WOMEN AND THE LAW

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Introductions for Women and the Law Supplement

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C-355/2006

EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA

Bogotá, D. C., May 10, 2006[1]

Exercising its constitutional jurisdiction in compliance with procedural and substantive requirements found in Decree 2067 of 1991, the full chamber of the Constitutional Court issues the following:

DECISION C-355/06

Writing for the majority of the Court:
Honorable Justice JAIME ARAÚJO RENTERÍA
Honorable Justice CLARA INÉS VARGAS HERNÁNDEZ

...Colombian citizens Mónica del Pilar Roa López, Pablo Jaramillo Valencia, Marcela Abadía Cubillos, Juana Dávila Sáenz and Laura Porras Santillana ("the Plaintiffs") request in separate complaints that this Court declare unconstitutional paragraph 7 of article 32, articles 122 and 124, as well as the expression "*or on a woman of less than 14 years of age*" contained in article 123 of Law 599, 2000 "by which the Penal Code is enacted."

The Plaintiffs assert that the articles and paragraphs in question violate the following constitutional rights: the right to dignity (Constitutional Preamble and article 1 of the Constitution); the right to life (article 11 of the Constitution); the right to bodily integrity (article 12 of the Constitution); the right to equality and the general right to liberty (article 13 of the Constitution); the right to the free development of the individual (article 16 of the Constitution); the right to reproductive autonomy (article 42 of the Constitution); the right to health (article 49 of the Constitution) and obligations under international human rights law (article 93 of the Constitution).

* * *

In general, the arguments of the Plaintiffs revolve around the fact that the articles of the Penal Code that criminalize abortion (article 122) and abortion without consent (article 123), together with the mitigating circumstances therein (article 124), are unconstitutional because they disproportionately and unreasonably limit the rights and liberties of the pregnant woman, including when she is a minor of less than 14 years of age.

The Plaintiffs also assert that the articles in question violate various international human rights law treaties, which are part of the *Constitutional Bundle*[2] in ac-

[1] Editor's note: the footnotes from the original text are omitted for the sake of brevity.

[2] Translator's note: the term employed by the Court in Spanish is "Bloque de Constitucionalidad" — referring to all the legal norms that are considered incorporated and thus form part of the Constitution.

cordance with article 93 of the Constitution, as well as with the opinions issued by the various bodies charged with interpreting and applying such international treaties. In particular, the challenge to paragraph 7 of article 32 of the Penal Code revolves around the fact that the state of necessity prescribed therein breaches a woman's fundamental right to life and physical integrity because she is forced to resort to a clandestine abortion *"which is humiliating and potentially dangerous to her integrity."*

Numerous amicus briefs were filed both supporting the arguments of the Plaintiffs as well as opposing them. The amici arguing that the challenged articles are unconstitutional put forward very similar reasons to those presented by the Plaintiffs. On the other hand, those defending the constitutionality of the challenged articles assert that the articles have the purpose of protecting the fetus' right to life; protection that is warranted under article 11 of the Constitution and international human right treaties, which are part of the *Constitutional Bundle*. Many of those who argue that the articles in question are constitutional assert that it is the legislature's prerogative, in its discretion over criminal matters, to legislate in order to protect fundamental rights, and that this is end is served by articles 122, 123 and 124. Furthermore, amici defending the challenged articles coincide in stating that the pregnant woman's constitutional rights are not absolute and are legitimately limited by the fetus' right to life.

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On the other hand, representatives of some state entities as well as representatives of scientific associations appeared as amici to highlight the fact that induced abortion is a serious public health problem in Colombia which primarily affects adolescents, displaced victims of the internal armed conflict, and those with the lowest levels of education and income. This is due to the fact that induced abortions constitute a crime and are therefore often performed in unhygienic and perilous conditions, which endanger the life and physical integrity of the woman.

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5. "Life" as a relevant constitutional value that must be protected by the Colombian state and as distinguished from the "right to life"

...The Preamble of the Constitution establishes "life" as one of the values that the constitutional legal system aims to protect. Article 2 notes that the authorities of the Republic exist in order to protect the life of the people residing in Colombia. Article 11 affirms, along with other references in the Constitution, that "*the right to life is inviolable.*" In the Constitution of 1991, these various references give "life" a multiplicity of functions, as both a value and a fundamental right....

Thus, it can be said that by virtue of the mentions "life" in various constitutional articles, the Constitution of 1991 is inclined to a general protection of life. From this point of view, all of the state's actions must focus on protecting life. This protection shall not be understood as an anthropocentric protection only. The duty to protect life as a constitutional value extends from the axiological sphere to the normative sphere and becomes a constitutional mandate with real obligations. Among those obligations is that all state authorities, without exception and to the extent of their abilities, act within their legal and constitutional discretion with the purpose of achieving appropriate conditions for the effective development of human life. Public authorities' duty to protect life is the necessary flip side of life as a constitutionally protected value, and as such it has given rise to multiple jurisprudential lines of argument from this Court....

Although it is Congress' role to determine and adopt ideal measures for complying with the duty to protect life, this does not mean that all norms aimed at that goal are justified, for, although "life" has constitutional relevance, it does not have an absolute value nor is it an absolute right; it must be weighed against other values and constitutional rights....

Within the legal system, life receives different normative treatments. For instance, there is a distinction between the right to life in article 11 of the Constitution and life as a value protected by the Constitution. The right to life requires that an individual be entitled to it and claim the right. As with all other rights, the right to life is restricted to human persons, while the protection of life can be afforded to those who have not yet reached the human condition....

Following this reasoning, "life" and "the right to life" are different phenomena. Human life passes through various stages and manifests in various forms, which are entitled to different forms of legal protection. Even though the legal system protects the fetus, it does not grant it the same level or degree of protection it grants a human person. These differences are notable in most legal systems where, for example, the criminal punishment for infanticide or for homicide is greater than the punishment for abortion. That is, the protected life is not identical in all cases and therefore the legal implications of the offence carry different degrees of reprisal and thus a proportional punishment.

These considerations must be taken into account by the legislature if it finds it appropriate to enact public policies regarding abortion, including imposing criminal penalties where the Constitution permits, while respecting the rights of women.

6. Life and international treaties on human rights; part of the *Constitutional Bundle*

Some of the amici assert that under international human rights law, and particularly under the international instruments addressing matters in the *Constitutional Bundle*, the fetus is entitled to the right to life, and therefore the state is obligated to adopt legislation criminalizing abortion under all circumstances. In other words, they assert that the state's obligation to ban abortion derives from those international treaties that form part of the *Constitutional Bundle*....

As this Court has held, international human rights treaties are not to be interpreted only literally; it is necessary to examine other factors, such as the context and the purpose of the norm in question. As was stated in Decision C-028, 2006:

> *In this sense, it is necessary to underscore that in recent years, interpreting international treaties by examining the context and the purpose of the norm in question has gained strength, as it permits for historical changes to be considered. Thus, the interpretation of a specific provision of an international treaty is not limited to reviewing the text of the instrument, rather the interpretation includes the examination of other diverse treaties on related matters; even if those other treaties form part of a different system of protection of international human rights. In other words, international treaties cannot be interpreted in an isolated manner. Instead, they should be interpreted in harmony with one another, in order to adequately take into account social changes and adjust to the new challenges faced by the international community. This must be done following existing specific rules of interpretation, which will lead to a coherent understanding of current international public law.*
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> *Notably, the Inter-American Court of Human Rights, based on article 29 of the Pact of San José, Costa Rica, has stated, as has the European Court of Human Rights, that "the treaties on human rights are living instruments. Their interpretation must be in accordance with the evolution of the times and current social conditions." The Inter-American Court has also stated that "such evolving interpretation is in harmony with the general rules of interpretation found in article 29 of the American Convention, as well as with those established by the Vienna Convention on the Law of Treaties." Therefore, international treaties on human rights must be interpreted in harmony with one another, utilizing the decisions on said treaties by the international bodies charged with enforcing the rights and guarantees contained within them as a starting point.*

In conclusion, it cannot be said that an absolute or unconditional duty to protect the life of the unborn fetus derives from the various international human rights treaties that form part of the *Constitutional Bundle*. A literal interpretation, just as a context-driven interpretation, requires weighing the unborn fetus' right to life against other rights, principles and values recognized in the 1991 Constitution and in other international human rights law instruments, an approach that has been followed by the Inter-American Court of Human Rights.

the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so." This Programme also established that *"Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so."* It was also established that men, women and adolescents have the right *"to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice,"* as well as *"the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth."*

The Fourth World Conference on Women (Beijing Platform) confirms the reproductive rights established in the Cairo's Program of Action.

In effect, various international treaties form the basis for the recognition and protection of women's reproductive rights, which derive from the protection of other fundamental rights such as the right to life, health, equality, the right to be free from discrimination, the right to liberty, bodily integrity and the right to be free from violence — all of which constitute the essential core of reproductive rights. Other fundamental rights, such as the right to work and the right to education — which are also affected when women's reproductive rights are violated — serve as parameters to protect and guarantee sexual and reproductive rights.

It must be noted that in addition to the protections for women's rights in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the American Convention on Human Rights, special protection for the rights of Latin American women are found in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which entered into force in Colombia on February 19, 1982, with the passage of Law 51, 1981, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), which entered into force in Colombia on December 15, 1996, by means of Law 248, 1995. These documents, together with those signed by the governments of the signatory countries in the World Conferences, are fundamental to the protection and guarantee of the rights of women as they form the point of reference for establishing concepts which contribute to their interpretation both in the national and international spheres.

The right to health, which includes the right to reproductive health and family planning, has been interpreted by international bodies on the basis of international treaties, including CEDAW, to include the duty of all states to offer a wide range of high quality and accessible health services, which must include sexual and reproductive health services. Furthermore, these international bodies also recommend that a gender perspective be included in the design of public health policies and programs. These same international bodies have also expressed concern for the health of women living in poverty, women living in rural areas, indigenous women and adolescents, as well as with obstacles to access to contraceptive methods.

In the area of health, all states should also eliminate all obstacles that impede women's access to services, education and information on sexual and reproduc-

tive health. CEDAW has emphasized that laws criminalizing medical interventions that specially affect women constitute a barrier to women's access to needed medical care, compromising women's right to gender equality in the area of health, and amounting to a violation of states' international obligations to respect those internationally recognized rights.

The international community has also recognized that violence against women infringes on human rights and fundamental freedoms, and has established, specifically, the right of women to live free from violence based on sex or gender.

The diverse forms of gender violence constitute a violation of women's reproductive rights, due to the fact that violence affects women's health as well as their reproductive and sexual autonomy. Sexual violence infringes on women's reproductive rights, particularly the right to bodily integrity and the right to control their sexuality and reproductive capacity. Sexual violence also threatens women's right to health, not only physical health but also psychological, reproductive and sexual health.

CEDAW declared that "*Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.*" The Convention of Belém do Pará, in force since March 5, 1995, and in force in Colombia since December 15, 1996 — Law 248, 1995 — is one of the most important instruments for protecting women's rights against the various forms of violence faced by women in diverse spheres of their lives. The Convention establishes two elements that make it particularly effective.

First, it defines violence against women both in the public and private spheres as a violation of women's human rights and fundamental freedoms. Second, the Convention establishes the state's responsibility for perpetrating or tolerating any such violence, regardless of where it occurs.

It is also important to highlight that the Rome Statute establishes, among other things, that violence and other reproductive and sexual crimes are at the same level as the other most atrocious international crimes, and may amount to torture and genocide. The Rome Statute also recognizes for the first time that violations of women's right to reproductive autonomy, both by means of forced pregnancy and forced sterilization, are amongst the most serious crimes under international human rights law.

One of the essential components of reproductive and sexual rights is women's right to choose freely the number and spacing of children. This is based on the principles of human dignity and the right to autonomy and intimacy, as has been recognized by various international conventions.

CEDAW has established that a woman's right to reproductive autonomy is infringed upon by obstacles to her access to the means of controlling her fertility. Thus, non-consensual sterilization and imposed birth control methods constitute serious violations of this right. Similarly, various committees have stated that the right to freely decide the number of children is directly linked to women's right to life when there are highly restrictive or prohibitive abortion laws that result in high maternal mortality rates.

Other sexual and reproductive rights are based on the right of freedom to marry and start a family. The right to privacy is also connected to reproductive rights and is infringed upon when the state or private citizens interfere with a woman's right to make decisions about her body and her reproductive capacity. The right to privacy includes the right of a patient to have her confidentiality respected by her doctor. Therefore, the right to intimacy is infringed upon when the doctor is legally obliged to report a woman who has undergone an abortion.

With regard to the right to equality and to be free from discrimination, the Women's Convention (CEDAW) establishes women's right to enjoy human rights in conditions of equality with men. It also prescribes the elimination of barriers impeding women's effective enjoyment of their internationally recognized rights, as well as of those found in national legislation. It also establishes measures to prevent and sanction acts of discrimination.

Finally, the right to education is closely linked to reproductive rights at various levels. Having access to basic education empowers women within their families and their communities, and it raises their consciousness regarding their rights. Furthermore, the right to an education includes education on reproductive health and on the right to choose freely and responsibly the number of children and the spacing between them.

To conclude, women's sexual and reproductive rights have finally been recognized as human rights, and, as such, they have become part of constitutional rights, which are the fundamental basis of all democratic states.

Sexual and reproductive rights also emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity's advancement towards social justice.

Nonetheless, neither a mandate to decriminalize abortion nor a prohibition on the legislature's adoption of criminal abortion laws derives from international treaties or constitutional articles on the topic. Congress has a wide range of discretion to adopt public policies on abortion. However, this discretion is not unlimited. As this Court has held, even in criminal matters, the legislature must respect two constitutional limits. First, the legislature cannot disproportionately encroach upon constitutional rights. Second, the legislature must not leave certain constitutional values unprotected. At the same time, the legislature must recognize the principle that criminal law, due to its potential to restrict liberties, must always be a measure of last resort.

Below, the Court will set out the limits to the legislature's discretion to utilize criminal law to penalize abortion, first examining the more general limits and then turning to the particulars of the case before it.

8. Limits on legislative discretion over criminal matters

...In summary, it is the legislature that must pass criminal laws for the protection of constitutional values such as life. However, fundamental rights and other constitutional principles establish limits on the legislature's discretion and it is the Cons-

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titutional Court that *as guardian of the integrity and supremacy of the Constitution, must oversee the limits imposed by the Constitution on the legislature. The Court must examine whether the legislation validly infringes upon constitutional rights.*

Congress may introduce variations in the criminalization and punishment of different conducts that threaten life, a value found in the Constitution. Colombia's legal system includes various laws that aim to protect life, such as laws against genocide, homicide, abortion, abandoning a minor or a person with disabilities, or genetic manipulation. Another example is failing to aid a person at risk. The criminalization of these acts all aim to protect life. Although all these laws have the same objective, that of protecting life, the penalties assigned are different, in accordance with the specific situation and the stage of life in question. In this manner, birth is a relevant event in determining the protection accorded by the law, as is reflected in the penalty associated with the crime.

8.1. The fundamental right to dignity as a limit on the legislature's discretion over criminal matters

As with "life," the concept of "dignity" has various functions in Colombian constitutional law, as has been recognized by constitutional jurisprudence. This Court has stated that "human dignity" has three different roles: (i) it is a foundational principle of the legal system and as such, it has an axiological dimension as a constitutional value; (ii) it is a constitutional principle; and (iii) it is a fundamental right....

[T]he rules which flow from the concept of human dignity — both the constitutional principle and the fundamental right to dignity — coincide in protecting the same type of conduct. This Court has held that in those cases where dignity is used as a criterion in a judicial decision, it must be understood that dignity protects the following: (i) autonomy, or the possibility of designing one's life plan and living in accordance with it (to live life as one wishes); (ii) certain material conditions of existence (to live well); and (iii) intangible goods such as physical integrity and moral integrity (to live free of humiliation)....

Human dignity warrants a sphere of autonomy and moral integrity that must be respected by public authorities and by private citizens. The sphere of protection for women's human dignity includes decisions related to their choice of life plan, among them decisions regarding reproductive autonomy. This protection also includes a guarantee of their moral integrity, which manifests itself in prohibitions against assigning women stigmatizing gender roles or imposing deliberate moral suffering.

According to constitutional jurisprudence, the concept of dignity, understood as protecting individual autonomy and the right to choose one's life plan, places a limit on the legislature's discretion over criminal matters....

In this way, the need to respect human dignity places a limit on the legislature's discretion with regard to criminal matters, even in circumstances where the legislature aims to protect other relevant constitutional values such as life.

Therefore, when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.

8.2. The right to the free development of the individual as a limit on the legislature's discretion over criminal matters

The right to the free development of the individual stems from axiological considerations: the principle of human dignity and the strong libertarian characteristics of the 1991 Constitution. This right is understood as the necessary result of a new conception of the state's role. In this new role, the state is "an instrument at the service of the citizens, as opposed to the citizen as a servant of the state." In this new light, individual autonomy — understood as the vital sphere of matters solely within the decisional ambit of the individual — becomes a constitutional principle, binding on public authorities, who are therefore prevented from infringing on this private sphere and making decisions on behalf of citizens because such infringement would amount to "a brutal usurpation of a citizen's ethical condition, reducing him/her to the condition of an object, converting him/her into a means to ends imposed from outside...."

The substance of the right is found within the realm of an individual's private decisions, which result in a person's life plan or in an individual's ideal of personal achievement. Throughout time, constitutional jurisprudence has identified a spectrum of conduct that is protected under the right to the free development of the individual, among which the following must be mentioned due to their importance in the present analysis.

* * *

The freedom of every individual to choose his or her marital status without coercion of any type; this includes, among others options, the freedom to choose whether to marry, to live in a common law relationship or remain single.

The right to be a mother, or in other words, the right to opt for motherhood as a "life choice," is a decision of the utmost private nature for each woman. Therefore, the Constitution does not permit the state, the family, the employer or educational institutions to introduce any regulation or policy that infringes upon the right of a woman to choose to be a mother or that interferes with the rightful exercise of motherhood. Any discriminatory or unfavorable treatment of a woman on the basis of special circumstances she might be facing at the time of making the decision of whether to be a mother (for example, at an early age, within marriage or not, with a partner or without one, while working, etc.) is a flagrant violation of the constitutional right to the free development of the individual.

The right to a personal identity from which the following rights derive: (i) the right to a name as an expression of individuality. The Court understands this right in a "legal sense" as "the ability of an individual to proclaim his or her uniqueness;" (ii) the right to freely choose one's sexuality. The Court has stated in various decisions that "sexual orientation and the assumption of a sexual identity are at the core of the right to the free development of the individual...;" and (iii) the right to make choices about one's appearance. The Court has said

that a certain standard of esthetics cannot be imposed by educational institutions, the state or private citizens. For instance, decisions about what dress, hair length or whether to use cosmetics cannot be determined by educational institutions. Government entities are also proscribed from establishing regulations that prevent access to certain public employment based on esthetics. Similarly, penal institutions are prevented from imposing rules that prevent visits to inmates based on personal appearance.

The right to make decisions about one's health encompasses the right to pursue or refuse a particular medical treatment even when the patient may be suffering from a mental disorder (so long as the mental condition is not so severe as to impair the patient's judgment or impair the patient's expression of his or her wishes) and even when the patient's decision will not lead, in the expert's medical opinion or the opinion of others, to improvement of the patient's illness or the achievement of wellness.

Finally, it must be noted that our constitutional jurisprudence has also said, on various occasions, that the free development of the individual provides a clear limit on the legislature's discretion, not only in criminal matters but also in its general discretion regarding penalties and prohibitions. The Court has held that regardless of the constitutional values it is aiming to protect, the legislature cannot establish "perfectionist measures" that restrict the free development of the individual in a disproportionate manner.

