LST REVIEW

Volume 11 Issue 164 June 2001

The Eppawala Case

National Competition Policy

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The Rights of Foreign Spouses

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ISSN - 1391 - 5770

Editor's Note

This month's issue of the LST Review addresses a number of themes: environmental litigation, national competition policy, the role of human rights commissions in promoting and protecting women's rights, and the rights of foreign spouses.

The Eppawela Case

The Supreme Court judgement in *Bulankulama and others* v *Secretary, Ministry of Industrial Development and others* (The Eppawela Case) was a landmark decision. In our first article, Nuwan Rupesinghe, analyses the Supreme Court decision and considers some of the legal principles articulated in that case.

'Eppawala', as it commonly became known, raised a huge controversy when the government decided to grant a license to a multi national with a particularly bad pollution record. There were moments of hope when it was felt that the government would re consider its decision and look at sustainable and less harmful options. When this was not to be the case, a group of residents filed an application in the Supreme Court and succeeded in halting the project, at least for the moment.

The Supreme Court in its decision, considered a number of principles of international environmental law in the context of a fundamental rights application which sought to establish a violation of Articles 12 (1), 14(1)(g) and (h) of the constitution. The court showed a willingness to look at internationally accepted environmental concepts in interpreting the fundamental rights provisions of the constitution. The case is an important one for a judiciary that has showed a reluctance to review the legality of economic and development policy and this article by Rupesinghe analyses some of the court's thinking and looks at the implications of the judgement.

National Competition Policy

Malathy Knight-John and Pududini Wickramaratne look at questions of fair trading, monopolies, consumer protection and regulation, in two related articles. These articles assume greater importance with the publication of the long awaited Bill on Consumer Protection. The Bill itself took a long time in coming and Knight-John and Wickramaratne in their two articles look at some of the deficiencies of the current law and policy and some of the new proposals contained in the Bill. As they both argue, even the proposed Bill is deficient and needs to be revised at Committee stage. They note that apart from the law itself, what is lacking is a coherent government policy and vision on the subject that would complement the proposed law. The law per se, is unlikely to ensure that commercial entities behave in ways that are not detrimental to consumer welfare and economic efficiency. They also call for a wide ranging debate on the subject and the participation of all stakeholders in the formulation of competition policy.

The Gender Composition of National Human Rights Institutions

We publish this month extracts from a report by the Commonwealth Human Rights Initiative (CHRI) on the gender composition of national human rights institutions. The report, written by Sneh Aurora, studied 15 human rights commissions in the Commonwealth to ascertain the level of gender representation on those institutions. The findings are not startling: the representation of women in these institutions, both at the level of commissioner and at the staff level, is poor. Even in those commissions where there is a more balanced representation of women, many women work in the lower paying and low status 'pink ghetto'. The report provides clear recommendations for increasing the representation of women in these institutions and also looks at the role of these institutions in realising women's rights.

The Rights of Foreign Spouses

South Africa has begun to generate some of the most imaginative and thought provoking jurisprudence on human rights. Both with the constitution and the

constitution drafting process, that country showed a willingness to think through established ideas and develop new concepts that reflected our growing understanding of human rights.

The South African Constitutional Court in its interpretation of the Bill of Rights has continued to reflect this imagination. Over the past few months the LST review has tracked some of the Court's jurisprudence. In this issue we publish the Court's decision in Booysen v Minister of Home Affairs where the rights of foreign spouses were considered.

In Sri Lanka the rights of male foreign spouses has been a matter of debate. The Controller of Immigration and Emigration had previously adopted different criteria when granting residence visas to foreign spouses depending on whether they were male or female. If you were a foreign male spouse, it was more difficult to obtain a residency visa than if you were the female foreign spouse of a Sri Lankan male. This position has now been altered by the new guidelines issued by the Controller. These guidelines come as a result of the Supreme Court order in the Fischer Case, delivered about two years ago. The Supreme Court, in that case, had ordered the Controller to issue fresh guidelines that were consistent with Article 12 of the constitution.

This South African case deals with the rights of both male and female spouses and their rights of entry and work. South African law required foreign spouses to seek a work permit from outside the country and not to enter the country till such time as the work permit was issued. Moreover, work permits would only be issued if the foreign spouse did not pursue an occupation for which a sufficient number of persons are available in South Africa.

The High Court had held that these provisions were inconsistent with the constitutional right to dignity. This order of the High Court was confirmed by the Constitutional Court in Booysen. The declaration of invalidity was suspended for 12 months to allow Parliament time to amend the law.

Regrettably, the right to dignity, which has significant consequences for women's rights among other rights, is not part of the current Bill of Rights, nor does it find a place in the Bill of Rights of the Draft Constitution.

Eppawala:
The Final Outcome

Nuwan Rupesinghe*

1. Introduction

All persons are entitled to certain basic rights as a direct result of being a human being. These rights are essential for the development of humankind. Most of these basic rights are embodied in constitutions all over the world. The right to life, the right to live in dignity, the right to be equal before the law and to the equal protection of the law, are some of these rights. Many consider that the rights relating to the use of the environment and the protection thereof for future generations are equally important for the development of humankind. The survival of humankind will depend on the survival of the environment.

Bulankulama and others v. *Secretary, Ministry of Industrial Development and others,*[1] which is popularly known as the Eppawala case, is a landmark case. The subject matter of the case revolves around the Eppawala rock phosphate, a rich natural resource that Sri Lanka possesses.

Governments are the guardians of the environmental resources in their countries but are not considered its owners. They may decide on the development of the environment and its use for the economic benefit of the country. International standards have guidelines which provide that the general public should be involved in the decision making process in relation to matters of the environment.

The present case revolves around the decision of the Government of Sri Lanka to grant Freeport McMoran Resource Partners of USA, a company specialized in phosphate mining, the task of exploiting the Eppawala rock phosphate deposit. In the process, the government faced animosity from the general public who were concerned of the environmental impact of the project and of the violation of their fundamental rights. These rights included the right to freedom of movement, the

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[1] [2000] 3 Sri. L. R. 243.

right to choose a residence of one's choice and the right to choose an occupation of their choice.[2] They claimed that there was a danger of them being arbitrarily deprived of their lands and livelihood. Since an environmental impact assessment [EIA], which was required for this project in terms of the Regulations framed under the National Environment Act[3] was not carried out, the public was not given a chance to participate in the EIA. This violated their right to equality and equal protection guaranteed under Article 12(1) of the Constitution. The end result was the Petitioners filing action in the Supreme Court.

This article contains an analysis of the judgement, and its impact on the future environmental issues in the country. It also looks at the provisions of the National Environment Act (NEA) and the Mineral Investment Agreement between the government and the company. The constitutional rights with regard to the petitioners, in particular, Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution will also be examined.

2. Facts[4]

The great discovery was made in 1971 when a group of scientists conducting a Geological Survey at Eppawala in the Anuradhapura district, came across a phosphate rock which was in the form of mineral apatite. Investigations proved that the phosphate deposit was 25 million tons and the inferred reserve was 35 million tons.

The Eppawala deposit was first entrusted to the District Development Council and later to the Lanka Phosphate Ltd., both of which were unsuccessful in making any substantial profit from the rock.

In 1992 the Government of Sri Lanka decided to invite proposals from around the world to establish a joint venture company to manufacture phosphate fertilizer

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[2] Guaranteed by Articles 14(1)(g) and (h) of the Constitution.

[3] National Environment Act No. 47 of 1980. This Act was amended by Act No. 56 of 1988 and by Act No. 55 of 2000.

[4] As taken from the Judgement of the Court. S.C. Application No. 884/99(F/R), S.C. Minutes 2nd June 2000.

using the resources at the Eppawala apatite deposit. This led to the great controversy that followed in the next few years.

In response to the advertisement calling for proposals to establish a joint venture, six proposals were received. The Cabinet thereupon appointed a committee to consider these proposals. The prospective investor was required to submit an evaluation report, giving details of certain basic qualifications such as technical expertise, resources, experience in similar endeavours, manufacture and marketing skills.

Out of the six proposals received by the committee, it was established that only Freeport McMoran Resource Partners of USA had the technology required to carry out a massive project like Eppawala. They were also a leading phosphate fertilizer firm in the world. In addition, IMC Agrico, an affiliate of Freeport McMoran, had conducted a study on this particular phosphate deposit a few years ago. Of these qualifications, the negotiating committee decided to conduct negotiations with Freeport McMoran.

Negotiations which commenced in 1994 continued for several rounds. The second round of negotiations took place in 1995, which focused on the drafting of the documents such as the Mineral Investment Agreement (MIA), Export Distributorship Agreement, Technical Advisory Services Agreement, Shareholders Agreement and the Memorandum and Articles of Association. In 1996, the third round got underway and soon after, Freeport submitted drafts of the MIA and other agreements. In 1997, the final round of negotiations was concluded where the drafts of the agreements were finalized. Thereupon Cabinet approval was obtained. The parties bound by the MIA were the Government of Sri Lanka, and the Project Company which was formed by a group of companies, namely, IMC-Agrico, Tomen Corporation of Japan and Lanka Phosphate Ltd.

2.1 The Reactions of the Citizens

The eagerness of the government to implement the project, despite the common conception that the project had negative implications socially, economically and most importantly environmentally, caused an uproar in the country, with people

protesting at various city centers.[5] Newspaper reports scrutinized the project endlessly pointing out the various implications that might arise if the project was implemented.[6]

Agriculture is the main source of livelihood for a majority of the residents of the area. As such, questions were asked about the wisdom of allowing such a vast project to get underway when the people living in the area would be adversely affected and when their livelihood and their freedom of choosing a residence of their choice was under threat.[7]

The National Academy of Sciences (NAS) published reports critizising the project. They considered the project to be premature since data relating to the quality and quantity of the mineral deposit had not been analyzed properly. They further stated that "Freeport McMoran had the dubious distinction of being the number one polluter in the USA."[8] Since Eppawala is situated in one of Sri Lanka' s oldest cities boasting of a number of ancient archeological sites, the NAS also emphasized the cultural impact the project would cause as, 'the Jaya Ganga', a national treasure which was required to be preserved by UNESCO's World Heritage Convention, was in danger of being destroyed in the process.[9]

As the unrest among the general public grew even stronger, the Minister of Science was forced to call for a report from the National Science Foundation. However, even that report was not in favour of the project. It was stated in the report that the project would be highly disadvantageous to the country and would result in adverse environmental impacts. Environmental pollution, disruption of the irrigation system of the North Central Province and the spreading of diseases as a result of the increase in waste collected in the vicinity of the rock, were identified as the almost certain consequences that would follow.

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[5] The Island 26th May 1999.
[6] The Island 26th March 2000, 28th March 2000.
[7] The Sunday Leader 26th March 2000.
[8] As taken from the judgement.
[9] Prof. Tissa Vitharana, 'Eppawala Phosphate: What is best for Sri Lanka', Christian Worker 2nd Qr. 1998.

Newspaper reports of the Government's intention to proceed with the project ignoring these recommendations caused the petitioners to file an application in the Supreme Court in October 1999.

3. Parties to the Action

The petitioners in this case were citizens of Sri Lanka and residents of the Eppawala area. The first to the fifth petitioners were land owners and paddy or dairy farmers. The sixth was a teacher who was also an owner of an extent of coconut land. The seventh was a Viharadhipathi of the Galkanda Purana Viharaya. The first six petitioners claimed that they feared the danger of losing their land and their means of livelihood while the Viharadhipathi feared the destruction of the Viharaya and paddy lands.

The respondents were the Secretary to the Ministry of Industrial Development who was the official who would have to sign the agreement on behalf of the Government, the BOI (Board of Investment), Geological Survey and Mines Bureau, which was the authority for granting exploration and mining licenses, the Central Environmental Authority, the project company Sarabhumi Resources (Pvt) Limited, Lanka Phosphate Limited, and another company whose exploration and mining license was to be transferred to the project company, and the Attorney General.

4. Constitutional Guarantees

The application was filed in the Supreme Court under Article 17 read with Article 126 of the Constitution, which gives sole and exclusive jurisdiction to the Supreme Court to hear cases where there is an infringement or imminent infringement by executive or administrative action of any fundamental right or language rights recognised in the Constitution.

