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JUSTICIABILITY OF ECONOMIC SOCIAL AND CULTURAL RIGHTS RELEVANT CASE LAW

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TABLE OF CONTENTS

PART ONE: EXECUTIVE SUMMARY.....	2
PART TWO: INTRODUCTION.....	9
PART THREE: EXAMPLES OF JUSTICIABILITY	13
PART FOUR: INDIA	16
PART FIVE: PHILIPPINES.....	39
PART SIX: SOUTH AFRICA	42
PART SEVEN: PAKISTAN	60
PART EIGHT: BANGLADESH.....	62
PART NINE: OTHER CASES: ESC RIGHTS AS CENTRAL TO THE CONSTITUTION	65
PART TEN: INTERNATIONAL JURISPRUDENCE	68
PART ELEVEN: CONCLUSION	79

PART ONE: EXECUTIVE SUMMARY

1. While it is argued in theory that Economic Social Cultural Rights (ESCRs) are not justiciable, there is sufficient case law to demonstrate otherwise and to illustrate the potential for future legal action. A difficult task it may be to argue before a judge that public expenditure for housing is insufficient and is a violation of international law and then demand that parliament increase public expenditure. But, as numerous cases have shown, there are aspects of governmental policy and expenditure that can be adjudicated.
2. As elaborated upon by the Centre on Housing Rights and Evictions (COHRE) in various reports, social programmes for food and nutrition have been reactivated in India and Argentina, the implementation of medicine programmes has been accelerated, evictions have been prevented in the Dominican Republic and child labour laws have been amended in Portugal. At the same time, an equal number of cases have had no impact, while some have acted as catalysts for subsequent cases. For example, in Argentina, five years after the *Viceconte case*, a vaccine for haemorrhagic fever has not been produced despite close judicial supervisions. Yet, the decision has given way to a series of successful cases for tuberculosis and HIV/AIDS medicines.
3. The case studies explored in this paper reveal an expanding ESCR jurisprudence wherein courts have played a role in supervising positive obligations, particularly where government action has been woefully inadequate, when the state fails to implement existing programmes, or when legislation, policies and programmes have been discriminatory. It is interesting to note that in most of the case studies, a common thread is one that litigation is not an end in itself. Rather it is a tool for mobilisation. As in case of South Africa, client communities fill the court gallery, making their point with their presence and their numbers. Litigation has thus emerged a pivot around which communities can organise.
4. Establishing ESCRs remains a major struggle in many places where these rights are not enshrined in the constitution or laws or where international law is not incorporated within the domestic law. The principal strategy in such circumstances has often been to ask courts to acknowledge the socio-economic dimensions of civil and political rights since these are more likely to be actionable.
5. According to Dr Murlidhar of the Supreme Court of India, this expanding ESCR jurisprudence has manifested itself in two ways¹. First, civil and political rights have been shown to possess socio-economic dimensions. These more traditional rights have been employed in a fashion to extend the right to non-discrimination and equality into the socio-economic arena (e.g. Prevention of forced evictions, exclusion of minorities from social programs or education)². Canada is a case in point. The Supreme Court, in *Eldridge v British Columbia*³, after considering cost and budgetary implications, ruled that the right to equality requires that governments provide resources to ensure that deaf people have access to interpreters in the provision of health care.
6. In other cases, ESCRs themselves have been directly derived from civil and political rights (e.g. the right to life implies the right to water and food). This form of jurisprudence is most evident in North America, South Asia (particularly India) and in the decisions of international human rights bodies.

¹ Dr. Muralidhar, Advocate, Supreme Court of India.

² Ibid.

³ *Eldridge v British Columbia (Attorney General)*, (1997) 3 SCR 624, 1997 CanLII 327 (SCC)

7. In India, the development of the jurisprudence of ESCRs is inextricably linked to the development of a new form of legal action, variously termed as public interest litigation (PIL) and social action litigation together with the pioneering role played by the Supreme Court of India. This form is characterised by a non-adversarial approach, the participation of *amicus curiae*, the appointment of expert and monitoring committees by the court, and the issue of detailed interim orders by the Supreme Court and the High Courts.
8. ESCRs in India have been defined through judicial interpretation of the Right to Life guaranteed under Article 21, rather than any direct guarantees in the Indian Constitution. The expanded notion of the right to life has enabled the courts, in its PIL jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of ESCRs. Subsequently, rights to work, health, shelter, education, water and food are regularly litigated. Expressions such as "basic necessities of life" "bare minimum expression of the human self" and "human dignity" found in several of the judgements have explored the import of "life" in Article 21. In reading several of the related rights of dignity, living conditions, health into the ambit of the right to life, the court has overcome the difficulty of the justiciability of these as economic and social rights, which in their manifestation as Directive Principles of State Policy (DPSP), are considered non enforceable. *Olga Tellis v. Bombay Municipal Corporation (BMC)*⁴ is a case in point. The judgement handed down in this case expanded the right to life guaranteed under Article 21 of the Constitution to include within its scope, the right to livelihood, which in this context translated into the right to be allowed to remain on the pavements. The Supreme Court held that "an equally important facet of the right to life is the right to livelihood because no person can live without 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."
9. Although the final orders in *Olga Tellis* found that the BMC Act of eviction of pavement dwellers was valid (under Article 14 and 19 of the Constitution) and that pavement dwellers should be evicted, the Supreme Court also laid down that this could be done only after arranging alternative accommodation for them. In a sense, therefore, by imposing this strong condition of providing alternate accommodation before eviction, the Supreme Court was in fact upholding the right of the pavement dwellers to shelter.
10. In its interpretation of Article 21, the Supreme Court has also facilitated the emergence of an environmental jurisprudence in India, while also strengthening human rights jurisprudence. In several decisions, the right to a clean environment, drinking water, a pollution free atmosphere etc. have been given the status of inalienable human rights and, therefore, fundamental rights of Indian citizens⁵.
11. The Court has also hinted at recognising the environment as intrinsically worthy of protection. This new thinking is reflected in the Court's reasoning in *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh*⁶, one of the first environmental complaints that were addressed to it. The Court issued interim orders halting the operation of limestone quarries in the Dehradun valley in the state of Uttar Pradesh, on the ground that mining had a deleterious impact on the surrounding environment. Although the Court did not specifically mention Article 21 in this case, it based its five comprehensive interim orders on the judicial understanding that environmental rights were to be implied into the scope of Article 21. This was later emphasised upon in *L.K. Koolwal v State of Rajasthan*⁷ where the Rajasthan High Court recognised the right to

⁴ 1985 3 SCC 545

⁵ Developments in India relating to environmental justice- Justice BN Kirpal. Accessed online at : www.unep.org/dpdl/symposium/Documents/Country_papers/INDIA%20.doc

⁶ AIR 1985 SC 652

⁷ AIR 1988 Raj 2

health and clean environment. The Court held that the Municipality had a statutory duty to remove the dirt, filth etc from the city within a period of six months and clear the city of Jaipur from the date of this judgement. A committee was constituted to inspect the implementation of the judgement.

12. A noteworthy contribution in the *L.K. Koolwal* judgement has been the Court's elaboration of Article 19 (1)(a)-guaranteeing freedom of speech-to include the "right to know". In this case, the Court extended the right to know to entitle the petitioner to full information about the municipality's sanitation programme, or the lack thereof.
13. The proactive role played by Indian courts is further exemplified in *Municipal Council Ratlam v Vardbichand and ors*⁸case. This case concerned a municipality that had failed to construct drains; filth and dirt had accumulated, and people could not remain in the locality due to the noxious nuisance. A magistrate passed an order, saying, "Construct a drain", but the municipality responded, "we have no money". It was appealed to the Supreme Court. The Court held, among other things, that the "right to life" of the person is affected; environmental pollution affects individual right to breathe fresh air, sanitary conditions are essential for the proper enjoyment of this right. The Supreme Court through Justice Krishna Iyer, upheld the order of the High Court and directed the Municipality to take immediate action within its statutory powers to construct sufficient number of public latrines, provide water supply and scavenging services, to construct drains, cesspools and to provide basic amenities to the public⁹. Justice Iyer observed "*decency and dignity are non-negotiable facets of human rights and are a first charge on the local self governing bodies*".
14. More recently, in the case of right to food, the Supreme Court has been able to evolve binding guidelines to ensure the availability of the bare minimum rations through the public distribution system for those below the poverty line.
15. In the US, relying on civil and political rights and the right to non-discrimination, advocates have challenged prison conditions, the denial of social security, the criminalisation of homelessness and segregation in education and housing¹⁰. As noted by Mario Foscarinis, Director of The National Law Centre on Homelessness and Poverty, "the trend has been to pass laws which make it a crime to sleep in public or to sit down on public sidewalks, things that people who are homeless end up having to do because they have no place else to be". In a landmark case, *Pottinger v City of Miami*¹¹, six thousand homeless people in Miami launched a class action alleging that police arrests and destruction of their property interfered with "life sustaining" activities such as sleeping and eating. The evidence revealed a systematic police practice of arresting homeless individuals, destroying their personal property and even eliminating their food resources to prevent homeless individuals from congregating. Justice Atkins in his judgement, found the police actions unconstitutional because they constituted cruel and unusual punishment, violated due process rights and were violations of privacy and the right to travel under the equal protection clause. A settlement was eventually reached with the City of Miami whereby police cannot arrest a homeless individual if no alternative accommodation is available.
16. Secondly, a more noticeable ESCR jurisprudence has emerged as central to constitutions that emerged in the wave of democratisation in the 1980s and 90s, particularly Latin America and South Africa. Many of these constitutions grant ESCRs a fully justiciable status. A number of

⁸ AIR 1980 SC 1622

⁹ Law Commission of India, 168th Report on Proposal to Construct Environmental Courts, September 2003. Available online at: www.lawcommissionofindia.nic.in/186threport

¹⁰ *Litigating Economic, Social and Cultural Rights: Achievements, challenges and strategies*, Centre on Housing Rights and Evictions, 2003

¹¹ *Pottinger v City of Miami*, 810 F. Supp.1551 (1992), 16 November 1992

courts have issued compelling and authoritative pronouncements. The constitutional case law of South Africa and Argentina is most notable in this regard.

17. Notwithstanding the fact that South Africa has yet to ratify the International Covenant on Economic and Social Rights (ICESCRs) its constitution includes key ESCRs including the right of access to adequate housing, to health care, food and water and to social security. Also protected is a range of children's rights to basic nutrition, shelter, basic health care services and social services. Except for the latter, the general socio economic right provisions are subject to internal limitations. They require the state to only take reasonable legislative and other measures within its available resources to progressively realise them.
18. The Constitutional Court of South Africa has made numerous decisions on the constitutionality of laws; conduct and policy including those pertaining to the realisation of constitutionally mandated basic services. The proactive role of the court is exemplified in the *Grootboom* case wherein the Court held that state is obliged by the Constitution to give effect to socio-economic rights provision in the Bill of Rights and that, the court is mandated by the Constitution, in appropriate circumstances, to enforce the state's constitutional obligation¹².
19. Although the *Grootboom* case centred on the right of access to housing, it emphasised that socio economic rights are interrelated and interconnected. The *Grootboom* judgement further elaborated that in order for a government policy to pass the test of reasonableness, a policy aimed at providing access to a right cannot be aimed at long-term statistical progress only but it should benefit the targeted people (poor households). Later judgements such as the cases of *Manquele v Durban Transitional Metropolitan Council (DTMC)* and *Residents of Bon Vista Mansion v Southern Metropolitan Local Council* have dealt with the negative obligation of the State to achieve the progressive realisation of a right. Both of these cases deal with the disconnection of water supply to households.
20. Numerous strategies have been employed by high-profile health rights litigation that have led to significant successes such as the halting of corporate challenges to health laws, a drop in drug prices and a court ruling that the Government must adopt a reasonable programme for Nevirapine (*TAC* case, which has been at the forefront of these campaigns.) *In the Treatment Action Case (TAC)*, the South African Constitutional Court held that the Government had an obligation to provide anti retroviral drugs to HIV positive pregnant women. It held that while it is impossible immediately to give everyone access even to a "core" service, the State must act reasonably to provide access to the constitutional socio-economic rights on a progressive basis.
21. The Court held,

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in Section 1. As the Bill of Rights indicates, their function in respect of socio economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable¹³.
22. Within the framework of reasonableness in decisions regarding resource allocation, however, and allowing for progressive realisation, even in South Africa's dire predicament, the Constitutional Court went on to grant a broad and immediate remedy in this case. Rather than leaving it to the government to design an appropriate response to a declaration of unconstitutionality, as had been done previously in the *Grootboom* case, the Court ordered that the Government act without delay to provide nevirapine in public hospitals and clinics when this is medically indicated and to

¹² 2000 (11) BCLR 1169 (CC) at para 94.

¹³ 2002 (10) BCLR 1033 (CC) at para 36.

take reasonable measures to provide testing and counselling facilities at hospitals and clinics. The Court allowed for the evolution of policy in the future if better methods become available to it for the prevention of mother-to-child transmission of HIV. This decision is momentous in that it invalidates the idea that the doctrine of progressive realisation of economic, social and cultural rights is in any way incompatible with courts playing a critical role in enforcing these rights and granting immediate, effective and systematic remedies to ESCR violations.

23. Concomitant to the TAC case there are numerous cases in Latin America (Argentina, Venezuela, Chile and Peru) where courts, faced with government inaction in the supply of HIV/AIDS drugs, have made far-reaching orders with significant cost implications. However, in such cases, the gravity of the epidemic appears to have been the deciding factor in the judgement.
24. The Constitution of *Argentina* is merit worthy in that a 1994 Amendment to the Constitution facilitated the protection on ESC Rights and created new means of legal protection through a collective amparo action, which allows individuals to file for the protection of a group. These changes are an indication that judicial interpretations of international treaties handed down by relevant bodies would be binding law in Argentina. Therefore, while the Argentine Constitution makes no explicit recognition of social rights, it does have to take into account any ESCR decision taken by the Inter-American Court of Human Rights or the Inter-American Commission on Human Rights. A landmark case in Argentina is the *Viceconte* case, which successfully compelled the government to provide a vaccine to prevent an endemic fever. This case has led to a series of rulings that have protected and invigorated programmes for the supply of medicines (for HIV/AIDS, Tuberculosis etc.)
25. Existing jurisprudence at the national level has been complemented at the regional and international level. Several of these decisions demonstrate how States are held, under international law, accountable for human rights violations that directly result from actions by corporations but entail also action (licensing or privatisation) or inaction (breach of positive obligations) by public authorities¹⁴. *Lopez Ostra v Spain* is a case in point.
26. Another significant case is that of *Costello-Roberts v. United Kingdom*¹⁵, where the European Court of Human Rights held that the State was, under the European Convention, responsible for securing that disciplinary punishments used in private schools did not result in violations of human rights. Although the Court came to the conclusion that there was no violation of the European Convention in the concrete case, the judgement was very clear on the issues of State responsibility and the interdependence between various human rights (right to education, prohibition against inhuman treatment, right to respect for private life) as the legal basis for such responsibility.
27. The European Court on Human Rights has condemned forced evictions, discrimination in educational languages and the destruction of property of slum dwellers. More recently, it has extended the right to life and protection from cruel and degrading treatment to cover protection from forced eviction and environmental hazards and acknowledged that the right to family life may entitle people with severe disabilities or diseases a right to a home.
28. The case law of the European Court of Human Rights is particularly helpful in demonstrating how the right to a fair trial affords protection not only to civil and political rights but to economic and social rights as well. For instance, in the case of *Airey v Ireland* the Court inferred from the general fair trial provision in the ECHR Article 6 a right to free legal aid in a case where

¹⁴ *State Responsibility, Good Governance and Indivisible Human Rights*- Martin Scheinin in Human Rights and Good Governance, Building Bridges, The Raoul Wallenberg Institute Human Rights Library, Edited by Hans-Otto Sano and Gudmundur Alfredsson with the collaboration of Robin Clapp, Martinus Nijhoff Publishers 2002

¹⁵ *Costello-Roberts v. United Kingdom*, Judgement on 25 March 1993, Series A 247 C

a woman under threats of family violence sought for separation in a country that did not recognise divorce. As observed by Martin Scheinin, in more recent cases on various types of social security or social assistance benefits the European Court has gradually expanded the requirement of full fair trial rights to many dimensions of economic and social rights, thus contributing to a growing interdependence between different categories of human rights and the recognition of judicial guarantees as constituent element of the rule of law.

29. *SERAC and CESR v Nigeria*, (Case No. 155/96) is of particular significance in that the complainants did not petition local or national courts, but went straight to the African Commission on Human Rights. Before bringing a complaint to the Commission, a petitioner must exhaust domestic remedies. This rule was waived in the *SERAC* case because the African Commission on Human Rights recognised that the then-military government of Nigeria had ousted the jurisdiction of the courts from reviewing government acts thereby violating the National Constitution and the African Charter.
30. The Commission ruled that the Ogoni had suffered violations of their right to health and the right to a clean environment as a result of the government's failure to monitor oil activities. In addition, the government's failure to involve local communities in decisions violated the States duty to protect its citizens from exploitation and despoliation of their wealth and natural resources. The Commission also recognised that the failure to provide material benefits for the Ogoni people was also a violation.
31. In the final analysis, there is no denying that litigation affirms the legal nature of rights and provides, in practice, the right to an effective remedy as recognised in the UDHR and in the jurisprudence of the Committee on Economic, Social and Cultural Rights. As demonstrated in this paper there are a variety of issues that can be litigated. As illustrated, jurisprudence in several countries has encouraged the development of a model of "reasonableness" for adjudicating the positive duties imposed by socio-economic rights. Of particular importance, as illustrated in the South African jurisprudence, is the test of measures taken by the State to make available short term provisions for vulnerable groups that live in desperate and squalid conditions. This model has allowed the Court to recognise the role of other branches of the government- the legislature and the executive, while not abdicating its responsibilities to enforce the positive duties imposed by socio economic rights. Having said that, there is a need for the re-conceptualisation of the socio-economic rights debate so that its various arguments, in particular those relating to institutional powers and competence, fall within the ambit of the framework of the duties to respect, protect and fulfil. This however, is not without certain complexities.
32. The complexity involved in giving substance to ESCR is demonstrated by what the CESCR has held to constitute the right to housing. It says that the right to housing includes the following rules/presumptions and entitlements: (a) measures which give security of tenure in its variety of forms to those lacking protection (b) policies that ensure that the percentage of housing related costs is, in general, commensurate with income levels (c) policies ensuring availability of building materials (d) adoption of measures against forced evictions (i.e. "the permanent or temporary removal against their own will of individuals, families and/or communities from the homes and/or land which they occupy without the provision of , and access to, appropriate forms of legal or other protection (e) provision of sustainable access to natural and common resources, safe drinking water, energy, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services¹⁶.
33. There is thus need to adopt measures that elaborate the nature of responsibilities of the state in connection with ESCRs. First, it is essential to inculcate a culture where the principle of equality is concomitant with the progressive realisation of rights. Second, it is of crucial significance that

¹⁶ UN Committee on Economic Social and Cultural Rights, General Comment 4, 1991, Para 8.

the principle of legitimate expectation in the ESC rights context be used especially when a government promises something, it should be held to account. Third, the socio economic entitlements should be developed in a way that it translates into direct benefits thereby making ECRs enforceable.

PART TWO: INTRODUCTION

34. A “traditional” or “generational” approach to human rights protection renders a view where civil and political rights (CPRs) are disconnected from economic social cultural rights (ESCRs) the latter being non-justiciable¹⁷. Of the several arguments advanced in favour of the non enforceability of ESCRs, the most frequent is an allusion to the text of Article 2 of the International Covenant on Economic Social and Cultural Rights (ICESCR) where it has been argued that ICESCR in general is framed in means and ends and the provisions are expressed as State obligations and not individual rights.
35. Article 2 of the ICESCR provides, “(e) ach State Party to the present Covenant undertakes to take steps...to the maximum of its available resources...to achieve progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”
36. The Committee on ESCRs has repeatedly rejected the suggestion that Article 2 undermines enforceability. It has taken several important steps in insisting that a number of the rights are justiciable, despite the popular misconception that they are not and this is evidenced in various General Comments. General Comment 9 on the domestic applicability of the norms is of particular significance in that it is perhaps the strongest statement from any UN body about the need for states to transform their international obligations into effective remedies¹⁸.
37. The ICCPR affirms the “right to life¹⁹”, which has conventionally been interpreted to mean that no person shall be deprived of his or her life in a civil and political sense. According to the Human Rights Committee (HRC) in adopting a General Comment on this issue, this should now be interpreted expansively to include measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics. “[HRC] has noted that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures²⁰.” 17
38. General Comment No. 3 (1990) notably states that “(a) mong 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 justiciable²¹.” 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.
39. The Committee further states in Para 4(General Comment 3) that , “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 State parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be most “appropriate” under the circumstances”.

¹⁷ A Fair deal: Justiciability of ESC rights – Human Rights Features, 58th Session of the CHR, April 2002. Available online at: <http://www.hrdc.net/sahrdc/hrfchr58/Issue3.htm#A%20fair%20deal>

¹⁸ Human Rights Features, op cit.

¹⁹ ICCPR Article 6(1): “Every human being has the inherent right to life. This right shall be protected by law. NO one shall be arbitrarily deprived of his life”.

²⁰ Human Rights Committee, General Comment No 6 adopted at the Sixteenth Session (1982) on Article 6 of the ICCPR.

²¹ *The nature of State parties Obligations* (Article 2, paragraph 1), CESCR General Comment 3. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument)

40. In its General Comment 3, Para 10 the ESCR Committee states 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. 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 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.
41. On the question of justiciability, General Comment No. 9 also notes that in relation to CPRs, it is "generally taken for granted that judicial remedies are essential... Regrettably the contrary assumption is too often made in relation to economic, social and cultural rights." The Committee concludes "[t]his discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions" (paragraph 10).
42. In interpreting Article 2, the Limburg Principles²² of the Implementation of Economic, Social and Cultural Rights note that "[a]lthough the full realisation of the rights recognised in the Covenant is to be attached progressively; the application of some rights can be made justiciable immediately, while other rights can become justiciable over time" i.e. progressive realisation of rights (General Comment 3). The requirement of "progressive realisation" reflects the fact that full realisation of all ESC rights will generally not be able to be achieved in a short period of time.
43. It is important to note that the "progressive obligation" component of the Covenant does not mean that only once a state reaches a certain level of economic development must the rights established under the Covenant be realised. The duty in question obliges all State parties, notwithstanding their level of national wealth, to move towards the realisation of ESC rights. Of these, two are of particular importance: the "undertaking to guarantee" that relevant rights "will be exercised without discrimination" and the undertaking in Article 2(1) "to take steps". The progressive realisation concept thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.
44. As the Committee points out, numerous provision of the ICESCR are capable of "immediate implementation". These include: articles 3 (equal rights of men and women), 7(a) (i) (fair wages and equal wages for men and women), 8 (right to form trade unions), 10 (3) (special measures for children), 13 (2) (a) (free and compulsory primary education), 13 (4) (freedom to establish educational institutions) and 15 (3) (respect for scientific freedom).
45. Any suggestion that the provisions indicated are inherently non self-executing i.e. capable of being applied by courts without further elaboration, would seem to be difficult to sustain. The Committee has noted that while the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimension²³.
46. One of the concerns in the realisation of ESCRs is the extent to which the judiciary can discharge its constitutional mandate without unduly interfering with the functions of the other

²² The Limburg Principles have largely been accepted by human rights scholars. They have been issued as an official UN Document and have found a mention in several UN Resolutions.