Decision C-309/97 establishes a differentiation between "perfectionist measures" and "protective measures;" the latter are constitutionally valid when they aim to preserve relevant constitutional values such as the right to life and the right to health. On this particular point, the Court stated:

> *In Colombia, perfectionist measures are not allowed as it is not permissible that a state that recognizes the right to individual autonomy as well as pluralism as a protected value permit its authorities to impose, with the threat of criminal penalties, a predetermined model of virtuous behavior or human excellence. In effect, perfectionist measures are policies that imply that the state only admits one ideal of what is commendable, which is totally incompatible with the notion of a plural society. Such measures also result in criminal sanctions against persons who have not infringed upon the rights of others, but instead have simply rejected the ideals imposed by the state, in flagrant violation of that individual's autonomy. Autonomy means precisely having the ability to establish one' own norms. On the other hand, protective measures that seek to protect the rights of the individual are not incompatible with the Constitution, nor with the recognition of a pluralist society, because these measures are not based on imposing a model of what is virtuous, rather, they aim to protect an individual's own interests and his or her own convictions.*

In order to prevent a protective measure from becoming perfectionist policy, the protective measure must be proportionate and may not excessively restrict the rights at issue, among them, of course, the right to the free development of the individual.

In close relationship to the above, the Court concludes that the penalty for a violation of a protective norm cannot be excessive when weighed against the interest that the measure seeks to protect. Not only because proportionality in determining criminal sanctions is a guiding principle of criminal law, but also because having proportionality in the penalties imposed is a manner of guaranteeing that a protective norm will not become a perfectionist measure....

8.3. Health, life and bodily integrity as limits on the discretion of the legislature over criminal matters

...The Constitutional Court has said on various occasions that the right to health, even though it is not expressly found in the Constitution as a fundamental right, has a fundamental character when it is in *close relation* to the right to life. That is, when its protection becomes necessary in order to guarantee the continuity of life in dignified conditions.

The Court has also said that human life as protected in the Constitution refers not only to a biological existence, but also to life with a minimum degree of dignity. Human beings are multifaceted and their existence involves more than purely material aspects; it incorporates physical, biological, spiritual, mental and psychological factors, all of which must be taken into consideration when defining human dignity.

The right to health encompasses not only physical, but also mental health. As the Court has said, *"The Constitution proclaims the fundamental right to personal integrity, and by doing so, refers not only to the physical aspects of the person, but also to the broad range of elements that affect one's mental health and psychological well-being. Accordingly, both the physical and psychological aspects of integrity must be preserved. A threat to one or the other, by action or omission, infringes upon this fundamental right and endangers the right to life with a minimum degree of dignity."*

The right to health is an integral right that includes mental and physical well-being. Furthermore, for women, it includes reproductive health, which is closely linked to both induced and spontaneous abortion. Induced abortions and miscarriages may in numerous circumstances put a woman's health or life at risk, or require medical intervention to preserve her reproductive capacity....

The constitutional right to health has a service provision dimension as well as an element of protection against government and third party intrusion or interference with this right. This latter dimension of protection from violation, or obligation on the state to not interfere, is closely related to the duty of every individual to be responsible for his or her own health. From this perspective, certain measures adopted by the legislature that disproportionately restrict the right to health are unconstitutional. This is so even when those measures are adopted in order to protect the constitutional rights of others.

Prima facie, it is not proportionate or reasonable for the Colombian state to obligate a person to sacrifice her or his health in the interest of protecting third parties, even when those interests are also constitutionally relevant.

Also, as mentioned above, the right to health has a dimension related to decision-making about one's own health, which is closely linked to the right to autonomy and the right to the free development of the individual. Thus, the Constitutional Court has understood that every person has the autonomy to make decisions related to his or her health, and that therefore the informed consent of the patient prevails over the views of the treating physician, and the interest of society and the state in preserving the health of the people. From this perspective, medical treatment or intervention should always take place with the consent of the patient, except in very exceptional circumstances.

The right to autonomy regarding one's own health encompasses other distinct rights, which are relevant here. These include the right to plan a family, the right to make free and non-coerced decisions regarding reproduction, and the right to be free from all forms of violence and coercion which affect sexual and reproductive health. Following is a brief analysis of each of these rights.

The right to plan a family has been defined as *"the possibility of all couples to freely choose in a responsible manner, the number and spacing of their children, and the right to access the information necessary to do so."* This right places an obligation on the state to adopt measures to assist couples and individuals in reaching their reproductive objectives and to provide information on family planning and reproductive health.

The right to be free of interference in decision-making regarding reproduction requires access to the information necessary to make informed choices. This is closely related to the right to adequate sex education. This right also *"protects people from unwanted physical intrusions and from other non-consensual restrictions on their physical autonomy."*

It must be noted again that the right to be free from all forms of violence and coercion that affect sexual and reproductive health has a gender perspective which derives from various international human rights instruments, particularly the Convention on the Elimination of All Forms of Discrimination against Women. It implies the right to make decisions regarding reproduction without discrimination, coercion or violence, and therefore it is closely connected with the right to personal integrity. This right also requires the state to protect individuals, particularly women, from undue family, social and cultural pressures that diminish their ability to decide regarding sexual or reproductive matters. Such pressures include being forced into marriage at an early age without the full consent of both parties or the practice of female circumcision. The right also implies a prohibition of state-condoned practices such as forced sterilization, violence and sexual abuse....

8.4. The *Constitutional Bundle* as a limit on the legislature's discretion over criminal matters

The *Constitutional Bundle* also limits the legislature's discretion with regard to criminal matters, as was recognized by this Court in Decision C-205, 2003:

> *The legislature has a broad margin of discretion when it comes to defining social conduct that is so harmful to a greater protected good that it must become crime. This decision is within the legisla-*

ture's realm of action on the basis of democracy, and these norms reflect the predominant societal values at the time. However, this discretion is not unlimited as the Constitutional Bundle *provides an axiological limit on the exercise of this discretion. Therefore, when defining which conduct constitutes a crime as well as defining issues of criminal procedure, the legislature must take into account the entirety of the legal system, and in particular, it must respect the rights and dignity of others, as has been held on various occasions and for some time now in the jurisprudence of this Court....*

In a similar manner, the Constitutional Court has said that "*Under article 93 of the Constitution, constitutional rights and obligations must be interpreted in harmony with international human rights treaties to which Colombia is a signatory. This means that international jurisprudence from the tribunals in charge of interpreting those treaties constitute a relevant interpretation guide when establishing the meaning of fundamental constitutional rights.*" This position has been stated in numerous decisions, and permits the conclusion that international jurisprudence provides a relevant guide for interpreting those rights contained in international treaties that form part of the *Constitutional Bundle*. This is different from saying that such international jurisprudence is part of the *Constitutional Bundle*....

This distinction aside, international human rights treaties, which, according to constitutional jurisprudence, are part of the *Constitutional Bundle*, provide a clear limit on the legislature's discretion over criminal matters. Accordingly, various articles of the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the International Covenant on Economic, Social and Cultural Rights, while neither dispositive nor preemptive of the legislature's discretion, are relevant in the analysis of the constitutionality of the total ban on abortion....

8.5. Proportionality and reasonability as limits to the legislature's discretion over criminal matters

...The political change from a liberal state, founded on national sovereignty and the rule of law, to a social state whose essential objectives are, among others, service to the community, the guarantee of fundamental constitutional principles, rights and duties, and the protection of constitutional rights and freedoms (article 2 of the Constitution) requires a renunciation of absolutist theories about the autonomy of the legislature with regard to criminal matters. The defendant's fundamental rights to dignity and integrity, which are protected by the Constitution (article 5 of the Constitution), limit society's ability to legislate in criminal matters. The axiological content of the Constitution limits the exercise of the power and responsibility of the public authorities (article 6 of the Constitution). The social aspect of the Constitution works to balance the public authority's restricting force so that free will is aligned with reason. Only a proportionate use of the state's punitive power with respect to constitutional rights and freedoms can guarantee a just social order, founded in human dignity and solidarity.

Thus, the type and length of a penalty are not matters entirely to be decided by democratic will. The Constitution imposes clear limits on the legislature (articles 11 and 12 of the Constitution). From the right to equality, principles such as reasonableness and proportionality follow and justify a different treatment depending on the particular circumstances of the case (article 13 of the Constitution), thus requiring an evaluation of the relationship between the ends and the means used to achieve those ends....

Thus, the legislature may choose from amongst the different available measures those that it considers the most adequate for the protection of legitimate ends, and it may adopt criminal laws penalizing conduct that threatens or infringes upon constitutionally protected values, rights or principles. However, the legislature's discretion is subject to various constitutional limits, including the principle of proportionality, which plays two different limiting roles. First, a criminal law cannot impose a disproportionate restriction on the fundamental rights in question. For example, it cannot constitute a perfectionist measure, by means of which the state seeks to impose an ideal model of conduct. Nor can it require a complete sacrifice of any individual's fundamental right in order to serve the general interests of society or in order to give legal priority to other protected values.

Second, the principle of proportionality must exist within the Penal Code because in a democratic state criminal sanctions, as the utmost infringement upon personal liberties and human dignity — both axiological grounds of a democratic state — must only be used when justified and necessary to punish serious and harmful conduct, and must also be proportionate to the crime....

An analysis of proportionality is necessary to determine whether the legislature, in aiming to protect the unborn fetus, affected the rights of women in a disproportionate manner and overstepped the limits within which it can exercise its discretion over criminal matters.

9. The issue of abortion in comparative law

[The court examines decisions from the constitutional courts of the United States, Germany and Spain]

...When constitutional tribunals have examined the constitutionality of laws governing the termination of pregnancy, they have coincided in the need to balance the various interests at stake; on one hand, the life of the fetus, which is constitutionally relevant and therefore should be protected, and on the other hand, the rights of the pregnant woman. Even though the various tribunals have differed on which of those interests must prevail in particular cases, they have shared common ground in affirming that a total prohibition on abortion is unconstitutional because under certain circumstances it imposes an intolerable burden on the pregnant woman which infringes upon her constitutional rights.

10. The case before the Court

10.1. The unconstitutionality of a total prohibition of abortion

...In the case at hand, as has been held numerous times, the life of the fetus is entitled to protection under constitutional law and therefore the decisions of the pregnant woman regarding the termination of her pregnancy go beyond

the sphere of her private autonomy and implicate the interests of both the state and the legislature....

It is not the role of the constitutional judge to determine the character or the nature of the measures that the legislature should adopt in order to protect a particular state interest. That is an eminently political decision reserved for the legislative branch, which has the legitimate democratic ability to adopt those measures. The intervention of the constitutional judge comes *a posteriori* and only in order to examine whether the legislature has exercised its powers within the limits of its discretion.

If the legislature decides to serve legitimate ends by adopting criminal measures, its margin of discretion is limited due to the severity of such measures and their potential to seriously impair human dignity and individual liberties. In the case of abortion, the decision is extremely complex because the crime impacts various rights, principles and values, all of which are constitutionally relevant. Accordingly, defining which should prevail and in what measure is a decision with profound social repercussions which may alter as society transforms and public policy changes. The legislature has the ability to modify its decisions in response to such changes, and it is the branch responsible for providing the state's response to competing constitutional rights, principles and values....

Even though the protection of the fetus through criminal law is not in itself disproportionate and penalizing abortion may be constitutional, the criminalization of abortion *in all circumstances* entails the complete pre-eminence of the life of the fetus and the absolute sacrifice of the pregnant woman's fundamental rights. This result is, without a doubt, unconstitutional.

In effect, one of the characteristics of constitutional regimes with a high degree of axiological content, such as the Colombian Constitution of 1991, is the coexistence of different values, rights and principles, none of which is absolute and none of which prevails over the rest. This is one of the fundamental pillars of proportionality that must be utilized as an *instrument* to resolve the tension amongst laws in a structured and principled manner.

Thus, a criminal law that prohibits abortion in all circumstances extinguishes the woman's fundamental rights, and thereby violates her dignity by reducing her to a mere receptacle for the fetus, without rights or interests of constitutional relevance worthy of protection.

Determining under which circumstances it is excessive to require a woman to continue a pregnancy because it results in an infringement of a woman's fundamental rights is an exercise within the legislature's sphere. Once the legislature has decided that criminal law is the most appropriate way to protect the life of the fetus, then the legislature must set out the circumstances under which it is not excessive to sacrifice the rights of the pregnant woman. Nonetheless, if the legislature does not establish those circumstances, it is then up to the constitutional judge to prevent a disproportionate infringement of the fundamental rights of the pregnant woman. This does not mean, however, that the legislature lacks discretion to deal with this matter within constitutional limits.

Even though the Penal Code contains a general prohibition of abortion, the articles in question demonstrate that under certain circumstances the legislature

did establish mitigating factors and even provided the judiciary with the discretion to not impose a penalty in a particular case. This exclusion relates to pregnancies resulting from rape, sexual abuse, non-consensual artificial insemination or implantation of a fertilized ovule. (article 124 of the Penal Code)

In these circumstances, the legislature decided that the penalty for abortion should be mitigated in light of the fundamental rights of the woman involved, such as her dignity and her right to the free development of the individual. However, the legislature decided that even in those circumstances, where the woman's dignity and free development were imperiled, she should be tried and sentenced as a criminal. A measure such as this is disproportionate because the conduct continues to be criminal, which seriously infringes on the constitutional rights of the pregnant woman.

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This Court is of the view that under the enumerated circumstances, abortion does not constitute a crime. This is not only because that result was originally contemplated by the legislature, but also because the absolute prevalence of the fetus' rights in these circumstances implies a complete disregard for human dignity and the right to the free development of the pregnant woman whose pregnancy is not the result of a free and conscious decision, but the result of arbitrary, criminal acts against her in violation of her autonomy; acts that are penalized in the Penal Code.

With regard to the infringement of the right to human dignity and the autonomy of the pregnant woman, it is worth citing portions of the concurring opinion in Decision C-647, 2001 which stated:

When a woman is the victim of rape or she is the victim of any of the types of conduct described in the paragraph in question, her right to dignity, her right to intimacy and her right to autonomy and freedom of conscience are blatantly and arbitrarily infringed upon. It is hard to imagine a more serious violation of those rights and a conduct more blatantly against social harmony among equals. A woman who becomes pregnant as a result of rape cannot be legally required to act as a heroine and take on the burden that continuing with the pregnancy entails. Nor can her fundamental rights be disregarded as would be the case if she were required to carry the pregnancy to term against her will, turning her into a mere instrument of procreation. Ordinarily, a woman in this situation will not act indifferently or as a heroine. When a woman has been the victim of rape or has been utilized as an instrument for procreation, she may make the exceptional and admirable decision to carry the pregnancy to term. Despite the lack of government assistance for her or the future child, a woman has the right to decide to continue with the pregnancy if she has the strength to do so and her conscience tells her to do so. But she cannot be obligated to procreate nor be subjected to criminal sanctions for exercising her constitutional rights while trying to lessen the consequences of the crime of which she was a victim.

Taking the duty to protect the life of the fetus in these exceptional circumstances to the extreme of criminalizing the termination of pregnancy is to give

an absolute privilege to the life of the fetus over the fundamental rights of the pregnant woman, in particular, her right to choose whether or not to carry to term an unwanted pregnancy. Such an intrusion by the state on her right to the free development of the individual and her human dignity is disproportionate and arbitrary. A woman's right to dignity prohibits her treatment as a mere instrument for reproduction, and her consent is therefore essential to the fundamental, life-changing decision to give birth to another person.

Pregnancy resulting from incest should also be included within these exceptional circumstances because it represents another example of a pregnancy resulting from a punishable act, where, in most cases, the woman does not consent. Even when there is no physical violence involved, incest generally infringes on a woman's autonomy. It also affects the stability of the family (an institution protected by the Constitution) and results in a violation of the constitutional principle of solidarity, which is, as has been held previously by this Court, a fundamental guiding principle of the Constitution. The criminalization of abortion in this circumstance amounts to a disproportionate and unreasonable infringement on the liberty and dignity of women.

When the pregnancy is the result of rape, sexual abuse, non-consensual artificial insemination or implantation of a fertilized ovule, or incest, it is necessary that such criminal acts be reported accordingly to the competent authorities.

To this end, the legislature may enact regulations as long as the regulations do not preclude access to abortion and do not impose a disproportionate burden on the rights of women. For instance, the regulations cannot require forensic evidence of actual penetration after a report of rape or require evidence to establish lack of consent to the sexual relationship. Nor can they require that a judge or a police officer find that the rape actually occurred; or require that the woman obtain permission from, or be required to notify, her husband or her parents.

The circumstances above are not the only ones in which it is disproportionate to criminalize abortion.

Also, when there is a risk to the health and life of the pregnant woman, it is clearly excessive to criminalize abortion since it would require the sacrifice of the fully formed life of the woman in favor of the developing life of the fetus. If the criminal penalty for abortion rests on valuing the life of the developing fetus over other constitutional interests involved, then criminalization of abortion in these circumstances would mean that there is no equivalent recognition of the right to life and health of the mother.

This Court has held on several occasions that the state cannot oblige a person, in this case a pregnant woman, to perform heroic sacrifices and give up her own rights for the benefit of others or for the benefit of society in general. Such an obligation is unenforceable, even if the pregnancy is the result of a consensual act, in light of article 49 of the Constitution, which mandates that all persons take care of their own health.

The importance of "life" as a constitutional value and the resulting obligation on the state to protect it imposes on the legislature the duty to enact protective measures through legislation. In Decision C-309, 1997, this Court held:

The Constitution is not neutral with regard to the values of life and health; rather, it clearly favors them. Thus, the state has a particular interest in seeing these values flourish in society's day-to-day life. Authorities cannot be indifferent to a citizen's decision that puts his or her life or health at risk. The state is authorized to act, through protective measures, even against the will of the citizens, in order to prevent an individual from harming him or herself. Protective measures are constitutional. This does not mean, however, that any measure of this nature is allowed, because, on occasion, the state, or society, in aiming to protect a person from his or her self, ends up infringing upon this person's autonomy. This Court, in recognizing the constitutionality of these measures, has been very careful in stating that they will lose their constitutional character if they turn into "perfectionist" measures, that is, in the "unwanted imposition on a citizen of an ideal of life and an ideal of what is worthy and virtuous, which is contrary to the citizen's beliefs, and is in violation of autonomy, dignity, and the right to the free development of the individual, all fundamental pillars of our legal system."

For the present analysis, it is relevant to consider various international human rights bodies' interpretation of international treaties that guarantee women's right to life and health. For instance, article 6 of the International Covenant on Civil and Political Rights, article 12.1 of the Convention on the Elimination of All Forms of Discrimination against Women and article 12 of the International Covenant on Economic, Social and Cultural Rights, are all part of the *Constitutional Bundle* and thus impose an obligation on the state to adopt measures to protect life and health. The prohibition of abortion where the life and health of the mother are at risk may therefore violate Colombia's obligations under international law.

These obligations do not pertain only where the woman's physical health is at risk, but also where her mental health is at risk. It must be noted that the right to health, under article 12 of the International Covenant on Economic, Social and Cultural Rights, includes the right to the highest achievable level of both physical and mental well-being. Pregnancy may at times cause severe anguish or even mental disorders, which may justify its termination if so certified by a doctor.

Some of the interveners argue that when the life or the health of the pregnant woman are at risk due to the pregnancy, article 32-7 of the Penal Code allows for the invocation of the necessity defense to avoid criminal liability. On this point, this Court must warn that the necessity defense does not resolve the constitutional tension at issue here for two reasons. First, application of the necessity defense presupposes that the legislature can completely criminalize abortion, which, as has been discussed here, is unconstitutional because it disregards the right to life and health of the mother in favor of protecting the fetus, regardless of the woman's particular circumstances. Second, for the necessity defense to apply under article 32-7, there must be actual and imminent danger which is not preventable in any other way, which was not willfully caused, and which the person does not have the legal duty to bear. These requirements do not clearly address the risks to the life or health of a pregnant woman and they impose an unreasonable burden on her.