The petitioners pleaded that their rights guaranteed under Articles 14 (1)(g) and (h) and Article 12(1) of Chapter III were in imminent danger of being infringed.

Articles 14(1)(g) and (h) of the Constitution guarantee a person the right to choose a residence and practice the trade or occupation of his or her choice, while Article 12(1) of the Constitution that guarantees a person the right to equality before the law and equal protection of the law.

5. Time Limit

The respondents, relying on Article 126(2) of the Constitution[10] claimed that the petitioners' application was time barred since more than one month had passed since the initialing of the implementation of the project.

The court, however, was of the view that the application had not crossed the time barrier. Since there was severe criticism from the general public over the project, the Minister requested the National Science Foundation for guidance on the matter. As the recommendations made thereafter were not in favour of the project, this led to the logical understanding that the project would not take effect. However, with the publication of newspaper reports regarding the possibility of the proposed agreement relating to the project being signed within two months, the petitioners realised the danger and applied to the Supreme Court.

The Supreme Court was of the view that the petitioners' rights were threatened only after the newspaper report was published. The Court held that the application had been filed within the time limit.

6. The Filing of a Single Application

Questions arose as to whether all seven petitioners could file a single application, since Article 126(2) of the Constitution refers to "any person", "such person" and "he may himself", pointing to the fact that only one party could file action.

[10] Article 126(2) - "Where any person alleges that any such fundamental right.........relating to that person has been infringed or about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf within one month thereof,.......apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement."

However, the court held that since individual rights are violated in the same allegely circumstances, the court will not interpret the law in such a way as to exclude a single action.

7. Right to Equality and Equal Protection of the Law, Article 12(1)

These rights apply to the present case since environmental issues require transparency, fairness and public participation. The regulations framed under the National Environmental Act No. 47 of 1980, which are discussed below protect these rights of the people of the country.[11] The petitioners complained that by not having an EIA process, their right to participate in the decision making process was infringed, therefore their right to equality before the law and equal protection of the law under Article 12(1) was violated.

7.1 Environment Impact Assessment (EIA)

Under the National Environment Act, certain projects should undergo the EIA process and should obtain approval from the relevant project approving agency. The EIA is a useful tool for promoting environmentally sound and sustainable development. Its purpose is to ensure that the development options under consideration are environmentally sound and sustainable and that the environmental effects of the projects are recognised and taken into account in the early stages of the project.

The EIA process is managed and monitored by the Central Environmental Authority and is implemented through fourteen state agencies. These state agencies/project approving agencies are identified by the Minister by order published in the Gazette. The Minister also determines the projects and undertakings or prescribed projects for which approval would be necessary. Projects that should undergo the EIA process and the procedures and methods to

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[11] This Act was amended by Act No. 56 of 1988. And by Act No. 55 of 2000.

be adopted were gazetted on 24th June 1993 and are contained in Gazette Extra-ordinary No. 772/22[12].

It is the task of the project approving agency to ensure that high quality environmental information is available to the public officials and citizens before decisions regarding the projects are made and before the government makes any significant commitment in relation to the environmental resources of the country.[13] It should also obtain an initial environmental assessment report from the Company or Firm implementing the project. Once such a report is received, the project approving agency should publish it in the Gazette and in one newspaper each, in Sinhala, Tamil and English. The publication should notify the place and times at which such report shall be available for inspection by the public, and invite the public to make comments.

Any member of the public could challenge this within thirty days from the date on which the notice was published. His/her comments about the project could be made and upon consideration of such comments, the project approving agency will give the party an opportunity to be heard. When the decision regarding the approval or rejection of the project is made, it should be published in one newspaper each in Sinhala, Tamil or English language[14].

The Eppawala project too had been identified as a project that required prior approval. However, the EIA process was not carried.

The petitioners pointed out that according to the Mineral Investment Agreement the government had to assist the company to carry out the project. They further pointed out that since the EIA had not been carried out, the signing of documents by the parties with an intention to proceed with the project would make it certain that the EIA, if carried out later, would be biased. Therefore the petitioners alleged that if the EIA was carried out, the citizens' right to participate in the EIA

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[12] A guide for implementing the EIA process, No. 1 1993, Central Environmental Authority, Sri Lanka. This was later amended by Gazette Extra-ordinary No. 859/14 of 23 February, 1995, and by Gazette Extra-ordinary No. 1104/22 of 5 November 1999.

[13] Ibid.

[14] National Environment Act No. 47 of 1980. Part IV C lays down the procedure for the approval of projects.

process would be hindered, violating their right to equality before the law and equal protection of the law.

The counsel for the respondents submitted that the proposed agreement obliged the Company to comply with the NEA and the regulations made thereunder. This would make the EIA process compulsory. However, the court pointed out that the proposed agreement (MIA) does not make any reference to the EIA. Instead, the MIA provides for an environmental study to be prepared by an international firm selected by the Company. This study is part of the feasibility study which determines feasibility of commercially developing any deposit or deposits identified by the Company.

The counsel for the respondents submitted that the steps framed under the NEA would be carried out after the feasibility study is submitted to the Central Environmental Authority. They pointed out that the public would then have the right to protest.

The court was of the view that the submissions put forward by the respondents were not satisfactory, since the EIA process conducted after the feasibility study would jeopardize the EIA process. The court held that the proposed agreement failed to ensure that development options were environmentally sound and sustainable. According to the court, the EIA process should be completed at an early stage in fairness to the project itself and to the public. The Court stressed that access to information on environmental issues is of paramount importance.

The National Environment Act is our basic national charter for the protection and management of the environment.[15] As the EIA process was not observed by the parties, the provisions of Part IV of the NEA designed to safeguard the environment were neglected. The petitioners feared that EIA process carried out later would not be done in good faith and could be biased.

The court considered the principle of sustainable development and reiterated the view expressed in the case of *Guneratne* v. *Homagama Pradeshiya Sabha,* where

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[15] A Guide for Implementing the EIA process, No. 1, 1993. Central Environmental Authority, Sri Lanka, second edition 1995.

it was said that publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved. [16]

Accordingly, the court was of the view that there was an imminent infringement of the petitioners' right to equality guaranteed by Article 12 of the Constitution. The petitioners' right to equal protection of the law and the right to be equal before the law was in imminent danger of being infringed when the EIA was not conducted. The court was also of the view that access to information regarding environmental issues are important and cited principle 10 of the Rio Declaration, which calls for better citizen participation in environmental decision making and rights of access to environmental information.

The court emphasized that Article 12 of the Constitution which encourages transparency and fairness in the administrative process had been violated in the present case due to the fact that the respondents have failed to comply with the regulations set out in the National Environment Act.

8. Article 14 (1) (g) and Article 14 (1) (h)

The petitioners who were residents of the area, claimed that the implementation of the project would result in them being evicted or displaced due to the heavy mining scheduled to be carried out in the area. They also feared that they might not be compensated or relocated.

The petitioners were enjoying their right to practice a trade or occupation of their choice, and claimed that they would be deprived of this right due to the implementation of the project. They feared that the effect of the project would severely affect their sources of income, most of them being farmers.

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[16] [1998] 2 Sri.L.R. 11.

8.1 MIA and its effect on the environment

In evaluating the pros and cons of implementing this project, the court considered the effects on the environment, the areas affected and the position of the settlers and also the economic benefits that might accrue. The court examined the MIA in order to investigate whether Article 14 (1) (g) and (h) of the Constitution were violated.

(a) Exploration: Area

Article 1 of the MIA defines the exploration area and the methods of exploration. The exploration area is an area of land which forms part of the contract area and which initially covered approximately 56 sq. km. of land. However, amending to the MIA, that area may be reduced or extended.

Though the Negotiating Committee appointed by the President stated in their report that the exploration area will be approximately 56 sq. miles and that the Buffer Zone Area will comprise of land area extending to 10 kilometers from the boundaries of the exploration area, the court refused to accept this. The court, interpreting the MIA, stated that the exploration area was not limited to 56 sq. but that it was contractually elastic and extendable.

(b) Exploration: Pilot Testing

There is a basic right of the company to conduct pilot test operations and this is not limited only to the exploration area. Where the necessity arises, pilot testing could be extended from the exploration area to the non-contract areas, thereby expanding the environmental damage.

(c) Feasibility Study

The respondents relied on Article 7.6 of the MIA which provided that a feasibility study would be conducted by the company. Article 25 of the MIA stated that as a part of the feasibility study, an environmental study in relation to all enterprise activities should be carried out. The company should also identify and analyze as part of the feasibility study, the potential impact of the operations on land, water,

air, biological resources and social, economic, cultural and public health. The environmental study should highlight the company's intentions on how to mitigate adverse environmental impacts of the enterprise and to restore and rehabilitate all contract areas and project areas at the termination of the agreement. Where the adverse effects on the environment are identified in the feasibility study, the study should provide an estimate of the cost of such activities.

The respondents argued that until the feasibility study is conducted, they could not make any estimate as to how many people will be relocated. The court however, did not agree with this argument. The court felt that the petitioners would not benefit from this study. The company had not carried out a study or produced a development plan yet and therefore there is no guarantee that it would ever take place. Even if it is completed, the process will be conducted by an internationally recognized independent environmental firm which is selected by the company and approved by the government. The court was of the view that this would not win the confidence of the petitioners since there is a provision in the agreement regarding the confidentiality of the study. This means that the feasibility study may never be published. Therefore, the court concluded that there was an imminent infringement of the petitioner's rights guaranteed by Articles 14(1)(g) and (h).

The court was of the view that when taking decisions regarding the environment, safeguarding the health and safety of the people should be given priority. The learned judges stressed the importance of ensuring the continued development of the petitioners in their occupations and the protection of the rights of future generations. The court drew its attention to the report of the National Science Foundation and to the petitioners' viewpoint that, the proposed project, if implemented, would result in highly adverse environmental impacts.

9. Other issues

9.1 Sustainable Development and International Instruments

The court raised a significant issue when they referred to the principle of sustainable development. The court referred to two of the international standard setting instruments, namely the Stockholm Declaration (1972) and the Rio De

Janerio Declaration (1992). The court was of the view that the proposed agreement should be considered in the light of the principles set out by the above two instruments. The court should be commended for this approach, as reference to international instruments with regard to sustainable development has not been a common practice in Sri Lanka.

In defining sustainable development, the court relied on the benchmark definition of the United Nations Commission on Environment and Development which in its 1987 report stated that sustainable development is "... development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The court made use of these instruments to highlight sustainable development and the rights of the states. According to Principle 21 of the Stockholm Declaration and Principle 2 of the Rio De Janeiro Declaration, the state has a right to exploit its resources but according to its own environmental development policy. The court gave prominence to certain sections which highlighted the importance of sustainable development and how it should be approached. Principle 1 of the Rio De Janeiro Declaration reads that human beings are the centre of concern for sustainable development and that they deserve to have a healthy and productive life in harmony with nature. Principle 4 states that in achieving sustainable development, protection of the environment constitutes an integral part of the development process and that the two should go hand in hand and not be isolated from one another.

The court reflected on the principles of sustainable development which were relevant to the present case. First, the court considered the *principle of inter-generational equity*, which means that natural resources are conserved for the benefit of future generations. Secondly, the *principle of sustainable use*, where natural resources are exploited in a sustainable or prudent manner. Thirdly, the principle relating to the *intergration of environmental considerations into economic and other development plans*.

Referring to the principle of inter-generational equity, the court cited the Stockholm Declaration which states that the responsibility to protect and improve the environment for the present and future generations falls on humankind. Natural

resources of the earth should be protected for the benefit of the present and future generations. It states that with regard to non-renewable resources of the earth, it should be safeguarded so that it could be shared by all generations.

The Rio Declaration states that the right to development should be fulfilled so as to equitably meet the developmental and environmental needs of the present and future generations.