²³ *The Domestic Application of the Covenant* (paragraph 10), CESCR General Comment 9, December 1998

branches of the government. It is often argued that adjudicating economic, social and cultural rights is not an appropriate or legitimate role for courts since it involves making policy decisions that are properly the function of the other branches of the government. This argument fails to acknowledge that courts routinely adjudicate on matters of public policy anyway²⁴. This is no way implies that courts will or should take over policy making from governments. Rather, in adjudicating ESCRs just as CPRs, courts can influence or shape policy formulated by the executive branch of the government and impact on the realisation of economic and social rights. As held by the South African Constitutional Court in the TAC case,

The primary duty of courts is to the Constitution and the law, “which they must apply impartially and without fear, favour or prejudice.” The Constitution requires the State “to respect, protect, promote, and fulfil the rights in the Bill of Rights”. Where the State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution itself. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself²⁵.

47. The Committee on Economic, Social and Cultural Rights has dealt with this objection in its General Comment No. 9, paragraph 10, in which it stated, “[i]t is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters, which have important resource implications. The adoption of a rigid classification of ESCRs, which puts them, by definition, beyond the reach of courts, would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.
48. As emphasised by the Vienna Declaration and Program of Action-adopted by the Vienna World Conference on Human Rights in 1993- and elaborated upon by the South African Constitutional Court, “CPRs and ESCRs are interdependent, indivisible and interrelated. The indivisibility of CPRs and ESCRs is quite simply a matter of common sense; human dignity, freedom and equality “are denied to those who have no food, clothing or shelter” (Grootboom, paragraph 23).
49. This indivisibility is further exemplified by the Human Rights Committee in its various General Comments where it has rejected any suggestion of a sharp divide between CPRs and ESCRs. In paragraph 5 of General Comment 6 the Human Rights Committee states²⁶: “. . . *the Committee has noted that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.*”
50. The role and responsibility of the State has also been elaborated upon by the Maastricht Guidelines, several of which deal with remedies and other responses to violations ESCRs. The Maastricht Guidelines emphasise that the overall responsibility for human rights violations rests upon the State and the State accordingly is obliged to provide effective and necessary remedies. The Guidelines also draw attention to the fact that economic, social and cultural rights are justiciable, and that victims should be able to seek and have remedies at the municipal, regional and international levels (Guideline 22). Consequently all victims of violations are entitled to

²⁴ Human Rights Features, op cit.

²⁵ 2002 (10) BCLR 1033 (CC) at para 99

²⁶ *Right to life*, CESCR General Comment 6, 1982. Available at :

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument)

restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition (Guideline 23). Furthermore, national judicial and other organs should ensure that any pronouncements they make do not result in the official sanctioning of a violation of an international obligation and National Human Rights Institutions should be aware that economic, social and cultural rights are not inferior to civil and political rights (Guideline 25)²⁷.

51. It is still too early to assess whether the Maastricht Guidelines will receive similar support and acceptance as the Limburg Principles. Although the principle of indivisibility has been repeatedly invoked, the reality is that ESC rights have yet to be recognised as legal rights at the same level as CPRs.
52. It is an urgent necessity to consider how the provisions of economic, social and cultural rights can be translated into concrete action at the national level. The question to be addressed is therefore whether the concept of good governance can function as a supporting mechanism in efforts to increase legal protection of individuals ESCRs.

²⁷ See also CESCR General Comment No. 10 on the Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights, UN Doc. E/C.12/1998/25

PART THREE: EXAMPLES OF JUSTICIABILITY

53. While it is argued in theory that ESCRs are not justiciable, there is sufficient case law to demonstrate otherwise and to illustrate the potential for future legal action. As elaborated upon by the COHRE in various reports social programmes for food and nutrition have been reactivated in India and Argentina, the implementation of medicine programmes has been accelerated, evictions have been prevented in the Dominican Republic and compensated in Serbia-Montenegro, child labour laws have been amended in Portugal. At the same time, an equal number of cases have had no impact, while some have acted as catalysts for subsequent cases. For example, in Argentina, five years after the Viceconte case, a vaccine for haemorrhagic fever has not been produced despite close judicial supervisions. Yet, the decision has given way to a series of successful cases for tuberculosis and HIV/AIDS medicines.
54. The case studies explored in this paper reveal an expanding ESCR jurisprudence wherein courts have played a role in supervising positive obligations, particularly when government action is woefully inadequate, when the state fails to implement existing programmes, or when legislation, policies and programmes have been discriminatory. According to Dr Murlidhar of the Supreme Court of India, this expanding ESCR jurisprudence has manifested itself in two ways²⁸. First, civil and political rights have been shown to possess socio-economic dimensions. These more traditional rights have been employed in a fashion to extend the right to non-discrimination and equality into the socio-economic arena (e.g. Prevention of forced evictions, exclusion of minorities from social programs or education)²⁹. Canada is a case in point. The Supreme Court, in *Eldridge v British Columbia*³⁰, after considering cost and budgetary implications, ruled that the right to equality requires that governments provide resources to ensure that deaf people have access to interpreters in the provision of health care.

CANADA: ELDRIDGE V BRITISH COLUMBIA

Thematic focus of the case

55. Constitutional law- charter of rights, equality and non-discrimination, physical disability, publicly funded Medicare- Medicare not providing for sign language interpreters, obligation to provide.

Facts of the case

56. Medical care in British Columbia is delivered through two primary mechanisms. Hospital services are funded under the *Hospital Insurance Act* by the government which reimburses them for the medically required services provided to the public. Funding for medically required services delivered by doctors and other health care practitioners is provided by the province's Medical Services Plan (established and regulated by the *Medical and Health Care Services Act* (now known as the *Medicare Protection Act*). Neither programme pays for medical interpreting services for the deaf.
57. Each of the appellants was born deaf and their preferred means of communication is sign language. The contention was that the absence of interpreters impairs their ability to communicate with their doctors and other health care providers, and thus increases the risk of misdiagnosis and ineffective treatment. The appellants sought a declaration in the Supreme Court of British Columbia that the failure to provide sign language interpreters as an insured benefit

²⁸ Dr. Muralidhar, Advocate, Supreme Court of India.

²⁹ Ibid.

³⁰ *Eldridge v British Columbia (Attorney General)*, (1997) 3 SCR 624, 1997 CanLII 327 (SCC)

under the Medical Services Plan is unconstitutional and violates their right to the equal protection and equal benefit of the law without discrimination under s. 15(1) of the Canadian Charter of Rights and Freedoms.

58. The constitutional questions before the Supreme Court queried (*Para 4 of the judgement*):
- whether the definition of "benefits" in s. 1 of the *Medicare Protection Act* infringed s. 15(1) of the *Charter* by failing to include medical interpreter services for the deaf,
 - If so, whether the impugned provision was saved under s. 1 of the *Charter*,
 - whether ss. 3, 5 and 9 of the *Hospital Insurance Act* and the Regulations infringed s. 15(1) by failing to require that hospitals provide medical interpreter services for the deaf, and
 - If the answer to 3 is yes, whether the impugned provisions were saved under s. 1. Also at issue were whether, and in what manner, the *Charter* applies to the decision not to provide sign language interpreters for the deaf as part of the publicly funded scheme for the provision of medical care and, if a *Charter* violation were found, what the appropriate remedy would be.
59. The respondents argued, *inter alia*, that s 15(1) should not apply to the hospitals as they do not constitute "government" within the meaning of S 32 of the Charter, which provides that: "This Charter applies... (b) To the legislature and government of each province in respect of all matters within the authority of legislature of each province". They also contended that the provision of such a sign language programme for the deaf would create a precedent for the funding of similar language services for non-official language speakers.

Judgement

60. The SC held that there is nothing in the Medical and Health Care Services Act and the Hospital Insurance Act that prohibits the Medical Services Commission and the hospitals, from determining that sign language interpretation should be provided as a service. It further held that while hospitals are private entities, the structure of the Hospital insurance Act reveals that, in providing medically necessary services, they carry out specific governmental objective and must, therefore conform with the Charter in the provision of those services.
61. As deaf persons, the appellants belong to an enumerated group under s 15(1) - physically disabled- whose history in Canada is one of exclusion and marginalisation. "In contending that the lack of funding for sign language interpreters renders them unable to benefit from the legislation to the same extent as hearing persons, the appellants claim is one of "adverse effects" of discrimination. Given that, it seems inevitable that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. "The failure to provide sign language interpretation where it is necessary for effective communication constitutes a prima facie violation of s. 15(1). This failure denies deaf persons the equal benefit of the law and discriminates against them in comparison with hearing persons." The refusal to expend a relatively insignificant sum to continue and extend the services cannot possibly constitute a minimum impairment of the appellants' constitutional rights.
62. It was further held that the possibility that s15 (1) claims might be made by non-official language speakers cannot justify the infringement of the constitutional rights of the deaf; the appellants do not demand that the government provide them with a discrete service of product, such as hearing aids, that will alleviate their general disadvantage but rather they ask only for equal access to services available to all. The Court stated that the evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing

population. Given the central place of good health in the quality of life of all persons in the Canadian society, the provision of substantial medical services to the deaf necessarily diminishes the overall quality of their lives.

63. In the present case, it was considered best to grant a declaration, as opposed to some kind of injunctive relief as a remedy, because there are myriad options available to the government that may rectify the unconstitutionality of the current system.
64. In other cases, ESC rights themselves have been directly derived from civil and political rights (e.g. the right to life implies the right to water and food). This form of jurisprudence is most evident in North America, South Asia (particularly India) and in the decisions of international human rights bodies. In India the right to life and the right to non-discrimination have been given a broad reading by the judiciary. Part III of the Constitution includes directive principles covering social and economic rights. While they are expressed as non-justiciable, they have been used as interpretative aids in delivering socio economic rights from the right to life. Subsequently, rights to work, health, shelter, education, water and food are regularly litigated, although they are rarely construed as fully fledged ESC rights. *Olga Tellis* is a case in point (discussed later in the paper).
65. In the US, relying on civil and political rights and the right to non-discrimination, advocates have challenged prison conditions, the denial of social security, the criminalisation of homelessness and segregation in education and housing³¹. As noted by Mario Foscarinis, Director of The National Law Centre on Homelessness and Poverty, “the trend has been to pass laws which make it a crime to sleep in public or to sit down on public sidewalks, things that people who are homeless end up having to do because they have no place else to be”. In a landmark case, *Pottinger v City of Miami*³², six thousand homeless people in Miami launched a class action alleging that police arrests and destruction of their property interfered with “life sustaining” activities such as sleeping and eating. The evidence revealed a systematic police practice of arresting homeless individuals, destroying their personal property and even eliminating their food resources to prevent homeless individuals from congregating. Justice Atkins in his judgement, found the police actions unconstitutional because they constituted cruel and unusual punishment, violated due process rights and were violations of privacy and the right to travel under the equal protection clause. A settlement was eventually reached with the City of Miami whereby police cannot arrest a homeless individual if no alternative accommodation is available.
66. Secondly, a more noticeable ESC rights jurisprudence has emerged as central to constitutions that emerged in the wave of democratisation in the 1980s and 90s, particularly Latin America and South Africa. Many of these constitutions grant ESC rights a fully justiciable status. The constitutional case law of South Africa and Argentina is most notable in this regard, which is discussed later in the paper.

³¹ *Litigating Economic, Social and Cultural Rights: Achievements, challenges and strategies*, Centre on Housing Rights and Evictions, 2003

³² *Pottinger v City of Miami*, 810 F. Supp.1551 (1992), 16 November 1992

PART FOUR: INDIA

ESCRs AS DERIVED FROM CPRs, IN PARTICULAR ARTICLE 21

67. The development of the jurisprudence of ESC rights is inextricably linked to the development of a new form of legal action, variously termed as public interest litigation (PIL) and social action litigation in India. This form is characterised by a non-adversarial approach, the participation of *amicus curiae*, the appointment of expert and monitoring committees by the court, and the issue of detailed interim orders issued by the Supreme Court of India and the High Courts under Articles 32³³ and 226³⁴ respectively.
68. In its early judgements³⁵ the Supreme Court held that where there is a conflict between Fundamental Rights and Directive Principles of State Policy (DPSP), fundamental rights stand supreme and that the directive principles are not enforceable in the court of law and hence their alleged breaches does not invalidate any law. The Court also held that such breaches do not entitle a citizen to complain of violation of DPSPs by the State so as to seek relief against the State. However in a series of later judgements³⁶ the Supreme Court (SC) held that the Directive Principles supplement Fundamental Rights in achieving a Welfare State and that parliament could amend Fundamental Rights for implementing the Directives as long as the amendment does not touch the basic feature of the Constitution³⁷. The SC also held that legislations enacted to implement the DPSPs should be upheld as far as possible. It was also said that “in building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to the directive principles³⁸”. Implicit here is the pioneering role played by the SC in recognising the justiciability of ESCRs at par with CPRs.
69. The SC has invoked Article 21 (the right to life) with reference to ESC Rights. The expanded notion of the right to life enabled the courts, in its PIL jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of ESCRs. In reading several of the related rights of dignity, living conditions, health into the ambit of the right to life, the court has overcome the difficulty of the justiciability of these as economic and social rights, which in their manifestation as DPSP, considered non enforceable.
70. The enforcement of judicial orders of the court has tended to depend to a large extent on the nature of the order. As observed by S Murlidhar of the Supreme Court, there are invariably two facets of an order ³⁹- the **declaratory** part and the **mandatory** part. Declaratory orders and

³³ Part III of the Indian Constitution- Right to Constitutional Remedies, Article 32 (Remedies for enforcement of rights conferred by this Part)

³⁴ Chapter V of the Constitution (The High Courts in the State), Article 226- Power of the High Courts to issue certain writs

³⁵ (State of Madras v Champakam Dorairajan, AIR 1951 SC 525, In re Keral Education Bill AIR 1958 SC 956, Deep Chand v State of Uttar Pradesh, AIR 1959 SC 648, UPSE Board v Hari, AIR 1979 SC 65

³⁶ State of Kerala v NM Thomas, AIR 1976 SC 496, Manchegowda v State of Karnataka AIR 1984 SC 1151, Lingappa v State of Maharashtra AIR 1985 SC 389, Laxmi Kant v Union of India, AIR 1987 SC 232

³⁷ *Judicial Protection of Economic, Social and Cultural Rights*, Geeta Ramseshan, Advocate Madras High Court. Paper presented at “Exchange on Access to Justice”, Chennai, 5-7 November 2004

³⁸ State of Kerala v N.M. Thomas (1976) 2SCC 310 at 367

³⁹ Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An overview of the Experience of the Indian Judiciary by S. Muralidhar, Advocate, Supreme Court of India. Paper presented at the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002. Available online at The International Environmental Law Research Centre, Geneva website accessed at : <http://www.ielrc.org/content/w0202.pdf>

judgements⁴⁰, without consequential directions to the state authorities, have to await the acceptance of their binding nature under Articles 141 and 144 by the state and their consequent implementation⁴¹. In *Unnikrishnan J.P. v. State of Andhra Pradesh*⁴², the court declared that “right to education is implicit in and flows from the right to life guaranteed under Article 21. In other words, the right to education is concomitant to the fundamental rights enshrined in Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of citizens. The benefit of education cannot be confined to richer classes”. However, it is important to note that this is not an absolute right—its contents and parameters have to be determined in the light of Article 45 and 41 of the Constitution and financial capacity of the State” and that “a child (citizen) has a fundamental right to *free education* up to the age of fourteen years”. This is reflected in the Supreme Court judgement where it stated:

We cannot believe that any state would say it need not provide education to its people even within the limits of its economic capacity and development. It goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the state.

71. Further the court clarified:

The right to education further means that a citizen has the right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development. By saying so we are not transferring Article 41 from Part IV to Part III— we are merely relying upon Article 41 to illustrate the content of the right of the right to education flowing from Article 21⁴³.

72. The state responded to this declaration nine years later by inserting, through the Ninety-third amendment to Constitution, Article 21-A which provides for the fundamental right to education for children between the ages of six and fourteen.

73. Mandatory orders, on the other hand, are premised on the general apathy displayed by the executive to move to action and spell out a plan of action as well as a time schedule within which compliance with court orders is expected. In *Bandhua Mukti Morcha v Union of India and Ors*⁴⁴, the Supreme Court declared that the non-enforcement of welfare legislation like the Minimum Wages Act, 1948 and the Bonded Labour (Abolition) Act, 1976 was tantamount to denial of the right to live with human dignity enshrined under Article 21 of the Constitution. Applying Article 21 in conjunction with the DPSP relating to education, health and condition of employment, the Court addressed the working conditions of child labourers in the carpet industry. However, the court did not stop with the declaration of the law but issued a series of directions for compliance by state authorities, ordering states to “evolve steps” to provide⁴⁵: compulsory education to all children either by the industries itself or in coordination 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.

⁴⁰ Declaratory judgement is a court decision on a point of law that is a focus of dispute between litigants. Such a judgement merely declares the law but does not direct specific relief. Subsequent action for relief may follow the issuance of a declaratory judgement.

⁴¹ Ibid.

⁴² (1993) 1 SCC 645. The case concerned the challenge for the validity of certain state legislations regulating the charging of fees by private educational institutions and prohibiting the charging for “capitation” fees from students seeking admission.

⁴³ Id. At 735

⁴⁴ AIR 1984 SC 802

⁴⁵ Writ Petition (C) No 12125 of 1984, 21 February, 1997, Para 13

74. Furthermore, recognising the importance of monitoring the enforcement of its judgements the Court requested periodic reports from the authorities on implementation, an exercise that is continuing till the present date.
75. More recently, in the case of right to food, the SC has been able to evolve binding guidelines to ensure the availability of the bare minimum rations through the public distribution system for those below the poverty line.

RIGHT TO SHELTER/HOUSING

76. In sharp contradiction to the Constitution of South Africa that is explicit in guaranteeing universal access to adequate housing and prohibiting forced evictions, the Right to Housing has no direct guarantees in the Indian Constitution. Instead the right to housing is defined through judicial interpretation of the Right to Life. In the eighties, such interpretation largely associated the “right to live with human dignity” with access to “adequate nutrition, clothing and shelter⁴⁶”. In 1990⁴⁷, it went a step forward in stating that “reasonable residence is an indispensable necessity” for human development and the fulfilment of the ‘right to life’.
77. The Supreme Court has elaborated at great length on the right to adequate housing, shelter and livelihood as part of the all-encompassing Right to Life under Article 21 of the Constitution. In *Francis Coralie Mullin v Administrator*, Justice Bhagwati observed:

The fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. We think that the right to life includes right to live, with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about, mixing and co-mingling with fellow human beings.

Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such function and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation of pro tanto of this right to live.

78. Expressions such as "basic necessities of life" "bare minimum expression of the human self" and "human dignity" found in the judgement have explored the import of "life" in Article 21 that has influenced several cases. *Chameli Singh and others v State of Uttar Pradesh*⁴⁸ is a case point where the Supreme Court stated,
79. “. . . Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right . . . Want of decent residence, . . . frustrates the very object of the constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself.”
80. *Chameli Singh* case was an appeal by a land owner to the Supreme Court of India from a decision of the Allahabad High Court, which affirmed the right of the state to acquire private lands for the development in the public interest. Key issues of the case were whether the exercise of the

⁴⁶Francis Coralie v. The Union Territory of Delhi, 1 SCC 608 (1981); and Francis Mullin v. Union Territory of Delhi, 2 SCR 516 (1982)

⁴⁷Shantistar Builders v. Naryan Khimalal Totome & Others, 1 SCC 520 (1990)

⁴⁸Chameli Singh & Ors. v State of UP & Anr. (1996) 2 SCC 549

state power of eminent domain and land acquisition infringes an individual's right to livelihood under the constitution; whether individual constitutional rights must yield to the public interest; whether the provision of housing for the poor is an urgent state obligation. Given that the Indian constitution assures to every citizen economic and social justice, equity of status, opportunity and dignity, the question was whether state resources should be distributed to promote the welfare of the weaker sections of society and minimise inequality.

Summary

81. The Supreme Court held that the lack of decent housing for poorer communities was a national problem that required urgent attention and that the state's action was appropriate. It further held that individual interests must yield to the greater public interest like the provision of housing for the poor. In its reasoning, the Court defined the meaning of the right to life under Article 21 of the Constitution:

In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object.

82. Right to life guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society.

Shelter for a human being, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civil amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live, should be deemed to have been guaranteed as a fundamental right.

83. In another celebrated case - *Olga Tellis v. Bombay Municipal Corporation (BMC)*⁴⁹, Supreme Court held that

. . . an equally important facet of the right to life is the right to livelihood because no person can live without 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.

Factual Score of *Olga Tellis v. Bombay Municipal Corporation (Olga Tellis hereafter)*

84. The State of Maharashtra and the Bombay Municipal Council (BMC) decided in 1981 to evict all pavement and slum dwellers from the city of Bombay. The residents claimed such action would violate the right to life, since a home in the city allowed them to attain a livelihood. In the event the evictions proceeded the residents claimed that alternative sites must be provided to them. They further argued that they had chosen a pavement or slum to live in only because it was nearest to their place of work, and that evicting them would result in depriving them of their livelihood. The petitioners (living in around more than 10,000 hutments) were to be evicted under the Bombay Municipal Corporation Act, which empowered the Municipal Commissioner

⁴⁹ 1985 3 SCC 545

to remove encroachments on footpaths or pavements over which the public have a right of passage or access.

85. The Supreme Court held that right to life, in Article 21 of the Constitution, encompassed means of livelihood since “no person can live without the means of living.” This was supported by other principles in the constitution, though not directly justiciable, that directed the government to direct its policy towards ensuring all citizens have an adequate means of livelihood and work principles. The court stated: “If there is an obligation upon the State to secure to 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 to life.” After reviewing expert evidence they agreed that evictions would entail the deprivation of livelihood.
86. The right to a livelihood was nonetheless not absolute. Deprivation of the right to livelihood could occur if there was a just and fair procedure undertaken according to law. The action must be reasonable and any person affected must be afforded an opportunity of being heard by the court or judiciary as to why that action should not be taken.
87. In the present case, the Court found that the residents had been rendered the opportunity of being heard by virtue of their presentations in various Supreme Court proceedings. While the residents were clearly not intending to trespass they found it was reasonable for the government to evict those living on public pavements, footpaths and public roads. The court held:

No one has the right to make use of a public property for a private purpose without requisite authorisation and, therefore, it is erroneous to contend that pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon . . . If a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his use of the pavement would become unauthorised.
88. Although the final orders in *Olga Tellis* found that the BMC Act was valid (under Article 14 and 19 of the Constitution) and that pavement dwellers should be evicted, the Supreme Court also laid down that this could be done only after arranging alternative accommodation for them. The court ordered that (i) sites should be provided to residents presented with census cards in 1976 (ii) slums in existence for 20 years or more were not to be removed unless land was required for public purposes and, in that case, alternative sites must be provided (iii) high priority should be given to resettlement. The evictions were to be delayed until one month after the monsoon season (31 October 1985).
89. The judgement handed down in this case expanded the right to life guaranteed under Article 21 of the Constitution to include within its scope, the right to livelihood, which in this context translated into the right to be allowed to remain on the pavements. In a sense, therefore, by imposing this strong condition of providing alternate accommodation before eviction, the Supreme Court was in fact upholding the right of the pavement dwellers to shelter.
90. Following this judgement, later decisions of the Supreme Court and some High Courts of the country have not been very consistent. While many judgements have upheld this ruling, there have been some rulings which have disregarded the basic right to housing and shelter that has been interpreted to be a crucial part of an individual’s right to life.
91. Later benches of the Supreme Court have followed the *Olga Tellis* dictum with approval. In *Municipal Corporation of Delhi v. Gurnam Kaur*⁵⁰, the court held that the Municipal Corporation of Delhi had no legal obligation to provide pavement squatters alternative shops for rehabilitation

⁵⁰ 1989 1 SCC 101

as the squatters had no legal enforceable right. In *Sodan Singh v. NDMC*⁵¹, a constitution bench of the Supreme Court reiterated that the question whether there can at all be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trade must be answered in the negative. These cases fail to account for socio-economic compulsions that give rise to pavement dwelling and restrict their examination of the problem from a purely statutory point of view rather than the human rights perspective⁵².