A final circumstance that must be addressed involves medically-certified malformations of the fetus. Although there are different types of malformations, those extreme malformations incompatible with life outside the womb pose a constitutional issue that must be resolved. Those circumstances are different from having identified an illness of the fetus that may be cured during pregnancy or after birth. Rather, those circumstances involve a fetus that is unlikely to survive due to a severe malformation, as certified by a doctor. In these cases, the duty of the state to protect the fetus loses weight, since this life is in fact not viable. Thus, the rights of the woman prevail and the legislature cannot require her, under the threat of a criminal penalty, to carry a pregnancy to term.

An additional reason for the decriminalization of abortion in these extreme circumstances is that imposing a criminal penalty in order to protect the fetus results in the imposition of an unreasonable burden on the pregnant woman, who is forced to go through a pregnancy only to lose the growing life due to the malformation.

Furthermore, in a situation where the fetus is not viable, forcing the mother, under the threat of criminal charges, to carry the pregnancy to term amounts to cruel, inhumane and degrading treatment, which affects her moral well-being and her right to dignity.

In both cases described above, where the continuation of the pregnancy puts the life or health of the pregnant woman at risk or when there are serious malformations of the fetus incompatible with life outside the womb, there should be a medical certificate to validate the circumstances under which the abortion cannot be penalized.

It is not in the realm of the Court's knowledge to stipulate when the continuation of a pregnancy puts the life or health of the mother at risk or when there are serious malformations of the fetus. Such determinations are to be made by medical practitioners acting within the ethical standards of their profession.

From a constitutional standpoint, if these requirements are met — a medical certificate or a report to the authorities, depending on the circumstances — neither the pregnant woman nor the doctor who performs the abortion can be the subject of criminal charges under the three circumstances in which article 122 has been found unconstitutional. Each of these three circumstances is independent from one another. Therefore, it cannot be required, for example, to establish after a rape that the life or health of the mother is at risk or that the fetus is not viable. In the case of rape or incest, the good faith of the woman who reports the incident to the authorities shall be presumed and it is enough for her to show a copy of the report to the doctor.

It must be noted that conscientious objection is not a right that legal entities or the state can exercise. It is only possible for natural persons to exercise this right. Hospitals, clinics or other health centers cannot raise a conscientious objection to performing an abortion when all the requirements established by this decision are met. When it comes to natural persons, it must be underscored that a conscientious objection relates to a religious belief and the opinion of the doctor with regard to abortion should not be questioned. However, women's fundamental rights cannot be disregarded, thus, if the doctor raises a conscientious objection, the doctor must immediately refer the pregnant woman to another medical practitioner who can perform the abortion. That referral is without prej-

udice to a determination that may be made afterwards, through mechanisms established by the medical profession, regarding whether the objection was legitimate.

Even though regulations are not necessary for the immediate decriminalization of abortion in the three circumstances presented in this decision, the legislature or the authorities regulating social and health services are not prevented from adopting decisions within their discretion and in order to fulfill their duties with respect to the constitutional rights of women; for example, taking measures that will effectively ensure women access in conditions of equality and safety in the area of health and social services.

In these three circumstances, the legislature is proscribed from establishing requirements that limit access to abortion services or that amount to a disproportionate burden on the rights of women.

The above analysis demonstrates that even though the decision to criminalize abortion as a measure to protect the life of the fetus is constitutionally justified — although it is not the only option open to the legislature, as it can choose social service measures for this purpose — the total prohibition of abortion in all cases is a blatantly disproportionate measure as it infringes upon the rights of the pregnant woman, protected by the Constitution of 1991 as well as by the international human rights treaties that are part of the *Constitutional Bundle*.

The protection of women's rights does not call for the complete invalidation of article 122, because this would leave life unprotected. Furthermore, it would

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prevent the legal system from regulating abortion in circumstances where the Constitution allows for it.

To conclude, under the principle that calls for the preservation of laws, it is necessary to declare the conditional constitutionality of the challenged article. In accordance with this decision, abortion will not be considered a crime in the circumstances described herein. In this manner, protection for the life of the fetus will not disproportionately override the rights of the pregnant woman.

The Court declares that article 122 of the Penal Code is constitutional with the understanding that abortion is not criminal in the following circumstances: a) when the continuation of the pregnancy presents risks to the life or the health of the woman, as certified by a medical doctor; b) when there are serious malformations of the fetus that make the fetus not viable, as certified by a medical doctor; and c) when the pregnancy is the result of any of the following criminal acts, duly reported to the authorities: incest, rape, sexual abuse, or artificial insemination or implantation of a fertilized ovule without the consent of the woman.

10.2. The constitutionality of the expression *"or on a woman of less than 14 years of age"* in article 123 of the Penal Code

Article 123 of the Penal Code penalizes abortion when it is performed without the consent of the woman or when it is performed on a woman of less than 14 years of age. The challenged article established a presumption that a woman of less than 14 years of age is legally incapable of consenting to an abortion and therefore her consent is irrelevant from the perspective of the criminal law.

In this case, the article is challenged on the grounds that the presumption infringes on the human dignity, the right to the free development of the individual, the health and even the life of the pregnant woman of less than 14 years of age, because, according to the Plaintiffs, the minor is capable of giving valid consent to an abortion.

In order to address this portion of the constitutional challenge, it is necessary to briefly review the jurisprudence of this Court relating to the right to the free development of the individual and to informed consent by minors to medical interventions.

With regard to the right to the free development of the individual, this Court has held that even though all persons possess this right, autonomy involves decisions which affect a person "in those stages in life in which the person has enough judgment to make a decision" or, in other words, "the right to the free development of the individual must be evaluated differently at each stage of life." Accordingly, this Court has held that minors may be subject, in certain circumstances, to greater restrictions on their exercise of the right, just as are legally incompetent persons and other temporarily or permanently psychologically immature individuals.

These criteria have been subject to refinement through decisions dealing with the protection of constitutional rights. First, with regard to minors, the Court has accepted that the classification in article 34 of the Civil Code (infants, pre-adolescents and adolescents) is based on "the result of a process by which the individual advances gradually in the knowledge of him or her self and in the recognition and use of his or her potential and abilities, discovering his or herself as an autonomous, singular and different being." This classification does not define who is entitled to the right to the free development, but it does permit certain specific restrictions on that right based on the degree of maturity of the person....

It is also relevant to consider the jurisprudential criteria established by this Court in decision SU-337 of 1999 regarding the validity of a minor's consent to treatment or medical interventions affecting one's sexual identity. The Court held:

> *On the other hand, a minor is not totally deprived of autonomy, and, in many circumstances, the minor's opinion must not only be taken into account but also respected. The Convention on the Rights of the Child, which was adopted by Colombia in Law 12 of 1991, and which therefore prevails in our legal system (article 93 of the Constitution), expressly establishes in article 12 that "state parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." Judicial decisions both nationally and internationally have recognized the autonomy of minors to make certain decisions relating to medical procedures, even if these decisions are not in agreement with the opinion of their parents.*

This led the Court to conclude that the age of the minor is not an absolute criterion for authorizing treatments and medical procedures, even when these are of an invasive nature:

Lastly, not even age is a purely objective criterion because, given the aforementioned distinction between legal capacity and autonomy to make health care decisions, it is understood that the age of the patient serves as a guide for assessing the minor's intellectual and emotional maturity, but is not an element with an absolute quality. It is reasonable to assume that an infant is less autonomous than an adolescent and therefore the degree of protection of their right to the free development of the individual is different in the two cases. Personality is an evolving process of maturity, such that humans go from a state of almost total dependency at birth to full autonomy at adulthood. The access to autonomy is therefore gradual as it is "the result of a process by which the individual advances gradually in the knowledge of him or her self and in the recognition and use of his or her potential and abilities, discovering him or herself as an autonomous, singular and different being." This progressive development of personality and autonomy is to a great degree linked to age, which justifies distinctions such as those made by Roman law and the Civil Code among infants, preadolescents and young adults. Thus, the age of the patient can be taken as an indication of the degree of autonomy, but the number of years is not an absolute criterion, as minors of identical age may, in fact, show different capacities for self- determination, and therefore may enjoy different protections of the right to the free development of the individual. This Court has established that the protection given by this fundamental right "is stronger as the ability of self-determination of the minor increases, which — it is assumed — becomes fully developed at the age at which the law fixes the coming of age." There is then, an "inverse relationship of proportionality between the capacity of self-determination of the minor and the legitimacy of interventions into a minor's decisions; thus, the higher the degree of intellectual capacity, the lesser the legitimacy of interventions into the decisions of the minor."

Thus, constitutional jurisprudence has recognized that minors possess the right to the free development of the individual and may consent to medical treatments and interventions, even when they are of a highly invasive nature. Purely objective criteria such as age have been rejected as the only standard for determining whether minors can consent to medical treatments and interventions. With regard to abortion, the legislature, if it deems appropriate, may establish rules in the future regarding representation of minors or the assertion of minors' rights, which shall not invalidate the consent of a minor of less than 14 years of age.

From this perspective, any protective measure that nullifies the legal effect of a minor's consent, such as the challenged expression in article 123 of the Penal Code, is unconstitutional because it completely annuls the minor's rights to the free development of the individual, autonomy and dignity.

Furthermore, this protective measure reveals itself as a counter-productive and ineffective means of achieving its end in cases where it is necessary to perform an abortion to protect the health or life of the pregnant minor. Because of the presumption established by the legislature, any person who performs an abor-

tion on a minor of less than 14 years of age can be charged with violation of article 123 of the Penal Code, even where the abortion is necessary to protect the life or health of the minor and she has given her consent.

For the reasons explained above, the Court must conclude that article 123 of the Penal Code annuls the pregnant minor's fundamental rights to the free development of the individual, autonomy and dignity, and is inadequate to achieve its stated goals. It is therefore clearly disproportionate and unconstitutional. Hence, the expression *"or on a woman of less than 14 years of age"* is hereby declared unconstitutional.

10.3. On the constitutionality of article 124 of the Penal Code

All of the circumstances cited as mitigating factors in the challenged article are included, by virtue of this decision, together with those not expressly mentioned in the article, as circumstances under which abortion is not a crime.

As a consequence of this decision, the article in question and the paragraph in question are superfluous because the Court declares that, instead of constituting mitigating factors, the circumstances no longer constitute a crime. The article shall be deleted from the Code....

11. Final considerations

Having weighed the duty to protect the life of the fetus against the fundamental rights of the pregnant woman, this Court concludes that the total prohibition of abortion is unconstitutional and that article 122 of the Penal Code is constitutional on the condition that the three circumstances described in this decision are excluded from its ambit and on the understanding that all three circumstances are autonomous and independent of one another.

However, the legislature in its discretion may decide that abortion is not penalized in additional circumstances. In the present decision, the Court has limited itself to the three extreme circumstances that violate the Constitution when the pregnant woman has consented to the abortion and the pertinent requirements have been met. However, aside from these circumstances, the legislature may foresee others in which public policy calls for the decriminalization of abortion, taking into consideration the circumstances under which abortions are performed, as well as socio-economic situations and other public health policy objectives.

For all legal purposes, including the application of the principle of favorability, the present decision shall enter into force immediately and the enjoyment of the rights protected in this decision do not require further legislation or regulations.

This does not prevent the authorities with discretion over the issues, if they so deem convenient, from issuing legislation establishing public policies in harmony with the present decision.

The Court must clarify that the present decision does not require women to choose to abort. Rather, in the event that a woman finds herself in one of the exceptional circumstances here mentioned, she can decide to carry the pregnancy to term and her decision is constitutionally protected. What the Court is

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establishing in the present decision is the ability of women in the described circumstances to choose to terminate their pregnancies without criminal consequences, so long as they so consent.

VII. DECISION

Based on the arguments expressed above, and in the name of justice on behalf of the people and under the authority given to it by the Constitution, the Constitutional Court, sitting in full chamber

DECIDES

First. To deny the requests for nullity as explained in point 2.3 of the present decision.

Second. To declare **CONSTITUTIONAL** article 32, paragraph 7 Law 599 of 2000, for the reasons explained in the present decision.

Third. To declare **CONSTITUTIONAL** article 122 Law 599 of 2000, with the understanding that abortion is not a crime when, with the consent of the woman, the termination of pregnancy is performed in the following circumstances: i) when the continuation of the pregnancy presents risks to the life or the health of the woman, as certified by a medical doctor; ii) when there are serious malformations of the fetus incompatible with life outside the womb, as certified by a medical doctor; and iii) when the pregnancy is the result of any of the following criminal acts, duly reported to the proper authorities: incest,

rape, sexual abuse, or artificial insemination or implantation of a fertilized ovule without the woman's consent.

Fourth. To declare **UNCONSTITUTIONAL** the expression "*or on a woman of less than 14 years of age...*" in article 123 of Law 599 of 2000.

Fifth. To declare **UNCONSTITUTIONAL** article 124 of Law 599 of 2000.

This decision is to be notified, communicated and inserted in the official publication of the Constitutional Court, complied with, and filed.

JAIME CÓRDOBA TRIVIÑO
President
SELF- RECUSED

RODRIGO ESCOBAR GIL
Vice-President
DISSENTING

JAIME ARAÚJO RENTERÍA
Honorable Justice
CONCURRING

ALFREDO BELTRÁN SIERRA
Honorable Justice

MANUEL JOSÉ CEPEDA ESPINOSA
Honorable Justice
CONCURRING

MARCO GERARDO MONROY CABRA
Honorable Justice
DISSENTING

HUMBERTO ANTONIO SIERRA PORTO
Honorable Justice

ÁLVARO TAFUR GÁLVIS
Honorable Justice
DISSENTING

CLARA INÉS VARGAS HERNÁNDEZ
Honorable Justice

MARTHA VICTORIA SÁCHICA DE MONCALEANO
General Secretary

Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott *Appellants*
v.
Her Majesty The Queen *Respondent*
and
The Attorney General of Canada *Intervener*
INDEXED AS: R. v. MORGENTALER
File No.: 19556.
1986: October 7, 8, 9, 10; 1988: January 28.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and La Forest JJ.
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

The judgment of Dickson C.J. and Lamer J. was delivered by

THE CHIEF JUSTICE--The principal issue raised by this appeal is whether the abortion provisions of the *Criminal Code*, R.S.C. 1970, c. C-34, infringe the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as formulated in s. 7 of the *Canadian Charter of Rights and Freedoms*. The appellants, Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott, have raised thirteen distinct grounds of appeal. During oral submissions, however, it became apparent that the primary focus of the case was upon the s. 7 argument. It is submitted by the appellants that s. 251 of the *Criminal Code* contravenes s. 7 of the *Canadian Charter of Rights and Freedoms* and that s. 251 should be struck down. Counsel for the Crown admitted during the course of her submissions that s. 7 of the *Charter* was indeed "the key" to the entire appeal. As for the remaining grounds of appeal, only a few brief comments are necessary. First of all, I agree with the disposition made by the Court of Appeal of the non-*Charter* issues, many of which have already been adequately dealt with in earlier cases by this Court. I am also of the view that the arguments concerning the alleged invalidity of s. 605 under ss. 7 and 11 of the *Charter* are unfounded. In view of my resolution of the s. 7 issue, it will not be necessary for me to address the appellants' other *Charter* arguments and I expressly refrain from commenting upon their merits.

During argument before this Court, counsel for the Crown emphasized repeatedly that it is not the role of the judiciary in Canada to evaluate the wisdom of legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 671, [hereinafter *"Morgentaler (1975)"*] I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to

the abortion question. See, e.g., *Roe v. Wade*, 410 U.S.113 (1973); *Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights); *The Abortion Decision of the Federal Constitutional Court -- First Senate --of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c.87 (U.K.)

But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler (1975)*, at p. 671, that:

> The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*. As Justice McIntyre states in his reasons for judgment, at p. 138, "the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*." It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

I

The Court stated the following constitutional questions:

1. Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

2. If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

3. Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?

4. Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?

5. Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

6. Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?

7. If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*) 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

The Attorney General of Canada intervened to support the respondent Crown.

II

Relevant Statutory and Constitutional Provisions

Criminal Code

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes

(*a*) the administration of a drug or other noxious thing,

(*b*) the use of an instrument, and

(*c*) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

(*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (*a*) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(*d*) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

(*a*) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(*c*) issued, by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(*b*) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(*c*), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection "accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;
"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;
"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;
"Minister of Health" means
(*a*) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,
(*a*.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,
(*b*) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,
(*c*) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and
(*d*) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;
"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;
"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.
(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

The Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

III

Procedural History

The three appellants are all duly qualified medical practitioners who together set up a clinic in Toronto to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s. 251(4). The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances.

Indictments were preferred against the appellants charging that they conspired with each other between November 1982 and July 1983 with intent to procure the miscarriage of female persons, using an induced suction technique to carry out that intent, contrary to s. 423(1)(*d*) and s. 251(1) of the *Criminal Code*.

* * *

IV

Section 7 of the *Charter*

In his submissions, counsel for the appellants argued that the Court should recognize a very wide ambit for the rights protected under s. 7 of the *Charter*. Basing his argument largely on American constitutional theories and authorities, Mr. Manning submitted that the right to "life, liberty and security of the person" is a wide-ranging right to control one's own life and to promote one's individual autonomy. The right would therefore include a right to privacy and a right to make unfettered decisions about one's own life.

In my opinion, it is neither necessary nor wise in this appeal to explore the broadest implications of s. 7 as counsel would wish us to do. I prefer to rest my conclusions on a narrower analysis than that put forward on behalf of the appellants. I do not think it would be appropriate to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of *Charter* interpretation. The Court should be presented with a wide variety of claims and factual situations before articulating the full range of s. 7 rights. I will therefore limit my comments to some interpretive principles already set down by the Court and to an analysis of only two aspects of s. 7, the right to "security of the person" and "the principles of fundamental justice".

A. *Interpreting s. 7*

The goal of *Charter* interpretation is to secure for all people "the full benefit of the *Charter*'s protection": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. To attain that goal, this Court has held consistently that the proper technique for the interpretation of *Charter* provisions is to pursue a "purposive" analysis of the right guaranteed. A right recognized in the *Charter* is "to be understood, in other words, in the light of the interests it was meant to protect" . . .

In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 204, Justice Wilson emphasized that there are three distinct elements to the s. 7 right, that "life, liberty, and security of the person" are independent interests, each of which must be given independent significance by the Court (p. 205). This interpretation was adopted by a majority of the Court, *per* Justice Lamer, in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500. It is therefore possible to treat only one aspect of the first part of s. 7 before determining whether any infringement of that interest accords with the principles of fundamental justice. (See *Singh*, *Re B.C. Motor Vehicle Act*, and *R. v. Jones*, [1986] 2 S.C.R. 284.)

With respect to the second part of s. 7, in early academic commentary one of the principal concerns was whether the reference to "principles of fundamental justice" enables the courts to review the substance of legislation . . . In *Re B.C. Motor Vehicle Act*, Lamer J. noted at p. 497 that any attempt to draw a sharp line between procedure and substance would be ill-conceived. He suggested further that it would not be beneficial in Canada to allow a debate which is rooted in United States constitutional dilemmas to shape our interpretation of s. 7 (p. 498):

> We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions.

Lamer J. went on to hold that the principles of fundamental justice referred to in s. 7 can relate both to procedure and to substance, depending upon the circumstances presented before the Court.