The court was of the view that these principles though not binding, should be a guide when dealing with matters concerning the natural resources and the environment in Sri Lanka. The learned judge stated that though the Rio and Stockholm Declarations are not binding they could be so, if they are enacted or become part of our law by adoption by the Superior Courts. This view point by the court is very encouraging. They also stated that since Sri Lanka is a member of the UN, these principles could not be ignored.

To emphasise the fact that the principle of sustainable development is nothing new in Sri Lanka, the court cited the case of *Hungary v. Slovakia (Danube case),* where Judge C.G. Weeramantry had referred to the irrigation works of ancient Sri Lanka.[17] In that case Judge Weeramantry explained the central notion of Buddhism, that harm should not be caused to others, which he said, translated into environmental attitudes. He said that sustainable development had been practiced with much success pointing out the philosophy of not permitting a single drop of water to flow into the sea without benefiting humankind.

The Court's interpretation of the provisions in our constitution through the aid of the international instruments is a welcome development especially with regard to human rights law.

9.2 State as 'trustee'

Another point put forward by the respondents was that since the Government was the "trustee" of the natural resources of the country, the court has no right to

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[17] I.C.J. 1997 September 25 General List No.92.

intervene and that only if the Government misused its powers, could the court intervene.

The counsel for the petitioners agreed with the respondents that the natural resources of the people were held in "trust" for them by the Government. However, they did not agree to the view that the court had no role to play. In any event, the petitioners argued that the respondents had not acted properly and that the Government as the "trustee" had not discharged its duties properly.

The court was of the view that the issue before it was not the question of whether the Court or the Government is a "trustee" and whether there has been a breach of trust. Instead, the court was called upon to decide whether in the instant case, the rights of the petitioners guaranteed by Articles 12(1), 14(1) (g) and (h) of the Constitution have been violated. The court stated that Article 126(1) of the Constitution clearly confers upon the Supreme Court, the exclusive jurisdiction to hear and determine questions relating to fundamental rights. As such, the court is "neither assuming a role as 'trustee' nor usurping the powers of any other organ of Government", but discharging a duty which had been entrusted to it.[17]

9.3 Public Trust Doctrine

Both counsel relied upon the most celebrated public trust case in American law, namely, *Illinois Central Railroad Company v. Illinois*[18] where the U.S. Supreme Court stated that "it is a title held in trust for the people of the state that they may enjoy..........free from the obstruction or interference of private parties"[19].

The respondents stated that although the jurisdiction invoked by the petitioners were that of fundamental rights, the matter in question was that of public interest

[17] As taken from the judgement. p 258.
[18] 146 U.S. 387 at 452, 135 S.C. 110 at 118 (1892).
[19] [68 Michigan Law Review 471, 489-502 (1970)].

litigation[20] or breach of trust doctrine[21] and requested the court to reject the application.

The court, referred to the public trust doctrine but rejected the principle and adopted the concept of shared responsibility which in the view of the learned judge had a wider meaning. Under the concept of shared responsibility, the responsibility is shared between the state and the citizens.

The court stated that organs of the State are guardians to whom the people have committed the care and preservation of the resources of the people. The State has an obligation to efficiently manage the resources in the process of development. The court referred to the judgement of the International Court of Justice in the case of *Hungary v. Slovakia*[22] where Judge C.G. Weeramantry, referred to the ancient irrigation works of Sri Lanka. In that judgement the learned judge refers to the times of King Devanampiya Tissa and to a statement made by the King about the land belonging to people and to all living beings and the rulers were just guardians. Therefore, the rulers could not do as they pleased. It was the duty of the people to make proper use of the resources.

9.4 Public Interest Litigation

With regard to the public interest nature of the matter, the court took the view that it is a question of standing that public interest litigation highlights, not a special course of action. According to the court, the petitioners as individual citizens have a constitutional right of standing, which is guaranteed by Article 17 of the Constitution read with Articles 12, 14 and 126. The fact that several individuals are affected would not make the matter a public interest issue, since every individual citizen has a right under the constitution to challenge any violation to their fundamental rights. Therefore, public interest litigation principle was discussed by the court with regarding to standing but court concentrated on the

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[20] The doctrine makes it possible for any person, who is not directly affected, to institute litigation by addressing a letter to a judge of that court.

[21] Under the Roman Law the doctrine was born with the basic idea that, common properties such as rivers, the seashore, and the air were held by the Government in trusteeship for the free and unimpeded use of the general public.

[22] I.C.J. 1997 September 25 General List No. 92.

collective rights of the citizens. The fact that their rights were linked to each other and the other citizens were not considered to disqualify the petitioners action.

The Court further stated that the alleged violation or the imminent infringement of the petitioners rights should be looked at by the Court, since in the event where the expectation of the petitioners that the Executive would act in line with the law and the failure to do so be the authority should be scrutinized.

10. Relief

The court held that there was an imminent infringement of the fundamental rights of the petitioners guaranteed by Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution.

The court ordered the State to pay each petitioner twenty five thousand rupees as cost. The fifth and the seventh respondents, namely, Sarabhumi Resources (private) Limited and Geo-Resources Lanka (private) Limited were ordered to pay twelve thousand and five hundred rupees individually to each of the petitioners.

The court directed the respondents not to enter into any contract relating to Eppawala until a comprehensive exploration and study relating to the locations, quantity, the exact amount of the inferred reserves and the quality of the apatite and other phosphate minerals is completed. The court ordered the respondents to publish the findings of such study. When entering into a contract, to do so only with any project proponent whomsoever obtains the approval of the Central Environmental Authority according to the law, including the decisions of the Superior Courts of record in Sri Lanka.

11. Conclusion

Chapter VI of the Constitution under the heading of Directive Principles of State Policy and Fundamental Duties gives guidelines to the Government on how it should act to protect the environment.

- Article 27(14) - The State shall protect, preserve and improve the environment for the benefit of the community.

- Article 28(f) - The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka to protect nature and conserve its riches.

The state should consider these principles when it implements projects like Eppawala. It will also be of value if the Government considers the options that have been highlighted by the scientists both local and foreign.

Even though the respondents have argued that the proposed agreement, if implemented, would be a massive success, it is rightly pointed out by the petitioners that this project would have caused severe environmental and economical impacts. The petitioners have produced evidence to prove their point.

The Judges, after considering these materials have admitted that gaining any benefit from the project is not clear cut and that it is evident that this a controversial area which needs to be studied carefully before committing to any serious decision.

12. The Final Outcome

The issues that would arise if the Government decides to enter into a contract with another company, without complying with the requirements highlighted by the Court, is not clear. Does it mean that an aggrieved party will have to file an application against such action taken by the State? If no one questions the action, would the guidelines drawn up by the Court in the Eppawala case be just restricted to paper?

Past experiences show that though guidelines are laid down by the court, where there is an absence of a monitoring body, it is difficult to know whether the guidelines have been followed. In *Bernard Maximillian Fischer v. The Controller of Immigration and Emigration*[23], the Court directed the Controller of Immigration

[23] S.C. Application No. 436/99, Supreme Court Minutes of 24th May 1999.

and Emigration to draft guidelines for the grant of resident visas to the foreign male spouses of Sri Lankan women in accordance with the non discrimination and equality guarantees in the Constitution. However, this was not attended to immediately. It is still not known whether the guidelines drafted are sufficient, since guidelines have not been tested in court.

However, the South African courts have come up with a remedy for such a situation. In the case of *Republic of South Africa* v. *Grootboom*[24], the Court appointed the Human Rights Commission to monitor and report on the efforts made by the state to comply with the order of the court.

A similar mechanism could be made use of by other countries as well and could have been made use by the Supreme Court of Sri Lanka, in the present case. Efforts that will be made by the State in complying with the judgement could have been monitored by the use of an existing institution such as the Human Rights Commission, Central Environment Authority or by the setting up of a new institution. This would prevent or the least minimize, the uncertainties as to how the Eppawala rock phosphate will be dealt with by the Government in future.

[24] *Republic of South Africa* v. *Grootboom*, Judgement of the Constitutional Court, 4th October 2000

National Competition Policy: What is Required?

Part 1

Malathy Knight-John*

Introduction

The last two decades have seen significant economic changes in both developed and developing countries with the increased pace in liberalization and privatization. Globalization and a progressive integration of the world economy have also increased the degree of openness in most countries. The market-oriented reform process has been paralleled by an increase in national competition legislation, with the number of countries having competition laws growing from less than 40 in 1980 to 80 in 2000. In Sri Lanka, two separate but inter-related statutes currently govern competition policy: the Consumer Protection Act No.1 of 1979 and the Fair Trading Commission Act No.1 of 1987. However, this situation is likely to change with the proposed Consumer Protection Authority Bill, which is set to combine consumer protection and regulation of internal trade, currently coming under the 1979 Act and the 1987 Act, respectively.

The objective of this article is to set out the rationale for competition policy in a market-oriented economy, to address the requirements for an *effective* competition policy and to critically evaluate Sri Lanka's competition policy framework against these criteria. The first part of this article will look at the objectives and requirements of competition policy, with particular reference to developing countries while the second part of the article will assess the legislation and institutions dealing with competition policy in Sri Lanka.

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Why competition policy?

Competition policy is defined in the economic literature as government interventions that directly impact on the structure of an industry and the conduct of firms in an industry. As such, a working definition of competition policy would include both microeconomic policies such as deregulation and privatization, and trade and investment liberalization, which enhance competition, and competition law, which aims to prevent anti-competitive practices.

The case for competition policy rests on the fact that economic reality is far from the textbook model of perfect competition where there are a large number of sellers, consumers are fully informed, there are no externalities and Pareto conditions of economic efficiency are satisfied. Instead, most industries tend towards an oligopolistic market structure with a small number of large firms, whilst monopolies are common – though increasingly less so - in the utility sectors. Accordingly, some of the more common objectives of a national competition policy is to maximize economic efficiency, maximize consumer welfare, and keep a check on the concentration of economic power.

In developing countries however, the emphases of competition policy could vary from this norm, given that competition policy is often viewed as a tool to stimulate development. For instance, as pointed out in various publications by the Consumer Unity and Trust Society, Jaipur (CUTS), the concept of public interest, which takes into consideration employment effects, the need to promote small and medium enterprises, or the need to maintain particular business activities for cultural reasons, and is wider in scope than consumer welfare, is important in developing countries. Then again, competition policy in developing countries could take on a pro-poor dimension, giving precedence to equity or distributional concerns. An interesting example in this regard, is the case of South Africa. Although not categorized as a developing economy, particular historical events pertaining to the practice of apartheid and the discrimination of the black population have led to the implementation of government policies to increase the black population's participation in and control over economic activities. As such, one of the mandates of South Africa's Competition Act is "to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

In Sri Lanka, the stated objectives of the Consumer Protection Act is *"to make provision for the regulation of internal trade; for the establishment of fair trade practices; for the amendment of the National Prices Commission Law, No.42 of 1975; for the repeal of the Licensing of Traders Act, No.62 of 1961; and for matters connected therewith or incidental thereto"*, while the objectives of the Fair Trading Commission Act is *"to provide for the establishment of a Fair Trading Commission for the control of monopolies, mergers and anti-competitive practices and for the formulation and implementation of a national price policy; for the repeal of the National Prices Commission Law, No.42 of 1975; and for all matters therewith or incidental thereto"*.

Although there was a radical shift in Sri Lanka's economic policies in 1977 with the implementation of pro-market reforms, we are still to put in place an *effective* competition policy framework. For instance, while trade liberalization and a relaxed foreign investment regime have been in place for over two decades, language relating to cross-border competition concerns has yet to be included in our legislation. The fact that consumer advocacy and competition culture are weak in spite of the two pieces of existing legislation, underscores the point that competition law is a necessary but not sufficient condition for enhancing and sustaining competition in the economy.

What is required?

It is worth reiterating that the existence of legislation *per se* is not likely to ensure that markets remain competitive and that firms behave in ways that are not detrimental to consumer welfare and economic efficiency. For sustainable competition to be a reality, certain essential ingredients need to be in place both within the national competition agency and in the microeconomic policy framework that buttresses competition.