92. A step forward has been the decision of the Supreme Court in *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*⁵³, in the context of eviction of encroachers in a busy locality of Ahmedabad city. The court said:
93. Due to want of facilities and opportunities, the right to residence and settlement is an illusion to the rural and urban poor. Articles 38, 39 and 46 of the Directive Principles mandate the State⁵⁴, as its economic policy, to provide socio-economic justice to minimise inequalities in income and in opportunities and status. It positively charges the State to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socio-economic justice a reality, meaningful and fruitful so as to make life worth living with dignity of person and equality of status and to constantly improve excellence. Though no person has a right to encroach and erect structures or otherwise on footpaths, pavements or public streets or any other place reserved or earmarked for a public purpose, the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful⁵⁵.

RIGHT TO HEALTH

94. Outside of Africa, India has generated by far the largest body of jurisprudence regarding the environmental aspects of the constitutional right to life. In several decisions, the right to a clean environment, drinking water, a pollution free atmosphere etc. have been the status of inalienable human rights and, therefore, fundamental rights of Indian citizens⁵⁶.
95. India's constitution contains provision protecting both human health (Article 47) and the natural environment (Article 48 and 51) in addition to extending a fundamental right to life (Article 21). Article 47 of DPSP provides for the duty of the state to improve public health. However, the court has recognised the right to health as being an integral part of the right to life.
96. In taking its first step towards sculpting an environmental dimension to Article 21, the Court has acted on the implicit premise that environmental degradation affects the quality of life. The Court has also hinted at recognising the environment as intrinsically worthy of protection. This new thinking is reflected in the Court's reasoning in *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh*⁵⁷, one of the first environmental complaints that were addressed

⁵¹ 1989 4 SCC 155

⁵² *Justiciability of ESC Rights- the Indian Experience*, by Dr. Muralidhar in Circle of Rights: Economic, Social and Cultural Rights Activism: A training resource, (University of Minnesota, Human Rights Resource Centre, 2000). Available online at :

<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>

⁵³ 1997 11 SCC 123

⁵⁴ Article 38-“State to secure a social order for the promotion of welfare of the people, Article 39-2 Certain principles of policy to be followed by the State- The state shall, in particular, direct its policy towards securing that the citizens, have the right to an adequate means of livelihood.

⁵⁵ *Ibid.*, Para 13, p.133

⁵⁶ Developments in India relating to environmental justice- Justice BN Kirpal. Accessed online at :

http://www.unep.org/dpdl/symposium/Documents/Country_papers/INDIA%20.doc

⁵⁷ AIR 1985 SC 652

to it. The Court issued interim orders halting the operation of limestone quarries in the Dehradun valley in the state of Uttar Pradesh, on the ground that mining had a deleterious impact on the surrounding environment. Although the Court did not specifically mention Article 21 in this case, it based its five comprehensive interim orders on the judicial understanding that environmental rights were to be implied into the scope of Article 21. This was later emphasised upon in *L.K. Koolwal v State of Rajasthan*⁵⁸.

L.K. Koolwal v State of Rajasthan

97. The case was filed as a writ petition by citizens of Jaipur, in the state of Rajasthan through the petitioner Mr. LK Koolwal to compel municipal authorities to provide adequate sanitation. The petitioner invoked Fundamental Rights and the Directives Principles of State Policy and brought to the fore the acute sanitation problem in Jaipur which, it claimed as hazardous to the life of the citizens of Jaipur.
98. While directing the Municipality to remove the dirt, filth etc. within a period of six months, D. L. Mehta, J. of Rajasthan High Court held as follows (Para. 3):

Maintenance of health, preservation of sanitation and environment falls within the purview of Art. 21 of the Constitution as it adversely affect the life of the citizen and it amounts to slow poisoning and reducing the life of the citizen because the hazards created of not checked.
99. The Rajasthan Court in this case invoked Article 51 A of the Constitution and was of the view that though this provision is a fundamental duty, it gives citizens a right to approach the court for a direction to the municipal authorities to clean city; and that maintenance of health, sanitation and environment falls within Article 21 thus giving the citizens the fundamental right to ask for affirmative action. It held that the Municipality had a statutory duty to remove the dirt, filth etc from the city within a period of six months and clear the city of Jaipur from the date of this judgement. A committee was constituted to inspect the implementation of the judgement.
100. Another noteworthy contribution in the Koolwal judgement is the Court's elaboration of Article 19 (1)(a)-guaranteeing freedom of speech-**to include the "right to know"**. In this case, the Court extended the right to know to entitle the petitioner to full information about the municipality's sanitation programme, or the lack thereof.

Municipal Council Ratlam v Vardhichand and ors ⁵⁹

101. The *Ratlam Municipality* case concerned a municipality that had failed to construct drains; filth and dirt had accumulated, and people could not remain in the locality due to the noxious nuisance. A magistrate passed an order, saying, "Construct a drain", but the municipality responded, "we have no money". It was appealed to the Supreme Court. The Court held, among other things, that the "right to life" of the person is affected; environmental pollution affects individual right to breathe fresh air, sanitary conditions are essential for the proper enjoyment of this right.

Legal Framework

- Constitution -Part III
- Criminal Procedure Code- Section 133⁶⁰

⁵⁸ AIR 1988 Raj 2

⁵⁹ AIR 1980 SC 1622

- Municipalities Act- Section 123

102. The residents of a locality within the limits of Ratlam Municipality in the state of Madhya Pradesh, tormented by the stench and stink by open drains and public excretions by nearby slum dwellers moved the Sub-Divisional Magistrate under Sec. 133 of Criminal Procedure Code (CrPC) to require the Municipality to construct drain pipes with the flow of water to wash the filth and stop the stench towards the members of the Public. The Municipality pleaded paucity of funds as the chief cause of disability to carry out its duties.
103. The Court examined state legislation that obliges the municipal council to maintain sanitary conditions and found that the municipal body had been indifferent towards its obligations enlisted in the Madhya Pradesh Municipality Act. Public sanitation was a low priority in the populous town of Ratlam.
104. The court held that the lack of money or resources is no answer to the statute. As stated by Justice Iyer, when the statute casts a burden, it is the duty of the council to fulfil it. If they do not have the resources they must make a representation to the legislature and ask for them.
105. Among other things, the Magistrate gave directions to the Municipality to draft a plan within six months for removing the nuisance. The High Court approved the order of the Magistrate, to which the Municipality further appealed to the Supreme Court.
106. The issue was whether a Court can compel a statutory body to carry out its duties to the community by constructing sanitation facilities?
107. The Supreme Court through Justice Krishna Iyer, upheld the order of the High Court and directed the Municipality to take immediate action within its statutory powers to construct sufficient number of public latrines, provide water supply and scavenging services, to construct drains, cesspools and to provide basic amenities to the public⁶¹. Justice Iyer observed “*decency and dignity are non-negotiable facets of human rights and are a first charge on the local self governing bodies*”.
108. In rejecting the defence of the Municipality, the Court observed that the CrPC applies to statutory bodies and others regardless of their financial standing, just as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provisions. Section 133 of the Criminal Procedure Code considered in conjunction with Section 123 of the Municipalities Act, empowers the Court to require a municipality to abate a nuisance by taking affirmative action within a stipulated time. Relying on Article 47 of the DPSP, which refer to improvement of public health, the Court stated,

Public nuisance because of pollutants being discharged by big factories to the detriment of the poorer sections is a challenge to the social justice component of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under nature's pressure, bashfulness becomes a luxury and dignity a difficult art.

A responsible Municipal Council constituted for the precise purpose of preserving public health and providing better facilities cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems, not pompous and attractive, but in working

⁶⁰ Section 133 (deals with public nuisances) contained within Chapter X of the CrPC (Maintenance of Public Order and Tranquillity). It empowers a magistrate to pass an order for the removal of a public nuisance within a fixed period of time.

⁶¹ Law Commission of India, 168th Report on Proposal to Construct Environmental Courts, September 2003. Available online at: www.lawcommissionofindia.nic.in/186threport

condition and sufficient to meet the needs of the people, cannot be evaded if the Municipality is to justify its existence. A bare study of the statutory provisions makes this position clear⁶².

MC Mehta v State of Orissa⁶³

109. The city of Cuttack in Orissa was under the grip of a severe problem of water pollution ranging from sewage water clogging, direct inflow of sewage into the river to non-existence of a sewage treatment plant, thereby contaminating water and resulting in various types of water borne diseases.
110. A writ petition was filed by MC Mehta on behalf of the people of Cuttack. The main contention of the petition was that the dumping of untreated waste water of the hospital and some other parts of the city in the Taladanda canal was creating health problems in the city. The State, on the other hand contended that a central sewerage system had been installed in the SCB Medical College Hospital and that there is no sewerage flow into the canal as alleged. Further, it was asserted that the State had not received any information relating to either pollution or of epidemic of water borne diseases caused by contamination of the canal. Also, the health department shrugged off the responsibility for supply of drinking water putting the onus on the Municipality, which refuted the contentions of callousness and carelessness.
111. During the course of the hearing of the petition the Court noticed that not a single Department of the State Government was willing to take any responsibility in the matter and were conveniently shifting the burden to another department. A startling revelation during the course of the hearing was the fact that there was a report culminating from a survey conducted earlier by the State Pollution Board, which had declared water in the city not fit for human consumption. Further reports that were obtained while the petition was pending revealed that the water was not even fit for bathing. The Court held that the city of Cuttack with its historic heritage, was in the midst of a huge water pollution crisis on account of the inaction of the State in setting up of a waste treatment plant and the sewage water directly doing into the river causing a serious health and sanitation problem. After going into the constitutional provisions, and the recommendations of the State Pollution Control Board which had made stark revelations about the conditions of drinking water and health in the city, the Court directed the State to immediately take necessary steps to prevent and control water pollution and to maintain wholesomeness of water which is supplied for human consumption.

Case of Paschim Banga Khet Mazdoor Samity v State of West Bengal⁶⁴

KEYWORDS

Constitution of India, Articles 21 and 39-A - Medical aid - Free medical aid - Right to life - Serious cases for treatment - Govt. hospitals - Medical Officers employed in Govt. Hospitals are duty bound to extend medical assistance to preserve human life - Failure of Govt. hospitals to provide timely medical aid to serious patients results in violation of their right to life guaranteed under Art. 21 of the Constitution - Medical Officers are under obligation to attend to the seriously injured patients

⁶² *Compendium of Summaries of judicial decisions in environment related cases*, SACEP/UNEP/NORAD Publication Series on Environmental Law and Policy No. 3. Available online at: www.unescap.org/dpad/vc/document/compendium/in31.htm

⁶³ AIR 1992 Ori 225. Summary taken from “*Environmental Justice: Emerging Trends*” by Colin Gonsalves, Human Rights Law Network, New Delhi, India. Available online at:

www.esgindia.org/projects/kja2002/docs/Environmental%20Justice%20by%20Colin%20Gonsalves.htm

⁶⁴ 1996 4 SCC 37

immediately and cannot be refused treatment on the ground of non-availability of bed/room - Directions issued for ensuring immediate medical aid to serious Patients/injured - Government directed to render necessary assistance for improvement of medical services in the country. [Paras 9 & 15 to 17]; Consumer Protection Act, 1986, Sections 2(1)(d)(ii) and 2(1)(o) - Medical services - Patients - Government Hospitals - Patients seeking treatment in Govt. Hospital are 'consumers' within the meaning of the Section 2(1)(d)(ii) and the hospitals established by the Govt. render 'services' within the meaning of Section 2(1)(o) of the Act - Patient not provided proper assistance in emergency condition - Patient awarded compensation of Rs. 25,000/-. [Paras 4, 9 and 10]

112. This case involved an agricultural labourer whose condition, after a fall from a running train, worsened considerably when as many as seven government hospitals in Calcutta refused to admit him on the ground that did not have beds vacant. He was finally admitted to a private hospital the following day, where he received 14 days' treatment at a cost of approximately Rs 17,000 (Rs 1000 was equivalent to approximately US\$29 as at 6 May 1996).
113. The petitioner filed a writ petition claiming that his constitutional right to life under Art 21 had been violated by the actions of the State-run hospitals in question. While the writ petition was pending, the State Government appointed an Enquiry Committee to investigate the incident and make recommendations as to suitable action which could be taken against those responsible, as well as to prevent the recurrence of similar incidents in the future. The Committee's report, which was critical of the manner in which the hospitals handled the treatment and suggested remedial measures, was accepted by the State Government and relevant directions were issued on the basis of the Committee's recommendations.
114. In disposing of the writ petition with directions, it was held that:
- The labourer's right to life was breached when the various government hospitals which were approached denied him treatment even though his condition was very serious and he was in need of immediate medical attention (*Parmanand Katara v Union of India* (1989) 4 SCC 286 (Ind SC) followed).
115. It is a well settled principle that adequate compensation can be awarded by the court for such violation by way of redress in writ proceedings under Arts 32 and 226 of the Constitution (*Rudul Shab v State of Bihar* (1983) 4 SCC 141 (Ind SC), *Nilabati Bebera v State of Orissa* (1993) 2 SCC 746 (Ind SC) and *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42 (Ind SC) applied). Having regard to the facts and circumstances of the case, the amount of compensation payable to him was fixed at Rs 25,000.
116. Apart from the recommendations of the Committee and the subsequent action taken by the State Government, the following measures are necessary to ensure that proper medical facilities are available for dealing with emergency cases: providing adequate facilities at Primary Health Centres; upgrading hospitals at the district and Sub-Division level; establishing a centralised communication system to monitor the availability of hospital beds at State-level hospitals; making proper arrangements for ambulances (provided with necessary equipment and medical personnel) to transport patients between hospitals at different levels; and gearing hospitals and medical personnel at all levels to deal with the higher risk of accidents (and, therefore, increased number of patients needing emergency treatment) during certain occasions and in certain seasons.
117. The State cannot ignore its constitutional obligation to provide adequate medical services to preserve human life on account of financial constraints (*Khatari (II) v State of Bihar* (1981) 1 SCC 627 (Ind SC) applied); this obligation has to be kept in mind in the allocation of funds for medical services. A time-bound plan for providing these services should be drawn up, in light of the measures outlined by the Committee and this court, and steps should be taken for its

implementation by the respondent State, as well as by other States not party to these proceedings.

118. The Supreme Court thus did not stop at declaring the right to health to be a fundamental right and at enforcing that right of the labourer by asking the Government of West Bengal to pay him compensation for the loss suffered. It directed the government to formulate a blue print for primary health care with particular reference to treatment of patients during an emergency.

119. The Court ruled that:

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. ... Article 21 imposes an obligation on the State to safeguard the right to life of every person. ... 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 a violation of his right to life guaranteed under Article 21.*

120. Observations:

- Since it is the joint obligation of Central Government and the States to provide medical services, it is expected that the Union of India, which is a party to these proceedings, will render the necessary assistance in the improvement of medical services in the country along these lines.
- It is also expected that the State Government will take appropriate administrative action against those medical officers found to be responsible for the lapse resulting in the denial of immediate medical aid to HS.

121. Similarly in the case of *Bandhua Mukti Morcha v. Union of India and others*⁶⁵, concerning bonded workers, the Supreme Court gave orders interpreting Article 21 as mandating the right to medical facilities for the workers.

122. In *Bandhua Mukti Morcha*, reference was made to Articles 14, 21, 23, 24, 27(1), 28, 31(1), 36, 39(e)(f) 45 and 46, 51A of the Indian Constitution, and Preamble - Read with Universal Declaration of Human Rights, Article 26(1) - Carpet factories in the Districts of U.P. - Employment to children below 14 years - Physical torture - Directive principles of State Policy - Child labour - Total prohibition - How to be achieved - *Held* that in view of JT 1996(11) SC 685, Govt. of India needs directions to convene a meeting for evolving progressive elimination of child employment and to take steps consistent with scheme laid down in that case and directions issued for submitting periodical reports of progress to the Court. [Paras 4 and 10]

123. Pursuant to the 93rd amendment to the constitution accepting education as a fundamental right, basic social services are now being recognised as fundamental rights. Despite the controversy and problems regarding the actual provisions of the Bill, it is now accepted that essential social services like education can be enshrined in the fundamental rights of the Constitution. This forms an appropriate context to establish the right to health care as a constitutionally recognised fundamental right⁶⁶.

124. Although the right to health care is not a fundamental right in India today, the right to life is. In keeping with this 'Emergency Medical Care' in situations where it is lifesaving, is the right of

⁶⁵ 1997 SOL Case No. 486

⁶⁶ *The Right to Health Care- Moving from Idea to Reality*, Abhay Shukla, Centre for Enquiry into Health and Allied Themes (CEHAT). Available online at: www.cehat.org/rhcseminar.html

every citizen. No doctor or hospital, *including those in the private sector*, can refuse minimum essential first aid and medical care to a citizen in times of emergency, irrespective of the person's ability to pay for it. The Supreme Court judgement quoted above (*Paschim Banga Khet Mazdoor Samity and others v. State of West Bengal and another, 1996*), directly relates to this right and clear norms for emergency care need to be laid down if this right is to be effectively implemented. As a parallel, one can look at the constitutional amendments enacted in South Africa, wherein the Right to Emergency Medical care has been made a fundamental right.

125. At the same time there is an urgent need for a comprehensive legislation to regulate qualification of doctors, required infrastructure, and investigation and treatment procedures especially in the private medical sector. Standard guidelines for investigations, therapy and surgical decision making need to be adopted and followed, combined with legal restrictions on common medical malpractices. Maintaining complete patient records, notification of specific diseases and observing a ceiling on fees also needs to be observed by the private medical sector.
126. In *MC Mehta v Union of India* [AIR 1988 SC 1037 and 1038] also known as the *Kanpur Tanneries or Ganga Pollution* case is among the most significant water pollution case. This was a continuation of earlier public interest litigation requesting the court to prevent tanneries, which were polluting the River Ganga, from operating until they installed primary effluent treatment plants. The Supreme Court passed the order accordingly.
127. Following the alarming details given by MC Mehta about the extent of pollution in the river Ganga due to the inflow of sewage from Kanpur city, the Court came down heavily on the Nagar Mahapalika (Municipality). The Supreme Court emphasised that it is the Nagar Mahapalika of Kanpur or the Municipal Corporation of Nagpur that has to bear the responsibility for the pollution of the river near Kanpur city. The Court treating the case as a representative action, directed the issue of notice by publishing the gist of the petition in the newspaper in circulation in northern India and calling upon all the industrialists and the municipal councils having jurisdiction over the areas through which the river Ganga flows, to appear before the Court and to show cause as to why directions should not be issued to them to stop the flow of trade effluents and the sewage into the river Ganga without treating them.
128. In 1990 the Kerala High Court clearly recognised the right of people to clean water as a right to life enshrined in Article 21 of the Constitution. The Kerala High Court in *Attakoya Thangal vs. Union of India*⁶⁷ attributed right to clean water as a right to life in Article 21. In this case, it was questioned that whether a scheme for pumping up ground water for supplying potable (drinking) water to Laccadives (now known Lakshwadeep Islands) in the Arabian Sea, would not bring more long-term harm than short term benefits.
129. The Petitioner approached the Court to complain about lack of adequate ground water resources, potable water and large scale withdrawals with electric or mechanical pumps that can cause depletion of the water sources, causing seepage or intrusion of saline water from the surrounding Arabian Sea. The local administration had initiated a scheme to augment water supply, by digging wells and by drawing water from those existing wells to meet increasing needs. According to the Petitioners, the Municipality had violated rights under Article 21 of the Constitution, and sought to restrain implementation of the scheme, by the issuance of appropriate writs or directions. Amongst other reports, the Petitioners relied heavily on "*Strategy for an Integrated Development of Lakshadweep*" by Prof. M.G.K. Menon, then Scientific Advisor to the Prime Minister of India and Member of the Planning Commission. The Court appointed a team comprising of V.C. Jacob, K. Rajagopalan, D.S. Thambi, K.M. Najeeb & K. Raman to study the problem and submit a report. The team accordingly made a very detailed study of various aspects, and submitted a report to the Court. The experts appointed by the Court considered

⁶⁷ 1990 KLT 580

and investigated the climate, soil, agriculture and irrigation, hydro geological aspects, tidal and water level fluctuations, hydrology infiltration studies, aquifer characteristics, hydro chemical studies, resources evaluation, recharge potential, water management concerns and other relevant matters. According to the report, other means of augmenting water supply, mainly by harvesting rainwater, desalination and reverse osmosis would be more appropriate in the circumstances of the case. Similar recommendations also came from the National Environmental Engineering Research Institute and Centre for Earth Science Studies.

130. The Kerala High Court in this matter asked for a deeper study to examine whether the scheme, if allowed to operate, would not dry up and result in salt water intrusion into the aquifers. Stressing the need for inter-disciplinary co-operation for provision of civic amenities, the judge observed that

The administrative agency cannot be permitted to function in such a manner as to make inroads into the fundamental rights under Article 21. The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. A prioritisation of human needs and a new value system has been recognised in these areas. The right to sweet water and to free air are attributes of the right to life, for, these are the basic elements which sustain life itself⁶⁸.

131. The Court held that a scheme, viable technically and meeting the requirements as nearly as possible has to be evolved and directed the administration not to proceed with the existing scheme.

132. In the case of *V. Lakshmi Pathy vs. State of Karnataka*⁶⁹, while issuing a mandamus⁷⁰ with a direction to abate the pollution in the concerned area H. G. Balkrishna, J. held as follows (Para-28):

The right to life inherent in Art. 21 of the Constitution of India does not fall short of the requirements of qualitative life which is possible only in an environment of quality. Where, on account of human agencies, the quality of air and the quality of environment are threatened or effected, the Court would not hesitate to use its innovative power within its epistolary jurisdiction to enforce and safeguard the right to life to promote public interest. Specific guarantees in Art. 21 unfold penumbras shaped by emanations from those constitutional assurance which help them life and substance.

THE RIGHT TO EDUCATION

133. While Article 45 of the Indian Constitution, which is a DPSP, was not designed to be legally enforceable, the Supreme Court has found that it obliges the government to ensure free and compulsory primary education.

134. The question whether the right to education was a fundamental right and enforceable as such was answered by the Supreme Court in the affirmative in *Mobini Jain v. State of Karnataka & Ors*⁷¹.

135. The Supreme Court observed in *Mobini Jain* case that the directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III of the Constitution. The principles have to be read into the fundamental rights. The two are supplementary to each other. It asserted that the state is under constitutional mandate to create conditions in which all could enjoy the fundamental rights

⁶⁸ Ibid., p 583

⁶⁹ AIR 1992 Karnataka 57

⁷⁰ Mandamus is an extraordinary remedy issued by a court of competent jurisdiction to an inferior tribunal, public official, administrative agency, a corporation or any person to command the performance of an act

⁷¹ (1992) AIR 1858

guaranteed to individuals under Part III. 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 the large majority which is illiterate.