I have no doubt that s. 7 does impose upon courts the duty to review the substance of legislation once it has been determined that the legislation infringes an individual's right to "life, liberty and security of the person". The section states clearly that those interests may only be impaired if the principles of fundamental justice are respected. Lamer J. emphasized, however, that the courts should avoid "adjudication of the merits of public policy" (p. 499). In the present case, I do not believe that it is necessary for the Court to tread the fine line between substantive review and the adjudication of public policy. As in the *Singh* case, it will be sufficient to investigate whether or not the impugned legislative provisions meet the procedural standards of fundamental justice. First it is necessary to determine whether s. 251 of the *Criminal Code* impairs the security of the person.

B. *Security of the Person*

The law has long recognized that the human body ought to be protected from interference by others. At common law, for example, any medical procedure carried out on a person without that person's consent is an assault. Only in emergency circumstances does the law allow others to make decisions of this nature. Similarly, art. 19 of the *Civil Code of Lower Canada* provides that "The human person is inviolable" and that "No person may cause harm to the person of another without his consent or without being authorized by law to do so". "Security of the person", in other words, is not a value alien to our legal landscape. With the advent of the *Charter*, security of the person has been elevated to the status of a constitutional norm. This is not to say that the various forms of protection accorded to the human body by the common and civil law occupy a similar status. "Security of the person" must be given content in a manner sensitive to its constitutional position. . . . Nor is it to say that the state can never impair personal security interests. There may well be valid reasons for interfering with security of the person. It is to say, however, that if the state does interfere with security of the person, the *Charter* requires such interference to conform with the principles of fundamental justice.

The appellants submitted that the "security of the person" protected by the *Charter* is an explicit right to control one's body and to make fundamental decisions about one's life. The Crown contended that "security of the person" is a more circumscribed interest and that, like all of the elements of s. 7, it at most relates to the concept of physical control, simply protecting the individual's interest in his or her bodily integrity.

* * *

. . . Lamer J. held, at pp. 919-20, that even in the specific context of s. 11(*b*):

> . . . security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" . . . These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

If state-imposed psychological trauma infringes security of the person in the rather circumscribed case of s. 11(*b*), it should be relevant to the general case of s. 7 where the right is expressed in broader terms. . .

I note also that the Court has held in other contexts that the psychological effect of state action is relevant in assessing whether or not a *Charter* right has been infringed. In *R. v. Therens*, at p. 644, Justice Le Dain held that "The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary" for the purposes of defining "detention" in s. 10 of the *Charter*. . . .

* * *

The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.

I wish to reiterate that finding a violation of security of the person does not end the s. 7 inquiry. Parliament could choose to infringe security of the person if it did so in a manner consistent with the principles of fundamental justice. The present discussion should therefore be seen as a threshold inquiry and the conclusions do not dispose definitively of all the issues relevant to s. 7. With that caution, I have no difficulty in concluding that the encyclopedic factual submissions addressed to us by counsel in the present appeal establish beyond any doubt that s. 251 of the *Criminal Code* is *prima facie* a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not wish to continue with a pregnancy.

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of

clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice.

Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s. 251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s. 251 creates additional glaring breaches of security of the person. The evidence indicates that s. 251 causes a certain amount of delay for women who are successful in meeting its criteria. In the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being.

More specifically, in 1977, the *Report of the Committee on the Operation of the Abortion Law* (the Badgley Report) revealed that the average delay between a pregnant woman's first contact with a physician and a subsequent therapeutic abortion was eight weeks (p. 146). Although the situation appears to have improved since 1977, the extent of the improvement is not clear. The intervener, the Attorney General of Canada, submitted that the average delay in Ontario between the first visit to a physician and a therapeutic abortion was now between one and three weeks. Yet the respondent Crown admitted in a supplementary factum filed on November 27, 1986 with the permission of the Court that (p. 3):

> . . . the evidence discloses that some women may find it very difficult to obtain an abortion: by necessity, abortion services are limited, since hospitals have budgetary, time, space and staff constraints as well as many medical responsibilities. As a result of these problems a woman may have to apply to several hospitals.

If forced to apply to several different therapeutic abortion committees, there can be no doubt that a woman will experience serious delay in obtaining a therapeutic abortion. . . . In her *Report on Therapeutic Abortion Services in Ontario* (the Powell Report), Dr. studies showed that in Quebec the waiting time for a therapeutic abortion in hospital varied between one and six weeks.

These periods of delay may not seem unduly long, but in the case of abortion, the implications of any delay, according to the evidence, are potentially devastating. The first factor to consider is that different medical techniques are employed to perform abortions at different stages of pregnancy. The testimony of expert doctors at trial indicated that in the first twelve weeks of pregnancy, the relatively safe and simple suction dilation and curettage method of abortion is typically used in North America. From the thirteenth to the sixteenth week, the more dangerous dilation and evacuation procedure is performed,

although much less often in Canada than in the United States. From the sixteenth week of pregnancy, the instillation method is commonly employed in Canada. This method requires the intra-amniotic introduction of prostaglandin, urea, or a saline solution, which causes a woman to go into labour, giving birth to a foetus which is usually dead, but not invariably so. The uncontroverted evidence showed that each method of abortion progressively increases risks to the woman. . . .

The second consideration is that even within the periods appropriate to each method of abortion, the evidence indicated that the earlier the abortion was performed, the fewer the complications and the lower the risk of mortality. For example, a study emanating from the Centre for Disease Control in Atlanta confirmed that "D & E [dilation and evacuation] procedures performed at 13 to 15 weeks' gestation were nearly 3 times safer than those performed at 16 weeks or later". (Cates and Grimes, "Deaths from Second Trimester Abortion by Dilation and Evacuation: Causes, Prevention, Facilities" (1981), 58 *Obstetrics and Gynecology* 401, at p. 401. See also the Powell Report, at p. 36.) The Court was advised that because of their perceptions of risk, Canadian doctors often refuse to use the dilation and evacuation procedure from the thirteenth to sixteenth weeks and instead wait until they consider it appropriate to use the instillation technique. Even more revealing were the overall mortality statistics evaluated by Drs. Cates and Grimes. They concluded from their study of the relevant data that: Anything that contributes to delay in performing abortions increases the complication rates by 15 to 30%, and the chance of dying by 50% for each week of delay. These statistics indicate clearly that even if the average delay caused by s. 251 *per arguendo* is of only a couple of weeks' duration, the effects upon any particular woman can be serious and, occasionally, fatal.

It is no doubt true that the overall complication and mortality rates for women who undergo abortions are very low, but the increasing risks caused by delay are so clearly established that I have no difficulty in concluding that the delay in obtaining therapeutic abortions caused by the mandatory procedures of s. 251 is an infringement of the purely physical aspect of the individual's right to security of the person. . . .. The above physical interference caused by the delays created by s. 251, involving a clear risk of damage to the physical well-being of a woman, is sufficient, in my view, to warrant inquiring whether s. 251 comports with the principles of fundamental justice. However, there is yet another infringement of security of the person. It is clear from the evidence that s. 251 harms the psychological integrity of women seeking abortions. A 1985 report of the Canadian Medical Association, discussed in the Powell Report, at p. 15, emphasized that the procedure involved in s. 251, with the concomitant delays, greatly increases the stress levels of patients and that this can lead to more physical complications associated with abortion. A specialist in fertility control, Dr. Henry David, was qualified as an expert witness at trial on the psychological impact upon women of delay in the process of obtaining an abortion. He testified that his own studies had demonstrated that there is increased psychological stress imposed upon women who are forced to wait for abortions, and that this stress is compounded by the uncertainty whether or not a therapeutic abortion committee will actually grant approval.

Perhaps the most powerful testimony regarding the psychological impact upon women caused by the delay inherent in s. 251 procedures was offered at trial by Dr. Jane Hodgson, the Medical Director of the Women's Health Center in Duluth, Minnesota. She was called to testify as to her experiences with Canadian women who had come to the Women's Health Center for abortions. Her testimony was extensive, but the flavour may be gleaned from the following short excerpts:

> May I add one other thing that I think is very vital, and that is that many of these [Canadian] women come down because they know they will be delayed in getting, first, permission, then delayed in getting a hospital bed, or getting into the hospital, and so they know they will have to have saline [instillation] procedures. And some of them have been through this, and others know what it is about, and they will do almost anything to avoid having a saline procedure. And of course, that is -- I consider that a very cruel type of medical care and will do anything to help them to avoid this type of treatment.

The cost, the time consumed, the medical risks, the mental anguish -- all of this is cruelty, in this day and age, because it's [the instillation procedure] an obsolete procedure that is essentially disappearing in the United States.

I have already noted that the instillation procedure requires a woman actually to experience labour and to suffer through the birth of a foetus that is usually but not always dead. Statistics from 1982 indicated that 33.4 per cent of second trimester abortions in Ontario were done by instillation . . . The psychological injury caused by delay in obtaining abortions, much of which must be attributed to the procedures set out in s. 251, constitutes an additional infringement of the right to security of the person.

* * *

In summary, s. 251 is a law which forces women to carry a foetus to term contrary to their own priorities and aspirations and which imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria. It must, therefore, be determined whether that infringement is accomplished in accordance with the principles of fundamental justice, thereby saving s. 251 under the second part of s. 7.

C. *The Principles of Fundamental Justice*

Although the "principles of fundamental justice" referred to in s. 7 have both a substantive and a procedural component (*Re B.C. Motor Vehicle Act*, at p. 499), I have already indicated that it is not necessary in this appeal to evaluate the substantive content of s. 251 of the *Criminal Code*. My discussion will therefore be limited to various aspects of the administrative structure and procedure set down in s. 251 for access to therapeutic abortions.

In outline, s. 251 operates in the following manner. Subsection (1) creates an indictable offence for any person to use any means with the intent "to procure the miscarriage of a female person". Subsection (2) establishes a parallel indictable offence for any pregnant woman to use or to permit any means to be used with the intent "to procure her own miscarriage". The "means" referred to in subss. (1) and (2) are defined in subs. (3) as the administration of a drug or "other noxious thing", the use of an instrument, and "manipulation of any kind". The crucial provision for the purposes of the present appeal is subs. (4) which states that the offences created in subss. (1) and (2) "do not apply" in certain circumstances. The Ontario Court of Appeal in the proceedings below characterized s. 251(4) as an "exculpatory provision" ((1985), 52 O.R. (2d) 353, at p. 365). In *Morgentaler (1975)*, at p. 673, a majority of this Court held that the effect of s. 251(4) was to afford "a complete answer and defence to those who respect its terms".

The procedure surrounding the defence is rather complex. A pregnant woman who desires to have an abortion must apply to the "therapeutic abortion committee" of an "accredited or approved hospital". Such a committee is empowered to issue a certificate in writing stating that in the opinion of a majority of the committee, the continuation of the pregnancy would be likely to endanger the pregnant woman's life or health. Once a copy of the certificate is given to a qualified medical practitioner who is not a member of the therapeutic abortion committee, he or she is permitted to perform an abortion on the pregnant woman and both the doctor and the woman are freed from any criminal liability. 37. A number of definitions are provided in subs. (6) which have a bearing on the disposition of this appeal. An "accredited hospital" is described as a hospital accredited by the Canadian Council on Hospital Accreditation "in which diagnostic services and medical, surgical and obstetrical treatment" are provided. An "approved hospital" is a hospital "approved for the purposes of this section by the Minister of Health" of a province. A "therapeutic abortion committee" must be "comprised of not less than three members each of whom is a qualified medical practitioner" who is appointed by a hospital's administrative board. Interestingly, the term "health" is not defined for the purposes of s. 251, so it would appear that the therapeutic abortion committees are free to develop their own theories as to when a potential impairment of a woman's "health" would justify the granting of a therapeutic abortion certificate.

As is so often the case in matters of interpretation, however, the straightforward reading of this statutory scheme is not fully revealing. In order to understand the true nature and scope of s. 251, it is necessary to investigate the practical operation of the provisions. . . . the most serious problems with the functioning of s. 251 are created by procedural and administrative requirements established in the law. . . . [E]ven if a hospital is eligible to create a therapeutic abortion committee, there is no requirement in s. 251 that the hospital need do so. . . .[I]n 1976, of the 559 general hospitals which met the procedural requirements of s. 251, only 271 hospitals in Canada, or only 20.1 per cent of the total, had actually established a therapeutic abortion committee (p. 105).

. . . . The requirement that therapeutic abortions be performed only in "accredited" or "approved" hospitals effectively means that the practical availability of the exculpatory provisions of subs. (4) may be heavily restricted, even denied, through provincial

regulation. In Ontario, for example, the provincial government promulgated O. Reg. 248/70 under *The Public Hospitals Act*, R.S.O. 1960, c. 322, now R.R.O. 1980, Reg. 865. This regulation provides that therapeutic abortion committees can only be established where there are ten or more members on the active medical staff . . .

A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. Subsection (4) states simply that a therapeutic abortion committee may grant a certificate when it determines that a continuation of a pregnancy would be likely to endanger the "life or health" of the pregnant woman. It was noted above that "health" is not defined for the purposes of the section. The Crown admitted in its supplementary factum that the medical witnesses at trial testified uniformly that the "health" standard was ambiguous, but the Crown derives comfort from the fact that "the medical witnesses were unanimous in their approval of the broad World Health Organization definition of health". The World Health Organization defines "health" not merely as the absence of disease or infirmity, but as a state of physical, mental and social well-being.

I do not understand how the mere existence of a workable definition of "health" can make the use of the word in s. 251(4) any less ambiguous when that definition is nowhere referred to in the section. . . . In the absence of such a definition, each physician and each hospital reaches an individual decision on this matter. How the concept of health is variably defined leads to considerable inequity in the distribution and the accessibility of the abortion procedure. . . . Some committees refuse to approve applications for second abortions unless the patient consents to sterilization, others require psychiatric assessment, and others do not grant approval to married women.

* * *

The combined effect of all of these problems with the procedure stipulated in s. 251 for access to therapeutic abortions is a failure to comply with the principles of fundamental justice. . . .

I conclude that the procedures created in s. 251 of the *Criminal Code* for obtaining a therapeutic abortion do not comport with the principles of fundamental justice. It is not necessary to determine whether s. 7 also contains a substantive content leading to the conclusion that, in some circumstances at least, the deprivation of a pregnant woman's right to security of the person can never comport with fundamental justice. Simply put, assuming Parliament can act, it must do so properly. For the reasons given earlier, the deprivation of security of the person caused by s. 251 as a whole is not in accordance with the second clause of s. 7. It remains to be seen whether s. 251 can be justified for the purposes of s. 1 of the *Charter*.

V

Section 1 Analysis

Section 1 of the *Charter* can potentially be used to "salvage" a legislative provision which breaches s. 7 . . . A statutory provision which infringes any section of the *Charter* can only be saved under s. 1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M Drug Mart Ltd.*, at p. 352) and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society. This second aspect ensures that the legislative means are proportional to the legislative ends (*Oakes*, at pp.139-40). In *Oakes*, at p. 139, the Court referred to three considerations which are typically useful in assessing the proportionality of means to ends. First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as little as possible the right or freedom under consideration. Third, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

The appellants contended that the sole purpose of s. 251 of the *Criminal Code* is to protect the life and health of pregnant women. The respondent Crown submitted that s. 251 seeks to protect not only the life and health of pregnant women, but also the interests of the foetus. On the other hand, the Crown conceded that the Court is not called upon in this appeal to evaluate any claim to "foetal rights" or to assess the meaning of "the right to life". I expressly refrain from so doing. In my view, it is unnecessary for the purpose of deciding this appeal to evaluate or assess "foetal rights" as an independent constitutional value. Nor are we required to measure the full extent of the state's interest in establishing criteria unrelated to the pregnant woman's own priorities and aspirations. What we must do is evaluate the particular balance struck by Parliament in s. 251, as it relates to the priorities and aspirations of pregnant women and the government's interests in the protection of the foetus.

Section 251 provides that foetal interests are not to be protected where the "life or health" of the woman is threatened. Thus, Parliament itself has expressly stated in s. 251 that the "life or health" of pregnant women is paramount. The procedures of s. 251(4) are clearly related to the pregnant woman's "life or health" for that is the very phrase used by the subsection. As McIntyre J. states in his reasons (at p. 155), the aim of s. 251(4) is "to restrict abortion to cases where the continuation of the pregnancy would, or would likely, be injurious to the life or health of the woman concerned, not to provide unrestricted access to abortion." I have no difficulty in concluding that the objective of s. 251 as a whole, namely, to balance the competing interests identified by Parliament, is sufficiently important to meet the requirements of the first step in the *Oakes* inquiry under s. 1. I think the protection of the interests of pregnant women is a valid governmental objective, where life and health can be jeopardized by criminal sanctions. Like Beetz and Wilson JJ., I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective. As the Court of Appeal

stated at p. 366, "the contemporary view [is] that abortion is not always socially undesirable behavior."

I am equally convinced, however, that the means chosen to advance the legislative objectives of s. 251 do not satisfy any of the three elements of the proportionality component of *R. v. Oakes*. The evidence has led me to conclude that the infringement of the security of the person of pregnant women caused by s. 251 is not accomplished in accordance with the principles of fundamental justice. It has been demonstrated that the procedures and administrative structures created by s. 251 are often arbitrary and unfair. The procedures established to implement the policy of s.251 impair s. 7 rights far more than is necessary because they hold out an illusory defence to many women who would *prima facie* qualify under the exculpatory provisions of s. 251(4). In other words, many women whom Parliament professes not to wish to subject to criminal liability will nevertheless be forced by the practical unavailability of the supposed defence to risk liability or to suffer other harm such as a traumatic late abortion caused by the delay inherent in the s. 251 system. Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved. Indeed, to the extent that s. 251(4) is designed to protect the life and health of women, the procedures it establishes may actually defeat that objective. The administrative structures of s. 251(4) are so cumbersome that women whose health is endangered by pregnancy may not be able to gain a therapeutic abortion, at least without great trauma, expense and inconvenience.

I conclude, therefore, that the cumbersome structure of subs. (4) not only unduly subordinates the s. 7 rights of pregnant women but may also defeat the value Parliament itself has established as paramount, namely, the life and health of the pregnant woman. As I have noted, counsel for the Crown did contend that one purpose of the procedures required by subs. (4) is to protect the interests of the foetus. State protection of foetal interests may well be deserving of constitutional recognition under s. 1. Still, there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion.

Section 251 of the *Criminal Code* cannot be saved, therefore, under s. 1 of the *Charter*.

* * *

The reasons of Beetz and Estey JJ. were delivered by

BEETZ J.--

. . . A pregnant woman's person cannot be said to be secure if, when her life or health is in danger, she is faced with a rule of criminal law which precludes her from obtaining effective and timely medical treatment.

Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.

* * *

Finally, I wish to stress that we have not been asked to decide nor is it necessary, given my own conclusion that s. 251 contains rules unnecessary to the protection of the foetus, to decide whether a foetus is included in the word "everyone" in s. 7 so as to have a right to "life, liberty and security of the person" under the *Charter*.

* * *

The reasons of McIntyre and La Forest JJ. were delivered by

McIntyre J. (dissenting)

* * *

. . .The battle lines so drawn are firmly held and the attitudes of the opposing parties admit of no compromise. From the submission of the Attorney General of Canada (set out in his factum at paragraph 6), however, it may appear that a majority in Canada do not see the issue in such black and white terms. Paragraph 6 is in these words: The evidence of opinion surveys indicates that there is a surprising consistency over the years and in different survey groups in the spectrum of opinions on the issue of abortion. Roughly 21 to 23% of people at one end of the spectrum are of the view, on the one hand, that abortion is a matter solely for the decision of the pregnant woman and that any legislation on this subject is an unwarranted interference with a woman's right to deal with her own body, while about 19 to 20% are of the view, on the other hand, that destruction of the living fetus is the killing of human life and tantamount to murder. The remainder of the population (about 60%) are of the view that abortion should be prohibited in some circumstances.

