

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 06 FEBRUARY 1996 (CP006026.MEM)

RE: THE MEANING OF "PROGRESSIVE" (SECTIONS 25 AND 26)

1. INTRODUCTION

The panel was requested to provide an opinion on the meaning of "progressive" in international human rights law. The issue relates to Sections 25(3) and 26(2) of the Working Draft, dealing with the socio-economic rights of housing and land, health, food, water and social security.

2. BACKGROUND

The international Bill of Rights is contained in several international instruments. Two of the most important ones are the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights of 1966.

Economic, social and cultural rights have become part and parcel of international human rights law, on both international and regional levels. The interrelationship and indivisible nature of civil and political rights and social welfare rights does not always accord with the traditional distinction drawn between so-called first and second generation rights. In the European system for instance, the right to education and cultural rights are considered in conjunction with civil and political rights, rather than in conjunction with socio-economic rights. (Education is included in Protocol 1 to the European Convention and not in the European Social Charter.)

This is not to deny that there are significant differences of emphasis between the typical civil and political rights on the one hand and some of the social and cultural rights on the other. Much of this revolves around the perceived role of the state.

The classical perception has been that civil and political rights only require state restraint from interference with their enjoyment, whereas a major element in regard to social welfare rights has been the claim on the states' positive action for protection and assistance. While there is some truth in this perception, numerous and substantial qualifications to it are necessary. For example, a general comment by the Human Rights Committee [UN Doc A/37/407] refers, inter alia, to widespread and serious malnutrition leading to extensive child

mortality, as a non-fulfilment of the right to life. Action to counteract child malnutrition often requires government organized provisions structurally and financially.

3. THE MEANING OF "PROGRESSIVE" IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

3.1 Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)(1966), describes the obligations of state parties:

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

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

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

The equivalent section in the International Covenant on Civil and Political rights reads:

"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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

3. Each State Party to the present Covenant undertakes:

a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,

notwithstanding that the violation has been committed by persons acting in an official capacity;

b. To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c. To ensure that the competent authorities shall enforce such remedies when granted".

3.2 The main obligation contained in Article 2 of the ICESCR has been explained by the UN Committee on Economic, Social and Cultural Rights as follows:¹

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

3.3 Some further obligations are contained herein:

¹ UN Doc. E/1991/23

The phrase "(t)o take steps ... has been interpreted to mean the necessary steps "to the maximum of its available resources."² In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

3.4 What type of steps are to be taken by the state parties?

Domestic legislation is considered 'highly desirable'. Legislation is necessary in order to give effect to specific obligations (re social security, labour matters etc) and in order to combat discrimination in the enjoyment of social benefits (several cases demonstrate that these socio-economic rights often find implementation by ensuring e.g. that women enjoy the same social benefits given to 'breadwinners' and males. The non-discrimination clause of a bill of rights is then made applicable to socio-economic rights.³

3.5 When will these steps be sufficient in order to satisfy the international obligations?

The following suggestions have been offered by the UN Committee on Economic, Social and Cultural Rights:

minimum essential needs have to be addressed

- any assessment as to whether obligations have been met "... must take account of resource constraints applying within the country concerned... In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy as a matter of priority, those minimum obligations".
- even "in times of severe resources constraints" the vulnerable members of society should be protected by appropriate steps.
- it is a general norm of international law that states should fulfil their international legal obligations in good faith.

3.6 The nature of international obligations.

3.6.1 The need for flexibility on socio-economic matters is recognized. While the concept of progressive realization of all socio-economic rights'... will generally not be able to be achieved in a short period

² Ibid

³ See Martin Scheinin 'Economic and Social Rights as legal rights', in Eide et al (eds), Economic, Social and Cultural Rights, 1995, 44.

of time, the phrase must be seen in the light of the overall objective which is to establish clear obligations for State parties to move expeditiously as possible towards the realization of these rights' (See Eide 36).

3.6.2 Supra-national courts (such as the European Court on Human Rights) allow national governments a margin of appreciation and freedom in the domestic implementation and protection of all human rights obligations.

3.7 Domestic enforcement of socio-economic norms

3.7.1 When states seek to implement these socio-economic obligations in national law, they are required to impose duties on persons subject to their jurisdiction. Subsequent legislation is therefore an obvious and necessary instrument in order to give domestic effect to socio-economic rights. This may touch on the issue of **horizontality**, although the current wording of Sections 25 and 26 does not suggest horizontality. (This specific matter still needs to be discussed further with respect to whole of Chapter 3.)

4. COMPARING THE INTERNATIONAL CONVENANCE AND THE REFINED WORKING DRAFT

4.1 The Working Draft uses 'progressive' and 'reasonable' to qualify legislative and other measures. The Covenant on the other hand uses 'progressive' to qualify the realization of state obligations: '... with a view to achieving progressively the full realization of the rights recognized...'

4.2 The phrase 'to the maximum of its available resources' appears in the Covenant only.

4.3 The Covenant refers to 'all appropriate means, including particularly the adoption of legislative measures.' The working draft speaks of 'legislative and other measures'

4.4 The rights discussed in the working draft are to apply to 'everyone', the Covenant on the other hand recognizes the possibility to treat non-nationals in a manner which would take into account the availability of resources.

5. CONCLUDING REMARKS

- 5.1 From the above references and other sources it is clear that the term "progressive" in international law captures the idea that the full realization of socio-economic rights will generally not be achieved in a short period of time, that economic realities are taken into account, and that the need for flexibility is taken into account, although the achievement of these rights have to be a matter of priority. The state may use different methods to achieve these rights, including legislation and negotiations with the private sector (such as banks and building societies). The measures must be "deliberate, concrete and clearly targeted" to meeting a state's international obligations, but a government may decide to prioritise certain rights in a particular period. Mathematical formulas are certainly not prescribed, but it would, e.g, not be permissible to neglect one or more of these rights completely for a length of time by not formulating any policies and plans.
- 5.2 Reporting procedures could be a useful mechanism to enhance the implementation of socio-economic rights.
- 5.3 This memo dealt only with the one request to the Panel, namely the meaning of the word "progressive". However, the treatment of socio-economic rights in the Bill of Rights may require some holistic attention. Perhaps a small workshop on the formulation of these rights, involving the relevant political parties, the experts who assisted TC4 and members of the Panel could help to clarify some misunderstandings and unresolved issues.