136. In the case of *Mobini Jain v State of Karnataka*, the challenge was to an administrative notification of June 1989, which provided for a fee structure, whereby for government seats, the tuition fee was Rs 2,000 per annum, and for students from Karnataka, the fee was Rs 25,000 per annum, while the fee for Indian students from outside Karnataka, under the payment category, was Rs 60,000 per annum. It had been contended that charging such a discriminatory and high “capitation fee” on those who wish to enter a private medical school, but did not qualify under the “government seats” violated constitutional guarantees and rights. The main issues were whether there is a “right to education” guaranteed to the people of India under the Constitution and whether the charging of capitation fees violates this right.
137. This allegation was sustained and the Supreme Court held that the Constitution grants the right to education, and that the state was duty bound to provide the education, and that the private institutions that discharge the state's duties were equally bound not to charge a higher fee than the government institutions. The court then held that any prescription of fee in excess of what was payable in government colleges was a capitation fee and would, therefore, be illegal.
138. It stated that “the right to education flows directly from the 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.” It held that the capitation fee makes education beyond the reach of the poor. Education is much too important in life and culture of India that its deprivation amounts to an arbitrary action which violates Article 14 (equality clause) of the Constitution.
139. The correctness of this decision was examined by a larger bench of five judges in *Unnikrishnan J.P. v. State of Andhra Pradesh*⁷², which partly builds on *Mobini Jain* and partly overrules it.
140. In *Unnikrishnan*, Reddy J. admitted that the right to education is not expressly granted by the Constitution, but said that, “the Court has not followed the rule that unless a rule is expressly stated as a fundamental right, it cannot be treated as one⁷³”. And, although Article 21 is “worded in negative terms, it is now well settled that Article 21 has both a negative and an affirmative dimension⁷⁴.”
141. The Court relied upon the formulation in the DPSP: Article 45 says the state must “endeavour to provide”, but the Court held that by the passage of 44 years, the “pious wish is converted into an “enforceable right⁷⁵”. The Court observed that there is a time limit of ten years for its implementation, and no reference, “to limits of its economic capacity and development”. It criticised the government for inverting priorities: more resources were devoted to higher education than, at the expense of, primary education (and to the detriment of the weaker sections, for whom special protection is provided in Article 46).
142. The court further held that “the three Articles 45, 46 and 41 are designed to achieve the goals prescribed therein⁷⁶, among others. It is in the light of these articles that the content and

⁷² 1993 1SCC 645

⁷³ *Ibid.*, at 664

⁷⁴ *Ibid.*, at 645

⁷⁵ *Murtagh Properties v Cleary (1972) IR 3330* cited in *The Role of Courts in Implementing Economic, Social and Cultural Rights in Economic, Social and Cultural Rights in Practice* Edited by Yash Ghai and Jim Cottrell, INTERIGHTS 2004

⁷⁶ Article 41 outlines the right to work, education and to public assistance in certain cases while Article 46 outlines State responsibility for the promotion of educational and economic interests of the Scheduled Caste, Scheduled Tribe and Other weaker sections.

parameters of the right to education have to be determined...The right to free education is available only to children until they complete the age of 14 years. Thereafter, the obligation of the state to provide education is subject to the limits of its economic capacity". To this extent, the earlier decision of the Supreme Court in *Mobini Jain* case stood modified.

Unnikrishnan J.P. v. State of Andhra Pradesh (1993)

143. This case involved a challenge to the constitutionality of the capitation fee (a fee in addition to the amount charged by governmental institutions) charged by private professional educational institutions. The college management was seeking enforcement of their right to charge capitation fee claiming it to be a right to business and profit. The Supreme Court expressly denied this claim and proceeded to examine the nature of the right to education. Refusing to accept the non enforceability of the DPSP (in Paragraph 181), the Supreme Court asked:
144. It is noteworthy that among the several articles in Part IV, only Article 45⁷⁷ speaks of a time-limit; no other article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the article merely calls upon it to endeavour to provide the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37⁷⁸. Does not the passage of 44 years—more than four times the period stipulated in Article 45—convert the obligation created by the article into an enforceable right? In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article 45. It is relevant to notice that Article 45 does not speak of the “limits of its economic capacity and development” as does Article 41, which inter alia speaks of right to education. What has actually happened is more money is spent and more attention is directed to higher education than to—and at the cost of—primary education. (By primary education, we mean the education which a normal child receives by the time he completes 14 years of age.) Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. We clarify, we are not seeking to lay down the priorities for the Government—we are only emphasising the constitutional policy as disclosed by Articles 45, 46 and 41. Surely the wisdom of these constitutional provisions is beyond question⁷⁹.
145. The Court held that there is no fundamental right to adult professional education under the Constitution, but that there is a guaranteed right to education for children up to age 14 years. That the passage of 44 years since the enactment of the Constitution had effectively converted the non-justiciable right to education (s.45) to one enforceable under the law and that to continue to only “endeavour to provide” (s.41) education to children up to age 14 years would be to ignore the significance of the interplay between the Directive Principles of State Policy and the Fundamental Rights of the Constitution.
146. The court then proceeded to examine how this right would be enforceable and to what extent. It clarified the issue thus:

⁷⁷ Article 45 provides for free and compulsory education to children, within a period of 10 years from the commencement of the constitution.

⁷⁸ Article 37 states that the provisions contained in Part IV shall not be enforceable by any court, but the principles laid therein are nonetheless fundamental in the governance of the country.

⁷⁹ Ibid., paras. 172, 181 and 183, p. 733. Available at: www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm

147. The right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. By saying so, we are not transferring Article 41 from Part IV to Part III—we are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21. We cannot believe that any State would say that it need not provide education to its people even within the limits of its economic capacity and development. It goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the State⁸⁰.
148. As observed by Dr Muralidhar⁸¹, the court had broken new ground in the matter of justiciability and enforceability of the DPSP. The decision in *Unnikrishnan* has been applied by the court in formulating broad parameters for compliance by the government in the matter of eradication of child labour. This it did in a PIL where it said:
149. Now, strictly speaking a strong case exists to invoke the aid of Article 41 of the Constitution regarding the right to work and to give meaning to what has been provided in Article 47 relating to raising of standard of living of the population, and Articles 39 (e) and (f) as to non-abuse of tender age of children and giving opportunities and facilities to them to develop in a healthy manner, for asking the State to see that an adult member of the family, whose child is in employment in a factory or a mine or in other hazardous work, gets a job anywhere, in lieu of the child. This would also see the fulfilment of the wish contained in Article 41 after about half a century of its being in the paramount parchment, like primary education desired by Article 45, having been given the status of fundamental right by the decision in *Unnikrishnan*. We are, however, not asking the State at this stage to ensure alternative employment in every case covered by Article 24, as Article 41 speaks about right to work “within the limits of the economic capacity and development of the State”. The very large number of child labour in the aforesaid occupations would require giving of job to a very large number of adults, if we were to ask the appropriate Government to assure alternative employment in every case, which would strain the resources of the State, in case it would not have been able to secure job for an adult in a private sector establishment or, for that matter, in a public sector organisation. We are not issuing any direction to do so presently. Instead, we leave the matter to be sorted out by the appropriate Government. In those cases where it would not be possible to provide job as above mentioned, the appropriate Government would, as its contribution/grant, deposit in the aforesaid Fund a sum of Rs.5000/- for each child employed in a factory or mine or in any other hazardous employment⁸².

RIGHT TO FOOD

Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existing leading to malnutrition, starvation and other related problems . . . [I]t is necessary to issue certain directions so that some temporary relief is available to those, who deserve it the most.

Supreme Court of India

⁸⁰ Ibid., paras. 181 and 182, p. 737

⁸¹ Advocate, Supreme Court of India

⁸² *MC Mehta v State of Tamil Nadu*, 1996 6 SCC 772, Para 31

150. This case, handled by the Human Rights Law Network (HRLN), is technically known as “*PUCL vs. Union of India and others* (Writ Petition [Civil] No. 196 of 2001)”. Supreme Court hearings have been held at regular intervals since April 2001, and the case has attracted wide national and international attention. Though the judgement is still awaited, significant “interim orders” have been passed from time to time.

151. The Petitioner is a voluntary organisation, Peoples Union for Civil Liberties (PUCL) fighting for the civil liberties of people and has units all over the country. The first respondent is the Union of India through its Ministry of Food and Consumer Affairs. This Ministry is largely responsible for allocation food to various states and also governs the public distribution system, prevalent in the country. The second Respondent is the Food Corporation of India, a statutory corporation fully controlled and managed by the Government of India and is the "State" as defined by Article 12. The remaining Respondents (3-8) are the relevant State Governments who are responsible for managing the public distribution system in their states.

152. In May 2001, the PUCL began a public interest litigation case regarding the right to food by filing a writ petition with the Supreme Court for the enforcement of various schemes of food distribution throughout the country and the Famine Code, a code permitting the release of grain stocks in times of famine. The PUCL grounded their arguments deriving the right to food from the right to life.

153. One of the petition's arguments was that several federal institutions and local state government should be held responsible for mass malnutrition among the people living in the states concerned. It has further argued:

Starvation death is but a natural phenomenon when there is a surplus stock of food grains in the Government godown while people don't get food to eat⁸³. Does the right to life mean that people who are starving and who are too poor to buy food grains ought to be given food grains free of cost by the State from the surplus stock lying with the State, particularly when it is reported that a large part of it is lying unused and rotting?

Does not the right to life under Article 21 of the Constitution of India include the right to food?

Does not the right to food, which has been upheld by the Court, imply that the State has a duty to provide food especially in situations of drought, to people who are drought affected and are not in a position to purchase food?

154. The PUCL petition essentially argues that the right to food is a fundamental right of all Indian citizens, and demands that the country's gigantic food stocks (about 50 million tonnes of grain at that time) should be used without delay to prevent hunger and starvation. The right to food can be seen as a corollary of the fundamental “right to life” (Article 21 of the Indian Constitution), in so far as it is impossible to live without food. As the Supreme Court itself noted in its interim order of 2 May 2003, “reference can also be made to Article 47 which inter alia provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties”. The Supreme Court affirmed that where people are unable to feed themselves adequately, governments have an obligation to provide for them, ensuring, at the very least, that they are not exposed to malnourishment, starvation and other related problems.

⁸³ Close to 50 million tonnes of grain are lying idle in public godowns in Rajasthan and across the country. There is so much grain in the Government's reserves that the Respondent no. 2, the Food Corporation of India has run out of storage space. In some cases, there is barely a distance of 75 kilometres between the location of these godowns and the places where starvation is rampant, people are malnourished, and cattle are dying

155. The right to food is elaborated in General Comment No. 12 of the Committee on Economic, Social and Cultural Rights, as follows: “The right to adequate food is realised when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”
156. This right creates an obligation on Governments to assure that "each and every human being on this planet shall be free from hunger". States are obligated to protect, respect, and fulfil the right to food. As explained in the report of the Special Rapporteur on the right to food (E/CN.4/2003/54), the obligation to respect means that States must not violate the right to food (e.g. evict people from their land, destroy crops). The obligation to protect means that States must protect their citizens against violations by other actors (e.g. by instituting regulations on food safety).
157. The third obligation to fulfil the right to food means that States must first facilitate the right to food by providing an enabling environment for people to feed themselves (e.g. engage in land reform, stimulate employment), and secondly the State must be the provider of last resort in cases where people cannot feed themselves for reasons beyond their control (e.g. social safety net programmes, food stamps, food in prison).
158. These obligations are an elaboration of Article 11 of the International Covenant on Economic, Social and Cultural Rights (CESCR). Furthermore, General Comment No. 3 of the Committee on Economic, Social and Cultural Rights concludes that these obligations are not precluded by the "progressive realisation" of economic, social and cultural rights. General Comment No. 3 therefore outlines minimum obligations that states must meet immediately for correct implementation of the right to food as provided for in the CESCR: obligation of non-discrimination, obligation to provide basic minimum substance, and obligation to respect.
159. The actions of the Indian government or more specifically the lack thereof, run contrary to the Constitution of India. Article 21 of the Constitution makes it mandatory for the State to ensure the right to life of the citizens, which includes the right to live with dignity. Article 47 of the DPSP provides "the duty of the State to raise the level of nutrition and the standard of living and to improve public health".
160. The PUCL petition highlights two aspects of the state's negligence in ensuring food security: the breakdown of the public distribution system (PDS), and the inadequacy of relief programmes in drought-affected areas. Following on this, it asked the Supreme Court to intervene, by directing the government to (a) provide immediate open-ended employment in drought-affected villages, (b) provide 'gratuitous relief' to persons unable to work, (c) raise the PDS entitlement per family, and (d) provide subsidised food grain to all families. The petition also requests the court to order the central government to supply free food grain for these programmes.
161. Interim applications submitted from time to time by PUCL have further enlarged and consolidated these demands. The initial petition focused on the drought situation prevailing at that time, especially in Rajasthan, but the litigation now has a much broader scope. The main concern is to put in place permanent arrangements to prevent hunger and starvation. The interim applications advocate the introduction of a nation-wide “employment guarantee act”, combined with social security arrangements for those who are unable to work. The Supreme Court in response has passed orders directing the Indian government, among other things, to: (1) introduce mid-day meals in all primary schools, (2) provide 35 kgs of grain per month at highly subsidised prices to 15 million destitute households, and (3) double resource allocations for *Sampoorna Grameen Rozgar Yojana*, India's largest rural employment programme.

162. On 28 November 2001, after four hearings, the Supreme Court passed an interim order that provides for the conversion of eight food security schemes into entitlements (rights) for the poor. These include the *Antyodaya Anna Yojna* (food for the poorest of the poor scheme), the National Old-Age Pension Scheme, the Integrated Child Development Services (ICDS) programme, the National Mid-day Meals Programme (NMMP), the *Annapurna scheme* (food scheme for those above the age of 65) and several employment schemes providing food for work, which would in the final instance, be an iron clad guarantee of food security.
163. In March 2002, the Supreme Court asked all States and Union Territories to respond to an application seeking the framing of wage employment schemes such as the *Sampoorna Gramin Rojgar Yojna* or the *SGRY (Comprehensive Village Employment Programme)* that ensure the right to work in rural areas. The Supreme Court also spelt out detailed directions on the implementation of various other schemes, and appointed two former civil servants as "commissioners" who would look into any persisting grievances that were not amenable to established procedures of redress. On 8 May 2002, the Supreme Court agreed on a system of monitoring. The Bench also added that the states are to provide a funds utilisation certificate before the money is released for their use. Returning to this order after a lapse of some months, the Supreme Court in November 2002 laid out clear procedures of accountability. Every State was required to publicise the details of the court's order in *Gram Panchayat offices (local village level government)*, school buildings and fair price shops within eight weeks. However the court order, like the food assistance system, has remained paralysed in several states
164. Of the eight schemes, the most significant is the order directing all state governments to provide cooked mid-day meals in all government schools in at least half of each state's districts by January 2002, which was later extended to 28 May 2002 and subsequently to 4 September 2004.
165. In 2003, the court ordered that:
- The Famine Code be implemented for three months;
 - Grain allocation for the Food for Work Scheme be doubled (from five to ten million tonnes) and financial support for schemes be increased;
 - ration shop licensees must stay open and provide the grain to families below the poverty line at the set price;
 - The Government should publicise the rights of families below the poverty line to grain to ensure that all eligible families are covered;
 - All individuals without means of support (older persons, widows, disabled adults) are to be granted an *Antyodaya Anna Yojana* ration card for free grain, and
 - State governments should progressively implement the mid-day meal scheme in schools.

Order of 29 October 2002

166. The hearing on 29th October, 02 resulted in the clarification of some points pertaining to the previous orders. The Supreme Court reaffirmed the previous orders and issued some of the following broad points as the order.
167. Chief Secretaries will be held responsible if starvation deaths are established in their states.
168. Each state will appoint one officer as an assistant to the commissioner.
169. One last chance is given to the states to take up the publicity of the orders and translate them.

Order of May 8, 2002

170. The *Gram Panchayats* shall frame employment generation proposals in accordance with the SGRY guidelines... These proposals shall be approved and sanctioned by the *Gram Panchayats* and the work started expeditiously.
171. The respondents shall focus the SGRY programme towards agricultural wage earners, non-agricultural unskilled wage earners, and marginal farmers and in particular, Scheduled Caste (SC) and Scheduled Tribe (ST) persons whose wage income constitutes a reasonable proportion of their household income and to give priority to them in employment, and within this section shall give priority to women.
172. The government shall release money entitlements under the different employment generation schemes to each State on schedule, provided that utilisation certificates have been provided by the states certifying that the funds have been used for the specified purpose.
173. The *Gram Sabhas*⁸⁴ (*mass assemblies of the entire panchayat*) are entitled to conduct Social Audits into all Food/ Employment schemes.
174. *Gram Sabhas* are entitled to monitor the implementation of the various schemes and have access to relevant information.
175. In view of the grievance that the identification of BPL families is not being done properly the central and the state governments are directed to clarify the issue and work out a policy for.
176. The respondents shall ensure that rations shops remain open throughout the months during fixed hours the details of which will be displayed on the notice board.
177. Appointment of two commissioners of the Court to redress complaints that have not been resolved by the Collectors and the Chief Secretary. They can take the help of NGOs and individuals to help them monitor the implementation of the court's orders.
178. In its latest *order* dated 7 October 2004, the Supreme Court has focussed primarily on Integrated Child Development Scheme (ICDS). The order discusses measures such as increasing the number of *anganwadis* (*mother and child nurseries*) from six lakhs to fourteen lakhs, increasing the norms for supplementary nutrition, abolition of contractors in provision of food, provision of detailed information on ICDS in the website and ensuring full utilisation of available finances.
179. Below is a summary of the orders that have been passed by the Supreme Court

Order of April 29, 2004

180. The court expressed concern that all children should be covered by ICDS programme. The Government of India has been directed to provide a plan of action to expand the number of *anganwadis* to cover all settlements, latest by July. All states have been directed to file a report on eligible number of children vis-à-vis number covered under the ICDS programme.

⁸⁴ Under the 73rd Amendment to the Constitution, the Gram Sabhas have the constitutional status of being formal deliberative bodies and mechanisms of accountability.

Order of April 27, 2004

181.No scheme covered in the previous orders can be discontinued without the prior permission of the court. The court expressed concern that children are not being adequately covered in the ICDS scheme.

Order of April 20, 2004

182.*Mid-day meals:* The court directed that all states have to start implementing the mid-day meal scheme latest by 1 September 2004. The Central Government was directed to make financial provisions for mid-day meal infrastructure, and also reply to the Food Committee's suggestion that it share a part of conversion costs. The Government should also state when it is planning to implement the Prime Minister's announcement to extend mid-day meals up to class 10. Dalits to be given preference in appointment of cooks and helpers and mid-day meals shall be provided in summer in drought affected states.

183.*Employment:* Allocation for SGRY to stand doubled. All documents pertaining to employment programmes shall be available for public scrutiny, and the price of these documents shall be no greater than cost of providing copies. Minimum wages should be paid in the works and use of labour-displacing machinery to be stopped. In case of financial difficulty the states can approach the centre for permission to pay 100 % wages in grain.

184.*Antyodaya:* BPL criterion should not be used in selection of Antyodaya beneficiaries. States have been directed to issue AAY cards to all primitive tribes immediately.

185.In response to the PUCL petition, the governments of the states of Rajasthan, Gujarat, Himachal Pradesh, Madhya Pradesh, Maharashtra, Punjab, Haryana, Karnataka, Orissa, Meghalaya and Manipur claimed before the Supreme Court that implementation of the Central and state schemes was complete, that there were no starvation deaths and no destitute in their respective states. They also claimed that sufficient food was being supplied through the Public Distribution System (PDS) and that anyone who needed food but was unable to work for it was being given relief. On further orders by the Supreme Court, the state governments prepared a compliance report vis-à-vis nine Central government schemes.

186.Despite the romantic optimism that states expressed in their statements before the Supreme Court, their compliance reports made it clear that the state of food security in India is worrisome.

187.Scepticism increases when one scrutinises the records of schemes that were cited as providers of food to the poor. The Public Distribution System (PDS) is a food subsidy programme that explicitly targets the poor. The program has recently been renamed the 'Targeted Public Distribution System' (TPDS), but results have still been extremely limited. The performance of fair price shops, where they exist, remains dismal in some states.

188.In Maharashtra, Uttar Pradesh, Delhi and Rajasthan, one often finds bogus ration cards, poor quality grains, short weighing of food, and rates equivalent to or marginally below the market rates. According to a National Sample Survey data conducted by the World Bank in 2002, 10 percent of poor households in Uttar Pradesh do not have any ration card at all. Among other things, it is clear that a review of the Below Poverty Line (BPL) list is long overdue.

189.It is equally clear that most states have not complied with the Supreme Court's order regarding the introduction of cooked mid-day meals in primary schools. The state of Uttar Pradesh is a case in point. In many cases, instead of providing children with cooked meals the students are

asked to collect food grain from a local ration shop. The students are given a chit and asked to queue up at the ration shop. Thus they are given neither "cooked" food nor a "meal", and there is no guarantee that they will eventually get the meagre amount of food they have ostensibly been provided with.

190. According to the second report of the appointed Commissioner of the Supreme Court on the right to food, submitted on 3 March 2003, with the exception of Rajasthan and Andhra Pradesh, several state governments (in particular Bihar, Jharkhand, Mizoram and Assam) have failed to implement the order on cooked meals. "Unaffordability", "unimplementability", waste of teachers' time, disruption of school activities and hygiene problems have been cited to justify the violation of the order.
191. Whether due to lack of funds from the central government, or lack of initiative in obtaining funds on the part of the state government, the implementation of the food-for-work programmes is extremely tardy even when the Centre provides free cereals.
192. In the state of Jharkhand, for example, employment programmes are non-existent in Manatu block in Palamau district - even though Manatu has been declared, "drought affected" since November 2001.
193. On 17 November 2004, the court directed that "every child eligible for cooked meal under the mid-day meal scheme, in all States and Union Territories, shall be provided with the said meal immediately, and in any case, not later than January 2005." Furthermore, rejecting the argument that the delay in the implementation of the scheme has been because the States did not receive necessary funds from the Centre, the court instructed the States to use whatever funds were available and claim from the Centre later. The Central support now consists of 100 grams of grain a day per child, Re. 1 as conversion cost (for firewood, pulses, vegetables and condiments) and a transport subsidy of up to Rs. 50 a quintal of food stuffs from the nearest FCI depot.
194. However, while in some areas efforts have been made towards implementation of the order others remain unaware of the order. For instance, in the state of Assam, in Chirang District the scheme began implementation on 1 February 2005. At a meeting held on 13 January for the Boro Bazaar block, the Deputy Commissioner announced that Re 1. would be given per child for 20 days a month to meet the cooking costs and Rs 500 towards wages for the cook. The block office has been given money for the transportation of food grain⁸⁵.
195. However, in Upper Assam, some villages and even *Sarpanches (President of the Panchayat)* are unaware of the court order.
196. The good news is that in village after village, the cooked meal scheme has led to higher enrolment and fewer dropouts. Bihar, one of the toughest states to monitor, has begun full implementation of the "khichdi" or cooked meal scheme. Dr. DS Gangwar, Director Primary Education, Bihar, explains, "We selected three blocks in 10 of the most backward districts, then extended the scheme to the whole district in 2003, and now, to the whole state. We are awaiting reports from all blocks, 26 of the 38 districts have confirmed that they have started serving cooked meals".
197. Nonetheless much is left to be desired. According to some activists, even in districts where the scheme was in place implementation remains tardy. For instance, in Dhabdhabwa village in East Champaran, one of the poorest districts in Bihar and one selected for the implementation of the

⁸⁵ *Food, for education*, Annie Zaidi in Frontline Magazine, Volume 22, Issue 4, February 2005. Available online at: www.flonnet.com/fl2205/stories/20050311000704900.htm

scheme earlier, cooked meals were never served. Action Aid observed that the block administration has failed to deliver the food grain.