Parliament has heeded neither extreme. Instead, an attempt has been made to balance the competing interests of the unborn child and the pregnant woman. . . .

* * *

In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 671, (hereinafter "*Morgentaler (1975)*") I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to the abortion question. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights); *The Abortion Decision of the Federal Constitutional Court -- First Senate -- of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c. 87 (U.K.) But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler* (*1975*), at p. 671, that:

> The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion. Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms* . . . . It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

While I differ with the Chief Justice in the disposition of this appeal, I would accept his words, referred to above, which describe the role of the Court, but I would suggest that in "ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*" the courts must confine themselves to such democratic values as are clearly found and expressed in the *Charter* and refrain from imposing or creating other values not so based.

It follows, then, in my view, that the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*. While this may appear to be self-evident, the distinction is of vital importance. If a particular interpretation enjoys no support, express or reasonably implied, from the *Charter*, then the Court is without power to clothe such an interpretation with constitutional status. It is not for the Court to substitute its own views on the merits of a given question for those of Parliament. The Court must consider not what is, in its view, the best solution to the problems

posed; its role is confined to deciding whether the solution enacted by Parliament offends the *Charter*. If it does, the provision must be struck down or declared inoperative, and Parliament may then enact such different provisions as it may decide. I adopt the words of Holmes J., which were referred to in *Ferguson v. Skrupka*, 372 U.S. 726 (1963), at pp. 729-30:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner* v. *New York*, 198 U.S. 45 (1905), outlawing "yellow dog" contracts, *Coppage* v. *Kansas*, 236 U.S. 1 (1915), setting minimum wages for women, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said:
>
> > "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain".
>
> . . . The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. Holmes J. wrote in 1927, but his words have retained their force in American jurisprudence: see *New Orleans v. Dukes,* 427 U.S. 297 (1976), at p. 304, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), at p. 469, and *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), at pp. 504-5. In my view, although written in the American context, the principle stated is equally applicable in Canada.

It is essential that this principle be maintained in a constitutional democracy. The Court must not resolve an issue such as that of abortion on the basis of how many judges may favour "pro-choice" or "pro-life". To do so would be contrary to sound principle and the rule of law affirmed in the preamble to the *Charter* which must mean that no discretion, including a judicial discretion, can be unlimited. But there is a problem, for the Court must clothe the general expression of rights and freedoms contained in the *Charter* with real substance and vitality. How can the courts go about this task without imposing at least some of their views and predilections upon the law? . . .

* * *

The present case may serve, perhaps, to emphasize that the courts lack both the exposure to public opinion required in order to discharge the essentially "political" task of weighing social or economic interests and deciding between them, and also the ability to gather the information they would need for that task. When it has run its course the litigation may also have served to demonstrate -- if demonstration be needed -- that the judicial system of necessity lacks the capacity of parliamentary bodies to act promptly when economic or social considerations indicate that a change in the law is desirable and, of equal importance, to react promptly when results show either that a change made for that purpose has not achieved its objective or that the objective is no longer desirable. . . .

The following are the reasons delivered by

WILSON J.—

* * *

(a) *The Right to Liberty*

* * *

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. . . . liberty [is] "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life" . . .

> To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

Dickson C.J. in *R. v. Big M Drug Mart Ltd.* makes the same point at p. 346:

> It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

It was further amplified in Dickson C.J.'s discussion of *Charter* interpretation in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

This view is consistent with the position I took in the case of *R. v. Jones*, [1986] 2 S.C.R. 284. One issue raised in that case was whether the right to liberty in s. 7 of the *Charter* included a parent's right to bring up his children in accordance with his conscientious beliefs. In concluding that it did I stated at pp. 318-19:

> I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it". He added: Each is the proper guardian of his own health, whether bodily *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.

Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

* * *

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has pointed out in her essay on "International Law and Human Rights: the Case of Women's Rights", in *Human Rights: From Rhetoric to Reality* (1986), the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-82). It

has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.

Given then that the right to liberty guaranteed by s. 7 of the *Charter* gives a woman the right to decide for herself whether or not to terminate her pregnancy, does s. 251 of the *Criminal Code* violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee. Furthermore, as the Chief Justice correctly points out, at p. 56, the committee bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations". The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.

* * *

(*a*) freedom of conscience and religion;

In *R. v. Big M Drug Mart Ltd., supra,* Dickson C.J. made some very insightful comments about the nature of the right enshrined in s. 2(*a*) of the *Charter* at pp. 345-47:

Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendent religion, came to voice opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(*a*) of our *Charter*, the single integrated concept of "freedom of conscience and religion".

What unites enunciated freedoms in the American First Amendment, in s. 2(*a*) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam Inc., supra,* the purpose of the *Charter* was identified, at p. 155, as "the unremitting protection of individual rights and liberties". It is

easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection. It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(*a*) might otherwise prohibit. [Emphasis added.]

The Chief Justice sees religious belief and practice as the paradigmatic example of conscientiously-held beliefs and manifestations and as such protected by the *Charter*. But I do not think he is saying that a personal morality which is not founded in religion is outside the protection of s. 2(*a*). Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(*a*). In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that "Canada is founded upon principles that recognize the supremacy of God . . . ." But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society.

As is pointed out by Professor Cyril E. M. Joad, then Head of the Department of Philosophy and Psychology at Birkbeck College, University of London, in *Guide to the Philosophy of Morals and Politics* (1938), the role of the state in a democracy is to establish the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life. He states at p. 801:

> For the welfare of the state is nothing apart from the good of the citizens who compose it. It is no doubt true that a State whose citizens are compelled to go right is more efficient than one whose citizens are free to go wrong. But what then? To sacrifice freedom in the interests of efficiency, is to sacrifice what confers upon human beings their humanity. It is no doubt easy to govern a flock of sheep; but there is no credit in the governing, and, if the sheep were born as men, no virtue in the sheep.

Professor Joad further emphasizes at p. 803 that individuals in a democratic society can never be treated "merely as means to ends beyond themselves" because: To the right of the individual to be treated as an end, which entails his right to the full development and expression of his personality, all other rights and claims must, the democrat holds, be subordinated. I do not know how this principle is to be defended any more than I can frame a defence for the principles of democracy and liberty. Professor Joad stresses that the essence of a democracy is its recognition of the fact that the state is made for man and not man for the state (p. 805). He firmly rejects the notion that science provides a basis for subordinating the individual to the state. He says at pp. 805-6:

> Human beings, it is said, are important only in so far as they fit into a biological scheme or assist in the furtherance of the evolutionary process. Thus each generation of women must accept as its sole function the production of children who will constitute the next generation who, in their turn, will devote their lives and sacrifice their inclinations to the task of producing a further generation, and so on *ad infinitum*. This is the doctrine of eternal sacrifice -- "jam yesterday, jam tomorrow, but never jam today". For, it may be asked, to what end should generations be produced, unless the individuals who compose them are valued in and for themselves, are, in fact, ends in themselves? There is no escape from the doctrine of the perpetual recurrence of generations who have value only in so far as they produce more generations, the perpetual subordination of citizens who have value only in so far as they promote the interests of the State to which they are subordinated, except in the individualist doctrine, which is also the Christian doctrine, that the individual is an end in himself.

It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.

Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of

another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their "essential humanity". . .

. . . It would be my view, and I think it is consistent with the position taken by the United States Supreme Court in *Roe v. Wade*, that the value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place in between these two extremes and, in my opinion, this progression has a direct bearing on the value of the foetus as potential life. It is a fact of human experience that a miscarriage or spontaneous abortion of the foetus at six months is attended by far greater sorrow and sense of loss than a miscarriage or spontaneous abortion at six days or even six weeks. This is not, of course, to deny that the foetus is potential life from the moment of conception. Indeed, I agree with the observation of O'Connor J., dissenting in *City of Akron v. Akron Center for Reproductive Health, Inc., supra,* at p. 461, (referred to by my colleague Beetz J. in his reasons, at p. 113) that the foetus is potential life from the moment of conception. It is simply to say that in balancing the state's interest in the protection of the foetus as potential life under s. 1 of the *Charter* against the right of the pregnant woman under s. 7 greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier. The foetus should accordingly, for purposes of s. 1, be viewed in differential and developmental terms: see L. W. Sumner, Professor of Philosophy at the University of Toronto, *Abortion and Moral Theory* (1981), pp. 125-28.

As Professor Sumner points out, both traditional approaches to abortion, the so-called "liberal" and "conservative" approaches, fail to take account of the essentially developmental nature of the gestation process. A developmental view of the foetus, on the other hand, supports a permissive approach to abortion in the early stages of pregnancy and a restrictive approach in the later stages. In the early stages the woman's autonomy would be absolute; her decision, reached in consultation with her physician, not to carry the foetus to term would be conclusive. The state would have no business inquiring into her reasons. Her reasons for having an abortion would, however, be the proper subject of inquiry at the later stages of her pregnancy when the state's compelling interest in the protection of the foetus would justify it in prescribing conditions. The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester. Indeed, according to Professor Sumner (p. 159), a differential abortion policy with a time limit in the second trimester is already in operation in the United States, Great Britain, France, Italy, Sweden, the Soviet Union, China, India, Japan and most of the countries of Eastern Europe although the time limits vary in these countries from the beginning to the end of the second trimester (cf. Stephen L. Isaacs, "Reproductive Rights 1983: An International Survey" (1982-83), 14 *Columbia Human Rights Law Rev.* 311, with respect to France and Italy).

Section 251 of the *Criminal Code* takes the decision away from the woman at all stages of her pregnancy. It is a complete denial of the woman's constitutionally protected right under s. 7, not merely a limitation on it. It cannot, in my opinion, meet the proportionality test in *Oakes*. It is not sufficiently tailored to the legislative objective and does not impair the woman's right "as little as possible". It cannot be saved under s. 1. Accordingly, even if the section were to be amended to remedy the purely procedural defects in the legislative scheme referred to by the Chief Justice and Beetz J. it would, in my opinion, still not be constitutionally valid.

One final word. I wish to emphasize that in these reasons I have dealt with the existence of the developing foetus merely as a factor to be considered in assessing the importance of the legislative objective under s. 1 of the *Charter*. I have not dealt with the entirely separate question whether a foetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section. The Crown did not argue it and it is not necessary to decide it in order to dispose of the issues on this appeal.

* * *

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Eighty-fifth session
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VIEWS

Communication No. 1153/2003

Submitted by:	K.L. (represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy)
Alleged victim:	The author
State party:	Peru
Date of communication:	13 November 2002 (initial submission)
Document reference:	Special Rapporteur's rule 91 decision, transmitted to the State party on 8 January 2003 (not issued in document form)
Date of adoption of Views:	24 October 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Refusal to provide medical services to the author in connection with a therapeutic abortion which is not a punishable offence and for which express provision has been made in the law.

Procedural issues: Substantiation of the alleged violation — unavailability of effective domestic remedies.

Substantive issues: Right to an effective remedy; right to equality between men and women; right to life, right not to be subjected to cruel, inhuman or degrading treatment; right not to be the victim of arbitrary or unlawful interference in one's privacy; right to such measures of protection as are required by the status of a minor and right to equality before the law.

Articles of the Covenant: 2, 3, 6, 7, 17, 24 and 26

Article of the Optional Protocol: 2

On 24 October 2005 the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1153/2003. The text is appended to the present document.

[ANNEX]

ANNEX

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-fifth session

concerning

Communication No. 1153/2003**

Submitted by:	K.L. (represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy)
Alleged victim:	The author
State party:	Peru
Date of communication:	13 November 2002 (initial submission)

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

Meeting on 24 October 2005,

Having concluded its consideration of communication No. 1153/2003, submitted on behalf of K.L. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

The text of an individual opinion signed by Committee member Mr. Hipólito Solari-Yrigoyen is appended to the present document.

Views under article 5 paragraph 4 of the Optional Protocol

1. The author of the communication is K.L., born in 1984, who claims to be a victim of a violation by Peru of articles 2, 3, 6, 7, 17, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy. The Optional Protocol entered into force for Peru on 3 October 1980.

Factual background

2.1 The author became pregnant in March 2001, when she was aged 17. On 27 June 2001 she was given a scan at the Archbishop Loayza National Hospital in Lima, part of the Ministry of Health. The scan showed that she was carrying an anencephalic foetus.

2.2 On 3 July 2001, Dr. Ygor Pérez Solf, a gynaecologist and obstetrician in the Archbishop Loayza National Hospital in Lima, informed the author of the foetal abnormality and the risks to her life if the pregnancy continued. Dr. Pérez said that she had two options: to continue the pregnancy or to terminate it. He advised termination by means of uterine curettage. The author decided to terminate the pregnancy, and the necessary clinical studies were carried out, confirming the foetal abnormality.

2.3 On 19 July 2001, when the author reported to the hospital together with her mother for admission preparatory to the operation, Dr. Pérez informed her that she needed to obtain written authorization from the hospital director. Since she was under age, her mother requested the authorization. On 24 July 2001, Dr. Maximiliano Cárdenas Díaz, the hospital director, replied in writing that the termination could not be carried out as to do so would be unlawful, since under article 120 of the Criminal Code, abortion was punishable by a prison term of no more than three months when it was likely that at birth the child would suffer serious physical or mental defects, while under article 119, therapeutic abortion was permitted only when termination of the pregnancy was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health.

2.4 On 16 August 2001, Ms. Amanda Gayoso, a social worker and member of the Peruvian association of social workers, carried out an assessment of the case and concluded that medical intervention to terminate the pregnancy was advisable "since its continuation would only prolong the distress and emotional instability of [K.L.] and her family". However, no intervention took place owing to the refusal of the Health Ministry medical personnel.

2.5 On 20 August 2001, Dr. Marta B. Rondón, a psychiatrist and member of the Peruvian Medical Association, drew up a psychiatric report on the author, concluding that "the so-called principle of the welfare of the unborn child has caused serious harm to the mother, since she has unnecessarily been made to carry to term a pregnancy whose fatal outcome was known in advance, and this has substantially contributed to triggering the symptoms

of depression, with its severe impact on the development of an adolescent and the patient's future mental health".

2.6 On 13 January 2002, three weeks late with respect to the anticipated date of birth, the author gave birth to an anencephalic baby girl, who survived for four days, during which the mother had to breastfeed her. Following her daughter's death, the author fell into a state of deep depression. This was diagnosed by the psychiatrist Marta B. Rondón. The author also states that she suffered from an inflammation of the vulva which required medical treatment.

2.7 The author has submitted to the Committee a statement made by Dr. Annibal Faúdes and Dr. Luis Tavara, who are specialists from the association called Center for Reproductive Rights, and who on 17 January 2003 studied the author's clinical dossier and stated that anencephaly is a condition which is fatal to the foetus in all cases. Death immediately follows birth in most cases. It also endangers the mother's life. In their opinion, in refusing to terminate the pregnancy, the medical personnel took a decision which was prejudicial to the author.

2.8 Regarding the exhaustion of domestic remedies, the author claims that this requirement is waived when judicial remedies available domestically are ineffective in the case in question, and she points out that the Committee has laid down on several occasions that the author has no obligation to exhaust a remedy which would prove ineffective. She adds that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. She also states that her financial circumstances and those of her family prevented her from obtaining legal advice.

2.9 The author states that the complaint is not being considered under any other procedure of international settlement.

The complaint

3.1 The author claims a violation of article 2 of the Covenant, since the State party failed to comply with its obligation to guarantee the exercise of a right. The State should have taken steps to respond to the systematic reluctance of the medical community to comply with the legal provision authorizing therapeutic abortion, and its restrictive interpretation thereof. This restrictive interpretation was clear in the author's case, in which a pregnancy involving an anencephalic foetus was considered not to endanger her life and health. The State should have taken steps to ensure that an exception could be made to the rule criminalizing abortion, so that, in cases where the physical and mental health of the mother was at risk, she could undergo an abortion in safety.

3.2 The author claims to have suffered discrimination in breach of article 3 of the Covenant, in the following forms:

(a) In access to the health services, since her different and special needs were ignored because of her sex. In the view of the author, the fact that the State lacked any means to prevent a violation of her right to a legal abortion on therapeutic grounds, which is applicable only to women, together with the arbitrary conduct of the medical personnel, resulted in a discriminatory practice that violated her rights — a breach which was all the more serious since the victim was a minor.

(b) Discrimination in the exercise of her rights, since although the author was entitled to a therapeutic abortion, none was carried out because of social attitudes and prejudices, thus preventing her from enjoying her right to life, to health, to privacy and to freedom from cruel, inhuman and degrading treatment on an equal footing with men.

(c) Discrimination in access to the courts, bearing in mind the prejudices of officials in the health system and the judicial system where women are concerned and the lack of appropriate legal means of enforcing respect for the right to obtain a legal abortion when the temporal and other conditions laid down in the law are met.

3.3 The author claims a violation of article 6 of the Covenant. She states that her experience had a serious impact on her mental health from which she has still not recovered. She points out that the Committee has stated that the right to life cannot be interpreted in a restrictive manner, but requires States to take positive steps to protect it, including the measures necessary to ensure that women do not resort to clandestine abortions which endanger their life and health, especially in the case of poor women. She adds that the Committee has viewed lack of access for women to reproductive health services, including abortion, as a violation of women's right to life, and that this has been reiterated by other committees such as the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights. The author claims that in the present case, the violation of the right to life lay in the fact that Peru did not take steps to ensure that the author secured a safe termination of pregnancy on the grounds that the foetus was not viable. She states that the refusal to provide a legal abortion service left her with two options which posed an equal risk to her health and safety: to seek clandestine (and hence highly risky) abortion services, or to continue a dangerous and traumatic pregnancy which put her life at risk.

3.4 The author claims a violation of article 7 of the Covenant. The fact that she was obliged to continue with the pregnancy amounts to cruel and inhuman treatment, in her view, since she had to endure the distress of seeing her daughter's marked deformities and knowing that her life expectancy was short. She states that this was an awful experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy, since she was subjected to an "extended funeral" for her daughter, and sank into a deep depression after her death.

3.5 The author points out that the Committee has stated that the prohibition in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that this

protection is particularly important in the case of minors.[1] She points out that, after considering Peru's report in 1996, the Committee expressed the view that restrictive provisions on abortion subjected women to inhumane treatment, in violation of article 7 of the Covenant, and that in 2000, the Committee reminded the State party that the criminalization of abortion was incompatible with articles 3, 6 and 7 of the Covenant.[2]

3.6 The author claims a violation of article 17, arguing that this article protects women from interference in decisions which affect their bodies and their lives, and offers them the opportunity to exercise their right to make independent decisions on their reproductive lives. The author points out that the State party interfered arbitrarily in her private life, taking on her behalf a decision relating to her life and reproductive health which obliged her to carry a pregnancy to term, and thereby breaching her right to privacy. She adds that the service was available, and that if it had not been for the interference of State officials in her decision, which enjoyed the protection of the law, she would have been able to terminate the pregnancy. She reminds the Committee that children and young people enjoy special protection by virtue of their status as minors, as recognized in article 24 of the Covenant and in the Convention on the Rights of the Child.

3.7 The author claims a violation of article 24, since she did not receive the special care she needed from the health authorities, as an adolescent girl. Neither her welfare nor her state of health were objectives pursued by the authorities which refused to carry out an abortion on her. The author points out that the Committee laid down in its General Comment No. 17, relating to article 24, that the State should also adopt economic, social and cultural measures to safeguard this right. For example, every possible economic and social measure should be taken to reduce infant mortality and to prevent children from being subjected to acts of violence or cruel or inhuman treatment, among other possible violations.

