obstruction of, or halt to, the progressive realisation of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure;*

(g) the reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

Violations through Acts of Omission

15. Violations of economic, social and cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:

(a) the failure to take appropriate steps as required under the Covenant;

(b) the failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;

(c) the failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;

(d) the failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;

(e) the failure to utilise the maximum of available resources towards the full realisation of the Covenant;

(f) the failure to monitor the realisation of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;

(g) the failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;

(h) the failure to implement without delay a right which it is required by the Covenant to provide immediately;
(i) the failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
(j) the failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organisations or multinational corporations.

III. Responsibility for Violations

State Responsibility
16. The violations referred to in section II are in principle imputable to the State within whose jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims.

Alien Domination or Occupation
17. Under circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question. This is true under conditions of colonialism, other forms of alien domination and military occupation. The dominating or occupying power bears responsibility for violations of economic, social and cultural rights. There are also circumstances in which States acting in concert violate economic, social and cultural rights.

Acts by Non-State Entities
18. The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-State actors.

Acts by International Organisations
19. The obligations of States to protect economic, social and cultural rights extend also to their participation in international organisations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organisations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organisations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organisations, individually or through the governing bodies, as well as the secretariat

and non-governmental organisations should encourage and generalise the trend of several such organisations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.

IV. Victims of Violations

Individuals and Groups
20. As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Certain groups suffer disproportionate harm in this respect such as lower-income groups, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless.

Criminal Sanctions
21. Victims of violations of economic, social and cultural rights should not face criminal sanctions purely because of their status as victims, for example, through laws criminalising persons for being homeless. Nor should anyone be penalised for claiming their economic, social and cultural rights.

V. Remedies and Other Responses to Violations

Access to Remedies
22. Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.

Adequate Reparation
23. All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

No Official Sanctioning of Violations
24. National judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned. At a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as an interpretative aide in formulating any decisions relating to violations of economic, social and cultural rights.

National Institutions
25. Promotional and monitoring bodies such as national ombudsman institutions and human rights commissions, should address violations of economic, social and cultural rights as vigorously as they address violations of civil and political rights.

Domestic application of international instruments
26. The direct incorporation or application of international instruments recognising economic, social and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.

Impunity
27. States should develop effective measures to preclude the possibility of impunity of any violation of economic, social and cultural rights and to ensure that no person who may be responsible for violations of such rights has immunity from liability for their actions.

Role of the Legal Professions
28. In order to achieve effective judicial and other remedies for victims of violations of economic, social and cultural rights, lawyers, judges, adjudicators, bar associations and the legal community generally should pay far greater attention to these violations in the exercise of their professions, as recommended by the International Commission of Jurists in the Bangalore Declaration and Plan of Action of 1995.[4]

Special Rapporteurs
29. In order to further strengthen international mechanisms with respect to preventing, early warning, monitoring and redressing violations of economic, social and cultural rights, the UN Commission on Human Rights should appoint thematic Special Rapporteurs in this field.

New Standards
30. In order to further clarify the contents of States obligations to respect, protect and fulfil economic, social and cultural rights, States and appropriate international bodies should actively pursue the adoption of new standards on specific economic, social and cultural rights, in particular the right to work, to food, to housing and to health.

Optional Protocols
31. The optional protocol providing for individual and group complaints in relation to the rights recognised in the Covenant should be adopted and ratified without delay. The proposed optional protocol to the Convention on the Elimination of All

[4] Reproduced : *ICJ Review*, No. 55, December 1995, pp. 219-227

Forms of Discrimination Against Women should ensure that equal attention is paid to violations of economic, social and cultural rights. In addition, consideration should be given to the drafting of an optional complaints procedure under the Convention on the Rights of the Child.

Documentation and Monitoring

12. Documenting and monitoring violations of economic, social and cultural rights should be carried out by all relevant actors, including NGOs, national governments and international organisations. It is indispensable that the relevant international organisations provide the support necessary for the implementation of international instruments in this field. The mandate of the United Nations High Commissioner for Human Rights includes the promotion of economic, social and cultural rights and it is essential that effective steps be taken urgently and that adequate staff and financial resources be devoted to this objective. Specialised agencies and other international organisations working in the economic and social spheres should also place appropriate emphasis upon economic, social and cultural rights as rights and, where they do not already do so, should contribute to efforts to respond to violations of these rights.

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