198. Undeniably there are gaps in the implementation of the scheme. For one, many villages face an acute shortage of grain and funds. Transportation of food grains is another major problem the schools face. The State Food Corporation is the nodal agency and is supposed to drop the grain at the doorstep of the school. But by all accounts, the children or the village panchayats have had to arrange for the cost of transportation.
199. Although the Government of India has ordered that cereals be transported from the FCI godowns one month in advance, this does not always happen. Another problem is the non-availability of water; children often go home to wash their hands after the meal and invariably do not return to school defeating the very purpose of the meal. The quality of the meals being served is the next major issue. Another problem besieging the scheme is the monitoring and quality. Caste discrimination is also rife, but the children themselves have shown the way. There have been instances when students have gone on strike to have a Dalit teacher reinstated⁸⁶.
200. In conclusion, some of the most important schemes such as the TPDS have had a limited impact on nutrition levels. Several have suffered or continue to suffer from problems of illegal diversion and black market selling of subsidised foodstuffs, a minimum purchase requirement that acts to exclude the poor, weak monitoring, a lack of transparency and inadequate accountability in management. It would therefore be inappropriate to separate the question of efficient food distribution from the general question of improving governance and people's participation.

⁸⁶ Ibid.

PART FIVE: PHILIPPINES

201. Courts in the Philippines have had a mixed and ambivalent history with socio-economic rights. In the well-known *Oposa Forestry* case, the Supreme Court affirmed the right of present and future generations to healthy ecology, but, in another case, they confined the mandate of the Commission on Human Rights to civil and political rights. **As in India and Bangladesh, economic and social rights are constitutionally enshrined in the Philippines as directive principles but have been more conservatively interpreted.** While the cases have most often not specifically relied upon human rights norms, they are illuminating because they embody a human rights approach, seeking to use constitutional and other legal provisions to protect basic rights of the poor.
202. The Supreme Court of the Philippines has taken a leading role in protecting the environment. This was most notable in *the Juan Antonio Oposa*⁸⁷ case where the plaintiff's argued that significant deforestation was caused by the government's leniency in issuing timber licences. The Court granted the plaintiff's action to cancel all existing logging permits on the ground that the right to a balanced and healthful ecology was protected by the constitution. Moreover, the Court held that even though parties have the freedom to enter into contracts with one another, this freedom could be limited in the interest of public health, safety, moral and general welfare.
203. The Court also set a precedent enforcing ESC rights in *Brigido Simon*⁸⁸, where it held that a human rights commission had jurisdiction to consider both civil and political rights and ESC Rights.

BRIGIDO SIMON ET AL. V. COMMISSION ON HUMAN RIGHTS

Thematic focus

204. Economic development and poverty, Right to housing, Right to social security and welfare

Nature of case

205. Petition for Prohibition; Jurisdiction of the Commission on Human Rights; Human Rights; interdependence; civil and political rights vis-a-vis economic, social and cultural rights; adjudicative, investigative powers and contempt powers; quasi-judicial authority.

Summary of the judgement

206. This is a petition to prohibit the Philippine Commission on Human Rights (CHR) from hearing and deciding a complaint involving small store and home owners whose stalls and shanties were ordered demolished by the office of the Quezon City mayor to give way to the construction of a "People's Park".
207. The petitioning mayor alleged that the CHR had no jurisdiction over the case as the latter's mandate covers only violations of civil and political rights. Respondent CHR on the other hand, asserted that the matter involves the right to earn a living, which is essential to one's fundamental

⁸⁷ Juan Antonia Oposa et al. V. Honbl Fulgencio, Jr (1993), GR No 100150 (Supreme Court of the Philippines), online: Human rights Network on the Web. Available at :

⁸⁸ Brigido Simon et al. v Commission on Human Rights (1994), GR No 100150 (Supreme Court of the Philippines). Available at:

right to development, life and dignity. However, the Court upheld the petitioner's contention by citing the proceedings of the Constitutional Commission indicating that the main purpose for the creation of the CHR was to prevent a repeat of human rights violations committed during the Marcos regime, namely torture, summary killing, disappearances and other "serious" civil and political rights violations.

208. The adverse ruling appears to delimit the CHR's powers as to which "human rights" are to be given attention in a manner that is inconsistent with the ICESCR and the recognition of interdependence of civil and political with economic, social and cultural rights. As noted in by the Committee on Economic, Social and Cultural Rights in its General Comment No. 10, national human rights institutions "have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions." (para.3).

JUAN ANTONIO OPOSA ET AL., VS. HONBL FULGENCIO, JR., SEC DEPARTMENT FOR ENVIRONMENT AND NATURAL RESOURCES ET AL ⁸⁹(SUPREME COURT OF THE PHILIPPINES)

Keywords

health rights — environmental rights — children's rights — future generation

Nature of case

209. Constitutional law issues on the right to a balanced and healthful ecology; non-impairment of contracts; Environmental law; judicial review and the political question doctrine; inter-generational responsibility; Remedial law: cause of action and locus standi.

Facts of the case

210. The action was filed by several minors represented by their parents against the Department of Environment and Natural Resources (DENR) to cancel existing timber license agreements in the country and to stop issuance of new ones. It was claimed that the resultant deforestation and damage to the environment violated their constitutional rights to a balanced and healthful ecology and to health (Section 15). The petitioners asserted that they represent others of their generation as well as generations yet unborn.

Decision

211. The Court stated that the petitioners were able to file a class suit both for others of their generation and for succeeding generations as "the minors" assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come".

⁸⁹ G.R. No. 101083, July 30, 1993. Available online at: www.elaw.org/resources/text.asp?ID=278 (Accessed on 16 February 2005)

Outcomes

212. This case had been widely-cited in jurisprudence worldwide, particularly in cases relating to forest/timber licensing. It had been used to demonstrate the effectiveness of using internationally accepted principles as well as constitutional provisions in advocating for environmental protection and/or a right to the environment.

PART SIX: SOUTH AFRICA

213. Despite the fact that South Africa has yet to ratify the ICESCRs its constitution includes key ESCRs including the right of access to adequate housing (section 26(1)), to health care, food and water, and to social security (section 27 (1)). Also protected is a range of children's rights to basic nutrition, shelter, basic health care services and social services (section 28(1) (c)). Except for the latter, the general socio economic right provisions are subject to internal limitations. They require the state to only take reasonable legislative and other measures within its available resources to progressively realise them (section 26(2)) and section 27(2)).

214. The inclusion of social and economic rights in the Bill of Rights is a clear articulation that democracy is as much about the right to vote, and of free expression and of association as it is about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.

215. Notably, the Constitution has tasked the South African Human Rights Commission with a specific mandate to advance social and economic rights. In particular, Section 184(3) requires that "each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment".

216. The South African Courts have accordingly been at the forefront providing that these rights are subject to judicial review. The leading South African case on the right to housing- landmark case on social and economic rights generally is the *Grootboom* case. Although the *Grootboom* case centred on the right of access to housing, it emphasised that socio economic rights are interrelated and interconnected and that in order for a government policy to pass the test of reasonableness as elaborated upon in the *Grootboom* judgement case, a policy aimed at providing access to a right cannot be aimed at long-term statistical progress only but it should benefit the targeted people (poor households).

217. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.

218. On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

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.

219. On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yacob said:

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.

220. Later judgements such as the cases of *Manquele v Durban Transitional Metropolitan Council (DTMC)* and *Residents of Bon Vista Mansion v Southern Metropolitan Local Council* have dealt with the negative obligation of the State to achieve the progressive realisation of a right. Both of these cases deal with the disconnection of water supply to households. *Manquele case* judgement took place in 2001 whilst *Bon Vista case* judgement took place in 2002.

THE GROOTBOOM CASE

Government of RSA and others v Grootboom and others	
Constitutional Court - CCT11/00	Hearing date: 11 May 2000
	Judgement date: 4 October 2000
2001 (1) SA 46 (CC)	
Right of access to adequate housing	

Summary of Judgement

221. This case raises the state's obligations under section 26 of the Constitution, which gives everyone the right of access to adequate housing, and section 28(1)(c), which affords children the right to shelter. It concerns questions about the enforceability of social and economic rights.
222. Mrs Grootboom was one of a group of 510 children and 390 adults living in appalling circumstances in Wallacedene informal settlement. They then illegally occupied nearby land earmarked for low-cost housing but were forcibly evicted: their shacks were bulldozed and burnt and their possessions destroyed. Their places in Wallacedene had been filled and in desperation they settled on its sports field and in an adjacent community hall.
223. The Cape of Good Hope High Court found that the children and, through them, their parents were entitled to shelter under section 28(1)(c) and ordered the national and provincial governments as well as the Cape Metropolitan Council and the Oostenberg Municipality, immediately to provide them with tents, portable latrines and a regular supply of water by way of minimal shelter. This decision formed the basis for the appeal to the Constitutional Court.
224. The Human Rights Commission and the Community Law Centre of the University of the Western Cape were admitted as *amicus curiae* in the appeal.
225. At the hearing on 11 May 2000, the Grootboom community accepted an offer by the state to relieve the crisis in which they were living. By 21 September the state had not implemented its offer and an urgent application was launched in this Court. On that date, after communication with the parties, the Court made an order putting the municipality on terms to provide certain rudimentary services.
226. In a unanimous decision, written by Justice Yacoob, it was noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The Court stressed that all the rights in the Bill of Rights are inter-related and mutually supporting. Realising socio-economic rights enables people to enjoy the other rights in the Bill of Rights and is the 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. Human dignity, freedom and equality are denied to those without food, clothing or shelter. The right of access to adequate housing can thus not be seen in isolation. The state must also foster

conditions that enable citizens to gain access to land on an equitable basis. But the Constitution recognises that this is an extremely difficult task in the prevailing conditions and does not oblige the state to go beyond its available resources or to realise these rights immediately. Nevertheless, the state must give effect to these rights and, in appropriate circumstances; the courts can and must enforce these obligations.

227. The question is always whether the measures taken by the state to realise the rights afforded by section 26 are reasonable. 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 is most in peril must not be ignored. If the measures, though statistically successful, fail to make provision for responding to the needs of those most desperate, they may not pass the test of reasonableness.
228. The Court emphasised that neither section 26 nor section 28(1) (c) gave any of the respondents the right to claim shelter immediately. However, the programme in force in the area of the Cape Metropolitan Council at the time the application was launched fell short of the obligations imposed upon the state by section 26. Although the overall housing programme implemented by the State since 1994 had resulted in a significant number of homes being built, it failed to provide for any form of temporary relief to those in desperate need, with no roof over their heads, or living in crisis conditions. Their immediate need could be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability.
229. After the case had been started in the High Court, an Accelerated Managed Land Settlement Programme had been introduced by the Cape Metropolitan Council to fulfil this need. This programme needs to be effectively implemented. The Court stressed that the judgement should 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.
230. The Court issued a declaratory order which required the state to devise and implement a programme that included measures to provide relief for those desperate people who had not been catered for in the state programme applicable in the Cape Metropolitan area before the Accelerated Managed Land Settlement Programme had been introduced.

KEY NOTES

The Grootboom Principles

231. The Court established several important principles for evaluating whether the State has fulfilled its positive duties.
232. The key question is whether the measures adopted by the State are 'reasonable'. This means that a court will not tell the State it could have adopted a more favourable policy or spent public money better. Rather, the State will have to show that the measures it has adopted are reasonable, given its positive duties under the Constitution to realise access to socio-economic rights.
233. The reasonableness of the measures adopted by the State must be considered in their social, economic and historical context.
234. The State must establish comprehensive and coherent programmes, which are capable of facilitating the realisation of the right.

235. A reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.
236. When deciding on the reasonableness of a programme, the court will pay special attention to the question of whether the needs of the most vulnerable sections of society have been addressed. In the words of the Court, 'The poor are particularly vulnerable and their needs require special attention'. In practice this means a State programme designed to promote access to socio-economic rights must make provision for people in desperate need. In the context of the right to housing this means that the housing programme must 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'. An example would be an accelerated land release programme for people in dire circumstances. It was on this ground that the Court found that the current state housing programme in the area of the Cape Metropolitan Council did not comply with section 26 of the Constitution.
237. In considering the test for reasonableness, the Court held that it should not enquire whether "other more desirable or favourable measures could have been adopted or whether public money could have been better spent (Para 41). It accepted that a measure of deference must be given to the legislature, and particularly the executive, to implement a housing programme.
238. However, the Court insisted that the concept of reasonableness meant more than an assessment of simple statistical progress and that evidence had to be prepared to show that there was sufficient attention given to the needy and most vulnerable within the community (Para 44). They were to be considered a priority in the development of any sensible and constitutionally valid housing policy.
239. However, it is not enough to merely design reasonable policies and legislation. The relevant programmes must also be reasonably implemented. This means, for example, that if the government does not allocate enough resources for the implementation of a programme or where people's access to a socio-economic right is hampered by bureaucratic inefficiency or very onerous regulations, it could be challenged in court as unreasonable.
240. Progressive realisation means the State has a duty to examine legal, administrative, operational and financial barriers to accessing socio-economic rights and, where possible, to take steps to lower them over time. Housing must be made accessible to both a larger number and also a wider range of people as time progresses. The Court also accepted that the State would have to fully justify any deliberately retrogressive measures that reduced people's access to socio-economic rights. An example in the housing context would be abolishing the housing subsidy scheme without putting in place a suitable alternative programme to facilitate access to housing by the poor.
241. Finally, the availability of resources would be an important factor in assessing the reasonableness of the measures adopted by the State.

PORT ELIZABETH MUNICIPALITY V VARIOUS OCCUPIERS

<i>Port Elizabeth Municipality v Various Occupiers</i>			
Constitutional Court - CCT53/03	Hearing date:	4	March 2004
	Judgement date:	1 October 2004	
2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)			
Right to housing -- right not to be evicted from one's home without order of court -- circumstances in which a municipality may apply to evict unlawful occupiers			

Summary of judgement

242. In response to a petition signed by 1600 people in the suburb of Lorraine, the Port Elizabeth Municipality sought an eviction order against 68 persons living in shacks on privately owned land. Most of the occupiers had been there for periods ranging from two to eight years, after eviction from other land. They were willing to move if given suitable alternative land. The Council said they could go to Walmer Township. The occupiers rejected this on grounds that Walmer is crime-ridden and unsuitable. Having no security of occupation, they also feared further eviction. The Municipality submitted that it was aware of its obligation to provide housing and for that reason it had embarked on a comprehensive housing development programme. It contended that if alternative land was made available to the occupiers they would be effectively “queue-jumping”, by occupying private land and, when asked to vacate it, demanding that they be provided with alternative accommodation, they would be disrupting the housing programme and forcing the Municipality to grant them preferential treatment.
243. The South Eastern Cape Local Division of the High Court held that since the occupiers were in unlawful occupation of the land, and it was in the public interest to terminate their occupation, they should be evicted. The High Court accordingly ordered the occupiers to vacate the land and authorised the Sheriff to demolish the structures if necessary, with the assistance of the police if required. It also ordered the occupiers to pay the costs of the proceedings. The occupiers appealed successfully to the Supreme Court of Appeal (SCA) against the eviction. The SCA held that the occupiers were not seeking preferential treatment in the sense that they were asking for housing to be made available to them in preference to people in the housing queue. They were merely requesting that land be identified where they could put up their shacks and where they would have some measure of security of tenure. The SCA further held that important consideration in the case was the availability of suitable alternative land.
244. The Municipality then appealed to the Constitutional Court, seeking a ruling that it was not constitutionally obliged to find alternative accommodation or land when seeking an order evicting unlawful occupiers.

Decision

245. Section 26(3) of the Constitution provides that 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. Section 6 of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* provides for circumstances in which a municipality may apply to evict unlawful occupiers. A court may then order eviction if it is just and equitable to do so, taking account of all the circumstances.
246. In a unanimous judgement Sachs J emphasised the importance of interpreting and applying the above provisions in the light of historically created landlessness in South Africa. He stressed the need for dealing with homelessness in a sensitive and orderly manner, and the special role of the courts in managing complex and socially stressful situations. The proceedings were being brought not by the landowners themselves but by the Municipality. Municipalities must show equal accountability to occupiers and land owners. Ordinarily, justice and equity would require that all reasonable steps be taken to procure a mediated solution before an eviction order is made. Making a reference to the *Grootboom case*, the Court stated (Para 56):

In considering whether it is “just and equitable” to make an eviction order in terms of section 6 of the Act, the responsibilities that municipalities, unlike owners, bear in terms of section 26 of the Constitution are relevant. As *Grootboom* indicates, municipalities have a major function to perform with regard to the fulfilment of the rights of all to have access to adequate housing. Municipalities, therefore, have a duty systematically to improve access to housing for all within their area. They must

do so on the understanding that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect. Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required.

247. In the present matter, the Municipality had not taken action against the occupiers for years and then had acted precipitately to secure their eviction. The land did not appear to be needed for immediate productive use by the owners. The Municipality had only taken cursory steps to determine the exact circumstances of the individual occupiers. The Court stated,

It took no steps to seek to address the problems of the occupiers at all before launching eviction proceedings, despite the fact that the land was not needed by the owners or the Municipality, and despite the fact that the occupiers are a small group of people who have resided on the land for a considerable time.

248. Although it was not under a constitutional duty in all cases to provide alternative accommodation or land, its failure to take all reasonable steps to do so would generally be an important consideration in deciding what was just and equitable. In the particular circumstances, in the light of the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that either the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, the Court held that it was not just and equitable for the eviction order to be granted.

249. The Court maintained that the real question in the case was whether the Municipality has considered seriously or at all the request of these occupiers that they be provided with suitable alternative land upon which they can live “without fear of eviction” until provided with housing by the Municipality. The thrust of the SCA judgement makes this clear. “The lack of information concerning the status of Walmer highlighted the failure of the Municipality to show that it had responded reasonably to the dire situation of the occupiers. The availability of suitable alternative accommodation is a consideration in determining whether it is just and equitable to evict the occupiers, it is not determinative of that question.”

250. In ordering the Municipality to pay the costs of the respondents, including the costs of two counsels, the Court concluded that,

“In cases like the present it is particularly important that the Municipality not appear to be aligned with one side or the other. It must show that it is equally accountable to the occupiers and to the landowners. Its function is to hold the ring and to use what resources it has in an even-handed way to find the best possible solutions. If it cannot itself directly secure a settlement it should promote a solution through the appointment of a skilled negotiator acceptable to all sides, with the understanding that the mediation proceedings would be privileged from disclosure. On the basis of this judgement a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution.”

Keywords
Right to water

The facts

251. The applicant, a 35-year-old woman with seven children in her care, failed to pay for water consumed in excess of the free six kilolitres per month provided by the Durban Transitional Metropolitan Council (DTMC). In accordance with its by-law on water supply, the DTMC gave the applicant written notice and allowed for representations to be made, before disconnecting her water supply. The applicant approached the Durban High Court for an order declaring the disconnection illegal.
252. The main arguments in *Manquele v Durban Transitional Metropolitan Council* were based on the applicant's right to basic water supply. Section 3 of the Water Services Act 108 of 1997 stipulates that everyone has a right of access to basic water supply and basic sanitation. Every water services institution must take reasonable measures to realise these rights (s 3(c)). Procedures for the disconnection of water services must be fair and equitable (s 4(3)(a)) and must not result in a person being denied access to basic water supply where that person proves that he or she is unable to pay (s 4(3)(c)). The applicant argued that the said by-law was inconsistent with the Water Services Act in that the discontinuation resulted in her being denied access to basic water services while she was not able to pay for basic services. In terms of the Water Services Act, 'basic water supply' is 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'. The term 'prescribed' indicates that regulations made under the Act must give further content to the term 'basic water supply'. No such regulations exist.

Decision

253. The Court said that, in the absence of the regulations prescribing the minimum standard of water supply, it could not enforce the right to basic water supply in terms of the Act. The judgement call, necessary for interpreting section 3 and 4(3) of the Act without the regulations, concerns 'policy matters which fall outside the purview of my role and function', according to the judge. Furthermore, the Court was satisfied that the procedures used by DTMC, in accordance with its by-law, did not fall foul of section 4(3)(a) or (b) of the Act. The by-law provided for written notice and for the opportunity to make representations. Another factor considered by the Court was that the applicant permitted tampering with the service during a previous disconnection. With regard to the argument that the disconnection resulted in the applicant and her children being denied access to basic water supply, the Court further considered that the applicant 'chose...not to limit herself to the water supply provided to her free of charge but to consume additional quantities...'. It is because of the non-payment for this water supply that the service was discontinued. This, according to the Court, removes her out of the ambit of being a person who can prove that he or she is unable to pay for 'basic services'.

⁹⁰ (2001) JOL 8956 (D)

COMMENTS BY JAAP DE VISSER, LOCAL GOVERNMENT PROJECT, COMMUNITY LAW CENTRE, UWC⁹¹

254. It is regrettable that, because of the arguments placed before it, the Court could not entertain section 27(1)(b) and section 28(1)(c) of the Constitution. These sections enshrine the constitutional right of access to water and the children's right to basic nutrition. Had the applicant based her argument on these provisions, the absence of regulations could not have prevented the Court from considering the scope of 'basic water supply'. This is because the constitutional right of access to basic water exists independently from the question whether or not regulations in terms of the Water Services Act exist. *The Grootboom* precedent would have required a more detailed and useful analysis in which the circumstances of the applicant, such as the fact that she was caring for seven children, should have played an important role. However, it is interesting to note that at first the Court avoided giving content to the term 'basic water supply' without the said regulations. However, towards the end of the judgement, the Court concludes that six kilolitres per month free of charge constitutes 'basic services' in terms of section 4(3)(c) of the Water Services Act. This indicates that the Court, even though it did not want to determine the scope of 'basic water supply' itself, was prepared to test the DTMC's interpretation of 'basic water supply'. This is exactly what is required from a Court when confronted with these kinds of challenges: not to take policy decisions but to assess whether or not rights have been violated on a case by case basis. The conclusion, albeit hesitantly, of the Court that six kilolitres per month constitutes "basic water supply" begs the following question: if the DTMC provides six kilolitres per month for free as standard practice and has the means to do that, is the non-payment of the applicant for excess usage good enough reason to deprive her of even that first six kilolitres? The Court could have argued that the basic water supply should continue if the applicant proves that she is unable to pay for the excess usage. Another argument could be that free basic water supply is completely dependent on income out of excess usage and that the two cannot be separated. Unfortunately, the Court did not entertain these arguments and an opportunity was missed to give further content to the right to basic water supply.

VANESSA ROSS V SOUTH PENINSULA MUNICIPALITY⁹²

Summary of judgement⁹³

255. In the case of *Vanessa Ross v South Peninsula Municipality*, the municipality was seeking an eviction order against Mrs Ross and her children from a flat in Lotus River that she had been leasing from the municipality since early 1997. In their summons, the municipality made three simple allegations:

- It was the owner of the property;
- Mrs Ross was in occupation of the property; and that
- She and all the people living with her were occupying the property illegally, as there was no agreement that entitled her to occupy the property.