The competition agency

- The agency needs to be independent. Perhaps the most problematic aspect in this regard is political interference. Then again, political interference is a

symptom of the bad governance that permeates the system as whole. As such, independence cannot be won by statute; it can only be achieved by building and maintaining legitimacy in the eyes of the stakeholders.

- Gaining legitimacy, as set out in *Samarajiva (2001)*, requires substantial investment in technical expertise, establishment of transparent administrative mechanisms and procedures and effective public communication of decisions, proceedings and activities of the agency.

- The four essential functions of the agency: investigation, prosecution, adjudication and advocacy must be separated.

Other considerations in competition policy

- When formulating competition policies it is worth recalling Baumol's notion of contestable markets, where entry and exit are absolutely costless. As such, it could well be the case that a market could be an oligopoly or even a monopoly, but that the fear of possible entry from a competitor will prompt competitive behavior. Therefore, the focus of policy makers should not be on the degree of competition amongst firms *in* the market but rather amongst existing and potential firms *for* the market.

- In a liberalized economy it is important that a level playing field between private and public sector entities be established in terms of competition legislation to promote an endurable competition culture. There is no valid reason to assume that a public monopoly will be less harmful than a private monopoly in terms of anti-competitive business practices or consumer welfare.

- Tensions between competition policy and other government policies need to be managed in a manner that would not compromise the fundamental objective of enhancing competition in the economy. In the case of privatization for instance, policy makers may see it fit to grant monopoly status or other special privileges to private investors so as to maximize privatization proceeds. However, the extension of such exclusivity provisions beyond a limited time

period could seriously undermine competition, economic efficiency and consumer welfare.

- Another potential problem area is the interface between the competition agency and sector-specific regulators, such as utility regulators. In general, a regulator is likely to have more information regarding the particular sector and would be better equipped to address issues such as access pricing, tariffs etc. while broader areas such as merger control and anti-competitive agreements would come under the competition authority. As such, the continuous interaction of the two bodies should be made mandatory by law. Moreover, given that time and technology can bring in competitive elements into previously monopolistic activities, it is important that the interface between the competition authority and the regulator is a dynamic one.

Finally, the most important ingredient in building and sustaining a healthy competition culture is to promote an active and open debate on the national competition policy framework. Given that the participation of all stakeholders is vital in this regard and that consumer awareness of competition law and their rights is very low in most developing countries, particular effort must be made to strengthen the voice of consumer organizations and to draw them into the process of framing an effective competition policy.

A National Competition Policy: What is Required?

Part II

Pubudini Wickramaratne*

Introduction

This part is a continuation of Part 1 of the article found earlier in this Review. The objective of this article is to critically analyze the present and proposed competition law regimes of Sri Lanka within the framework set out in Part 1.

The competition law of the country is found in two inter related statues which deal with consumer protection and fair-trading. The consumer protection law is presently found in the Consumer Protection Act,[1] which provides for the regulation of trade, protection of the consumer and the establishment of fair trade practices. These come under the Department of Internal Trade (DIT). Competition policy and fair trading law are found in the Fair Trading Commission Act, by which the Fair Trading Commission (FTC) is entrusted with the control of monopolies, mergers and anti competitive practices and the implementation of a national price policy.[2]

It is significant to note that Sri Lanka is one of the first Asian countries to introduce fair trading and consumer protection laws. The need for reform was strongly felt due to the inadequacy of the laws to cater to the challenges posed by the open economy and globalization. The Consumer Protection Authority Bill[3] (the Bill), which was presented in Parliament in June 2001, is the long awaited revision of the consumer protection and competition law of Sri Lanka. The Bill is the result of a law reform process that began as far back as 1995. It seeks to

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[1] No. 1 of 1979 as amended.
[2] No. 1 of 1987 as amended.
[3] Available in June 2001.

combine the areas of consumer protection and market regulation of internal trade and has generated much discussion within the legal and business circles as to the direction in which reforms need to move.

The Bill repeals the Fair Trading Commission Act, the Consumer Protection Act and the Control of Prices Act.[4] It seeks to protect the consumer while at the same time regulate internal trade to ensure effective competition through the amalgamation of the functions of the DIT and the FTC. A Consumer Protection Authority (authority) and a Consumer Protection Council (council) will also be established to deal with these issues.

What is required?

Part 1 of this article highlighted the following points:

i) the independent nature of the competition authority
ii) gaining legitimacy by the competition authority
iii) links with sector specific regulators
iv) Adequacy of competition laws
v) the formulation of a comprehensive competition policy

This part will analyze the existing laws to ascertain whether the requirements to create a comprehensive competition policy and a competition culture have been met through legislative intervention.

Is the competition authority independent?

It is important that the competition authority of a country be a statutory body, which is independent from political interference, budgetary control of the government and the appointment of its members. The FTC is the main authority that deals with competition law issues in Sri Lanka. It consists of seven members appointed by the Minister, one of whom is also appointed as the Chairman.

[4] No. 29 of 1950.

The selection process of the members and the structure of the present system are not satisfactory as it leaves room for external influences. This is evident by the Minister's powers to appoint and remove members of the FTC. The Minister could also terminate the tenure of the Chairman without stating the reasons for such removal. This opens the door for political interference, which negates the independent nature of the FTC. The Bill does not fully remedy this situation as it makes provision for the members of the Authority and the Council to be appointed and removed by the Minister. Improving on the present situation however, the Bill empowers the Minister to remove the members and the Chairman of the Authority only in specified circumstances.[5]

A further drawback to the independence of the FTC is the manner in which it is funded. The majority of its funds are allocated to it by Parliament. This dependence on Parliament has hindered the FTC's capacity to increase the salaries of its officers. This therefore has been identified as a root cause of the vacant posts at the FTC, which has resulted in a serious shortfall in staff members.

Therefore if the competition authority is to be an independent body, it is recommended that all the members of the FTC, Authority/Council, be appointed by the President or by an independent Public Service Commission. The salaries of the members and other expenditures of the authority should be charged upon the Consolidated Fund.

Strengthening the legitimacy of the competition authority

The mere fact that the competition authority is a statutory body and that failure to comply with its orders attract penalties by the court system, does not necessarily make it legitimate in the eyes of the consumers and the players in the market. For the body to be legitimate it should be transparent in its duties, which includes an effective administrative mechanism. The decision- making process should be streamlined and be in a position to make swift decisions when necessary. As stated

[5] Provision 3 of the Schedule to the Bill provides that the Minister may remove a member of the Authority for misconduct or physical or mental incapacity.

earlier it should also comprise of staff that are skilled and capable of working as a team.

Another element that needs to be strengthened is the investigation process of the FTC. This process takes up a considerable amount of time. The FTC takes several months to acknowledge receipt of a complaint. It has been observed that several years have lapsed before an investigation is initiated only after considering matters such as the importance of the breach under the law, availability of resources and the public interest element.[6] Further, although the FTC is empowered to initiate investigations on its own accord, it rarely does so.

This dormancy could be attributed to the lack of staff and lack of incentive on the part of its officers. Over the years, the FTC has found it difficult to recruit competent staff, thus resulting in only 14 positions (at present) out of the approved 27 positions being occupied.[7] It is also noteworthy that the post of the Investigating Officer has been vacant since 1996.[8] At present there are only five members of the Commission and two positions remain vacant.

The difficulties experienced in the recruitment of staff can be attributed to the poor salaries and other benefits paid to the FTC staff when compared to the wage structure of the private sector. Unless attractive remuneration schemes are provided, the FTC will not be able to secure the expertise that is necessary. With its increased staff, the Authority and Council will face greater difficulties.

In the proposed structure, there is no clear demarcation of investigative and adjudicative powers between the Authority and the Council. An example is provided through Section 36 of the Bill, which empowers the Authority to carryout investigations regarding the existence of monopolies, mergers and anti-competitive practices and requires it to refer the matter to the Council for determination. However, under Section 17, it is the Authority, which is empowered to investigate and decide as to the price increase of 'specified articles' essential to the life of the community. If the investigative and adjudicative powers

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[6] This information was provided by the FTC in reply to a questionnaire provided by the Trust regarding the functioning of the FTC.

[7] Annual Reports of the FTC 1996 – 2000.

[8] Ibid.

are clearly demarcated, infrastructural bottlenecks and red-tapism can be avoided, resulting in a swift decision making process which is clearly necessary for future development.

Further, the Bill exempts the public sector from its scope[9] and protects government-sanctioned monopolies, which operate for less than three years. There is express provision allowing the Government to grant monopolies to supply goods and services. The present statutes in place do not confer such powers, but the Government has in fact granted such monopolies. Thereby section 50 now permits the Government to legally grant monopolies.

Links with sector specific regulators

Many items, mostly in the utility sector, do not fall within the scope of the FTC and are regulated by separate regulatory bodies such as the Telecom Regulatory Commission. FTC's powers *vis a vis* these regulatory bodies are not clear and as such complaints received by the FTC regarding these items are not taken up. Currently, only pharmaceuticals are under the price control of the FTC although there are other items that are under the price control of other bodies, over which the FTC has no powers. An example of this is the Ceylon Electricity Board, which engages in a cross subsidization programme, by applying varying formulae for households and religious places as against industries. Further, the relationship of the FTC or the proposed Authority *vis-a-vis* the Public Enterprise Reform Commission (PERC) or the Board of Investment is vague. Once the new Authority is set up, it is not clear whether PERC is in a position to grant monopolies disregarding the powers of the Authority.

Adequacy of the laws

Neither the current legislation nor the proposed Bill equip the authorities sufficiently to deal with the challenges posed by the current modes of privatization and liberalization of the market. The existing legal provisions are limited to

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[9] Section 50 of the Bill.

monopolies, mergers and anti-competitive practices and some aspects of fair-trading.

In the case of monopolies, the FTC cannot intervene if the item in question is not a prescribed article;[10] there are only 47 prescribed articles at present.[11] Further, the determination process of the FTC is heavily dependent upon the 'public interest' element; this has caused considerable difficulty to consumers. The issue that arose with respect to the plastic water tank market highlights this fact. Here the price was intentionally lowered to prevent a new competitor entering the market. The FTC failed to order a price increase to enable the new competitor to enter the market despite the fact that the other players would increase the price after eliminating the new entrant.

Even the Court of Appeal interpreted the FTC's powers narrowly when it held that the FTC does not have jurisdiction to inquire into predatory pricing, discriminatory rebates and exclusive dealings.[12] It is unfortunate that the court failed to recognize that this type of case falls under the category of anti-competitive practices.

Further, the present laws do not empower the authorities to deal specifically with horizontal and vertical restraints and cross-border transactions. A code with respect to advertising and market practices that set out the best practice methods among industries should be introduced. Whether issues of anti-dumping fall under the FTC or are exclusively covered by the proposed Anti-Dumping Bill is also not clear.

Formulation of a comprehensive competition policy

A comprehensive competition policy is vital is some of the problems in this area are to be addressed effectively. The Government has not attempted to formulate an overall competition policy and policy reform has generally been introduced on an *ad hoc* basis. A comprehensive competition policy framework should be

[10] This is provided for in Section 12 of the Fair Trading Commission Act.
[11] For example - oxygen, milk, electric bulbs.
[12] *Ceylon Oxygen Ltd. v Fair Trading Commission,* S.C. Minutes 30.04.1996.

formulated and published. Such policy should also govern policies relating to privatization and liberalization. The following factors should be taken into consideration, particularly the changing contours of the market in the light of globalization, the relationship between competition policy and other policies that have an effect on competition, and the flexibility of the policy enabling growth or the achievement of the development goals of the country. These are some of the issues that should be looked at when structuring an overall competition policy. It is important that the competition law be flexible in order to adapt to the ever-changing dynamics of competition policy.

Conclusion

With the Consumer Protection Authority Bill being referred to a Parliamentary Select Committee for further consideration, there is still an opportunity to bring reforms to the competition law of the country. As explained in this article, the Bill should be revised to make the competition authority an independent and a stronger body. Its powers should be strengthened to face the new challenges posed by the rapidly changing market structures while its administration should be made more effective to result in speedy and accurate dispute resolution. Most importantly the Government should adopt an overall competition policy that would set the normative standard for both competition and consumer laws.