3.8 The author claims a violation of article 26, arguing that the Peruvian authorities' position that hers was not a case of therapeutic abortion, which is not punishable under the Criminal Code, left her in an unprotected state incompatible with the assurance of the protection of the law set out in article 26. The guarantee of the equal protection of the law implies that special protection will be given to certain categories of situation in which specific treatment is required. In the present case, as a result of a highly restrictive interpretation of the criminal law, the health authorities failed to protect the author and neglected the special protection which her situation required.

3.9 The author claims that the administration of the health centre left her without protection as a result of a restrictive interpretation of article 119 of the Criminal Code. She adds that the text of the law contains nothing to indicate that the exception relating to therapeutic abortion should apply only in cases of danger to physical health. But the

[1] Human Rights Committee, General Comment No. 20, 10 March 1992 (HRI/GEN/1/Rev.7), paras. 2 and 5.

[2] Concluding observations of the Human Rights Committee: Peru, 15 November 2000 (CCPR/CO/70/PER), para. 20.

hospital authorities had drawn a distinction and divided up the concept of health, and had thus violated the legal principle that no distinction should be drawn where there is none in the law. She points out that health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity", so that when the Peruvian Criminal Code refers to health, it does so in the broad and all-embracing sense, protecting both the physical and the mental health of the mother.

State party's failure to cooperate under article 4 of the Optional Protocol

4. On 23 July 2003, 15 March 2004 and 25 October 2004, reminders were sent to the State party inviting it to submit information to the Committee concerning the admissibility and the merits of the complaint. The Committee notes that no such information has been received. It regrets that the State party has not supplied any information concerning the admissibility or the merits of the author's allegations. It points out that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.[3]

Issues and proceedings before the Committee

Consideration of admissibility

5.1 In accordance with rule 93 of the rules of procedure, before examining the claims made in a communication, the Human Rights Committee must decide whether the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that, according to the author, the same matter has not been submitted under any other procedure of international investigation. The Committee also takes note of her arguments to the effect that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. The Committee recalls its jurisprudence to the effect that a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol.[4] In the absence of a reply from the State party, due weight must be given to the author's allegations. Consequently, the Committee considers that the requirements of article 5, paragraph 2 (a) and (b), have been met.

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[3] See communication No. 760/1997, *J. G. A. Diergaart et al. v. Namibia*; Views adopted on 25 July 2000, para. 10.2, and Communication No. 1117/2002, *Saodat Khomidova v. Tajikistan*; Views adopted on 29 July 2004, para. 4..

[4] See Communication No. 701/1996, *Cesáreo Gómez Vázquez v. Spain*; Views adopted on 20 July 2000, para. 6.2.

5.3 The Committee considers that the author's claims of alleged violations of articles 3 and 26 of the Covenant have not been properly substantiated, since the author has not placed before the Committee any evidence relating to the events which might confirm any type of discrimination under the article in question. Consequently, the part of the complaint referring to articles 3 and 26 is declared inadmissible under article 2 of the Optional Protocol.

5.4 The Committee notes that the author has claimed a violation of article 2 of the Covenant. The Committee recalls its constant jurisprudence to the effect that article 2 of the Covenant, which lays down general obligations for States, is accessory in nature and cannot be invoked in isolation by individuals under the Optional Protocol.[5] Consequently, the complaint under article 2 will be analysed together with the author's other allegations.

5.5 Concerning the allegations relating to articles 6, 7, 17 and 24 of the Covenant, the Committee considers that they are adequately substantiated for purposes of admissibility, and that they appear to raise issues in connection with those provisions. Consequently, it turns to consideration of the substance of the complaint.

Consideration of the merits

6.1 The Human Rights Committee has considered the present complaint in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes that the author attached a doctor's statement confirming that her pregnancy exposed her to a life-threatening risk. She also suffered severe psychological consequences exacerbated by her status as a minor, as the psychiatric report of 20 August 2001 confirmed. The Committee notes that the State party has not provided any evidence to challenge the above. It notes that the authorities were aware of the risk to the author's life, since a gynaecologist and obstetrician in the same hospital had advised her to terminate the pregnancy, with the operation to be carried out in the same hospital. The subsequent refusal of the competent medical authorities to provide the service may have endangered the author's life. The author states that no effective remedy was available to her to oppose that decision. In the absence of any information from the State party, due weight must be given to the author's claims.

6.3 The author also claims that, owing to the refusal of the medical authorities to carry out the therapeutic abortion, she had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon. This was an experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy. The author attaches a psychiatric certificate dated 20 August 2001, which confirms the state of deep depression into which she fell and the severe consequences this caused, taking her age into account. The

[5] See Communication No. 802/1998, *Andrew Rogerson v. Australia*; Views adopted on 3 April 2002, para. 7.9.

Committee notes that this situation could have been foreseen, since a hospital doctor had diagnosed anencephaly in the foetus, yet the hospital director refused termination. The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced. The Committee has pointed out in its General Comment No. 20 that the right set out in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that the protection is particularly important in the case of minors.[6] In the absence of any information from the State party in this regard, due weight must be given to the author's complaints. Consequently, the Committee considers that the facts before it reveal a violation of article 7 of the Covenant. In the light of this finding the Committee does not consider it necessary in the circumstances to made a finding on article 6 of the Covenant.

6.4 The author states that the State party, in denying her the opportunity to secure medical intervention to terminate the pregnancy, interfered arbitrarily in her private life. The Committee notes that a public-sector doctor told the author that she could either continue with the pregnancy or terminate it in accordance with domestic legislation allowing abortions in cases of risk to the life of the mother. In the absence of any information from the State party, due weight must be given to the author's claim that at the time of this information, the conditions for a lawful abortion as set out in the law were present. In the circumstances of the case, the refusal to act in accordance with the author's decision to terminate her pregnancy was not justified and amounted to a violation of article 17 of the Covenant.

6.5 The author claims a violation of article 24 of the Covenant, since she did not receive from the State party the special care she needed as a minor. The Committee notes the special vulnerability of the author as a minor girl. It further note that, in the absence of any information from the State party, due weight must be given to the author's claim that she did not receive, during and after her pregnancy, the medical and psychological support necessary in the specific circumstances of her case. Consequently, the Committee considers that the facts before it reveal a violation of article 24 of the Covenant.

6.6 The author claims to have been a victim of violation of articles 2 of the Covenant on the grounds that she lacked an adequate legal remedy. In the absence of information from the State party, the Committee considers that due weight must be given to the author's claims as regards lack of an adequate legal remedy and consequently concludes that the facts before it also reveal a violation of article 2 in conjunction with articles 7, 17 and 24.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 2, 7, 17 and 24 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including compensation. The State

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[6] Human Rights Committee, General Comment No. 20: Prohibition of torture and other cruel, inhuman or degrading treatment or punishment (art. 7), 10 March 1992 (HRI/GEN/1/Rev.7, paras. 2 and 5).

party has an obligation to take steps to ensure that similar violations do not occur in the future.

9. Bearing in mind that, as a party to the Optional Protocol, the State party recognizes the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to offer an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

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

APPENDIX

DISSENTING OPINION BY COMMITTEE MEMBER HIPÓLITO SOLARI-YRIGOYEN

My dissenting opinion on this communication - the majority not considering that article 6 of the Covenant was violated - is based on the following grounds:

Consideration of the merits

The Committee notes that when the author was a minor, she and her mother were informed by the obstetric gynaecologist at Lima National Hospital, whom they had consulted because of the author's pregnancy, that the foetus suffered from anencephaly which would inevitably cause its death at birth. The doctor told the author that she had two options: (1) continue the pregnancy, which would endanger her own life; or (2) terminate the pregnancy by a therapeutic abortion. He recommended the second option. Given this conclusive advice from the specialist who had told her of the risks to her life if the pregnancy continued, the author decided to follow his professional advice and accepted the second option. As a result, all the clinical tests needed to confirm the doctor's statements about the risks to the mother's life of continuing the pregnancy and the inevitable death of the foetus at birth were performed.

The author substantiated with medical and psychological certificates all her claims about the fatal risk she ran if the pregnancy continued. In spite of the risk, the director of the public hospital would not authorize the therapeutic abortion which the law of the State party allowed, arguing that it would not be a therapeutic abortion but rather a voluntary and unfounded abortion punishable under the Criminal Code. The hospital director did not supply any legal ruling in support of his pronouncements outside his professional field or challenging the medical attestations to the serious risk to the mother's life. Furthermore, the Committee may note that the State party has not submitted any evidence contradicting the statements and evidence supplied by the author. Refusing a therapeutic abortion not only endangered the author's life but had grave consequences which the author has also substantiated to the Committee by means of valid supporting documents.

It is not only taking a person's life that violates article 6 of the Covenant but also placing a person's life in grave danger, as in this case. Consequently, I consider that the facts in the present case reveal a violation of article 6 of the Covenant.

[*Signed*]: Hipólito Solari-Yrigoyen

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

COURT (PLENARY)

CASE OF OPEN DOOR AND DUBLIN WELL WOMAN v. IRELAND

(Application no. 14234/88; 14235/88)

JUDGMENT

STRASBOURG

29 October 1992

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 24 April 1991, and on 3 July 1991 by the Government of Ireland ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in two applications against Ireland lodged with the Commission under Article 25 (art. 25) on 10 August and 15 September 1988. The first (no. 14234/88) was brought by Open Door Counselling Ltd, a company incorporated in Ireland; the second (no. 14235/88) by another Irish company, Dublin Well Woman Centre Ltd, and one citizen of the United States of America, Ms Bonnie Maher, and three Irish citizens, Ms Ann Downes, Mrs X and Ms Maeve Geraghty.

... The object of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by Ireland of its obligations under Articles 8, 10 and 14 (art. 8, art. 10, art. 14) and also, in the case of the application, to examine these issues in the context of Articles 2, 17 and 60 (art. 2, art. 17, art. 60).

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AS TO THE FACTS

I. Introduction

A. The applicants

9. The applicants in this case are (a) Open Door Counselling Ltd (hereinafter referred to as Open Door), a company incorporated under Irish law, which was engaged, inter alia, in counselling pregnant women in Dublin and in other parts of Ireland; and (b) Dublin Well Woman Centre Ltd (hereinafter referred to as Dublin Well Woman), a company also incorporated under Irish law which provided similar services at two clinics in Dublin; (c) Bonnie Maher and Ann Downes, who worked as trained counsellors for Dublin Well Woman; (d) Mrs X, born in 1950 and Ms Maeve Geraghty, born in 1970, who join in the Dublin Well Woman application as women of child-bearing age. The applicants complained of an injunction imposed by the Irish courts on Open Door and Dublin Well Woman to restrain them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland by way of non-directive counselling (see paragraphs 13 and 20 below).

Open Door and Dublin Well Woman are both non-profit- making organisations. Open Door ceased to operate in 1988 (see paragraph 21 below). Dublin Well Woman was established in 1977 and provides a broad range of services relating to counselling and marriage, family planning, procreation and health matters. The services offered by Dublin Well Woman relate to every aspect of women's health, ranging from smear tests to breast examinations, infertility, artificial insemination and the counselling of pregnant women.

10. In 1983, at the time of the referendum leading to the Eighth Amendment of the Constitution (see paragraph 28 below), Dublin Well Woman issued a pamphlet stating inter alia that legal advice on the implications of the wording of the provision had been obtained and that "with this wording anybody could seek a court injunction to prevent us offering" the non-directive counselling service. The pamphlet also warned that "it would also be possible for an individual to seek a court injunction to prevent a woman travelling abroad if they believe she intends to have an abortion".

B. The injunction proceedings

1. Before the High Court

11. The applicant companies were the defendants in proceedings before the High Court which were commenced on 28 June 1985 as a private action brought by the Society for the Protection of Unborn Children (Ireland) Ltd (hereinafter referred to as S.P.U.C.)....

12. S.P.U.C. sought a declaration that the activities of the applicant companies in counselling pregnant women within the jurisdiction of the court to travel abroad to obtain an abortion were unlawful having regard to Article 40.3.3° of the Constitution which protects the right to life of the unborn (see paragraph 28 below) and an order restraining the defendants from such counselling or assistance.

13. No evidence was adduced at the hearing of the action which proceeded on the basis of certain agreed facts. The facts as agreed at that time by Dublin Well Woman may be summarised as follows:

(a) It counsels in a non-directive manner pregnant women resident in Ireland;

(b) Abortion or termination of pregnancy may be one of the options discussed within the said counselling;

(c) If a pregnant woman wants to consider the abortion option further, arrangements will be made by the applicant to refer her to a medical clinic in Great Britain;

(d) In certain circumstances, the applicant may arrange for the travel of such pregnant women;

(e) The applicant will inspect the medical clinic in Great Britain to ensure that it operates at the highest standards;

(f) At those medical clinics abortions have been performed on pregnant women who have been previously counselled by the applicant;

(g) Pregnant women resident in Ireland have been referred to medical clinics in Great Britain where abortions have been performed for many years including 1984.

The facts agreed by Open Door were the same as above with the exception of point (d).

14. The meaning of the concept of non-directive counselling was described in the following terms by Mr Justice Finlay CJ in the judgment of the Supreme Court in the case ...:

"It was submitted on behalf of each of the Defendants that the meaning of non-directive counselling in these agreed sets of facts was that it was counselling which neither included advice nor was judgmental but that it was a service essentially directed to eliciting from the client her own appreciation of her problem and her own considered choice for its solution. This interpretation of the phrase 'non-directive counselling' in the context of the activities of the Defendants was not disputed on behalf of the Respondent. It follows from this, of course, that non- directive counselling to pregnant women would never involve the actual advising of an abortion as the preferred option but neither, of course, could it permit the giving of advice for any reason to the pregnant women receiving such counselling against choosing to have an abortion."

15. On 19 December 1986 Mr Justice Hamilton, President of the High Court, found that the activities of Open Door and Dublin Well Woman in counselling pregnant women within the jurisdiction of the court to travel abroad to obtain an abortion or to obtain further advice on abortion within a foreign jurisdiction were unlawful having regard to the provisions of Article 40.3.3° of the Constitution of Ireland.

He confirmed that Irish criminal law made it an offence to procure or attempt to procure an abortion, to administer an abortion or to assist in an abortion by supplying any noxious thing or instrument (sections 58 and 59 of the Offences against the Person Act 1861 - see paragraph 29 below). Furthermore, Irish constitutional law also protected the right to life of the unborn from the moment of conception onwards.

An injunction was accordingly granted...

2. Before the Supreme Court

16. Open Door and Dublin Well Woman appealed against this decision to the Supreme Court which in a unanimous judgment delivered on 16 March 1988 by Mr Justice Finlay CJ rejected the appeal.

The Supreme Court noted that the appellants did not consider it essential to the service which they provided for pregnant women in Ireland that they should take any part in arranging the travel of women who wished to go abroad for the purpose of having an abortion or that they arranged bookings in clinics for such women. However, they did consider it essential to inform women who wished to have an abortion outside the jurisdiction of the court of the name, address, telephone number and method of communication with a specified clinic which they had examined and were satisfied was one which maintained a high standard.

17. On the question of whether the above activity should be restrained as being contrary to the Constitution, Mr Justice Finlay CJ stated:

"... the essential issues in this case do not in any way depend upon the Plaintiff establishing that the Defendants were advising or encouraging the procuring of abortions. The essential issue in this case, having regard to the nature of the guarantees contained in Article 40, s.3, sub-s.3 of the Constitution, is the issue as to whether the Defendants' admitted activities were assisting pregnant women within the jurisdiction to travel outside that jurisdiction in order to have an abortion. To put the matter in another way, the issue and the question of fact to be determined is: were they thus assisting in the destruction of the life of the unborn?

I am satisfied beyond doubt that having regard to the admitted facts the Defendants were assisting in the ultimate destruction of the life of the unborn by abortion in that they were helping the pregnant woman who had decided upon that option to get in touch with a clinic in Great Britain which would provide the service of abortion. It seems to me an inescapable conclusion that if a woman was anxious to obtain an abortion and if she was able by availing of the counselling services of one or other of the Defendants to obtain the precise location, address and telephone number of, and method of communication with, a clinic in Great Britain which provided that service, put in plain language, that was knowingly helping her to attain her objective. I am, therefore, satisfied that the finding made by the learned trial Judge that the Defendants were assisting pregnant women to travel abroad to obtain further advice on abortion and to secure an abortion is well supported on the evidence ..."

The Court further noted that the phrase in Article 40.3.3° "with due regard to the equal right to life of the mother" did not arise for interpretation in the case since the applicants were not claiming that the service they were providing for pregnant women was "in any way confined to or especially directed towards the due regard to the equal right to life of the mother ...".

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19. As to whether there was a constitutional right to information about the availability of abortion outside the State, the court stated as follows:

"The performing of an abortion on a pregnant woman terminates the unborn life which she is carrying. Within the terms of Article 40.3.3° it is a direct destruction of the constitutionally guaranteed right to life of that unborn child.

It must follow from this that there could not be an implied and unenumerated constitutional right to information about the availability of a service of abortion outside the State which, if availed of, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn. As part of the submission on this issue it was further suggested that the right to receive and give information which, it was alleged, existed and was material to this case was, though not expressly granted, impliedly referred to or involved in the right of citizens to express freely their convictions and opinions provided by Article 40, s.6, sub-s.1 (i) of the Constitution, since, it was claimed, the right to express freely convictions and opinions may, under some circumstances, involve as an ancillary right the right to obtain information. I am satisfied that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child."

20. The court upheld the decision of the High Court to grant an injunction but varied the terms of the order as follows:

"... that the defendants and each of them, their servants or agents be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise."

....

21. Following the judgment of the Supreme Court, Open Door, having no assets, ceased its activities.

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C. Subsequent legal developments

[S.P.U.C. also won an injunction restraining students from publishing or distributing in student publications "information concerning the identity and location of abortion clinics outside the jurisdiction."]

D. Evidence presented by the applicants

26. The applicants presented evidence to the Court that there had been no significant drop in the number of Irish women having abortions in Great Britain since the granting of the injunction, that number being well over 3,500 women per year. They also submitted an opinion from an expert in public health (Dr J.R. Ashton) which concludes that there are five possible adverse implications for the health of Irish women arising from the injunction in the present case:

1. An increase in the birth of unwanted and rejected children;

2. An increase in illegal and unsafe abortions;

3. A lack of adequate preparation of Irish women obtaining abortions;

4. Increases in delay in obtaining abortions with ensuing increased complication rates;

5. Poor aftercare with a failure to deal adequately with medical complications and a failure to provide adequate contraceptive advice.

In their written comments to the Court, S.P.U.C. claimed that the number of abortions obtained by Irish women in England, which had been rising rapidly prior to the enactment of Article 40.3.3°, had increased at a much reduced pace. They further submitted that the number of births to married women had increased at a "very substantial rate".

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II. RELEVANT DOMESTIC LAW AND PRACTICE CONCERNING PROTECTION OF THE UNBORN

A. Constitutional protection

28. Article 40.3.3° of the Irish Constitution (the Eighth Amendment), which came into force in 1983 following a referendum, reads:

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

...

B. Statutory protection

29. The statutory prohibition of abortion is contained in sections 58 and 59 of the Offences Against the Person Act 1861. Section 58 provides that:

"Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to betaken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable, [to imprisonment for life] ..."

Section 59 states that:

"Whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof, ..."

30. Section 16 of the Censorship of Publications Act 1929 as amended by section 12 of the Health (Family Planning) Act 1979 provides that:

"It shall not be lawful for any person, otherwise than under and in accordance with a permit in writing granted to him under this section

(a) to print or publish or cause or procure to be printed or published, or

(b) to sell or expose, offer or keep for sale or

(c) to distribute, offer or keep for distribution,

any book or periodical publication (whether appearing on the register of prohibited publications or not) which advocates or which might reasonably be supposed to advocate the procurement of abortion or miscarriage or any method, treatment or appliance to be used for the purpose of such procurement."