⁹¹ Local Government Law Bulletin, Volume 3 No. 1 April 2001, Published by the Community Law Centre in association with the South African Local Government Association. Available online at:

[http://www.sn.apc.org/users/clc/localgovt/bulletin/01\(1\)frc2b.htm](http://www.sn.apc.org/users/clc/localgovt/bulletin/01(1)frc2b.htm)

⁹² (1999) JOL 5298 (C)

⁹³ "Evictions, municipalities and the Constitution: the right to housing", Local Government Law Bulletin, Volume 1 No. 4 December 1999, Published by the Community Law Centre in association with the South African Local Government Association. Available online at:

[http://www.sn.apc.org/users/clc/localgovt/bulletin/99\(4\)evict.htm](http://www.sn.apc.org/users/clc/localgovt/bulletin/99(4)evict.htm)

256. Mrs. Ross's attorneys noted an exception to the summons on the basis that it did not disclose a valid cause of action under the Constitution, particularly in terms of section 26(3). This judgement is an appeal from the decision of the Magistrate's Court, dismissing the exception. The municipality's form of pleading was in accordance with established common law principles. The owner of a property is entitled to possession of the property. In an ejection application, it is therefore sufficient for the owner simply to allege ownership of the property in question and that the respondent is in unlawful possession.
257. The main issue in this appeal was whether section 26(3) of the Constitution has altered these established common law principles. In other words, has the Constitution now placed an onus on an owner of land to inform the court of circumstances justifying the eviction of a person in possession of the owner's property if it is the occupier's home?
258. Section 26(3), which forms an integral part of the right of access to adequate housing, reads as follows:
- 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.
259. The court held that it was beyond question that the incidence of the onus could be affected by a constitutional requirement. Experience and fairness would determine where the onus should be placed.
260. In terms of section 26(3), a court can only grant an eviction order after it has considered all the 'relevant circumstances'. The question that follows is one of how these circumstances should be placed before the court? The court observed that in inquisitorial legal systems, a judicial officer is able to call for and gather whatever information is required. In adversarial systems, it is up to the parties to place the relevant information before the court. The onus of proof becomes very important in this context as it prescribes which party must place particular facts and circumstances before the court and therefore what has to be alleged in pleadings or affidavits. The effect of section 26(3) in an adversarial legal system such as the South African one is that the plaintiff (owner) must place the information that it considers relevant before the court. The defendant (occupier) can plead by answering these allegations, and can also raise additional issues that it considers relevant. The plaintiff can respond to any new allegations raised by the defendant in reply. In this way the pleadings will introduce the issues and define them, and the evidence will provide the substance and detail. The court will be able to exercise its discretion after having considered all the relevant circumstances. The court itself could presumably also call for amplification of the issues if it deems it necessary. Since the Constitution only protects eviction from a 'home', section 26(3) would not apply in the case of eviction from, for example, business premises.
261. Section 26(3) of the Constitution prescribes that an eviction order can only be made in terms of an order of court. This means that an eviction order may not be issued by, for example, a clerk of the Magistrate's Court or the Registrar of the High Court, in an application for default judgement. Only the presiding officer can issue such an order and then only after considering all the relevant circumstances. Where the defendant does not indicate that he or she wants to defend the matter and the plaintiff seeks judgement by default, the defendant would not have the opportunity to place facts that he or she considers relevant before the court. The plaintiff would still bear the burden of alleging and proving the 'relevant circumstances' that would justify the court in granting an eviction order. However, less evidence would be required from a plaintiff in relation to knowledge which is mainly within the knowledge of the defendant.
262. The court held that it was beyond the scope of the appeal to consider what circumstances will be regarded as 'relevant' in an eviction context. However, it said that some guidance could be

obtained from the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (see, e.g. section 4(6) and (7)). Of particular relevance was the legislature's concern that the rights of the elderly, children, disabled persons and households headed by women should be protected in an eviction context.

Impact of the case: A fundamental change

263. This judgement is important as it affirms that section 26(3) of the Constitution has fundamentally changed the common law of evictions. It is no longer sufficient for an owner of property in an eviction application to allege that persons who are occupying the property as their home are in illegal possession. The owner-plaintiff must allege and prove 'relevant circumstances' that would entitle it to an eviction order. The exact nature of the circumstances that the plaintiff must allege is still uncertain. Some guidance can be obtained from the factors a court must have regard to in deciding whether it is 'just and equitable' to grant an order for eviction under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 1998. Section 26(3) thus appears to confer a broader equitable discretion on a court in a context where people are being evicted from their homes. This potentially represents a significant shift in the balance of power between landlords and tenants, by providing greater protection to tenants against unfair, arbitrary evictions. The Ross case highlights how socio-economic rights can alter the established common law and provide greater protection to vulnerable and disadvantaged groups.

RIGHT TO WATER, HEALTH

Case of Residents of Bon Vista Mansions

264. Section 27 of the Constitution provides right of access to health care, sufficient food and water, and social security.

265. The *Bon Vista Mansions v Southern Metropolitan Local Council*⁹⁴ case was about the disconnection of water supply to the residents of a block of flats in Hillbrow because of the non-payment of arrears. In this case the court held that the constitution required the state to ensure access to sufficient water when a local council disconnected the water supply to a block of residences. The residents obtained an interim order against the municipality to restore their water supply.

Key Points of the case

266. Water disconnections must be fair and equitable.

267. A municipality cannot disconnect water if a consumer can prove that he or she is unable to pay for it.

268. The municipality must give reasonable notice of the intention to disconnect water and must provide an opportunity for representations.

269. Once water is disconnected, the municipality must prove that it did so legally.

270. The City of Johannesburg disconnected the water supply of a block of flats in Hillbrow, Johannesburg, because of non-payment and arrears. The residents urgently applied to the

⁹⁴ Case NO: 01/12312, High Court, Witwatersrand Local Division, 2002 (6) BCLR 625 (W); Judgement date: 5/09/2001, 2001 SACLX LEXIS 103, Accessed via Lexis

Witwatersrand High Court for the reconnection of their water supply as an interim measure pending finalisation of the case.

271. The court held that, once water is disconnected, the burden of proof is on the municipality to justify the disconnection. First, the Constitution, in section 27, provides that everyone has the right of access to water. Municipalities have a duty to respect this right. Furthermore, the Water Services Act 108 of 1997 creates a legal framework for disconnection. Section 4(3) provides that disconnections must be fair and equitable. The municipality must give reasonable notice of its intention to disconnect water services and must provide an opportunity for the consumer to state his or her case. The municipality must inform the consumer of this right to give it real meaning. A municipality cannot disconnect water services if a consumer can prove that he is unable to pay for it.
272. The court held in favour of the residents on the grounds that the municipality did not prove that it had valid grounds for disconnecting the water supply, nor that it had acted according to fair procedures. The court also expressed doubt as to whether a standard notice saying that services would be disconnected if arrears were not paid (without saying that the consumer could make representations) met the requirements of the Act.

Summary

273. The applicant's case was that the respondent had unlawfully discontinued its municipal water supply late on afternoon of 21 May 2001. They had for three days attempted to seek redress through the manager of the premises, but without success. In desperation, they turned to the court for relief. They asked for interim relief in the form of an order on the respondent to restore their water supply, pending the final determination of an application for similar relief.
274. The respondent raised a number of points.
275. First, it was contended that the identity of the applicant was not clear. It was contended that either the application should have been brought by a number of the residents in their own names, or the applicant should have annexed a resolution authorising him to bring these proceedings on behalf of other residents.
276. The Judge did not consider that there is any substance in this point stating that it is clear from the papers that Mr Ngobeni, the deponent, is a resident of the premises. He alleged that the application was on behalf of the residents of Bon Vista, stating that a meeting of residents was held at which they authorised him to do so; He annexed a list of names which is clearly intended to reflect the names of residents.
277. The Court further stated that

In a highly urgent matter of this kind, and at the stage where only interim relief is sought, it can clearly not be required that the applicant should comply with the sorts of formalities which would apply in the usual course. In the particular circumstances of this case, the allegations referred in the previous paragraph are sufficient at this stage. Further, it appears from the papers before the court that in bringing these proceedings, Mr Ngobeni did so as a member of and in the interest of a group of persons, alleging that a right in the Bill of Rights has been infringed. That would be a further basis for locus standi⁹⁵. And in any event, it is clear that Mr Ngobeni is himself a resident, and that he has been deprived of his access to water. Even if he has no authority to sue on behalf of his co-residents, he plainly had locus standi to do so on his own behalf for a reconnection of the water supply.

⁹⁵ S 38 (c) of the Constitution of the Republic of South Africa Act 108 of 1996

278. The City of Johannesburg maintained that it disconnected the water supply of the Bon Vista Mansions because of non-payment and arrears. The court contended that, water supply may not be discontinued if it results in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.
279. Secondly, it was contended that the respondents had been wrongly cited. The court was informed from the bar by Mr Bester, for the respondent, that the Southern Metropolitan Local Substructure has been incorporated into the City of Johannesburg, and no longer exists as a separate legal entity. The court was further informed that in fact, the service provider to the premises was previously the Eastern Metropolitan Local Substructure, which has likewise been incorporated into the City of Johannesburg.
280. The Court stated that the given the true service provider (and disconnecter) was actually served and was actually before the court, it could hardly claim that it suffered prejudice through the incorrect citation- and it did not do so.
281. The third point was argued only faintly. It was in relation to the question of urgency. The respondent correctly pointed out that it had received very short notice of these proceedings, 3 hours before the matter was heard.
282. The Court considered that the matter was inherently urgent. It involved a basic and essential service, namely the provision of water, which in turn also involves the provision of sewerage services. The absence of these services could entail serious health risks, both for Applicants and for the other residents of the city.

The constitutional foundation

283. Section 27(1) of the Constitution provides that everyone has the right of access to water. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. In terms of Section 7, the State must respect, protect, promote and fulfil the rights in the Bill of Rights.
284. The Court observed that international law was particularly helpful in interpreting the Bill of Rights where the Constitution used language which was similar to that employed in international instruments. The jurisprudence of the International Covenant on Economic, Social and Cultural Rights, which was plainly the model for parts of the Bill of Rights, was an example of this. It assisted in understanding the nature of the duties placed on the State by section 7 of the Constitution. Section 7 required the State to respect, protect, promote and fulfil the rights in the Bill of Rights. Each of the words used in section 7 had a particular meaning. The duty to respect a right required the State to refrain from action which would serve to deprive individuals of their rights. The obligation to respect existing access to adequate food required State parties not to take any measures that resulted in preventing such access. A violation of the duty to respect a right arose when the State, through legislative or administrative conduct, deprived people of the access they enjoyed to socio-economic rights.
285. The effect of section 4(3) of the Water Services Act 108 of 1997 was that a water supply might not be discontinued if it resulted in a person being denied access to basic water services for non-payment, where that person proved, to the satisfaction of the relevant water services authority, that he or she was unable to pay for basic services.

286. The effect of section 27(1) (a) (read with section 7) of the Constitution, and of section 4 of the Water Services Act was as follows: If a local authority disconnected an existing water supply to consumers, this was prima facie a breach of its constitutional duty to respect the right of (existing) access to water, and required constitutional justification. The Water Services Act required that the water service provider set conditions which dealt with the circumstances under which water services might be discontinued, and the procedures for discontinuing water services. It also required that those conditions and procedures meet the requirements of section 4(3) of the Act. In particular, the procedures had to be fair and equitable; they had to provide for reasonable notice of termination and for an opportunity to make representations; they could not result in a person being denied access to basic water services for non-payment where that person proved, to the satisfaction of the water services authority, that he or she was unable to pay for basic services.
287. On the facts of the case, the applicants had existing access to water before the Respondent disconnected the supply. The act of disconnecting the supply was prima facie in breach of Respondent's constitutional duty to respect the right of access to water, in that it deprived Applicants of existing access. This placed an onus on Respondent to justify the breach. Applicants had shown at least a prima facie right to a continuing supply of water, which was being infringed. They had been deprived of access to water, and the deprivation was continuing. They had no other satisfactory remedy. The balance of convenience weighed heavily in their favour. Accordingly, they satisfied the requirements for the granting of an interim interdict. In accordance with what is sometimes called the two-stage approach that places a burden or onus on the Respondent to justify the breach.
288. The effect of section 27 (1) (a) (read with section 7) of the Constitution, and section 4 of the Water Services act is as follows:
- If a local authority disconnects an existing water supply to consumers, this is prima facie a breach of its constitutional duty to respect the right of (existing) access to water, and requires constitutional justification.
 - The Water Services Act requires that: (a) the water service provider must set conditions which deal with the circumstances under which water services may be discontinued, and the procedures for discontinuing water services. (b) Those conditions and procedures must meet the requirements of section 4(3) of the Act. In particular, the procedures must be fair and equitable.
 - In the context of a case such as this, they must provide for reasonable notice of termination and for an opportunity to make representations. They must not result in a person being denied access to basic water services for non-payment where that person proves, to the satisfaction of the water services authority, that he or she is unable to pay for basic services.
289. That is a demanding set of requirements. One would assume that the Constitution-makers and Parliament imposed such demanding requirements because of the potentially serious human and health consequences of terminating water services.
290. The Court contended that it is not necessary to decide, at least at this stage of this case, whether the provisions of Administrators Notice of 1977 meet the requirements of either the Constitution or the Water Services Act.
291. What is clear is that at this stage of this case, the Respondent has not produced evidence to show that its actions met the requirements of the Constitution and the Act. It may well be able to do so in due course. On the facts as they stood at the hearing of the application for an interim interdict, however, the applicants had proved that the Council had discontinued their water

supply. They averred, in effect, that there was no valid reason for this - although as Mr Bester pointed out, their allegation that they had honoured their obligations to pay for water was couched in somewhat bald and sweeping terms.

292. That being the case, in the court's view the onus rested on the Respondent to show either that it had not discontinued the water supply (which did not appear to be its case), or that it had legally valid grounds for doing so, and had acted in compliance with the Constitution and the Act. The Court stated that

One assumes that the Council does not assert a right to disconnect people's water supply without good cause, or without following fair procedures⁹⁶. If that assumption is correct, the respondent should have no difficulty in proving the reason for termination, and what procedure it followed in disconnecting the water supply. That reason, and those procedures, can then be tested against the Constitution and the Act.

HEALTH

293. Numerous strategies have been employed by high-profile health rights litigation that have led to significant successes such as the halting of corporate challenges to health laws, a drop in drug prices and a court ruling that the Government must adopt a reasonable programme for Nevirapine (TAC case, which has been at the forefront of these campaigns.) *In the Treatment Action Case (TAC)*, the SA C Court held that the Government had an obligation to provide anti retroviral drugs to HIV positive pregnant women. It held that while it is impossible immediately to give everyone access even to a "core" service, the State must act reasonably to provide access to the constitutional socio-economic rights on a progressive basis.

294. The State's policy of not making nevirapine available at hospitals and clinics, other than for research and training, was unreasonable. It applied the approach adopted earlier in *Grootboom* to section 27(2) and found that the Government had failed to devise and implement-with its available resources- a comprehensive and coordinated programme to realise progressively, the rights of pregnant women and their new-born children to have access to health services in order to combat the transmission of HIV from mothers to their children (Para 67).

295. Within the framework of reasonableness in decisions regarding resource allocation, however, and allowing for progressive realisation, even in South Africa's dire predicament, the Constitutional Court went on to grant a broad and immediate remedy in this case. Rather than leaving it to the government to design an appropriate response to a declaration of unconstitutionality, as had been done previously in the *Grootboom* case, the Court ordered that the Government act without delay to provide nevirapine in public hospitals and clinics when this is medically indicated and to take reasonable measures to provide testing and counselling facilities at hospitals and clinics. The Court allowed for the evolution of policy in the future if better methods become available to it for the prevention of mother-to-child transmission of HIV.

296. This decision is momentous in that it invalidates the idea that the doctrine of progressive realisation of economic, social and cultural rights is in any way incompatible with courts playing a critical role in enforcing these rights and granting immediate, effective and systematic remedies to ESCR violations.

⁹⁶ Given that the termination of water services appears to be administrative action, the respondent would in any event be obliged by Section 33 of the Constitution to act in a manner which is lawful, reasonable, and procedurally fair.

Minister of Health and Ors v Treatment Action Campaign and Ors⁹⁷

The Appellants Members of the executive council for health, Eastern Cape, member of the executive council for health, Free State, members of the executive council for health, Gauteng, member of the executive council for health, Kwazulu-Natal, member of the executive council for health Mpumalanga, member of the executive council for health, Northern Cape, member of the executive council for health, Northern Province, member of the executive council for health, North West.

Respondents- Treatment action campaign (TAC), Dr. Haroon Saloojee and Children's rights centre- third respondent together with Institute for democracy in South Africa- First Amicus Curiae

Community Law Centre- Second Amicus Curiae, Cotlands Baby Sanctuary- Third Amicus Curiae

Heard on: 2, 3 and 6 May 2002

Decided on: 5 July 2002

297. This case concerned a government policy that appeared to be based upon a refusal to make an anti-retroviral drug called Nevirapine available in the public sector to prevent mother-to-child transmission of HIV. The applicants supported their challenge to government policy by invoking section 27, the right of everyone to have access to health care services, and the right of the child to basic health care services in section 28(1)(c).

Summary of Judgement

298. The respondents, a number of associations and members of civil society concerned with the treatment of people with HIV/AIDS and with prevention of new infections, applied for an order against the appellants contesting the government's programme for dealing with mother-to-child transmission of HIV. The programme only made Nevirapine ("NVP"), a registered drug offered to the government free of charge by its manufactures, available in two research and training sites per province, thus impeding the other doctors working in the public sector after prescribing it to their patients. The respondents argued that this restriction was contrary to the state's constitutional duty under SS. 7(2) and 8(1) to enforce the rights guaranteed in the Bill of Rights; in particular, to the right of everyone under s.27 to have access to public health care services and the right of children under s. 28 to special protection. Further, it was argued that the government was constitutionally obliged to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the Country. In asserting this, the respondents relied on the concept that the government, having ratified the International Covenant on Economic, Social and Cultural Rights, was under an immediate duty to implement the "minimum core" content of economic, social and cultural rights. The appellants contended that on four grounds - doubts about the efficacy of NVP in the absence of a comprehensive support package; the possibility of the development of resistance to NVP and other anti retrovirals by giving it to the mother and child at such an early stage, safety concerns and the capacity of the public health system to administer the drug - a restrictive application of the NVP was warranted. The High Court held that the government programme was unreasonable to the extent that it imposed restrictions on the availability of NVP in the public health sector and did not set out a timeframe for a national programme to prevent mother-to-

⁹⁷ South African Constitutional Court, Case CCT 8/02

child transmission of HIV. Accordingly, it ordered the appellants, firstly, to make NVP available to pregnant women with HIV who gave birth in public health facilities where this was recommended by the attending medical practitioner and secondly, to plan an effective, comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV.

299. On appeal, the appellants argued *inter alia* that, in line with the principle of separation of powers, the making of policy was the prerogative of the executive and not of the courts, and that therefore courts could not make orders that had the effect of requiring the executive to pursue a particular policy.

300. In dismissing the appeal, it was held that:

It must be borne in mind that the courts are not institutionally equipped to make wide-ranging factual and political enquiries necessary for determining the minimum core standards of economic and social rights nor for deciding how public revenues should be effectively spent. Rather, the Constitution contemplates a restrained and focused role for the courts requiring the state to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness, although often having budgetary implications, are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve the appropriate constitutional balance. Accordingly, the right to public health services as guaranteed by s. 27 is not a self-standing and independent positive right, but is concerned with access to the services that the state is obliged to provide.

However, at the very least, the state is under a negative obligation to desist from preventing or impairing the right of access to health care services (*Government v Grootboom & Ors* 2001 (1) SA 765 and *First certification Judgement, Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 (CC) applied).

In this context, the policy of confining the potentially lifesaving drug NVP to research and training sites is unreasonable and constitutes a breach of the state's obligations under section 27 in that it does not consider the degree and extent of the denial of the right it endeavours to realise.

In particular, none of the four reasons advanced by the appellants for restricting the availability of NVP are accepted. Firstly, the wealth of scientific evidence makes plain that NVP is to some extent efficacious in combating mother-to-child HIV transmission. Secondly, the possibility of a resistance persisting is small compared with the potential benefits of administering the drug to mother and baby at birth. Thirdly, safety is no more than a hypothetical issue given that the current medical consensus, including the WHO, is that there is no reason to fear harm from this particular method of administering NVP. Fourthly, although the concerns regarding the capacity of the state are relevant re the provision of a 'full package' they are not relevant to the question whether NVP should be used in those facilities outside of the designated research sites that do possess the necessary infrastructure for testing and counselling.

Further, the appellants' argument that the court has the power to issue only a declaratory order is rejected. In accordance with s. 38 of the Constitution, where a breach of any right in the Bill of Rights has taken place, a court is under a duty to ensure that "appropriate relief" is granted and it has wide powers to achieve this goal effectively. This includes the power to make orders that affect policy as well as legislation, taking into account the nature of the right infringed and the nature of the infringement itself (*Hoffman v South African Airways* 2001 (1) SA 1 (CC) applied⁹⁸). Remedies may include both injunctive relief or mandamus and the exercise of supervisory jurisdiction.

The rigidity of the government's approach has affected its whole policy necessitating a complete review. Hence, the government is ordered to devise and implement, within its available resources, a comprehensive and co-ordinated programme to recognise progressively the rights of pregnant women

⁹⁸ Constitutional Court Judgement on right to equality for people with HIV

and their new-born children to have access to health services to combat mother-to-child transmission of HIV. In particular, in those facilities where testing and counselling is available, the training of counsellors ought now to include training on the use of NVP. This is not a complex task and it should not be difficult to equip counsellors with the additional knowledge. In addition, the government should take reasonable measures to extend testing and counselling facilities throughout the public health sector. This order does not preclude the government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission.

301. It is important to note that the Court went beyond *Grootboom* in the sense that it talked about the relationship between planning and resources. When the government claimed inadequate resources and produced evidence for the same, the court responded “You don’t have a plan, and, if you don’t have one, then you are never going to have the resources because a plan creates the resources: the plan creates the necessity to find the resources from somewhere”.
302. A more recent court encounter on socio-economic rights was in *Khosa and Others v Minister of Social Development and Others; Mablaule and Another v Minister of Social Development and Others* (Khosa/Mablaule⁹⁹). This case involved a constitutional challenge to certain provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997, including provisions that had not yet been brought into force. These provisions restricted access to social assistance to South African citizens only, thus excluding permanent residents such as aged persons and children, who would have qualified for social assistance but for the requirement of citizenship. The Constitutional Court ruled that the exclusion of permanent residents from the social security scheme was unreasonable and inconsistent with section 27 (social assistance) of the Constitution.