Balancing the Scales:
Gender Composition of National Human Rights Institutions

Sneh Aurora

EXRTACTS FROM A REPORT PUBLISHED BY THE COMMONWEALTH HUMAN RIGHTS INITIATIVE (CHRI)

I. INTRODUCTION

It is common knowledge that women the world over face discrimination in nearly all aspects of their lives. Women are subject to disparities in terms of employment, wages, access to resources, participation in public life, power-sharing and decision-making. Despite signing international human rights treaties and covenants, many countries, especially in the developing world, continue to exist under regimes where there is formal, legal discrimination against women. In all countries, there are manifestations of a deep societal and cultural bias against women.

While national and regional particularities and varied historical, cultural and religious backgrounds must be borne in mind, it is the duty of all states regardless of their political, economic and cultural systems to promote and protect the human rights and fundamental freedoms of all persons, including women.[1] Respect for religious and ethical values, cultural backgrounds and philosophical convictions of individuals and their communities should contribute to the full enjoyment of women's human rights and not be an obstacle to the process.

The full and equal participation of women in political, civil, economic, social and cultural arenas at each of the regional, national and international levels, together with the eradication of all forms of discrimination on grounds of gender, must be priority objectives for both international and national communities, including the Commonwealth. It is only when the contribution of women is fully recognised and valued, and when women are able to equally and actively participate in decision-

[1] Vienna Declaration and Programme of Action. Adopted by the world Conference on Human Rights, 25 June 1993, Part I.

making processes, that true development and democracy is achieved.

It is often not recognised that the realisation of women's human rights falls squarely within the mandate of national human rights institutions. Human rights institutions are required to be proactive in ensuring that women's rights are protected and promoted. They must take the lead in promoting a human rights culture and in educating the public of acceptable practices by ensuring that their own internal structures and policies conform to the standards of equality and non-discrimination that they are promoting within society as a whole. At the very outset, so that there can be no room for equivocation in the public mind, national human rights institutions must manifest their commitment to equity and non-discrimination by ensuring gender balance at all levels of their own staff, especially at the level of commissioner.

In an effort to determine how national human rights institutions are measuring up to these standards, the Commonwealth Human Rights Initiative (CHRI) conducted a study which examines gender representation within human rights commissions in the Commonwealth. Using a detailed questionnaire,[2] we gathered first-hand information on the gender composition of staff from 15 of the 18 established human rights commissions in the Commonwealth. The responses received reveal that most national human rights institutions, especially those in Asia and Africa, fall short of achieving gender balance, both at the level of commissioner and generally within their staff. Even amongst national human rights commissions who have attained balanced gender representation (including those who have tipped the scales in favour of women), a closer examination reveals that the majority of women employed by these institutions are in lower paying and low status "pink collar ghetto" positions. Discrimination against women remains prevalent in national human rights institutions throughout the Commonwealth.

The first part of this paper looks at ground realities and discusses the need to prioritise the rights of women. This section discusses international regimes and standards aimed at protecting and promoting women's rights, as well as the role and responsibility of national human rights institutions. The second part of this report focuses on CHRI's study on the gender composition of human rights

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[2] See Appendix 1 for a copy of the questionnaire.

commissions within the Commonwealth and discusses the methodology used and the results obtained. In conclusion, we offer several recommendations on achieving gender equity within national human rights institutions. A summary of all recommendations contained in this report follows at the end. This full list of recommendations includes those with the goal of achieving gender balance within NHRIs, as well as those for the general advancement and realisation of women's human rights by such institutions.

II. THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN PRIORITISING WOMEN'S RIGHTS

The need to prioritise women's rights

Despite concerted efforts over the last decade to change the status quo, women continue to endure widespread inequalities in all spheres of life. Not only do they experience discrimination in the workplace and in access to resources and power, but the rights of women are also neglected and curtailed in the private sphere through domestic violence and forms of discrimination sanctioned and perpetuated by the existence of rigid customs, negative stereotypes and traditional cultural and religious practices detrimental to women.

Recent efforts to document the realities faced by women worldwide have produced alarming statistics on the economic and social inequalities between men and women.[3] Of the over one billion people who live in poverty, women constitute 70%. Two-thirds of the world's 700 million illiterates are women. On average, women occupy only 14% of managerial and administrative jobs worldwide, less than 20% of manufacturing jobs, 10% of parliamentary positions and a mere 6% of cabinet positions.[4]

Contrary to common perception, however, women are not dependent on male members of society, but rather are full contributing members in their own right. Women work long and hard, and are key contributors to the economy.

[3] United Nations Development Programme (UNDP), Human Development Report, oxford University Press, Annually 1990-1999.
[4] UNDP, Human Development Report 1995. Oxford University Press, 1995, Page 4.

Recognition of this fact, as well as proper valuation of women's contribution and participation, are necessary preconditions to economic and social progress.

At present, in almost every country women work longer hours than men - approximately 13 hours a week more in Africa and Asia. Two-thirds to three-quarters of men's work is within the paid labour market, while most of women's work is devoted to unpaid household and community activities. In the paid labour market, women typically receive a much lower wage than men either because they are given lower paying jobs or because they are paid less than men (up to 30 to 40% less) for equal work. As a result, men receive a much larger share of the income and greater recognition for their economic contribution, while most of women's work remains unrecognised and undervalued.[5] Consequently, women receive a disproportionately smaller share of credit from formal banking institutions as they are assumed to have no collateral to offer. In the Caribbean, for example, women comprise only 7-11 % of the beneficiaries of credit programmes.[6]

Yet women produce an invisible income which is not considered in the calculation. Women's work in the domestic realm (at home or in the field) which allows men to work within the paid sector is ignored. If the contribution of women was economically quantified and included in the calculation of the world's GDP, it would amount to approximately 11 trillion dollars.[7]

Discriminatory macroeconomic policies further disadvantage women. Few allocations are made for women in national budgets. The rapid process of change and economic restructuring programmes has led to increased unemployment, with a disproportionate negative impact on women as money is diverted from poverty reduction and women's empowerment programmes.[8]

Mainly as a result of the tireless efforts of women's advocacy and pressure groups, there is now a growing recognition of the contribution of women in the process of

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[5] *Ibid.* Page 6.

[6] UNDP, *Human Development Report, Supra,* Note 4, Page 4.

[7] Figure is in US Dollars, *Ibid*, Page 6.

[8] *Further Actions and Initiatives to Implement the Beijing Declaration and the Platform for Action* Final Unedited Outcome Document Adopted by, the Twenty-third Special Session of the General Assembly. 10 June 2000. Paragraph A.5.

economic growth and development. There is an increasing realisation that for sustainable development and democracy to be achieved, there is a need to protect and promote women's rights so that they are free to contribute and be recognised as viable and vibrant members of society. By refusing to address this issue, nations are losing the contribution of half of society and thus delaying overall economic and social development.

However, the persistence of traditional beliefs and cultural and social norms which foster negative gender stereotypes are also large obstacles to the achievement of gender equality in almost all regions.[9] They prevent women from asserting their rights through social and legal processes and in fact strengthen patriarchal male values that incite violence against women in various forms. Such harmful restrictions and widespread condoned violence against women prevent society as a whole from recognising women's rights in all spheres of life and in fact hamper women from exercising their human rights. Inequity and discrimination stalk women throughout their lives - from the cradle to the grave.

* In countries where there is a preference for sons, thousands of girls are denied even the right to be born. In India, prenatal sex-determination tests are increasingly popular, and female foetuses are routinely aborted.[10]

* At birth and throughout childhood, in most of South Asia girls have a higher mortality rate than boys.[11]

* In many parts of Africa and South Asia, many more girls suffer from malnutrition than boys of equal age because they are allowed to eat only after the sons in the family have been fed.[12]

* In their school-going years, girls are forced to drop-out more often than boys in many parts of Asia and Africa because education is seen as "wasted" on girls who either are needed for chores at home or will eventually leave their

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[9] United Nations. *Review and Appraisal of the Implementation of the Beijing Platform for Action.* 3-17 March 2000.
[10] UNDP, *Human Development Report. Supra.* Note 4. Page 7.
[11] United Nations. *Women: Challenges to the Year 2000.* New York, 1991. Page 3.
[12] *Ibid.*

family home to join that of their husband's.[13]

* During adolescence, the value put on the chastity of young females requires that a girl must at all costs be "protected" to ensure her reputation and "marriageability", resulting in even higher school drop-out rates for girls as their ages increase.[14]

* At marriageable age, women have little or no say in who they marry and are "bought and sold" like commodities through practices such as "bride price" in Africa and "dowry" in India.

* Under customary laws in Pakistan, Bangladesh, India and Sri Lanka, women generally do not receive an equal share of property inheritance as compared to their brothers or when they inherit as spouses.[15] Those few women who do own land are often persuaded to relinquish their deeds in favour of male family members or, as in many African countries, do not have the power to sell or trade these assets without the permission of their husbands or other male relatives.[16]

* Divorce laws often disadvantage women. In Pakistan and Bangladesh, a man has the absolute and unconditional right to divorce his wife without having to give any reason, while a woman, unless her husband agrees to the termination, must go through a more elaborate process and "prove" her grounds before the marriage can be dissolved.[17]

* In old age, many widowed women are often marginalised and ostracised within their families and communities. In India, some Hindu widows are reduced to the status of servants within their families. Other widows

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[13] United Nations High Commissioner for Human Rights, *Fact Sheet No. 23: Harmful Traditional Practices Affecting the Health of Women and Children. 1997.* Page 7. See also Women: Challenges to the Year 2000. supra. Note 11. Pages 31-32.

[14] Fact Sheet No. 23: Harmful Traditional Practices. Supra. Note 13. see also UN Population Fund (UNFPA), WO

[15] Mahbub ul Haq Human Development Centre, *Human Development in South Asia 2000: The Gender Question.* Oxfrord University Press, 2000. Page 89.

[16] UNDP, *Human Development Report. Supra.* Note 4. Page 43.

[17] *Woman: Challenges to the Year 2000. Supra.* Note 11. Page 85.

abandoned by their families have been found living in separate, oppressed communities in the cities of Varanasi, Vrindavan and Mathura.

Throughout their lives, women are also subjected to considerable amounts of violence.

* Sexual abuse is far too common. In countries such as Canada, New Zealand and the United Kingdom, statistics indicate that as many as one-third of girls are sexually abused during childhood or adolescence.[18]

* Dowry-related violence and deaths are common in South Asian countries. In developed countries, domestic violence regularly becomes a "part of marriage" that women are forced to endure.[19]

* About 130 million girls and women worldwide suffer female genital mutilation which is performed in many countries, including the Gambia, Ghana, Nigeria, Cameroon, Sierra Leone, Uganda, Malaysia, and within immigrant communities in Europe and Australia.[20]

* Statistics from Canada, New Zealand and the United Kingdom suggest that approximately one woman in six is raped in her lifetime.[21] Information from South Africa reveals that an even higher percentage of women are victims of rape in that country - although 36,888 cases of rape were reported in 1995, police believe that this figure represents only 2.8% of actual cases of rape.[22]

* In South Asia, there is an increase in violence meted out to women by jilted lovers who often murder their "beloved" who dared to say no. Increasingly in Bangladesh and Latin America, women are victims of acid attacks by rejected vengeful suitors or for non-compliance with dowry demands, and are left permanently disfigured.[23]

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[18] *UNDP, Human Development Report, Supra,* Note 4, Page 7.

[19] *Women: Challenges to the Year 2000. Supra.* Note 11. Pages 68-70.

[20] *Fact Sheet No. 23: Harmful Traditional Practices. Supra.* Note 13.

[21] UNDP, *Human Development Report. Supra.* Note 4. Page 7.

[22] Radhika Coomaraswamy, Special Rapporteur on violence Against Women. *Report on the Mission of the Special Rapporteur to South Africa on the Issue of Rape in the Community.* Commission on Human Rights, 53rd Session, E/CN.4/1 997/47/Add.3. Paragraph 31.

[23] Ain 0 Salish Kendro (ASK), *Human Rights In Bangladesh 1998.* Dhaka, 1999. Pages 149-151.