31. Section 58 of the Civil Liability Act 1961 provides that "the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive".

32. Section 10 of the Health (Family Planning) Act 1979 re-affirms the statutory prohibition of abortion and states as follows:

"Nothing in this Act shall be construed as authorising -

(a) the procuring of abortion,

(b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of any instruments to procure abortion) or,

(c) the sale, importation into the State, manufacture, advertising or display of abortifacients."

C. Case-law

33. Apart from the present case and subsequent developments (see paragraphs 11-25 above), reference has been made to the right to life of the unborn in various decisions of the Supreme Court ....

PROCEEDINGS BEFORE THE COMMISSION

36. In their applications (nos. 14234 and 14235/88) lodged with the Commission on 19 August and 22 September 1988 the applicants complained that the injunction in question constituted an unjustified interference with their right to impart or receive information contrary to Article 10 (art. 10) of the Convention. Open Door, Mrs X and Ms Geraghty further claimed that the restrictions amounted to an interference with their right to respect for private life in breach of Article 8 (art. 8) and, in the case of Open Door, discrimination contrary to Article 14 in conjunction with Articles 8 and 10 (art. 14+8, art. 14+10).

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AS TO THE LAW

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52. To sum up, the Court is able to take cognisance of the merits of the case as regards all of the applicants.

III. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

53. The applicants alleged that the Supreme Court injunction, restraining them from assisting pregnant women to travel abroad to obtain abortions, infringed the rights of the corporate applicants and the two counsellors to impart information, as well as the rights of Mrs X and Ms Geraghty to receive information. They confined their complaint to that part of the injunction which concerned the provision of information to pregnant women as opposed to the making of travel arrangements or referral to clinics (see paragraph 20 above). They invoked Article 10 (art. 10) which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

54. In their submissions to the Court the Government contested these claims and also contended that Article 10 (art. 10) should be interpreted against the background of Articles 2, 17 and 60 (art. 2, art. 17, art. 60) of the Convention the relevant parts of which state:

Article 2 (art. 2)

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

Article 17 (art. 17)

"Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 60 (art. 60)

"Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

A. Was there an interference with the applicants' rights?

55. The Court notes that the Government accepted that the injunction interfered with the freedom of the corporate applicants to impart information. Having regard to the scope of the injunction which also restrains the "servants or agents" of the corporate applicants from assisting "pregnant women" (see paragraph 20 above), there can be no doubt that there was also an interference with the rights of the applicant counsellors to impart information and with the rights of Mrs X and Ms Geraghty to receive information in the event of being pregnant.

To determine whether such an interference entails a violation of Article 10 (art. 10), the Court must examine whether or not it was justified under Article 10 para. 2 (art. 10-2) by reason of being a restriction "prescribed by law" which was necessary in a democratic society on one or other of the grounds specified in Article 10 para. 2 (art. 10-2).

B. Was the restriction "prescribed by law"?

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2. Court's examination of the issue

59. This question must be approached by considering not merely the wording of Article 40.3.3° in isolation but also the protection given under Irish law to the rights of the unborn in statute law and in case-law (see paragraphs 28-35 above).

It is true that it is not a criminal offence to have an abortion outside Ireland and that the practice of non-directive counselling of pregnant women did not infringe the criminal law as such. Moreover, on its face the language of Article 40.3.3° appears to enjoin only the State to protect the right to life of the unborn and suggests that regulatory legislation will be introduced at some future stage.

On the other hand, it is clear from Irish case-law, even prior to 1983, that infringement of constitutional rights by private individuals as well as by the State may be actionable (see paragraph 35 above). Furthermore, the constitutional obligation that the State defend and vindicate personal rights "by its laws" has been interpreted by the courts as not being confined merely to "laws" which have been enacted by the Irish Parliament (Oireachtas) but as also comprehending judge-made "law". In this regard the Irish courts, as the custodians of fundamental rights, have emphasised that they are endowed with the necessary powers to ensure their protection (ibid.).

60. Taking into consideration the high threshold of protection of the unborn provided under Irish law generally and the manner in which the courts have interpreted their role as the guarantors of constitutional rights, the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable (See the Sunday Times v. the United Kingdom judgment of 26 April 1979, Series A no. 30, p. 31, para. 49). This conclusion is reinforced by the legal advice that was actually given to Dublin Well Woman that,

in the light of Article 40.3.3°, an injunction could be sought against its counselling activities (see paragraph 10 in fine above).

The restriction was accordingly "prescribed by law".

C. Did the restriction have aims that were legitimate under Article 10 para. 2 (art. 10-2)?

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63. The Court cannot accept that the restrictions at issue pursued the aim of the prevention of crime since, as noted above (paragraph 59), neither the provision of the information in question nor the obtaining of an abortion outside the jurisdiction involved any criminal offence. However, it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum (see paragraph 28 above). The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect....

D. Was the restriction necessary in a democratic society?

64. The Government submitted that the Court's approach to the assessment of the "necessity" of the restraint should be guided by the fact that the protection of the rights of the unborn in Ireland could be derived from Articles 2, 17 and 60 (art. 2, art. 17, art. 60) of the Convention. They further contended that the "proportionality" test was inadequate where the rights of the unborn were at issue. The Court will examine these issues in turn.

1. Article 2 (art. 2)

65. The Government maintained that the injunction was necessary in a democratic society for the protection of the right to life of the unborn and that Article 10 (art. 10) should be interpreted inter alia against the background of Article 2 (art. 2) of the Convention which, they argued, also protected unborn life. The view that abortion was morally wrong was the deeply held view of the majority of the people in Ireland and it was not the proper function of the Court to seek to impose a different viewpoint.

66. The Court observes at the outset that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2 (art. 2). The applicants have not claimed that the Convention contains a right to abortion, as such, their complaint being limited to that part of the injunction which restricts their freedom to impart and receive information concerning abortion abroad (see paragraph 20 above).

Thus the only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals as explained above (see paragraph 63). It follows from this approach that the Government's argument based on Article 2 (art. 2) of the

Convention does not fall to be examined in the present case. On the other hand, the arguments based on Articles 17 and 60 (art. 17, art. 60) fall to be considered below (see paragraphs 78 and 79).

2. Proportionality

67. The Government stressed the limited nature of the Supreme Court's injunction which only restrained the provision of certain information (see paragraph 20 above). There was no limitation on discussion in Ireland about abortion generally or the right of women to travel abroad to obtain one. They further contended that the Convention test as regards the proportionality of the restriction was inadequate where a question concerning the extinction of life was at stake. The right to life could not, like other rights, be measured according to a graduated scale. It was either respected or it was not. Accordingly, the traditional approach of weighing competing rights and interests in the balance was inappropriate where the destruction of unborn life was concerned. Since life was a primary value which was antecedent to and a prerequisite for the enjoyment of every other right, its protection might involve the infringement of other rights such as freedom of expression in a manner which might not be acceptable in the defence of rights of a lesser nature.

The Government also emphasised that, in granting the injunction, the Supreme Court was merely sustaining the logic of Article 40.3.3° of the Constitution. The determination by the Irish courts that the provision of information by the relevant applicants assisted in the destruction of unborn life was not open to review by the Convention institutions.

68. The Court cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable ....

It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them ....

However this power of appreciation is not unlimited. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.

69. As regards the application of the "proportionality" test, the logical consequence of the Government's argument is that measures taken by the national authorities to protect the right to life of the unborn or to uphold the constitutional guarantee on the subject would be automatically justified under the Convention where infringement of a right of a lesser stature was alleged. It is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights. However, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions. To accept the Government's pleading on this point would amount

to an abdication of the Court's responsibility under Article 19 (art. 19) "to ensure the observance of the engagements undertaken by the High Contracting Parties".

70. Accordingly, the Court must examine the question of "necessity" in the light of the principles developed in its case-law .... It must determine whether there existed a pressing social need for the measures in question and, in particular, whether the restriction complained of was "proportionate to the legitimate aim pursued".

71. In this context, it is appropriate to recall that freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

72. While the relevant restriction, as observed by the Government, is limited to the provision of information, it is recalled that it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion. Furthermore, the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman's health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.

73. The Court is first struck by the absolute nature of the Supreme Court injunction which imposed a "perpetual" restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The sweeping nature of this restriction has since been highlighted by the case of The Attorney General v. X and Others and by the concession made by the Government at the oral hearing that the injunction no longer applied to women who, in the circumstances as defined in the Supreme Court's judgment in that case, were now free to have an abortion in Ireland or abroad.

74. On that ground alone the restriction appears over broad and disproportionate. Moreover, this assessment is confirmed by other factors.

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77. In addition, the available evidence, which has not been disputed by the Government, suggests that the injunction has created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing themselves of customary medical supervision after the abortion has taken place (see paragraph 26 above). Moreover, the injunction may have had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information (see paragraph 76 above). These are certainly legitimate factors to take into consideration in assessing the proportionality of the restriction.

3. Articles 17 and 60 (art. 17, art. 60)

78. The Government, invoking Articles 17 and 60 (art. 17, art. 60) of the Convention, have submitted that Article 10 (art. 10) should not be interpreted in such a manner as to limit, destroy or derogate from the right to life of the unborn which enjoys special protection under Irish law.

79. Without calling into question under the Convention the regime of protection of unborn life that exists under Irish law, the Court recalls that the injunction did not prevent Irish women from having abortions abroad and that the information it sought to restrain was available from other sources (see paragraph 76 above). Accordingly, it is not the interpretation of Article 10 (art. 10) but the position in Ireland as regards the implementation of the law that makes possible the continuance of the current level of abortions obtained by Irish women abroad.

4. Conclusion

80. In the light of the above, the Court concludes that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued. Accordingly there has been a breach of Article 10 (art. 10).

IV. ALLEGED VIOLATIONS OF ARTICLES 8 AND 14 (art. 8, art. 14)

[The Court refused to consider whether the injunction also violated the "right to respect for private life" under Article 8, nor the question of whether the injunction "discriminated against women since men were not denied information 'critical to their reproductive and health choices'". The Court did not consider it "necessary to examine these complaints" in light of the fact that it had already found a breach of Article 10.]

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FOR THESE REASONS, THE COURT

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3. Holds by fifteen votes to eight that there has been a violation of Article 10 (art. 10);

4. Holds unanimously that it is not necessary to examine the remaining complaints;

5. Holds by seventeen votes to six that Ireland is to pay to Dublin Well Woman, within three months, IR£25,000 (twenty-five thousand Irish pounds) in respect of damages;

6. Holds unanimously that Ireland is to pay to Open Door and Dublin Well Woman, within three months, in respect of costs and expenses, the sums resulting from the calculation to be made in accordance with paragraphs 90, 93 and 94 of the judgment;

7. Dismisses unanimously the remainder of the claims for just satisfaction.

DISSENTING OPINION OF JUDGE CREMONA

There are certain aspects in this case which merit special consideration in the context of the "necessary in a democratic society" requirement for the purposes of Article 10 para. 2 (art. 10-2) of the Convention.

Firstly, there is the paramount place accorded to the protection of unborn life in the whole fabric of Irish public policy, as is abundantly manifest from repeated pronouncements of the highest judicial and other national authorities.

Secondly, this is in fact a fundamental principle of Irish public policy which has been enshrined in the constitution itself after being unequivocally affirmed by the direct will of a strong majority of the people by means of the eminently democratic process of a comparatively recent national referendum.

Thirdly, in a matter such as this touching on profound moral values considered fundamental in the national legal order, the margin of appreciation left to national authorities (which in this case the judgment itself describes as wide), though of course not exempt from supervision by the Strasbourg institutions, assumes a particular significance. As has been said by the Court on other occasions -

(a) "it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals" so that "the view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject" (Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 22, para. 35; and see also Handyside v. the United kingdom judgment of 7 December 1976, Series A no. 24, p. 22, para. 48); and

(b) "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than an international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them" (ibid.).

I think this assumes particular importance in the present case in view of the popular expression in a national referendum. The interference in question is in fact a corollary of the constitutional protection accorded to those unable to defend themselves (i.e. the unborn) intended to avoid setting at nought a constitutional provision considered to be basic in the national legal order and indeed, as the Government put it, to sustain the logic of that provision.

Fourthly, there is also a certain proportionality in that the prohibition in question in no way affects the expression of opinion about the permissibility of abortion in general and does not extend to measures restricting freedom of movement of pregnant women or subjecting them to unsolicited examinations. It is true that, within its own limited scope the injunction was couched in somewhat absolute terms, but what it really sought to do was to reflect the general legal principle involved and the legal position as then generally understood.

I am convinced that any inconvenience or possible risk from the impugned injunction which has been represented as indirectly affecting women who may wish to seek abortions, or any practical limitation on the general effectiveness of such injunction cannot, in the context of the case as a whole, whether by themselves or in conjunction with other arguments, outweigh the above considerations in the overall assessment.

In conclusion, taking into account all relevant circumstances and in particular the margin of appreciation enjoyed by national authorities, I cannot find that the injunction in question was incompatible with Article 10 (art. 10) of the Convention. In my view it satisfied all the requirements of paragraph 2 (art. 10-2) thereof. There was thus no violation of that provision.

II. Forced and Coerced Sterilization

The foundations for reproductive rights, including the right to decide when and whether to create a family, are found in several human rights treaties and case law. An individual's reproductive rights are violated not only when a state *directly* interferes with her decision or capacity to reproduce, but also when the state *indirectly burdens* a decision or capacity to reproduce. Consider the law held unconstitutional in *Skinner v. Oklahoma*, which mandated the sterilization of persons who were convicted three times of certain offenses. This law is paradigmatic of laws that directly encumber a person's right to reproductive self-determination. However, states can in some cases indirectly interfere with individuals' reproductive rights— achieving in a roundabout way what is an obvious human rights infraction when accomplished directly.

The following cases provide a snapshot of different approaches that courts and other legal bodies have taken to laws that impact private choices regarding reproduction and the creation of family. While the U.S. Supreme Court in *Skinner* found that "marriage and procreation are fundamental to the very existence and survival of the race"[2] and should be understood as "basic liberties,"[3] other legal bodies have used alternative rationales to recognize reproductive rights.

In *Re Eve*, the Supreme Court of Canada grapples with the question of whether to allow a mother to consent to the sterilization of her mentally retarded daughter, discussing the grave intrusion on a person's fundamental right to free procreative choice that sterilization represents and questioning whether, by protecting the daughter's physical integrity, it would violate her right to equality. How does this compare with the now overturned Supreme Court case of *Buck v. Bell* in which the Court held that "three generations of imbeciles is enough?" Consider the Peruvian case of *Maria Mamerita Mestanza v. Peru* where the Inter-American Commission on Human Rights addresses the repercussions of a massive, compulsory and systematic government policy to encourage sterilization as a means to rapidly alter the reproductive behavior of the Peruvian population, especially poor Indian and rural women. In that case, the Inter-American Commission discusses whether the right to reproductive freedom exits within the Peruvian State's Constitutional rights to life, personal integrity, and equality before the law. Alternatively, in *Sojourner v. N.J. Dept. of Human Services*, the New Jersey Supreme Court addresses privacy and equality claims brought to challenge caps on cash assistance for families exercising their fundamental right to conceive and bear children after welfare benefits have been received. Query whether disparate treatment in this case is functionally different than the forced sterilization at issue in the *Mestanza* case. In contrast, consider the case of *Javed v. State of Haryana* where the Supreme Court of India balances the social and economic implications of the "torrential" increase in the population of the country against individual rights to life and liberty when making private family choices.

Taken together, these cases confront the confines of evaluating fundamental rights in isolation and serve as a useful supplement to U.S. jurisprudence that has thus far considered coerced family planning in limited contexts.

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[2] *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

[3] *Id.*

Re Eve
(1986) 31 D.L.R. (4th) 1 (S.C.C.)

¶ 1 LA FOREST J.:— These proceedings began with an application by a mother for permission to consent to the sterilization of her mentally retarded daughter who also suffered from a condition that makes it extremely difficult for her to communicate with others. The application was heard by McQuaid J. of the Supreme Court of Prince Edward Island – Family Division. In the interests of privacy, he called the daughter "Eve," and her mother "Mrs. E".

¶ 2 When Eve was a child, she lived with her mother and attended various local schools. When she became twenty-one, her mother sent her to a school for retarded adults in another community. There she stayed with relatives during the week, returning to her mother's home on weekends. At this school, Eve struck up a close friendship with a male student; in fact, they talked of marriage. He too is retarded, though somewhat less so than Eve. However, the situation was identified by the school authorities who talked to the male student and brought the matter to an end.

¶ 3 The situation naturally troubled Mrs. E. Eve was usually under her supervision or that of someone else, but this was not always the case. She was attracted and attractive to men and Mrs. E. feared she might quite possibly and innocently become pregnant. Mrs. E. was concerned about the emotional effect that a pregnancy and subsequent birth might have on her daughter. Eve, she felt, could not adequately cope with the duties of a mother and the responsibility would fall on Mrs. E. This would understandably cause her great difficulty; she is a widow and was then approaching sixty. That is why she decided Eve should be sterilized.

¶ 4 Eve's condition is more fully described by McQuaid J. as follows:

> The evidence established that Eve is 24 years of age, and suffers what is described as extreme expressive aphasia. She is unquestionably at least mildly to moderately retarded. She has some learning skills, but only to a limited level. She is described as being a pleasant and affectionate person who, physically, is an adult person, quite capable of being attracted to, as well as attractive to, the opposite sex. While she might be able to carry out the mechanical duties of a mother, under supervision, she is incapable of being a mother in any other sense. Apart from being able to recognize the fact of a family unit, as consisting of a father, a mother, and children residing in the same home, she would have no concept of the idea of marriage, or indeed, the consequential relationship between, intercourse, pregnancy and birth.
>
> Expressive aphasia was described as a condition in which the patient is unable to communicate outwardly thoughts or concepts which she might have perceived. Particularly in the case of a person suffering from any degree of retardation, the result is that even an expert such as a psychiatrist is unable to determine with any degree of certainty if, in fact, those thoughts or concepts have actually been perceived, or whether understanding of them does exist. Little appears to be known of the cause of this condition, and even less of its remedy. In the case of Eve, this condition has been diagnosed as extreme.

From the evidence, he further concluded:

> [t]hat Eve is not capable of informed consent, that her moderate retardation is generally stable, that her condition is probably non-inheritable, that she is incapable of effective alternative means of contraception, that the psychological or emotional effect of the proposed operation would probably be minimal, and that the probable incidence of pregnancy is impossible to predict.

...

General Considerations

¶ 21 ... The Court is asked to consent, on behalf of Eve, to sterilization since she, though an adult, is unable to do so herself. Sterilization by means of a tubal ligation is usually irreversible. And hysterectomy, the operation authorized by the Appeal Division, is not only irreversible; it is major surgery. Eve's sterilization is not being sought to treat any medical condition. Its purposes are admittedly non-therapeutic. One such purpose is to deprive Eve of the capacity to become pregnant so as to save her from the possible trauma of giving birth and from the resultant obligations of a parent, a task the evidence indicates she is not capable of fulfilling. As to this, it should be noted that there is no evidence that giving birth would be more difficult for Eve than for any other woman. A second purpose of the sterilization is to relieve Mrs. E. of anxiety about the possibility of Eve's becoming pregnant and of having to care for any child Eve might bear.

...

Parens patriae Jurisdiction

¶ 72 ... From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in Wellesley v. Duke of Beaufort, *supra* at 2 Russ., at p. 20, 38 E.R., at p. 243 is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.