THE RIGHT TO FOOD ¹⁰⁰

303. The *Grootboom* judgement, which elaborated on the housing rights of adults and children with “no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations”, reasoned that the State should “devise, fund, implement and supervise measures to provide relief to those in desperate need” within its available resources¹⁰¹. In terms of the judgement, a reasonable programme would be one that resulted in progressive realisation of the right within available resources while being balanced and flexible, as well as making appropriate provision for attention to crises and to short-, medium and long-term needs. In addition, “a reasonable programme had clearly to allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources were available¹⁰²”.
304. Several interpretations of the right to food in light of the *Grootboom* judgement have placed an emphasis on: a) the extent to which a policy should respond to the immediate consumption needs of people in desperate situations as opposed to focusing on longer-term food production objectives; and b) the requirement that a policy is only reasonable when it is coherent and co-ordinated. In terms of the right to food, policy co-ordination between the National Departments of Agriculture, Health and Social Development at a national level has been seen as key.
305. In terms of the right to food and other economic and social rights, the *TAC* judgement is significant because the Constitutional Court issued an order to government to act without delay

⁹⁹ 2004 (6) BCLR 569 (CC); 2004 SACLR Lexis 2

¹⁰⁰ South African Human Rights Commission (2003) 5th Economic and Social Rights Reports Series. Available online at: http://www.sahrc.org.za/5th_esr_food.pdf (Accessed 24 February 2005)

¹⁰¹ Government of the Republic of South Africa v Grootboom and Others 2000 (11) BCLR 1169 (CC)

¹⁰² Ibid., (39)

in rolling out Neviripine with a view towards reducing the risk of mother-to-child transmission and saving lives. The *TAC* judgement is also important because it stated that for a “public programme ... to meet the constitutional requirement of reasonableness, its contents must be made known appropriately”¹⁰³. State provision of good nutrition to HIV/AIDS sufferers in the form of formula feed for infants or food supplements has not been the main subject of an application to court thus far. Although breast milk substitutes were discussed in the *TAC* judgement, the issue did not form part of the Constitutional Court order¹⁰⁴.

306. Whether a right-to-food programme is reasonable in its conception and implementation is being brought into sharper focus by cases against the State and the implementation of its National Food Emergency Scheme in terms of the Social Assistance Act. The South African Human Rights Commission (SAHRC) also intervened to ensure the implementation of the National Food Emergency Scheme after it failed temporarily in KwaZulu-Natal.
307. In the final analysis, the obligation to “protect” a right requires the state to take measures that prevent third parties from interfering with the right¹⁰⁵. In South Africa, in the case of housing rights the state has given effect to this duty through the enactment of statutes which give protection to people whose tenure of their homes is insecure and who are vulnerable to eviction. The right to housing also becomes justiciable when the constitutionality of the legislation is challenged, as has happened in the case before the High Court: *City of Cape Town v Rudolph and others (Cape Provincial Division Case no 8860/01)* – the defence can be raised that the state was in fact under a constitutional duty to protect the existing housing of people who are otherwise vulnerable¹⁰⁶. The obligation to protect the right to housing and this extends to ESCRs in general therefore gives rise to justiciable issues in relation to the validity of the statutes that have been enacted.

¹⁰³ See *TAC* case

¹⁰⁴ In the *TAC* judgement the Constitutional Court called for a comparison between the savings from preventing new-born babies from being infected with HIV and the costs of providing breast milk substitutes. P 1060 (91)

¹⁰⁵ General Comment 14, E/C. 12/2000/4, Paragraph 33

¹⁰⁶ *Justiciability of the Right to Housing-The South African Experience*, Geoff Budlender, Legal Resources Centre, Cape Town.

PART SEVEN: PAKISTAN

ENVIRONMENTAL RIGHTS, RIGHT TO LIFE

Shela Zia v WAPDA PLD 1994 SC 693, Supreme Court of Pakistan¹⁰⁷

Nature of case

308. Petitioners claimed electricity grid station had potential health hazards - constitutional right to life includes right to live in a clean environment - 'precautionary principle' in the 1992 Rio Declaration persuasive – order for public consultation process and scientific inquiry.

309. *Summary*

310. A group of residents approached Court to prevent the Water and Power Development Authority (WAPDA) from constructing an electricity grid station in their neighbourhood. They claimed the proposed grid station contravened planning laws, since the area was designated as a “green-belt”, and that high voltage electro-magnetic transmissions from the station would constitute a serious health hazard.

311. The Court agreed to hear the claim after receipt of a letter from the chairman of an organization IUCN Pakistan. The Court in the case of Akbar Ali v State 1991 SCMR 2114 held that every citizen has the right to justice and could directly approach the Court. Referring to case law of the Supreme Court of India, the Court found that the residents claim was grounded on the right to life and right to dignity which included the right to live in a clean environment.

312. The evidence led by the petitioners to demonstrate the link between disease and electro-magnetic transmissions was not conclusive. The Court, however, accepted the petitioner’s argument that it should adopt the precautionary principle set out in the 1992 Rio Declaration on the Environment and Development whereby “lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. The Rio Declaration while not binding upon Pakistan had “persuasive value and commands respect”. The Court also found that Pakistan’s economic policy should be informed by a policy of sustainable development.

313. The Court decided it lacked the expertise to adjudicate the different scientific and policy arguments. Nevertheless, it ordered that WAPDA immediately introduce public consultation procedures for all projects concerning grid stations and power lines along the lines of the US Public Service Commission. The government of Pakistan was ordered to establish a commission of internationally known and recognised scientists whose permission should be attained before the construction of the grid station.

Outcome

314. This case spawned a number of environmental cases in Pakistan that relied on human rights principles. For example, in Human Rights Case (Environmental Pollution in Baluchistan) PLD 1994 SC 102 Supreme Court on its own initiative ordered a provincial government to investigate

¹⁰⁷ Accessed at : <http://www.escr-net.org/EngGeneral/CaseLawSearchResult.asp>

newspaper claims of nuclear waste dumping along the coast on the basis that such dumping would violate the right to life.

PART EIGHT: BANGLADESH

315. In Bangladesh, economic and social rights are incorporated in the Constitution under the heading of principles of state policy.

ASK [AIN O AALISH KENDRA] AND ORS V GOVERNMENT OF BANGLADESH AND ORS ¹⁰⁸

316. In Dhaka city, a large number of inhabitants of *bastis*, or (informal settlements,) were evicted without notice. Their homes were demolished with bulldozers.

317. Three non-governmental organisations concerned with human rights and upholding the rule of law, and two slum dwellers in Dhaka filed a writ petition under Art 102 of the Constitution, challenging the Government's (?) demolition of 'Basties' (slum-dwellings) in Dhaka and the eviction of their inhabitants. The petitioners alleged that implementing the project, without proper notice or provision of alternative housing, would, *inter alia*, violate the fundamental rights to equality, life, liberty and livelihood (Arts 27, 31 and 32 of the Constitution) of hundreds of thousands of people as well as principles contained in the Fundamental State Policy in the Constitution.

318. The Supreme Court recognised that such inhabitants are often the victims of misfortune and natural calamities, migrants who earlier fled from rural areas where profession, food or shelter were scarce. Slum dwellers also contributed significantly to the national economy. The Court believed, however, that some dwellers took to crime.

319. Evictions had a severe impact on the right to livelihood. Noting *Olga Tellis v Bombay Municipality*

320. *Corporation* (Supreme Court of India), the court found that the right to livelihood could be derived from constitutional fundamental rights. These included the right to life, respect for dignity and equal protection of the law.

321. The State must also direct its policy towards ensuring the provision of the basic necessities of life, including shelter [see Constitution, Article. 15]: "Thus, our country is pledge-bound, within its economic capacity and in an attempt for development, to make an effective provision for the right to life, livelihood.' etc. 'While such State policies were not judicially enforceable (Article. 15 is only a directive principle), the right to life implied the right not to be deprived of a livelihood and shelter.

322. The Government effort to remove alleged 'criminals' through evictions meant that "innocent slum dwellers [had] become victims of repression/oppression not only by *mastans* and terrorists [sic], but sometimes through the government agencies."

323. The Court held that:

- Although the principles in the Fundamental State Policy are not legally enforceable by the courts, they are fundamental in governing the country and in interpreting the meaning and content of basic rights (*Olga Talia v Bombay Municipal Corporation* (1985) 3 SCC 454 (Indian SC) applied).
- Even though in the circumstances the slum dwellers could not be properly notified of the planned evictions, respect for human dignity requires that they must be undertaken in the spirit of the Constitution and under a specific rehabilitation programme.

¹⁰⁸ Supreme Court of Bangladesh, (Writ Petition No. 3034 of 1999); (1999) 2CHRLD 393

- The Government may proceed with the eviction process but it should be done in stages and with reasonable notice. A master plan or pilot project to rehabilitate slum dwellers in phases, taking account of the availability of other housing, should be undertaken. Otherwise, the total eviction of one slum may simply cause another to develop.
- Slum dwellers should be given the option of returning to their home villages, or leading an urban life. If they choose to stay in urban areas, they should be provided with loans for constructing houses, food, and in some cases vocational training. Special arrangements should be made for vulnerable population groups such as the sick and elderly, including the provision of food, shelter and medical facilities.

324. In summary, the court ordered that:

- The Government should develop master guidelines, or pilot projects, for the resettlement of the slum dwellers;
- The plan should allow evictions to occur in phases and according to a person's ability to find alternative accommodation;
- Reasonable time is to be given before the eviction, and
- For security reasons, slums along railway lines and road sides should be cleared, but inhabitants should be resettled elsewhere according to the guidelines.

Impact of the Judgement

325. In terms of rehabilitation, the Government has occasionally made land temporarily available for evictees, for example, when it had an urgent need for squatters' land for a building site. But it remains limited to getting temporary protection. There is no recognized right to shelter. As observed by Dr. Kamal Hussain who was central in the above mentioned case, "all we have is a protection against some forcible evictions. But this temporary reprieve can be used to pursue other alternatives. After getting the first judgement, whereby the court recommended that rehabilitation programmes should be made available, the judges suggested that we pursue the executive branch of the Government: they're the ones that will give you land¹⁰⁹".

FOOD SAFETY AND RIGHT TO LIFE/HEALTH

Dr Mohiuddin Farooque v Bangladesh & Ors¹¹⁰

326. A consignment of powdered milk imported by a respondent company exhibited a radiation level above the acceptable limit in some (but not all) of the examinations conducted by various government testing bodies. The petitioner, who was the Secretary General of the Bangladesh Environmental Lawyers Association (BELA), argued that the actions of the relevant government officers in not compelling the importer to send the consignment back to the exporter had violated the constitutional right to life of the people of the country, including himself, who were potential consumers of such goods (Arts 31 and 32). He sought an order directing that measures be taken to send the consignment back. The exporter had already initiated a civil suit against the Government in a lower court seeking a re-examination of the consignment and a declaration that an order sending it back was illegal.

¹⁰⁹ *Litigating Economic, Social and Cultural Rights- Achievements, Challenges and Strategies-* ESC Rights Litigation Programme, Centre for Housing Rights and Evictions (COHRE), Geneva 2003. Available online at: www.cohre.org/litigation

¹¹⁰ 48 DLR(1996) (HCD) 438; (1996) 2 CHRLD 107

327. The Supreme Court of Bangladesh considered Indian Supreme Court decisions and held that the right to life is not limited to the protection of life and limb but also includes, amongst other things, the protection of the health and normal longevity of an ordinary human being. Even though the directive principle (Art 18 of the Constitution) of raising the level of nutrition and improving public health cannot be enforced, the State can be compelled by the courts to remove any threat to public health unless such a threat is justified by law. The Court made specific directions for the better implementation of radiation standards and ordered the Government to properly contest the suit filed by the exporter challenging the return of the consignment so that the matter can be properly adjudicated.

328. In denying the relief sought but issuing specific directions to improve testing procedures, it was held that:

- The right to life is not limited to the protection of life and limb necessary for the full enjoyment of life but also includes, amongst other things, the protection of the health and normal longevity of an ordinary human being (various Indian Supreme Court decisions considered).
- Health and the normal expectation of longevity can be threatened by man-made hazards, including the consumption and even marketing of food or drink injurious to health.
- The state can be compelled by the courts to remove any threat to public health, unless such a threat is justified by law, even though its primary obligation under Art 18 of the Constitution, as a Fundamental Principle of State Policy, to raise the level of nutrition and improve public health cannot be enforced.
- The Government's enactment of the Nuclear Safety and Radiation Control Act 1993 and publication of the Import Policy Order 1993-95 show that it was conscious of the threat posed to the life of people in Bangladesh by the consumption of foods containing an excessive level of radiation and was, by providing for radiation testing, taking steps to control any risk. Nevertheless, the confusion which has led to the present situation was created by the actions (and inaction) of officers of the various testing bodies.
- It is not considered advisable, however, to give any direction to the importer to send back the consignment in question as the relief sought by the petitioner is under judicial consideration by the court below in the separate suit brought by the exporter. The Government is directed to contest the suit in the lower court by filing a written statement and producing relevant evidence so that the matter can be properly adjudicated.
- To avoid confusion and to ensure enforcement of the right to life, specific directions should be given to the testing bodies for the better implementation of the provisions of the Import Policy Order in regard to radiation levels in food. Until foolproof effective methods are evolved by the authorities, the testing bodies are directed to follow the procedures set out in the present judgement.

PART NINE: OTHER CASES: ESC RIGHTS AS CENTRAL TO THE CONSTITUTION

329. There are numerous cases in Latin America (Argentina, Venezuela, Chile and Peru) where courts, faced with government inaction in the supply of HIV/AIDS drugs, have made far-reaching orders with significant cost implications. However, in such cases, the gravity of the epidemic appears to have been the deciding factor in the judgement.
330. The Constitution of *Argentina* is exceptional in that a 1994 Amendment to the Constitution facilitated the protection on ESC Rights and created new means of legal protection through a collective amparo action that allows individuals to file for the protection of a group. The changes also indicated that judicial interpretations of treaties handed down by relevant control bodies would be binding law in Argentina. While the Argentine Constitution makes no explicit recognition of social rights, it does have to take into account any ESCR decision taken by the Inter-American Court of Human Rights or the Inter-American Commission on Human Rights. A case in point is the *Viceconte* case that successfully compelled the government to provide a vaccine to prevent an endemic fever. The case has led to a series of cases that have protected and invigorated programmes for the supply of medicines (for HIV/AIDS, Tuberculosis etc.)

DEFENSORIA DE MENORES NRO3 v. PODER EJECUTIVO MUNICIPAL¹¹¹

331. In this case, the Public Defender of Minors of Neuquén, interposed an injunction (amparo) protection in order to guarantee the health and the access to fresh water of children and youngsters of the Paynemil aboriginal Mapuche Community, contaminated by water consumption containing lead and mercury.
332. During the course of the Judicial Process, evidence was given that the Executive Authority knew about the pollution of the water used by the community for their consumption. It was argued that it also demonstrated the lack of diligence from the authorities in giving a solution to the problem.
333. Although the State alleged to have taken some measures and to be studying the causes and the type of pollution present in the water, given to the seriousness of the situation and the urgency demanded by the need to protect affected rights, the Court of Appeals sustained that the delay of the adoption of the measures to stop the pollution constituted an omission and therefore was not justifiable.
334. The Superior Justice Court upheld the decision of the court of appeal, which ordered the State Government to provide 100 litres of drinkable water per day to each individual member of the families living in the colony- as well as means by which the less well could store it in safe conditions. The Court directed that that the order be implemented within 48 hours and to continue until such time as a definite solution for the contamination of underground water was found and implemented. The Court also specified that water should be provided to all children and their families-irrespective of their legal entitlements to reside in the colony. As well as relying on the provisions of the Argentinean Constitution, the Supreme Court also based parts of its arguments on the provisions of the right to health in the CRC.

¹¹¹ Agreement 5, Superior Justice Court, Neuquen, 2 March 1999

RIGHT TO HEALTH

Viceconte, Mariela Cecilia v. Argentinian Ministry of Health and Social Welfare¹¹²

Issue

335. Argentine haemorrhagic fever and the lack of the vaccine.
336. The plaintiff, Mariela Viceconte, and the National Ombudsmen requested the court to order that the Argentine Government take protective measures against haemorrhagic fever, to produce the Candid-1 vaccine and to rehabilitate those environments where the disease was breeding.
337. There are 3,500,000 people at risk of contracting “Argentine Hemorrhagic Fever.” The most effective sanitary measure against it is to supply the Candid 1 vaccine, which is 95% effective and has been approved by the World Health Organization (WHS). The vaccine is an orphan drug, which means that its production is not profitable for drug manufacturers.
338. In September 1996, the Centro de Estudios Legales y Sociales (CELS) initiated a class action –an Amparo action – asking the State to complete the construction of its own laboratory. On November 8, 1996, Mariela Viceconte filed an amparo action seeking protection of the right to health of the people who live in the affected area by forcing the State to manufacture the vaccine. On June 2, 1998, the Court of Appeals supported the action and ordered the State to manufacture the vaccine, and to comply strictly and without delays with the schedule that had already been designed for such purposes by the Ministry of Health.
339. Upon expiration of the term set in the said schedule, the lower court judge required the Executive Branch to fulfil its obligation and established a new deadline, which was also disregarded. Therefore, the judge ordered that the funds allocated to the corresponding budget line item no longer be available for anything else, so that they could be exclusively used to enforce the decision. The lower court judge also set a fine for each day of non-compliance. This was appealed by the State.
340. When the case reached the Court of Appeals, the Minister of Health was summoned to attend a hearing in which the official would have to explain why the vaccine was not being manufactured three years after the court decision. The Federal Court of Appeals found that any individual could bring complaints concerning the right to health, due to the Constitution’s incorporation of international treaties referring to the right¹¹³. It concluded that the State had delayed in the schedule, and it was important to establish a legal obligation, particularly since the fever was an epidemic and endemic disease.
341. In addition, the Court ordered an audit of the management control in charge of the vaccine-manufacturing schedule. Finally, in December 2001, the Court requested the Executive Branch to inform whether the annual budget bill to be sent to Congress for approval included an appropriation for the expenses to be incurred in manufacturing the Candid 1 vaccine.
342. According to the court, the Government was legally obliged to intervene to provide health care when individuals and the private sector could not guarantee their own health. When a state faces an epidemic and endemic disease, the legal obligation under the ICESCR, Article 12(2)(c), right to health, on the duty of a state is very strong. In this situation, millions of lives were threatened.

¹¹² Poder Judicial de la Nacion, Case No 31.777/96, 2 June 1998

¹¹³ The American Declaration on the Rights and Duties of Man (Article XI); UDHR (Article 25); ICESCR (Article 12), including the duty to prevent, control and treat epidemic and endemic disease (Article 12 (2) (c))

343. In the case of Argentine haemorrhagic fever, this duty entailed the production of the Candid-1 vaccine. The court cited evidence from the government that (a) the fever was epidemic and endemic, (b) the Candid-1 vaccine was the most effective protection against the disease, (c) both the World Health Organisation and Argentina's Minister of Health had previously endorsed Candid-1, (d) the stock of Candid-1 was insufficient and (e) the disease was exclusive to Argentina, thereby making it an unattractive commercial proposition.
344. The court found that the Government had not punctually fulfilled its obligations to produce the vaccine and made the Ministers of Health and Economy personally liable for its production with in a specified time schedule. The latter had control over the release of budgeted funds.
345. According to Victor Abramovich, Executive Director, Economic, Social and Cultural Rights Programme, CELS, enforcement of these types of obligations requires new legal procedures. The court in this case empowered itself to supervise the execution procedure, to demand information and to establish hearings before the court. For example, the Minister of Public Health had to appear before the court and inform it of progress made in producing the vaccine. But the method is still very weak¹¹⁴.
346. The court also established another way of supervising the orders. The National Public Ombudsmen intervened to get information and supervise fulfilment of the different steps that the Argentine State had to take. This was another actor and was important in a political sense.

The impact of the case

347. The *Viceconte* case is a key precedent in Argentine case law. The importance of the court decision lies, on the one hand, on the fact that it strengthened the role of the collective amparo action as a means of citizen participation and control of public matters, by evidencing the process' function as a space of dialogue between the citizenry and the State. On the other hand, the decision acknowledged the legitimacy of the claimant's request that a vaccine be manufactured for 3,500,000 people living in the affected area.
348. Furthermore, this instance of direct application by a domestic court of right to health standards enshrined in international covenants, such as article 12 of the International Covenant on Economic, Social and Cultural Rights, contributes to enhance the legal apparatus available to defend human rights. The decision also reaffirms the State's role as guarantor of the right to health in the case certain services or benefits are not profitable or convenient for private providers.
349. Finally, the case shows the importance of the courts in controlling the allocation and execution of budget line items. In the case of collective actions demanding protection for social rights, the implementation of public policies, with their corresponding budget appropriations, is at stake. Essentially, a productive dialogue has been established between the State's political powers and the courts, with each one applying its own institutional competences to achieve the realization of the right to health.

¹¹⁴ Victor Abramovich, Executive Director, Economic, Social and Cultural Rights Programme, Centro de Estudios Legales y Sociales in *Litigating Economic, Social and Cultural Rights- Achievements, Challenges and Strategies-* ESC Rights Litigation Programme, Centre for Housing Rights and Evictions (COHRE), Geneva 2003. Available online at: www.cohre.org/litigation

PART TEN: INTERNATIONAL JURISPRUDENCE

INTERNATIONAL DECISIONS

350. Existing jurisprudence at the regional and international level demonstrates how States are held, under international law, accountable for human rights violations that directly result from actions by corporations but entail also action (licensing or privatisation) or inaction (breach of positive obligations) by public authorities¹¹⁵. *Lopez Ostra v Spain* (discussed later) is a case in point. Another significant case is that of *Costello-Roberts v. United Kingdom*¹¹⁶, where the European Court of Human Rights held that the State was under the Convention responsible for securing that disciplinary punishments used in private schools did not result in violations of human rights. Although the Court came to the conclusion that there was no violation of the European Convention in the concrete case, the judgement was very clear in the issues of State responsibility and the interdependence between various human rights (right to education, prohibition against inhuman treatment, right to respect for private life) as the legal basis for such responsibility.

The Court has consistently held that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligations under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction". (Paragraph 26)

The Court notes that, as was pointed out by the applicant, the State has an obligation to secure to children their right to education under Article 2 of Protocol 1... That a school's disciplinary system falls within the ambit of the right to education has also been recognised, more recently, in Article 28 of the UN Convention on the Rights of the Child....

Secondly, in the United Kingdom, independent schools co-exist with a system of public education. The fundamental right to education as a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two....

Thirdly, the Court agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals." (Paragraph 27)

Accordingly, in the present case, which relates to the particular domain of school discipline, the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the Convention if it proves to be incompatible with Article 3 or Article 8 or both. (Paragraph 28)

UN Human Rights Committee

351. A small number of cases of a socio economic character have been brought before the UN Human Rights Committee, the body that oversees the ICCPR. For example, discrimination in social security legislations of cultural rights has been held to violate the treaty. A series of cases in the European Court of Human Rights and the UN Committee against Torture has pushed the scope of torture provisions to show how a loss of social rights can breach characteristically civil rights. For example, in the *Džemajl* case, the Committee Against Torture (CAT) accepted the submissions that the failure of the government to prevent the destruction of a Serbian-Montenegrin Roma settlement by non-Roma local residents amounted to cruel and degrading

¹¹⁵ *State Responsibility, Good Governance and Indivisible Human Rights*- Martin Scheinin in Human Rights and Good Governance, Building Bridges, The Raoul Wallenberg Institute Human Rights Library, Edited by Hans-Otto Sano and Gudmundur Alfredsson with the collaboration of Robin Clapp, Martinus Nijhoff Publishers 2002

¹¹⁶ *Costello-Roberts v. United Kingdom*, Judgement on 25 March 1993, Series A 247 C

treatment. However, despite this integrated approach, the protection of ESC rights is still much weaker than the protection of CPRs.

Zwaan-de Vries v the Netherlands

Communication No.182/1984 (9 April 1987)
Date of communication: 28 September 1984
Date of decision on admissibility: 23 July 1985

KEYWORDS

Equality and discrimination, social security and welfare, progressive realisation and maximum available resources.