* In Pakistan, hundreds of women are killed at the hands of their husbands, brothers, fathers and even young sons every year in the name of honour."Honour killings" are justified by perceived transgressions of the woman, such as marrying of her own accord, not serving her husband's meal quickly enough, or merely being viewed by another male.[24]

* Approximately one million children (mostly girls from South Asia) are forced to enter the multi-billion dollar commercial sex trade every year. Girls and young women are trafficked from countries such as Nepal and Bangladesh to work as prostitutes in India and other countries lured by the prospects of money, a better education or a good job.[25]

This already bleak picture of the inequities women endure during their lives coupled with the specific situations they face in their home countries - for example, religion, caste, armed conflict and situations of war - all work to make an already disadvantaged segment of the population further disadvantaged.

Freedom from fear and freedom from want are the two indicators for assessing whether the enjoyment of human rights are within the grasp of an ordinary citizen's existence. Freedom from fear requires women to be free of violence. Freedom from want requires protection of women's economic and social rights - i.e., the right to food and the right to education - and guaranteeing women equality of opportunity and equal distribution of benefits. Yet women's lives everywhere illustrate that most women do not enjoy enabling environments, either privately or publicly, which would allow them to be free from fear and from want.

The rights of women must be protected - in the home, in the workplace and in the political arena. Enabling environments for women, or public spaces that are accessible to and accommodating of women's needs, should be guaranteed by the state.

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[24] Amnesty International, *Pakistan: Violence Against Women in the Name of Honour*, 1999.
[25] UNICEF's website (www.unicef.org).

International regimes for the protection and promotion of women's rights

In response to the growing recognition of women as potential equal partners in the path to development and democracy, the international community has urged the recognition of the full enjoyment of human rights by women, as well as their equal participation in political, civil, economic, social and cultural life. It is only recently, however, that women's rights have been recognised as human rights and that international human rights treaties have been reviewed with a "gender sensitized" eye in terms of their force and application. International treaties that specifically focus on protecting and promoting women's rights and issues are a relatively new phenomenon.

In 1979, the United Nations approved the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has come to be known as the basic charter of the human rights of women. CEDAW provides positive affirmation of the principles of equality and establishes not only an international bill of rights for women, but also an agenda for action by states to guarantee the enjoyment of those rights. The Convention explicitly acknowledges that "*extensive discrimination continues to exist*" and emphasises that such discrimination "*Violates the principles of equality of rights and respect for human dignity*" The Convention recognises that discrimination against women hinders both economic and social development of a state and requires states to recognise the important contribution of women to society as a whole. Both men and women are encouraged to change prevailing attitudes in order to accept equality rights and to overcome prejudices and practices based on negative stereotyped roles and rigid customs. States have a positive obligation to remove discrimination and take "*all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*"[26] CEDAW also requires action to protect women against discrimination by non-state actors.

Although 166 countries (more than two-thirds of the members of the United Nations) have signed CEDAW, 24 UN member states still have not signed the

[26] *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). Adopted by the United Nations General Assembly by Resolution A/RES/34/1 80, 18 December 1979. Article 3.

Convention, 2 have signed without ratification and 51 have ratified the Convention with reservations. Within the Commonwealth community, 7 out of a total of 54 Commonwealth countries have not signed the Convention,[27] while 15 Commonwealth countries have signed with reservations.[28] In other words, 77 UN member states (and 22 Commonwealth countries) have not yet fully accepted the principles of equality and non-discrimination between women and men.[29] Further, most countries which have ratified CEDAW have inadequately implemented the Convention. Thus even under law, the equality of women is not assured or practiced in many societies.

The Harare Declaration of 1991, adopted by Commonwealth Heads of Government, affirms the importance of women's rights for the Commonwealth community. The Heads of Government pledged "*to work with renewed vigour, concentrating especially in the [area of].. - equality for women, so that they may exercise their full and equal rights.*"

In the Vienna Declaration, adopted by 171 nation states (including all Commonwealth countries) at the 1993 World Conference on Human Rights, the international community recognised that although women's human rights are an integral and indivisible part of universal human rights, the violation of women's rights must be separately recognised and addressed. The Vienna Declaration also reaffirms the universally accepted principle of equal enjoyment of human rights by both women and men. This principle has se veral aspects including:

* equal access by both women and men to basic social services, such as health and education;

* equal opportunity to participate in economic and political decision-making;

* equal reward for equal work;

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[27] Commonwealth countries that have not signed CEDAW: Botswana, Brunei, Mozambique, Solomon Islands, Swaziland, Tonga, Tivalu.

[28] Commonwealth countries that have signed CEDAW, but with reservations: Australia, Bahamas, Bangladesh, Cypress, Fiji Islands, India, Jamaica, Lesotho, Malaysia, Maldives, Malta, Mauritius, New Zealand, Pakistan, Singapore.

[29] Unlted Nations' website (www.un.org) as of 7 September 2000.

* equal protection under the law;

* elimination of gender discrimination and violence against women; and

* equal rights of citizens in all areas of life, including the public sphere (such as the workplace) and the private (such as the home).

At the 1995 World Conference on Women held in Beijing, the global community adopted a Platform for Action which provides an agenda for women's empowerment and aims at removing all obstacles to women's active participation in all spheres of private and public life by providing an equal share in economic, social, cultural and political decision-making. In the Beijing Platform for Action, participants affirmed the fundamental principles set forth in CEDAW, committed themselves to build on the consensus and progress made in Vienna in 1993, and made efforts to accelerate the implementation of these prior commitments. In particular, this outcome document recognises the role of national human rights institutions in the protection and promotion of women's rights and urges governments to create and strengthen independent national institutions for the protection and promotion of these rights. The Beijing Platform for Action calls on governments to encourage human rights institutions to develop programmes to protect the human rights of women by "*according them appropriate status, resources and access to government, and [to] ensure that such institutions pay adequate attention to problems involving the violation of the human rights of women.*"

In 1999, the Commonwealth Heads of Government's Durban Communique reiterated the Commonwealth's commitment to women's human rights and saw it as "*a particular Commonwealth challenge*". This Communiqué urged governments to take action "*by strengthening their national mechanisms to implement gender mainstreaming for the acceleration of women's empowerment in political, economic and social activities in the 21St Century.*"

Disappointingly, however, the final communiqué from an international conference organised by the Commonwealth Secretariat in July of 2000 was silent on the issue of the role of national human rights institutions in advancing the rights of women. Though the communiqué was intended to refer to the human rights

principles contained in the Harare Declaration, it neglected a vital component of international human rights - women's rights.

By contrast, in the Asia-Pacific region, home to 60% of the Commonwealth's population, the Asia-Pacific Forum of National Human Rights Institutions (APF) has gone some way ahead in furthering the women's right agenda since its foundation in 1977. The APF Secretariat organised a three-day workshop on *The Role of National Human Rights Institutions in Advancing the International Human Rights of Women* which focussed explicitly on the responsibility of these institutions to address women's rights in their programmes and internal policies.

In July 2000, participants at the Beijing +5 Meeting, a follow-up to the 1995 World Conference on Women, reaffirmed and strengthened the commitments made by member states five years earlier. The outcome document of this meeting highlights the need for gender mainstreaming in all areas of governance at both national and international levels. It recognizes the fact that, though women's participation in decision-making has become more widely accepted internationally, the actual numbers of women in positions of power have not grown significantly since 1995. The document encourages the creation and support of national institutions for the promotion of gender equality, and it encourages the cooperation of these institutions with women's NGOs. States were required to "*take action at the highest levels for the continued advancement of women particularly by strengthening national machineries to mainstream the gender perspective to accelerate the empowerment of women in all areas and ensure commitment to gender equality pollcies"*[30] and to "*provide national machineries with the necessary human and financial resources, including through exploring innovative funding schemes so that gender mainstreaming is integrated in all policies, programmes and projects"*[31] The Beijing +5 Meeting reminded the international community of its responsibilities to the cause of women's equality in all facets of life, including national decision-making processes. Participants also encouraged states to "*[s]et and encourage the use of explicit short- and long- term time bound targets or measurable goals, including where appropriate, quotas, to promote progress towards gender balance, including women's equal access to*

[30] Outcome Document of the Beijing +5 Meeting entitled *Women 2000: Gender Equality Development and Peace for the Twenty-First Century* New York, June 2000. Article 1 12b.

[31] *Ibid*, Article 112c.

and full participation on a basis of equality with men in all areas and at all levels of public life, especially in decision - and policy-making positions..."[32]

These international initiatives recognise the historical disadvantages and discrimination women have faced. Unfortunately, because women have been given particular attention within these covenants and instruments, there is a tendency to treat women as a separate "victim group". However, it would be wrong to equate women with people who have disabilities, whether physical or legal (i.e., the disabled or children). We must mainstream women in all spheres, but the danger of this is that women may get absorbed into the general mass, such that they again become invisible and disregarded. Proper mainstreaming of gender is paying attention to the particularities of each gender in the process of developing policies.

Each of these international declarations and covenants also commits states to ensure the full realisation of human rights and fundamental freedoms of all women. These action plans require states to go beyond mere policy statements and to put in place the necessary implementing machinery for ensuring women's equality. One such implementation vehicle is an effective, independent national human rights institution.

The responsibility of human rights institutions

Adopted in 1991 and approved by the United Nations General Assembly in 1993, the *Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights* (the "Paris Principles"),[33] are the basic guidelines for the establishment and operation of independent, effective national human rights institutions (NHRIs). Under the Paris Principles, NHRIs have a role in ensuring that international mandates and obligations are realised at the national level. The Paris Principles also require NHRIs to combat all forms of discrimination and to protect and promote the human rights of all citizens. The realisation of women's human rights falls squarely within the mandate of NHRIs. Such institutions must

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[32] *Ibld,* Article lOOa.

[33] United Nations, *Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights.* Annexed to General Assembly Assembly Resolution A/RES/48/134, 20 December 1993.

be proactive in ensuring that women are guaranteed equality and equity at all levels and in all spheres. NHRIs have a duty to take the lead in promoting a human rights culture and in educating the wider public of acceptable practices. By not giving women's human rights due recognition, NHRIs reflect and perpetuate existing social biases.

NHRIs should have both the mindset (commitment) and the mechanisms (capacity) to address the protection and promotion of women's rights. As part of their mandate, NHRIs should first recognise and understand the particular obstacles and issues that women face and second, be committed to removing these obstacles. The work of NHRIs in ensuring the practical realisation of women's rights should be wide in scope. In order to create an enabling environment, NHRIs should:[34]

* Ensure the ratification of CEDAW by their respective states, and work to remove reservations to the Convention, if they exist.

* Monitor their respective governments reporting obligations under CEDAW and other international conventions and influence and critique the content of state reports. Critiques may make use of alternative reporting processes - for example, an NHRI can go to women at the grass-roots level for direct information which can be fed to the government and incorporated in its reports to international committees.

* Ensure conformity of all domestic legislation to international human rights standards and commitments, including CEDAW.

* Collaborate with other NHRIs on cross-border or regional issues, such as trafficking of women.

* Cooperate and undertake joint activities with women's commissions, where they exist. Collaboration with women's commissions in such areas as policy

[34] Many of these recommendations are contained in a document entitled *Action for Human Rights. Harare 1999* which was adopted by over 100 human rights advocates at CHRI's international conference on '*Pan-Commonwealth Advocacy for Human Rights, Peace and Good Governance in Africa* held in Harare, Zimbabwe in January 1999. *Action for Human Rights* is a set of practical initiatives aimed at realising the values enshrined in the Harare Declaration of 1991. Areas covered include the efficacy of human rights commissions and gender equality and equity.

reform, investigations and research sponsorship can be cost-effective and synergistic.

* Pressure public institutions (including the government and the judiciary) to monitor and reassess their practices and policies regarding women so as to ensure that such practices are equitable and non-discriminatory. By encouraging regular reporting on the existence and implementation of internal employment policies, the composition and patterns of employment of their workforce, the availability of facilities and the pay and promotion provided to women, patterns of discrimination and violation of rights can be recognised and broken.