Facts

352. Mrs. Zwaan de Wries application for unemployment benefit was rejected by the Municipality of Amsterdam on the ground that she did not meet the requirements of the Unemployment Benefits Act (WWV) since she was a married woman and was not the family “breadwinner”. The refusal was based on section 13, subsection 1(1), of WWV, which did not apply to married men- married men could receive an unemployment benefit even if their wife was the principal income earner or breadwinner. The appellant appealed against the decision to the Board of Appeal in Amsterdam, which by an undated decision sent to her on 27 November 1981, declared her appeal unfounded. She then appealed to the Central Board of Appeal, which confirmed the decision of the Board of Appeal on 1 November 1983. The rejection was on the basis that the right to social security was not included in the ICCPR.

Decision

353. The Human Rights Committee found a violation of Article 26 of the ICCPR, which provides that all persons are entitled without any discrimination to equal protection of the law and that this protection applied to the socio-economic domain.

354. The Committee found that the right to non-discrimination in article 26 was an independent right. If there was discrimination in the socio-economic domain, that could not be objectively justified, it was a violation of the covenant. In this case they found the legislation unreasonable. The Committee observed that the provisions of Article 2 of the ICESCR do not detract from the full application of article 26 of the ICCPR. Examining the State party contention that article 26 of the ICCPR cannot be invoked in respect of a right which is specifically provided under 9 of the ICESCR (social security, including social insurance), the committee contended 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 UDHR. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and their application thereof.

355. The committee further stated that while article 26 does not require any State to enact legislation to provide for social security, however when such legislation is adopted, then it must comply with article 26 of the Covenant (Para 12.4).

356. What is at issue is not whether 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 ICCPR and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

357. The legislation was repealed before the decision, and an appropriate remedy for Mrs. Zwaan de Wries was recommended.

Ilmari Lämsman et al v Finland

Communication No: 511/1992, CCPR/C/52D/511/1992

Date of communication: 11 June 1992 (initial submission)

Date of decision on admissibility: 14 October 1993

KEYWORDS:

indigenous peoples, economic development and poverty, rural and land issues, cultural rights participation

Facts

358. Reindeer herding case brought before the Committee by Sami indigenous groups in northern Finland. The origin of the cases by Finnish Sami was in stone quarrying and logging that threatened traditional livelihoods, a claim that violated the Sami people's right as a minority to enjoy their culture. Sami herdsman challenged the granting by the Forestry Board of a forestry concession in winter herding lands. These untouched forests were a rich source of lichen, a reindeer food. While the case was lost, the Committee's decisions have led to the improvement of the law on minority rights and participation as well as greater impetus to secure protection from forestry and mining interests.

Decision

359. The Committee affirmed that reindeer herding was an essential element of their right to enjoy their culture despite the introduction of some modern technologies. The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observed that Article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the Sami may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking Article 27 of the Covenant.

360. It however found that the limited nature of the quarrying did not "substantially" infringe the herdsman's rights; the stone quarry approved by the National Beginning Forestry Board was adjudged to have minimum impact on herding routes. Instead, the Committee warned against future large-scale mining and emphasised the importance of pre-consultation with Sami. The Committee also issued a strong warning to Finland that future large-scale logging and mining may violate Article 27 of the ICCPR¹¹⁷.

¹¹⁷ Right of ethnic, linguistic or religious minorities to enjoy their own culture.

Communication No. 779/1997
Date of communication: 4 November 1997
Date of admissibility: 7 November 2001

361. In this recent case, in 2001, the Sallivara Cooperative of Herdsmen challenged a logging concession in the Kariselkä area. These herdsmen had lost a much earlier case before the Committee when the Finnish government was able to show, at a very late stage, that it could be brought before national courts. In the new case initiated after unsuccessful proceedings in domestic courts the Committee decided that the domestic courts' conclusion that logging would not significantly impact reindeer herding was tainted by a procedural violation of fair trial and should be reconsidered. Also, it held that the imposition of a large legal costs award by Finland's Court of Appeal against the reindeer herdsmen was a violation of their right to a fair trial under Article 14.
362. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an effective remedy. The State party is also under an obligation to ensure that similar violations do not occur in the future.

REGIONAL DECISIONS

European Court of Human Rights

363. The ECHR has condemned forced evictions, discrimination in educational languages and the destruction of property of slum dwellers. More recently, it has extended the right to life and protections from cruel and degrading treatment to cover protection from forced eviction and environmental hazards and acknowledged that the right to family life may entitle people with severe disabilities or diseases a right to a home.
364. It is important to note that the case law of the European Court of Human Rights is particularly helpful in demonstrating how the right to a fair trial affords protection not only to civil and political rights but to economic and social rights as well. For instance, in the case of *Airey v Ireland* the Court inferred from the general fair trial provision in the ECHR Article 6 a right to free legal aid in a case where a woman under threats of family violence sought for separation in a country that did not recognise divorce. As observed by Martin Scheinin, in more recent cases on various types of social security or social assistance benefits the European Court has gradually expanded the requirement of full fair trial rights to many dimensions of economic and social rights, thus contributing to a growing interdependence between different categories of human rights and the recognition of judicial guarantees as constituent element of the rule of law.

Communication No: Series A No 303-C; (1995) 20 EHHR 277, ECtHR
Case Number: 41/1993/436/515
Keywords: environmental rights, housing rights, positive obligations

365. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 December 1993, within the three-month period laid down by Article 32 Para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no.

16798/90) against the Kingdom of Spain lodged with the Commission under Article 25 (art. 25) by a Spanish national, Mrs Gregoria Lopez Ostra, on 14 May 1990.

Facts:

366. A waste treatment plant was built, with a State subsidy, on municipal land near a town centre and 12 metres from the home in which Lopez Ostra (L) lived with her husband and two children. It began operating, without seeking or being granted a licence, in July 1988 and emitted fumes, smells and contamination which caused health problems and nuisance to many residents in the town. The council evacuated and re-housed them for three months but L and her family returned home in October 1988. A partial shutdown of the plant's activities was ordered by the council but many experts maintained that certain nuisances continued to endanger the health of those living nearby.
367. L made a special application for the protection of fundamental rights, alleging that various constitutional rights had been infringed by the council's passive attitude to the nuisance and risks caused by the plant. This attempt to obtain an order for the temporary or permanent cessation of the plant's activities was unsuccessful at first instance and in both appeal courts.
368. L's sisters-in-law brought administrative proceedings against the council and the owner of the plant for its unlawful operation. They also lodged a complaint which led to the institution of criminal proceedings against the owner for an environmental health offence. The courts in both sets of proceedings, which were still pending, had ordered the plant's closure but had then allowed appeals against this by the council and the owner in the administrative case and crown counsel in the criminal case. An expert opinion for the latter proceedings indicated that the gas levels emitted from the plant exceeded the permitted levels and were the likely cause of a health problem for L's daughter and nephew. L was also advised by a paediatrician that her child should be moved from the area.
369. In February 1992 L and her family were re-housed in a flat in the town centre, for which the council paid the rent. However, the inconvenience resulting from this move and the precariousness of their housing situation prompted them to purchase a house in a different area in February 1993. The criminal court ordered the temporary closure of the plant in October 1993. L complained about the inactivity in respect of the nuisance caused by the plant.
370. The ECHR *found* a breach of Art 8 but not of Art 3. The government objected that L, like her sisters-in-law, should have brought criminal and administrative proceedings rather than make a special application for protection of fundamental rights since that was inappropriate for raising questions of compliance with the ordinary law or for disputes of a scientific nature. It also objected that L had ceased to be a victim, having been re-housed, and that any nuisance had ended with the closure of the plant.

Decision

371. The Court held the application admissible and expressed the unanimous opinion that there had been a violation of Article 8 but not article 3.
372. The Court stated that neither L's move nor the temporary closure of the plant altered the fact that she and her family lived for years only 12 metres away from a source of smells, noise and fumes. It further held that severe environmental pollution may affect the individuals' well being

and prevent them from enjoying their homes in such a way as to affect their private and family life adversely without, however, seriously endangering their health.

373. The Court held that the State failed to succeed in striking a balance between the interest of the town's economic well being in having a waste treatment plant and the applicant's effective enjoyment of her individual right to respect for her home and her private and family life making a reference to the fact that L's family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences and they only moved when it became apparent that the situation could continue indefinitely and the doctor of L's daughter so recommended. Therefore, it held that there had been a violation of Article 8 of the Convention and awarded compensation of ESP 1.5 million, less the legal aid already paid, for costs and expenses before the ECHR institutions.

374. The Court held further that the conditions in which the applicant and her family had lived, although were very difficult did not amount to degrading treatment within the meaning of Article 3.

African Commission on Human Rights

375. The African Charter on Human and Peoples' Rights encompasses all human rights. Economic, social and cultural rights are as important as any other. The Commission takes the view that enforcement of human rights must not be discriminatory: all rights must be enforceable. The advantage of the African Charter is that, under Articles 60 and 61, the Commission has the mandate to go beyond the Charter rights to look at international standards. There is hardly a right at the international level that cannot be subject to protection in the African system.

SERAC and CESR v Nigeria

Case No. 155/96.

Decision at the 30th Ordinary session, Banjul from 13-27 October 2001

KEYWORDS

Right to food, housing rights, health rights, obligation to respect, obligation to protect, obligation to fulfil, transnational corporations.

Facts

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. . . . there is no right in the African Charter that cannot be made effective.

SERAC and CESR v Nigeria Decision, African Commission on Human and Peoples' Rights, paragraph 68

376. The *SERAC* case is of particular significance in that the complainants did not petition local or national courts, but went straight to the African Commission on Human Rights (hereafter the Commission). Before bringing a complaint to the Commission, a petitioner must exhaust domestic remedies. This rule was waived in the *SERAC* case because the then-military government of Nigeria had ousted the jurisdiction of the courts from reviewing government acts potentially violating the national Constitution or the African Charter. They also had notice of the complaint, but did not respond.

377. The communication alleged 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, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, neurological and reproductive problems resulting from the contamination of the environment among the Ogoni people.
378. The communication alleged that the government was guilty of violations of the right to health, the right to dispose of wealth and natural resources, the right to clean environment and family rights due to its condoning and facilitation of the operations of oil corporations in Ogoniland.

Decision

379. The Commission ruled that the Ogoni had suffered violations of their right to health (article 16) and the right to a clean environment (article 24) due to the government's failure to monitor oil activities and involve local communities in decisions violated the States duty to protect its citizens from exploitation and despoliation of their wealth and natural resources (article 21). The Commission suggested that a failure to provide material benefits for the Ogoni people was also a violation.
380. The Commission also held that the implied right to housing (including protection from forced eviction), which is derived from the express right to property, health and family, was violated by the destruction of housing and harassment of residents who returned to rebuild their homes. Finally, destruction and contamination of crops by government and non-state actors violated the duty to respect and protect the implied right to food.
381. The Commission issued orders to cease attacks on the Ogoni people, to investigate and prosecute those responsible for attacks, to provide compensation to victims, to prepare environmental and social impact assessment in future and to provide information on health and environmental hazards.
382. 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 Ogoniland. The Commission held that the State is under an obligation to respect the 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. It went on to further state that 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. This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments.

Communications Nos. 25/89, 47/90, 56/91, 100/93 (Joined), in Annex to Communications to the Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1995-1996 (ACHPR/RPT/9th), AHG/207 (XXXII).

KEYWORDS

ESCRs- right to health, right to education, serious and massive violations of Articles 4,5,6,7,8,16 and

17

Facts

383. This case partially concerned the right to education. Closing down of schools by the Government violated education rights. Zaire was ordered to provide a minimum in terms of social amenities for the community, i.e., water, electricity and health.

384. The communication alleged numerous instances of torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press. It also alleged that public finances were mismanaged; that the failure of the Government to provide basic services was degrading; that there was a shortage of medicines; that the universities and secondary schools had been closed for two years; that freedom of movement was violated; and that ethnic hatred was incited by the official media.

Decision

385. The failure of the government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicine constituted a violation of the right to enjoy the best attainable state of physical and mental health and the obligation of the state to take necessary measures to protect the health of its people as set out in article 16 of the African Charter.

Inter American System

Amilcar Menéndez, Juan Manuel Caride y otros (Nº 11.670)

Institution:

Inter American Commission on Human Rights

Country

Argentina

KEYWORDS

Right to an adequate standard of living, Right to health, older persons' rights, Right to social security and welfare

Summary

386. Between December 27, 1995 and September 30, 1999, the Inter-American Commission on Human Rights (the Commission) received numerous petitions filed by retired persons and several non-governmental organisations. The petitions claimed violations of the rights to effective judicial remedy, due legal process, property, social security, health, well-being and equal protection, which are enshrined in the American Declaration on the Rights and Duties of Man (the Declaration) and in the American Convention on Human Rights (the Convention).
387. The petitioners had filed claims before the Argentine National Social Security Administration (ANSES) requesting that their social security benefits be adjusted or calculated. As their claims were rejected by the administrative agency, they resorted to the domestic courts.
388. Retired persons seeking an adjustment in their retirement benefits have to deal with a cumbersome administrative and judicial system that fails to realise their rights. The fundamental violations alleged derive from delayed judgements, as well as postponed or inadequate enforcement of judgements. The petitioners particularly question Law 24463, whose terms enable postponing enforcement of judgements favourable to them due to budgetary restrictions and indefinitely postponing payment of social security adjustments. Furthermore, the petitioners claim that their right to property is thereby adversely affected, and that the social security system violates the right to equal protection, because there are groups of privileged retired persons (members of the legislative and judicial branches, the military and former Executive Branch officials). The petitioners also maintain that this situation adversely affects their right to health, well-being and life, since it prevents them from buying food, essential services or medicines.

Outcomes

389. This case is of major importance, because it involved an issue that is common in several Latin American countries: the progressive degradation of the right to social security.
390. Furthermore, the report adopted by the Commission is particularly relevant to the defence of the economic, social and cultural rights within the sphere of the Inter-American system, given that the case has been declared admissible in respect of alleged violations of rights including social rights enshrined in the American Declaration of Rights and Duties of Man. In other words, the Commission acknowledged its competence to hear violations of economic, social and cultural rights provided for by the Declaration.

Comunidad Mayagna (Sumo) Awas Tingni v Nicaragua (Inter American Court of Human Rights Series C, No. 79, 31 August 2001)

Country
Nicaragua

KEYWORDS

Indigenous peoples, land and property rights, obligation to protect, compensation

Facts

391. The complainants the Awas Tingni Indians lodged a petition before the Inter-American Commission on Human Rights (the Commission) denouncing the State of Nicaragua for failing

to demarcate the Awas Tingni Community's communal land and to take the necessary measures to protect the Community's property rights over its ancestral lands and natural resources. They requested compensation for the encroachment on their land caused by the government's approval of destructive logging concessions on indigenous communal lands without consultation with or agreement of the affected communities. Furthermore, the petitioners denounced the State for failing to guarantee access to an effective remedy for the Community's property claims. In addition, precautionary measures were requested to prevent the forthcoming concession of 62,000 hectares of tropical forest to be exploited by a company in communal lands.

Decision

392. On June 4, 1998, the Inter-American Commission on Human Rights submitted the case to the Inter-American Court of Human Rights. In its judgement of August 31, 2001, the Court declared that the State had violated the right to judicial protection enshrined in article 25 of the American Convention on Human Rights and the right to property enshrined in article 21 of the Convention, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community. Therefore, the Court decided that the State had to adopt the necessary measures to create an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores. The Court also decided that, until such mechanism was created, the State had to refrain from any acts that may affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the indigenous community live and carry out their activities.

393. This case is of major significance, because it is the first time that the Inter-American Court has issued a judgement in favour of the rights of indigenous peoples.

Jorge Odir Miranda Cortéz (Nº 12.249)

Country
El Salvador

KEYWORDS

Right to an adequate standard of living, equality rights and non discrimination, right to health, HIV/AIDS

Summary

394. On January 24, 2000, a petition was filed against the State of El Salvador before the Inter-American Commission on Human Rights alleging violation of the rights to life, health and full development of personality of a group of persons who are carriers of HIV. The allegation was grounded on the State's failure to provide them with the triple therapy medication needed to prevent them from dying and to improve their quality of life. The petitioners also claimed that the situation of the said persons constituted an instance of cruel, inhumane and degrading treatment.

395. The Commission requested the State to adopt urgent precautionary measures in respect of the alleged victims in this case so that they could receive the medical services, treatment and antiretroviral medication needed to prevent them from dying. The measures were granted on February 29, 2000.

Decision

396. On March 7, 2001, the Commission declared the case admissible in respect of alleged violations to the rights enshrined in articles 24 (equal protection), 25 (judicial protection) and 26 (social rights) of the American Convention on Human Rights (the Convention). The Commission stated that “although establishing violations to article 10 of the Protocol of San Salvador is beyond our competence, (...) the standards referring to the right to health will be considered in our analysis of the merits of the case, pursuant to articles 26 and 29 of the Convention.” Upon issuing this decision, the Commission made itself available to the parties to help reach a compromise. In November 2001, the petitioners considered that the friendly solution process had failed and requested the Commission to decide on the merits of the case.

Outcomes/implications

397. The significance of the case is the direct enforceability of the right to health. In a valuable interpretation, the Commission resolved that the right to health is protected by the Convention in its Article 26 and consequently the Commission is empowered to hear individual cases of violations. The same criterion could be applied to other social rights referred to in article 26.

398. The Commission’s involvement in the case led the Salvadorian Supreme Court to order medication to be supplied to the petitioners. However, the persons receiving medication account for only 18 % of all AIDS patients.

PART ELEVEN: CONCLUSION

399. There is no denying that litigation affirms the legal nature of rights and provides, in practice, the right to an effective remedy as recognised in the UDHR and in the jurisprudence of the Committee on Economic, Social and Cultural Rights. As demonstrated in this paper there are a variety of issues that can be litigated. The jurisprudence in several countries has encouraged the development of a model of “reasonableness” for adjudicating the positive duties imposed by socio-economic rights. Of particular importance, as illustrated in the South African jurisprudence, is the test of measures taken by the State to make available short term provisions for vulnerable groups that live in desperate and squalid conditions. This model has allowed the courts to recognise the role of other branches of the government- the legislature and the executive, while not abdicating its responsibilities to enforce the positive duties imposed by socio-economic rights. Having said that, there is a need for the re-conceptualisation of the socio-economic rights debate so that its various arguments, in particular those relating to institutional powers and competence, fall within the ambit of the framework of the duties to respect, protect and fulfil.
400. One of the major challenges faced by ESCR litigants is that, even where courts issue favourable decisions, countries often fail to implement them. Generally speaking, the barriers encountered to access justice in conflicts of public concern are due to procedural matters. For example, the case of *Grootboom*, which was decided in 2001, has yet to result in a significant increase in housing funding from the government, and petitioners have returned to court to argue that government has failed to comply with the judgement of the Constitutional Court. While it has had a real impact on official housing policy and on the way in which the courts deal with evictions, it has a weakness. As observed by Geoff Budlender of the Constitutional Litigation Unit at the Legal Resource Centre, “it does not deal with the question of what you can do if you are a person who has no home, and you are left out in the cold. Is there any direct remedy provided under the Constitution? Can you get a direct benefit by going to court? The judgement is quite weak on this point. All you are entitled to is a reasonable programme which will give you access within a reasonable period. It does not give you a directly enforceable right as an individual.” Similarly, in spite of Argentina’s strong positive decision on the right health case, *Viceconte* in 1998, implementation has not taken place. It was noted that the part of the problem in this instance was a lack of established procedure for implementation¹¹⁸.
401. In the final analysis, the focus of future legal strategy will have to be to develop three types of cases. First, it is essential to inculcate a culture where the principle of equality is concomitant with the progressive realisation of rights. Second, it is of crucial significance that the principle of legitimate expectation in the ESC rights context be used especially when a government promises something, it should be held to account. Third, develop the entitlement to direct benefits from the rights, so there is some definable and directly enforceable aspect to ESC rights.
402. The CESCRs has expressed that States are not immune to human rights scrutiny even where their structural adjustment policies flow from an international treaty or other kind of relationship with international actors. For instance in its concluding observations on Finland, the Committee stated:

The Committee encourages the Government to take adequate measures to ensure that the reduction of the budgetary allocations for social welfare programmes does not result in the violation of the State party’s obligations under the Covenant. The Committee particularly lays emphasis on the need to protect the rights of socially vulnerable groups, such as young families with children, refugees and elderly or unemployed persons.

¹¹⁸ *The Right to Water in Argentina*, Report prepared for Rights and Humanity, by CEDHA, Argentina, November 2003. Available online at : <http://www.cedha.org.ar/docs/doc175-eng.doc>

403. In conclusion, human rights and good governance should not only be regarded as expressing a scattered relation, but should be seen as merged with one another. To the extent that human rights law binds the State in question, it can be argued that human rights are a part of good governance. “Rule of law is also rule of human rights law¹¹⁹” and “good governance is essential to the realisation of all human rights¹²⁰.”

¹¹⁹ General Comment No. 9, CESCR. UN Doc E/C.12/1998/24

¹²⁰ General Comment No. 12, CESCR. UN Doc. E/C.12/1999/5

ANNEXTURE I

Government obligations and domestic jurisprudence ¹²¹

The obligation to ensure non-discrimination and equality

The duty not to discriminate in the enjoyment of rights such as the right to work, health, education, housing etc is a binding obligation under articles 2.2 and 3 of the ICESCR. Laws and practices that directly or indirectly discriminate against minorities, women, children and other groups are daily litigated before many courts. Often, these cases have important implications for government allocation of resources. Courts and human rights bodies must ensure that positive steps are taken so that marginalized and vulnerable groups have equal access to essential goods and services.

Box 1: *Brown v. Board of Education (USA)* - The Supreme Court held that educational segregation of Afro- Americans violated the equal protection clause in the Constitution.

Box 2: *Eldridge v. BC (Canada)* - The Supreme Court of Canada, after considering cost and budgetary implications, ruled that the right to equality requires that governments provide interpretation services for the deaf and hard of hearing in hospitals and in the provision of health care.

The obligation to Respect

Economic, social and cultural rights are often taken away from individuals and communities. The duty to respect means governments must ensure that such interferences only occur when justified and are carried out in the proper way, with provision of compensation or alternatives where appropriate. Courts or other bodies can monitor this duty by hearing complaints from individuals and communities.

Box 3: *ASK v Bangladesh* - Eviction of slum-dwellers without notice and without any attempt to find alternative accommodation violates the right to shelter and livelihood, according to Supreme Court of Bangladesh.

The obligation to Protect

Private actors, individuals or corporations, often impede or deny access to economic, social and cultural rights. Regional human rights bodies have regularly assessed whether States have complied with their duty to protect individuals from such violations. (See Boxes 4 and 5)

Box 4: *ICJ v. Portugal* - The European Committee on Social Rights found that Portugal had failed to take sufficient steps to regulate child labour under the European Social Charter.

¹²¹ ESCR Advocacy kit- The NGO Coalition for an Optional Protocol to the ICESCR, February 2004

Box 5: *SERAC v. Nigeria* - Nigeria's failure to prevent Shell from polluting environment was a breach of their duty to protect the rights to food and health environment of Ogoni people according to the African Commission on Human and Peoples' Rights.

The obligation to Fulfil

Lastly, courts can play an active role in monitoring States' progress in fully realising the rights, by hearing complaints about the failure to make reasonable plans, allocate the necessary and available resources, and implement and monitor appropriate policies and programs. They may also require States to define and achieve progressive benchmarks for the fulfilment of economic, social and cultural rights. (See Box 6)

Box 6: *Grootboom v South Africa* - The Constitutional Court of South Africa faulted governmental housing programme for failing to provide a mechanism for emergency relief for those in desperate need –a critical part of the progressive realization of the right to housing of all South Africans.