* Work with non-governmental organisations focusing on women's issues who can assist NHRIs with information gathering and dissemination.

* Implement educational and public awareness programmes aimed at bringing about social and behavioural changes for enhancing the status of women.

If NHRIs are taking their work seriously, and indeed if such institutions themselves are to be taken seriously, they must first put their own houses in order. As a model for other state and quasi-state institutions in the country, human rights institutions should examine their own governance and ensure that they are demonstrating in their internal structure and policies, the values of equity and non-discrimination that they are seeking to promote in society as a whole. In particular, NHRIs should:[35]

* Establish and implement effective internal policies which demonstrate the institution's proactive commitment to women's equality and equity. For example, NHRIs should have declared policies on employment equity, equal opportunity and sexual harassment.

* "En-gender" their programmes, that is, ensure that their programmes not only pay special attention to women's issues and situations, but also that such programmes have been considered and evaluated in terms of their

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[35] *Ibid.*

indirect effect on women.

* Ensure that human rights violations against women are prioritised in the work of the commission whether or not other institutions, such as a separate women's commission, exist.

* Demonstrate gender balance in staffing at all levels of the commission, in particular at the level of commissioner.

* Appoint commissioners and staff who have a proven commitment to women's human rights.

* Provide mandatory training in women's rights and gender sensitisation at all levels of commission staff.

* Establish a high level Internal "advocate" or focal point to particularly address women's rights and issues in respect of the commission's programmes as well as its internal structure and policies, and to ensure that all such policies are implemented.

* Make explicit reference to gender in annual plans, reports, policy statements and case management files. Statistics and data contained therein should be separated by gender.

* Publish their internal gender profile as well as all internal policies, including those on employment equity and equal opportunity.

* Mainstream women's issues in all aspects of their work, including all policies, programmes and activities, and provide flexible mechanisms for implementation and monitoring.

III. ANALYSING THE GENDER COMPOSITION OF NATIONAL HUMAN RIGHTS INSTITUTIONS

In the previous section of this paper, we discussed the important role of NHRIs in the process of ensuring that the human rights of women are realised. Such institutions can make immediate impact by ensuring compliance with international standards of equality and non-discrimination in their programmes and by breaking patterns of discrimination through clear and discernable demonstrations of equality within their own composition and work.

The Commonwealth Human Rights Initiative (CHRI) has studied what Commonwealth NHRIs do institutionally to demonstrate their commitment to women's rights and issues. In particular, we focussed our study on one very obvious indicator of an NHRI's pledge to gender equality - internal gender composition. If such institutions are indeed committed to the practical realisation of women's rights, then their commitment should be reflected in their own internal policies - in particular, their employment / hiring policies, which are ultimately manifested in the gender ratio of commissioners and staff.

Methodology

To assess the gender composition of human rights institutions in the Commonwealth, CHRI initially examined their mandate set out in legislation and/or constitutional provisions for any explicit reference to gender balance or equal opportunity policies. The main part of our study, however, analyses the responses received from a detailed questionnaire that was prepared and distributed by CHRI to all NHRIs in the Commonwealth.[36] The questionnaire was designed to examine the gender breakdown at all levels of staff, including commissioners, professional staff, administrative staff and establishment staff. The questionnaire also inquired about the existence of employment equity or gender policies, as well as the institutions' reporting requirements and accountability on gender issues.

Questionnaires were initially distributed to national human rights commissions and ombudsman offices in all Commonwealth countries. However, as ombudsman

[36] See Appendix 1 for a copy of the questionnaire.

offices typically have a mandate focussing on violations in the context of government administration and as there was a very low response rate from such institutions, this category was dropped from our analysis. Although we have focussed our analysis on established national human rights commissions in Commonwealth countries,[37] the principles of gender equity and equality and the recommendations contained in this paper would nonetheless apply equally to all human rights institutions.

Getting timely responses from the various human rights institutions was the first challenge encountered in the completion of the study. The questionnaire was initially distributed in August of 1999 and it took approximately nine months before the majority of completed questionnaires were returned.[38] We are pleased to report that of the 18 established human rights commissions resident in Commonwealth countries, a total of 15 (or 83%) have participated in our study.

The responses we have received reveal clear and discernible trends. Rather than focussing on absolute numbers,[39] we have reported and analysed percentages and ratios to provide a realistic picture of the internal composition of Commonwealth NHRIs.

The questionnaire also requested a breakdown of full-time and part-time staff on a gender basis. However, many of the responses received did not contain this information and in those that did, we found that there was no obvious correlation between full-time or part-time status and the gender of commission staff. Consequently, a discussion of full-time vs. part-time status of commissioners and employees of the NHRIs has been omitted.

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[37] Appendix 2 lists those NHRIs which ar3e included in this study.

[38] This report is based on information obtained from Commonwealth NHRIs over a period of approximately nine months from August 1999. Information regarding a particular NHRI is current as at the date on which the NHRI completed the questionnaire. Other information contained in this report is current to September 2000.

[39] Only at the level of commissioner have we reported absolute numbers.

Overall findings - all staff

Women constitute, on average, 37% of all staff (including commissioners) of the Commonwealth NHRIs that responded to our questionnaire.[40]

Predictably, however, behind this respectable figure is a very broad range of female representation among the various respondent NHRIs. The Northern Ireland Human Rights Commission boasts *75%* women on their staff, and the Canadian commission, 71 %. The excellent ratio of women to men within these commissions disguises the very poor performance of many South Asian and African NHRIs. At the bottom of the list, for example, is the Indian commission which employs only 13% women.

IV. CONCLUSION

There are several NHRIs which have achieved (and in fact have surpassed) the goal of gender balance within their staff, namely Canada, Northern Ireland, Australia and New Zealand. The human rights commissions of the Fiji Islands and Malaysia, although both are still in the process of establishing themselves, also seem to be on the right track in ensuring equal representation of both women and men at all levels of staff. There are also NHRIs that have taken steps to formalise the protection of the rights of women employees by instituting internal gender policies, while other human rights commissions abide by general national human rights legislation which ensures that women are guaranteed equal rights vis-à-vis their male counterparts. However, there are many human rights institutions that still have a long way to go towards achieving gender equality and equity. Particularly in South Asia and some parts of Africa, human rights commissions are heavily male-oriented at the level of commissioner, as well as within their staff. Even in those NHRIs which have attained balanced gender representation, many women working in these institutions are in the "pink collar ghetto" of low paying, low status jobs. Thus, even in developed countries, the problem of discrimination against women persists, but in a different form.

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[40] See Table 1.

As role models for other institutions, NHRIs should lead the way in ensuring that women all over the world are no longer neglected or their rights violated, and that women are valued and can freely participate on an equal footing with men in political, civil, economic, social and cultural life.

Change must first happen within. Only through a gender balanced staff will the national institution be representative of the community it aims to protect, and only then will it have the necessary diverse perspective and proven commitment to norms of non-discrimination and equality in order to be able to protect and promote women's rights generally.

Women are essential agents of political and economic change. When the contribution of women is fully recognised and valued by society, and when women are empowered and able to actively and equally participate in decision-making processes, there will be a tangible contribution to a state's economic growth, overall development and attainment of true democracy. As Boutros Boutros-Ghali, the former UN Secretary-General, said, "Human rights are not worthy of the name if they exclude the female half of humanity. The struggle for women's equality is part of the struggle for a better world for all human beings, and all societies."

V. SUMMARY OF RECOMMENDATIONS

In fulfilling their mandate to promote and protect the human rights of all citizens, national human rights institutions should demonstrate their commitment to the realisation of women's rights and the eradication of gender-based discrimination by implementing the following recommendations at the earliest possible date. NHRIs should:

* Ensure the ratification of CEDAW by their respective states, and work to remove reservations to the Convention, if they exist.

* Monitor their respective governments reporting obligations under CEDAW and other International conventions and influence and critique the content of state reports. Critiques may make use of alternative reporting processes - for

example, an NHRI can go to women at the grass-roots level for direct information which can be fed to the government and incorporated in its reports to international committees.

* Ensure conformity of all domestic legislation to international human rights standards and commitments, including CEDAW.

* Collaborate with other NHRIs on cross-border or regional issues, such as trafficking of women.

* Cooperate and undertake joint activities with women's commissions, where they exist. Collaboration with women's commissions in such areas as policy reform, investigations and research sponsorship can be cost-effective and synergistic.

* Pressure public institutions (including the government and the judiciary) to monitor and reassess their practices and policies regarding women so as to ensure that such practices are equitable and non-discriminatory. By encouraging regular reporting on the existence and implementation of internal employment policies, the composition and patterns of employment of their workforce, and the availability of facilities and the pay and promotion provided to women, patterns of discrimination and violation of rights can be recognised and broken.

* Work with non-governmental organisations focusing on women's issues who can assist NHRIs with information gathering and dissemination.

* Implement educational and public awareness programmes aimed at modifying or eradicating rigid social customs, cultural stereotypes and traditional practices which prohibit women from fully enjoying their human rights within the family and society as a whole.

As a role model for other state and quasi-state institutions, NHRIs should first set their own house in order by themselves adhering to principles of equality and equity that they are promoting within greater society. In this context, NHRIs should:

* Review, and modify or establish as necessary, effective internal policies on hiring and employment practices to ensure that women have unhindered and equal access to opportunities of employment, promotion and remuneration. This includes having declared policies on employment equity, equal opportunity and sexual harassment.

* Establish a high level internal "advocate" or focal point whose responsibility is to address women's rights and issues in respect of the commission's programmes, as well as to ensure that all internal gender policies are implemented, monitored and evaluated for their effectiveness.

* "En-gender" their programmes, that is, ensure that their programmes not only pay special attention to women's issues and situations, but also that such programmes have been considered and evaluated in terms of their indirect effect on women.

* Ensure that human rights violations against women are prioritised in the work of the commission whether or not other institutions, such as a separate women's commission, exist.

* Appoint commissioners and staff who have a proven commitment to women's human rights.

* Provide mandatory training in women's rights and gender sensitisation at all levels of commission staff.

* Make explicit reference to gender in annual plans, reports, policy statements and case management files. Statistics and data contained therein should be separated by gender.

* Publish their internal gender profile as well as all internal policies, including those on employment equity and equal opportunity.

* Mainstream women's issues in all aspects of their work, including all policies, programmes and activities, and provide flexible mechanisms for implementation and monitoring.

* Demonstrate gender balance in staffing at all levels of the commission, in particular at the level of commissioner.

Specifically in the context of ensuring balanced gender representation within an NHRI as the first step toward strengthening institutional credibility and capacity to advance gender equality, CHRI recommends that NHRIs should:

* Undertake an immediate review of their internal composition and structure to ensure that women are equally represented at all levels.

* If gender balance does not exist within an NHRI, set a time-bound goal for gender parity at all levels of staff. CHRI recommends that at the level of commissioner, there should be *no more than one person over a simple majority for either gender.*

* Where a vacancy exists at the level of commissioner, lobby and advocate for the appointment of a woman to such position. Such lobbying can be conducted by the NHRI with the assistance of NGOs, women's groups and the government.

* Promote women's employment by supporting women's education through scholarships or by implementing positive or affirmative action programmes that aim to alleviate gender discrimination by guaranteeing women increased employment opportunities within the NHRI.

* Advocate for constitutional and/or legislative amendments to ensure gender equity, as well as equality of opportunity for women. For example, NHRIs should lobby to change legislated criteria for selecting human rights commissioners which contain inherent cultural, religious and educational biases that prevent women from being appointed.

Booysen v Minister of Home Affairs

Decision of the Constitutional Court of South Africa
4th June 2001

Summary

This was an application for confirmation of the declaration of invalidity of two sections of the Aliens Control Act 96 of 1991 which deal with applications for work permits by foreign spouses of South African citizens or permanent residents. The applicants are four couples consisting of a South African married to a non-South African. The Minister of Home Affairs did not oppose the confirmation.

The first section concerns the obligation of such spouses seeking to work in South Africa to apply for a work permit while outside the country and then not to enter the country until the permit has been issued. The second section relates to the provision that work permits would only be issued to spouses of South African citizens if they do not pursue an occupation for which a sufficient number of persons are available in South Africa.

Van Heerden J in the Cape High Court declared that the provisions were inconsistent with section 10 of the Constitution which guarantees the right to dignity. She held that the provisions failed to give proper recognition to the importance of family life, particularly the reciprocal rights and duties of the spouses to cohabitation and to financial support.

In a unanimous decision written by Sachs J, the Constitutional Court confirmed the orders of invalidity, stating that it was in substantial agreement with the reasons advanced by van Heerden J that the provisions in question infringed the right to human dignity of the spouses. It suspended the two declarations of invalidity for a year in order to give Parliament a chance to remedy the defects. In the interim period the Director-General of the Department of Home Affairs is directed to accept any application for a work permit made within South Africa by any foreign non-resident spouse of a South African. He is also directed not to decline to issue or extend such work permits, unless good cause for refusal is established. In addition, he is ordered to give a decision on any application made

by such spouse within thirty working days of submission, unless there is good cause for a longer period.

ANETTE SUSAN BOOYSEN First Applicant

versus

THE MINISTER OF HOME AFFAIRS First Respondent

Heard on : 22nd May 2001

Decided on : 4th June 2001

SACHS J:

[1] The applicants are the spouses in four marriages contracted in terms of the laws of South Africa. Each couple comprises a South African and a foreign national[1] spouse who is not in possession of an immigration permit. They ask this court to confirm the declarations of constitutional invalidity[2] ordered by van Heerden J on 8 February 2001 sitting in the Cape of Good Hope High Court (the High Court)[3] of two sections of the Aliens Control Act 96 of 1991 (the Act). Both sections deal with applications for work permits by, amongst others, foreign nationals who are spouses of South African citizens or permanent residents (South Africans). Van Heerden J also declared certain provisions of regulations promulgated under the provisions of the Act to be constitutionally invalid and made certain consequential orders. These orders, relating as they do to the constitutional invalidity of regulations, and not to Acts of Parliament or to a

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[1] The term "foreign national" is used to describe those persons who are not South African citizens, and are defined as "aliens" by Section 1 of the Aliens Control Act. See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at 16I-J; 2000(1) BCLR 39 (CC) at 52I-J at footnote 11.

[2] Under the provisions of section 172(2)(a) of the Constitution of the Republic of South Africa, 1996. Section 172(2)(a) of the Constitution provides that-

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[3] *Makinana and Others v The Minister of Home Affairs and Another; Keelty and Another v The Minister of Home Affairs and Another* (Cape of Good Hope) Case No 339/2000, 8 February 2001, unreported.

provincial Act, do not fall within the purview of section 172(2)(a) and accordingly do not require confirmation by this Court for their coming into force. There has been no appeal against any of these orders and their validity is accordingly not an issue in the present case.

[2] The first declaration of invalidity which is submitted for confirmation is of section 26(2)(a) of the Act, which concerns the obligation of the foreign national spouse seeking to work in South Africa, to apply for a work permit while outside the country and then not to enter the country until the permit has been issued. Section 26(2)(a) of the Act provides that-

> "Subject to paragraph (b) and subsection (5), application for a work permit, study permit or a workseeker's permit referred to in subsection (1), may only be made while the applicant is outside the Republic and such applicant shall not be allowed to enter the Republic until a valid permit has been issued to him or her."

Regulation 16(1) of the Aliens Control Regulations[4] provides further that-

> "An application for a work permit, study permit or workseekers permit referred to in section 26 of the Act must be made in the country or territory of which the applicant validly holds a passport, or in which he or she normally lives and to which he or she returns regularly after any period of temporary absence."

[3] In the High Court proceedings the applicants contended that the effect of section 26(2)(a) of the Act was seriously to disrupt their family life and to impede the possibilities of their living together and giving each other marital support. The Minister of Home Affairs (the Minister) and the Director General, Department of Home Affairs (the DG) at first opposed the applications. After delivery of the judgment of this Court in *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others*[5], however, they caused affidavits to be submitted

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[4] Made in terms of section 56 of the Act by the Minister of Home Affairs, and published under Government Gazette 17254 GN R999, 28 June 1996.

[5] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

acknowledging that the effect of the provision was unjustifiably to limit the applicants' right to dignity as protected by section 10 of the Constitution, which states that-

> "[e]veryone has inherent dignity and the right to have their dignity respected and protected."

[4] Van Heerden J found that the legislation significantly impairs the ability of the spouses to honour their obligations to one another, and constitutes an unjustifiable limitation of the right to human dignity of both South Africans and their foreign spouses.

[5] She suspended the declaration of invalidity for 12 months to allow the inconsistencies that had resulted in the declaration of invalidity to be corrected by Parliament and further directed that during the period of suspension the DG was to accept any application for a work permit in terms of the Act made within South Africa by any foreign non-resident spouse of a South African.

[6] The second declaration of constitutional invalidity is of section 26(3)(b) of the Act, which provides that work permits are only to be issued to spouses of South Africans if they do not or are not likely to pursue an occupation in which a sufficient number of persons are available in South Africa to meet the requirements of the inhabitants of South Africa. The paragraph in question provides that-

> "The Director-General shall only issue a work or workseeker's permit with due regard to the provisions of section 25(4)(a)(i) and (iv) of this Act."

Section 25(4) provides that-

> "The regional committee concerned may authorize the issue to the applicant of an immigration permit if the applicant—
>
> (1) (i) is of a good character; and
>
> (ii) will be a desirable inhabitant of the Republic; and
>
> (iii) is not likely to harm the welfare of the Republic; and

> (iv) does not and is not likely to pursue an occupation in which, in the opinion of the regional committee, a sufficient number of persons are available in the Republic to meet the requirements of the inhabitants of the Republic . . ."

[7] The applicants contended that the effect of subparagraph (iv) was to prevent the foreign spouses from working if they did not have scarce occupational skills. In many cases the foreign spouse was the sole or main provider for the family and this highly restrictive provision prevented them from fulfilling their duty to support, thereby violating the right to human dignity of both spouses. Here too, an affidavit was submitted on behalf of the Minister withdrawing opposition to the application in the light of the decision in *Dawood's* case.

[8] In the High Court van Heerden J held that this provision resulted in an unjustifiable limitation on the constitutionally entrenched right to human dignity of South African permanent residents who are married to foreign spouses, as well as of such foreign spouses.

[9] She suspended the declaration of invalidity for 12 months to enable Parliament to correct the inconsistency which had resulted from the declaration of invalidity, and further ordered that during the period of suspension the DG was not to decline to issue work permits to foreign non-resident spouses of South Africans, unless good cause for refusal to issue such permits is established. She also ordered that the mere fact that the foreign spouse of a South African pursues or is likely to pursue an occupation in which, in the DG or the Regional Committee's opinion, a sufficient number of persons are available in the Republic to meet the requirements of the inhabitants of the Republic, is not in itself to constitute such good cause for refusing to issue the permits. In addition she ordered that during the period of suspension applications for the issue or extension of work permits by foreign spouses of South Africans were to be finalised within thirty working days of submission.

[10] Van Heerden J has dealt comprehensively with the relevant facts. The correctness of the factual basis to which she applied the relevant statutory and constitutional provisions of the Act was conceded before us. In substance, van

Heerden J analysed and applied to those facts the relevant principles laid down in *Dawood's* case[6] and the other judgments of this Court cited in her judgment. It is unnecessary to review afresh these principles or their application to the undisputed facts of this case. I am in substantial agreement with the reasons advanced by her for coming to the conclusion that sections 26(2)(a) and 26(3)(b) of the Act unjustifiably limit the constitutionally entrenched right to human dignity of South Africans and their foreign spouses.

[11] Counsel who appeared for the Minister at the hearing in this Court indicated that he supported confirmation of the orders made, subject only to latitude being given where it is impossible for the applications for work permits to be finalised within thirty days, as ordered by the High Court. Counsel for the applicants agreed with this qualification. I share the view that uncertainty and possible unfairness should be avoided and will in confirming paragraph 2.5 of the High Court Order do so in an amended form. I have also amended the High Court Order so as to make it quite clear that any refusal before 8 February 2001 of applications for work permits made under section 26(1)(b) of the Act will not be rendered unlawful.

[12] The applicants sought to recover costs, including the costs of two counsel, from the respondents for the hearing in this Court. It was necessary for the applicants to seek confirmation of the declarations of invalidity, and it is helpful for this Court to receive argument in all but the most straightforward of cases. In the event, counsel on both sides have assisted the Court in refining the orders to be made. If the Minister had indicated immediately after the High Court Order had been granted that he would not oppose confirmation, the applicants might well not have been entitled to costs of two counsel in this Court. As it happened, the Minister only withdrew his opposition at a late stage. By then the applicants had already employed two counsel, as they had done in the High Court. For this they could not be faulted. Under these circumstances it would be fair and just to order the respondents to pay the costs of the applicants, including the costs of two counsel.

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[6] Above n 5 especially at 960A-B and 963B-D.

Order

The order made by van Heerden J in the Cape High Court on 8 February 2001 is confirmed in the following amended form:

1.1 Section 26(2)(a) of the Aliens Control Act 96 of 1991, as amended (the Act) is declared to be inconsistent with the Constitution of the Republic of South Africa (the Constitution) and invalid.

1.2 The order made in para 1.1 above is suspended for a period of 12 (twelve) months from the date of this order to give Parliament an opportunity to correct the inconsistency that has resulted in the declaration of invalidity.

1.3 Pending the enactment of such legislation or the expiry of the period referred to in para 1.2 above, whichever occurs sooner, the second respondent is directed to accept, notwithstanding the provisions of section 26(2)(a) of the Act and of Regulation 16(1) of the Aliens Control Regulations, any application for a work permit in terms of section 26(1)(b) of the Act, made within South Africa, by any foreign non-resident spouse of a person who is permanently and lawfully resident in the Republic of South Africa.

2.1 Section 26(3)(b) of the Act is declared to be inconsistent with the Constitution and invalid.

2.2 The declaration of invalidity made in para 2.1 above is suspected for a period of 12 (twelve) months from the date of this order to enable Parliament to pass legislation to correct the inconsistency which has resulted in the declaration of invalidity.

2.3 Pending the enactment of such legislation or the expiry of the period referred to in para 2.2 above, whichever occurs sooner, the second respondent, when exercising the discretion conferred upon him or her by section 26(3)(a) of the Act, may not refuse to issue work permits as contemplated by section 26(1)(b) of the Act to foreign non-resident spouses

of South African permanent residents, unless good cause for refusal to issue such permits is established.

2.4 Pending the enactment of legislation by Parliament or the expiry of the period referred to in para 2.2 above, whichever occurs sooner, the second respondent shall not, when exercising the discretion conferred upon him or her by section 26(6) of the Act, refuse to extend the validity of work permits as contemplated by section 26(1)(b) of the Act to foreign non-resident spouses of South African permanent residents, unless good cause for refusal to extend such permits is established.

2.5 The fact that the foreign spouse referred to in paras 2.3 or 2.4 above pursues or is likely to pursue an occupation in which, in the opinion of the second respondent or of the relevant Regional Committee of the Immigrants Selection Board, a sufficient number of persons are available in the Republic to meet the requirements of the inhabitants of the Republic, shall not be taken into account in determining the existence of good cause for the purposes referred to in paras 2.3 and 2.4 above.

2.6 Pending the enactment of legislation by Parliament or the expiry of the period referred to in para 2.2 above, whichever occurs sooner, the second respondent shall, when exercising the discretion conferred upon him or her by section 26(3) and 26(6) of the Act, finalise any application made by the foreign non-resident spouse of a South African permanent resident for the issue or extension of a work permit, within 30 (thirty) working days of the submission of such application, unless there is good cause for a longer period to be taken.

3. The orders made under paras 1.1 and 2.1 shall not render unlawful the refusal prior to 8 February 2001 of applications made under section 26(1)(b) of the Act.

The first respondent is to pay the applicants' costs of these confirmation proceedings, including the costs attendant upon the employment of two counsel.

Chaskalson P, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Madlanga AJ and Somyalo AJ concur in the judgment of Sachs J.

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