¶ 73 The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his other "benefit" or "welfare".

¶ 74 The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in J. v. C., [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion ...." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in Re X, *supra*, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

¶ 75 What is more, as the passage from Chambers cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

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¶ 76 I have no doubt that the jurisdiction may be used to authorize the performance of a surgical operation that is necessary to the health of a person, as indeed it already has been in Great Britain and this country. And by health, I mean mental as well as physical health. In the United States, the courts have used the *parens patriae* jurisdiction on behalf of a mentally incompetent to authorize chemotherapy and amputation, and I have little doubt that in a proper case our courts should do the same. Many of these instances are related in Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969), where the court went to the length of permitting a kidney transplant between brothers. Whether the courts in this country should go that far or as in Quinlan permit the removal of life-sustaining equipment, I leave to later disposition.

¶ 77 Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuick in Re X, at pp. 706-07, and Heilbron J. in Re D, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

¶ 78 There are other reasons for approaching an application for sterilization of a mentally incompetent person with the utmost caution. To begin with, the decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human. This attitude has been aided and abetted by now discredited eugenic theories whose influence was felt in this country as well as the United States. Two provinces, Alberta and British Columbia, once had statutes providing for the sterilization of mental defectives; The Sexual Sterilization Act, R.S.A. 1970, c. 341, repealed by S.A. 1972, c. 87; Sexual Sterilization Act, R.S.B.C. 1960, c. 353, s. 5(1), repealed by S.B.C. 1973, c. 79.

¶ 79 Moreover, the implications of sterilization are always serious. As we have been reminded, it removes from a person the great privilege of giving birth, and is for practical purposes irreversible. If achieved by

means of a hysterectomy, the procedure approved by the Appeal Division, it is not only irreversible; it is major surgery. Here, it is well to recall Lord Eldon's admonition in Wellesley's case, *supra*, at 2 Russ. p. 18, 38 E.R. p. 242, that "it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done". Though this comment was addressed to children, who were the subject matter of the application, it aptly describes the attitude that should always be present in exercising a right on behalf of a person who is unable to do so.

¶ 80 Another factor merits attention. Unlike most surgical procedures, sterilization is not one that is ordinarily performed for the purpose of medical treatment. The Law Reform Commission of Canada tells us this in Sterilization, Working Paper 24 (1979), a publication to which I shall frequently refer as providing a convenient summary of much of the work in the field. It says at p. 3:

> Sterilization as a medical procedure is distinct, because except in rare cases, if the operation is not performed, the physical health of the person involved is not in danger, necessity or emergency not normally being factors in the decision to undertake the procedure. In addition to its being elective it is for all intents and purposes irreversible.

As well, there is considerable evidence that non-consensual sterilization has a significant negative psychological impact on the mentally handicapped; see Sterilization, *supra*, at pp. 49-52. The Commission has this to say at p. 50:

> It has been found that, like anyone else, the mentally handicapped have individually varying reactions to sterilization. Sex and parenthood hold the same significance for them as for other people and their misconceptions and misunderstandings are also similar. Rosen maintains that the removal of an individual's procreative powers is a matter of major importance and that no amount of reforming zeal can remove the significance of sterilization and its effect on the individual psyche.
>
> In a study by Sabagh and Edgerton, it was found that sterilized mentally retarded persons tend to perceive sterilization as a symbol of reduced or degraded status. Their attempts to pass for normal were hindered by negative self perceptions and resulted in withdrawal and isolation rather than striving to conform ....
>
> The psychological impact of sterilization is likely to be particularly damaging in cases where it is a result of coercion and when the mentally handicapped have had no children.

¶ 81 In the present case, there is no evidence to indicate that failure to perform the operation would have any detrimental effect on Eve's physical or mental health. The purposes of the operation, as far as Eve's welfare is concerned, are to protect her from possible trauma in giving birth and from the assumed difficulties she would have in fulfilling her duties as a parent. As well, one must assume from the fact that hysterectomy was ordered, that the operation was intended to relieve her of the hygienic tasks associated with menstruation. Another purpose is to relieve Mrs. E. of the anxiety that Eve might become pregnant, and give birth to a child, the responsibility for whom would probably fall on Mrs. E.

¶ 82 I shall dispose of the latter purpose first. One may sympathize with Mrs. E. To use Heilbron J.'s phrase, it is easy to understand the natural feelings of a parent's heart. But the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. And a court, as I previously mentioned, must exercise great caution to avoid being misled by this all too human mixture of emotions and motives. So we are left to consider whether the purposes underlying the operation are necessarily for Eve's benefit and protection.

¶ 83 The justifications advanced are the ones commonly proposed in support of non-therapeutic sterilization (see Sterilization, passim). Many are demonstrably weak. The Commission dismisses the argument about the trauma of birth by observing at p. 60:

> For this argument to be held valid would require that it could be demonstrated that the stress of delivery was greater in the case of mentally handicapped persons than it is for others. Considering the generally known wide range of post-partum response would likely render this a difficult case to prove.

¶ 84 The argument relating to fitness as a parent involves many value-loaded questions. Studies conclude that mentally incompetent parents show as much fondness and concern for their children as other people; see Sterilization, *supra*, p. 33 et seq., 63-64. Many, it is true, may have difficulty in coping, particularly with the financial burdens involved. But this issue does not relate to the benefit of the incompetent;

it is a social problem, and one, moreover, that is not limited to incompetents. Above all it is not an issue that comes within the limited powers of the courts, under the *parens patriae* jurisdiction, to do what is necessary for the benefit of persons who are unable to care for themselves. Indeed, there are human rights considerations that should make a court extremely hesitant about attempting to solve a social problem like this by this means. It is worth noting that in dealing with such issues, provincial sterilization boards have revealed serious differences in their attitudes as between men and women, the poor and the rich, and people of different ethnic backgrounds; see Sterilization, *supra*, at p. 44.

¶ 85 As far as the hygienic problems are concerned, the following view of the Law Reform Commission (at p. 34) is obviously sound:

> ... if a person requires a great deal of assistance in managing their own menstruation, they are also likely to require assistance with urinary and fecal control, problems which are much more troublesome in terms of personal hygiene.

Apart from this, the drastic measure of subjecting a person to a hysterectomy for this purpose is clearly excessive.

¶ 86 The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction.

¶ 87 To begin with, it is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a court purports to act, let alone one in which that procedure is necessary in his or her best interest. And how are we to weigh the best interests of a person in this troublesome area, keeping in mind that an error is irreversible? Unlike other cases involving the use of the *parens patriae* jurisdiction, an error cannot be corrected by the subsequent exercise of judicial discretion. That being so, one need only recall Lord Eldon's remark, *supra*, that "it has always been the principle of this Court, not to risk damage to children which it cannot repair" to conclude that non-therapeutic sterilization may not be authorized in the exercise of the *parens patriae* jurisdiction. McQuaid J. was, therefore,

right in concluding that he had no authority or jurisdiction to grant the application.

¶ 88 Nature or the advances of science may, at least in a measure, free Eve of the incapacity from which she suffers. Such a possibility should give the courts pause in extending their power to care for individuals to such irreversible action as we are called upon to take here. The irreversible and serious intrusion on the basic rights of the individual is simply too great to allow a court to act on the basis of possible advantages which, from the standpoint of the individual, are highly debatable. Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well presented a case may be, it can only partially inform. If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes, the legislature is the appropriate body to do so. It is in a position to inform itself and it is attuned to the feelings of the public in making policy in this sensitive area. The actions of the legislature will then, of course, be subject to the scrutiny of the courts under the Canadian Charter of Rights and Freedoms and otherwise.

¶ 89 Many of the factors I have referred to as showing that the best interests test is simply not a sufficiently precise or workable tool to permit the *parens patriae* power to be used in situations like the present are referred to in Matter of Guardianship of Eberhardy, *supra*. Speaking for the court in that case, Heffernan J. had this to say, at p. 894:

> Under the present state of the law, the only guideline available to circuit courts faced with this problem appears to be the "best interests" of the person to be sterilized. This is a test that has been used for a number of years in this jurisdiction and elsewhere in the determination of the custody of children and their placement -- in some circumstances placement in a controlled environment ... No one who has dealt with this standard has expressed complete satisfaction with it. It is not an objective test, and it is not intended to be. The substantial workability of the test rests upon the informed fact-finding and the wise exercise of discretion by trial courts engendered by long experience with the standard. Importantly, however, most determinations made in the best interests of a child or of an incompetent person are not irreversible; and although a wrong decision may be damaging

> indeed, there is an opportunity for a certain amount of empiricism in the correction of errors of discretion. Errors of judgment or revisions of decisions by courts and social workers can, in part at least, be rectified when new facts or second thoughts prevail. And, of course, alleged errors of discretion in exercising the "best interest" standard are subject to appellate review. Sterilization as it is now understood by medical science is, however, substantially irreversible.

¶ 90 Heffernan J. also alluded to the limited capacity of judges to deal adequately with a problem that has such general social overtones in the following passage, at p. 895:

> What these facts demonstrate is that courts, even by taking judicial notice of medical treatises, know very little of the techniques or efficacy of contraceptive methods or of thwarting the ability to procreate by methods short of sterilization. While courts are always dependent upon the opinions of expert witnesses, it would appear that the exercise of judicial discretion unguided by well thought-out policy determinations reflecting the interest of society, as well as of the person to be sterilized, are hazardous indeed. Moreover, all seriously mentally retarded persons may not ipso facto be incapable of giving birth wit out serious trauma, and some may be good parents. Also, there has been a discernible and laudable tendency to "main-stream" the developmentally disabled and retarded. A properly thought out public policy on sterilization or alternative contraceptive methods could well facilitate the entry of these persons into a more nearly normal relationship with society. But again this is a problem that ought to be addressed by the legislature on the basis of fact-finding and the opinions of experts.

¶ 91 The foregoing, of course, leaves out of consideration therapeutic sterilization and where the line is to be drawn between therapeutic and non-therapeutic sterilization. On this issue, I simply repeat that the utmost caution must be exercised commensurate with the seriousness of the procedure. Marginal justifications must be weighed against what is in every case a grave intrusion on the physical and mental integrity of the person.

¶ 92 It will be apparent that my views closely conform to those expressed by Heilbron J. in Re D, *supra*. She was speaking of an infant, but her remarks are equally applicable to an adult. The importance of maintaining the physical integrity of a human being ranks high in our

scale of values, particularly as it affects the privilege of giving life. I cannot agree that a court can deprive a woman of that privilege for purely social or other non-therapeutic purposes without her consent. The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account. The Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.

¶ 93 I should perhaps add, as Heilbron J. does, that sterilization may, on occasion, be necessary as an adjunct to treatment of a serious malady, but I would underline that this, of course, does not allow for subterfuge or for treatment of some marginal medical problem. Heilbron J. was referring, as I am, to cases where such treatment is necessary in dealing with a serious condition. The recent British Columbia case of Re K, *supra*, is at best dangerously close to the limits of the permissible.

¶ 94 The foregoing remarks dispose of the arguments based on the traditional view of the *parens patriae* jurisdiction as exercised in this country. Counsel for the respondent strongly contended, however, that the Court should adopt the substituted judgment test recently developed by a number of state courts in the United States. That test, he submitted, is to be preferred to the best interests test because it places a higher value on the individuality of the mentally incompetent person. It affords that person the same right, he contended, as a competent person to choose whether to procreate or not.

¶ 95 There is an obvious logical lapse in this argument. I do not doubt that a person has a right to decide to be sterilized. That is his or her free choice. But choice presupposes that a person has the mental competence to make it. It may be a matter of debate whether a court should have the power to make the decision if that person lacks the mental capacity to do so. But it is obviously fiction to suggest that a decision so made is that of the mental incompetent, however much the court may try to put itself in her place. What the incompetent would do if she or he could make the choice is simply a matter of speculation. The sophistry embodied in the argument favouring substituted judgment has been fully revealed in Eberhardy, *supra*, at p. 893 where in discussing Grady, *supra*, the court stated:

> The fault we find in the New Jersey case is the ratio decidendi of first concluding, correctly we believe, that the right to sterilization

> is a personal choice, but then equating a decision made by others with the choice of the person to be sterilized. It clearly is not a personal choice, and no amount of legal legerdemain can make it so.
>
> ...
>
> We conclude that the question is not choice because it is sophistry to refer to it as such, but rather the question is whether there is a method by which others, acting in behalf of the person's best interests and in the interests, such as they may be, of the state, can exercise the decision. Any governmentally sanctioned (or ordered) procedure to sterilize a person who is incapable of giving consent must be denominated for what it is, that is, the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate.

¶ 96 Counsel for the respondent's argument in favour of a substituted judgment test was made essentially on a common law basis. However, he also argued that there is what he called a fundamental right to free procreative choice. Not only, he asserted, is there a fundamental right to bear children; there is as well a fundamental right to choose not to have children and to implement that choice by means of contraception. Starting from the American courts' approach to the due process clause in the United States Constitution, he appears to base this argument on s. 7 of the Charter. But assuming for the moment that liberty as used in s. 7 protects rights of this kind (a matter I refrain from entering into), counsel's contention seems to me to go beyond the kind of protection s. 7 was intended to afford. All s. 7 does is to give a remedy to protect individuals against laws or other state action that deprive them of liberty. It has no application here.

¶ 97 Another Charter related argument must be considered. In response to the appellant's argument that a court-ordered sterilization of a mentally incompetent person, by depriving that person of the right to procreate, would constitute an infringement of that person's rights to liberty and security of the person under s. 7 of the Canadian Charter of Rights and Freedoms, counsel for the respondent countered by relying on that person's right to equality under s. 15(1) of the Charter, saying "that the most appropriate method of ensuring the mentally incompetent their right to equal protection under s. 15(1) is to provide the mentally incompetent with a means to obtain non-therapeutic sterilizations,

Re Eve
(1986) 31 D.L.R. (4th) 1 (S.C.C.)

which adequately protects their interests through appropriate judicial safeguards." A somewhat more explicit argument along the same lines was made by counsel for the Public Trustee of Manitoba. His position was stated as follows:

> It is submitted that in the case of a mentally incompetent adult, denial of the right to have his or her case presented by a guardian ad litem to a Court possessing jurisdiction to give or refuse substituted consent to a non-therapeutic procedure such as sterilization, would be tantamount to a denial to that person of equal protection and equal benefit of the law. Such a denial would constitute discrimination on the basis of mental disability, which discrimination is prohibited by Section 15 of The Canadian Charter of Rights and Freedoms.

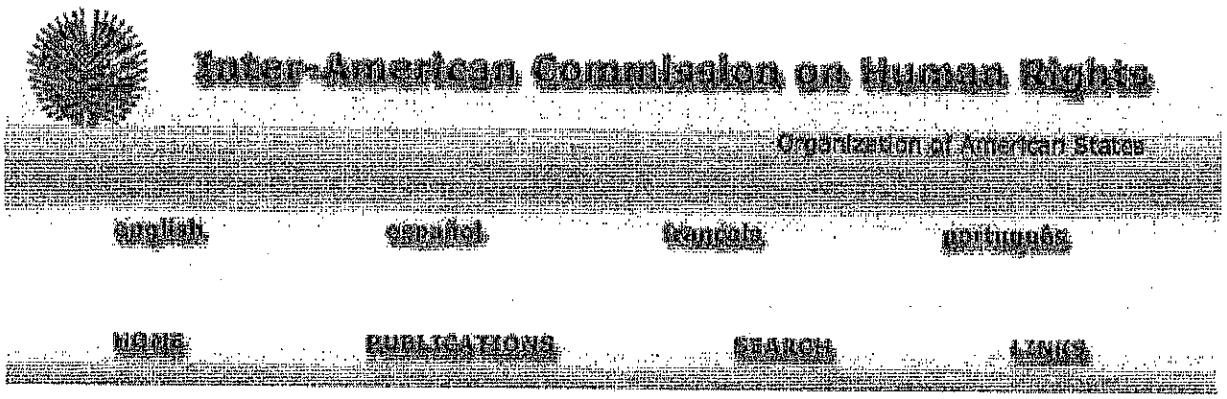
¶ 98 Section 15 of the Charter was not in force when these proceedings commenced but, this aside, these arguments appear flawed. They raise in different form an issue already dealt with, i.e. that the decision made by a court on an application to consent to the sterilization of an incompetent is somehow that of the incompetent. More troubling is that the issue is, of course, not raised by the incompetent, but by a third party.

¶ 99 The court undoubtedly has the right and duty to protect those who are unable to take care of themselves, and in doing so it has a wide discretion to do what it considers to be in their best interests. But this function must not, in my view, be transformed so as to create a duty obliging the court, at the behest of a third party, to make a choice between the two alleged constitutional rights -- the right to procreate or not to procreate -- simply because the individual is unable to make that choice. All the more so since, in the case of non-therapeutic sterilization as we saw, the choice is one the courts cannot safely exercise.

...

Conclusion

¶ 101 I would allow the appeal and restore the decision of the judge who heard the application.



REPORT Nº 71/03[1]
PETITION 12.191
FRIENDLY SETTLEMENT
MARÍA MAMÉRITA MESTANZA CHÁVEZ
PERU
October 22, 2003

I. SUMMARY

1. In a petition lodged with the Inter-American Commission on Human Rights (hereinafter "the Commission," "the Inter-American Commission," or "the IACHR") on June 15, 1999, the nongovernmental organizations Office for the Defense of Women's Rights (DEMUS), the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), and the *Asociación Pro Derechos Humanos* [Association for Human Rights] (APRODEH), which subsequently accredited as co-petitioners the Center for Reproductive Law and Policy (CRLP) and the Center for Justice and International Law (CEJIL), (hereinafter "the petitioners"), alleged that the Republic of Peru (hereinafter "Peru") violated the human rights of Ms. María Mamérita Mestanza Chávez, by forced sterilization that ultimately caused her death.

2. The original petitioners alleged that the facts denounced constitute violation by the Peruvian State of the rights to life, personal integrity, and equality before the law, contained in Articles 4, 5, 1, and 24 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), and violation of Articles 3, 4, 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (hereinafter "the Convention of Belém do Pará"), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (hereinafter "the Protocol of San Salvador.") and Articles 12 and 14 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

3. On February 22, 2001, the Peruvian State signed a joint press release with the Inter-American Commission on Human Rights, in which it was agreed to pursue friendly settlement of some cases before the Commission, including this one, in accordance with Articles 48(1)(f) and 49 of the American Convention on Human Rights.

4. On March 2, 2001, during the 110th session of the Inter-American Commission on Human Rights, the Peruvian State and the victims' representatives signed the Preliminary Agreement for Friendly Settlement with intervention and approval by the IACHR. The final friendly settlement was agreed upon on August 26, 2003, when the act setting out the friendly

settlement reached by the parties was signed in Lima.

5. This friendly settlement report, pursuant to Article 49 of the Convention and Article 41.5 of the Commission's Regulations, presents a brief summary of the facts alleged by the petitioners, the friendly solution reached, and agreement for its publication.

II. PROCESSING WITH THE COMMISSION

6. The Commission received the claim on June 15, 1999. On July 14, 1999 the IACHR opened the case, transmitted pertinent parts of the petition to the Peruvian State, and requested information within 90 days. Peru asked for additional time to prepare its reply, which was approved by the IACHR. Peru replied on January 14, 2000. The petitioners made comments on the State's reply on April 12, 2000. On October 3, 2000 the Inter-American Commission on Human Rights approved the Report on Admissibility Nº 66/00.

7. On March 2, 2001, with intervention and approval by the Inter-American Commission on Human Rights, the parties signed the Preliminary Agreement for Friendly Settlement, in which the Peruvian State admitted its international responsibility for the acts alleged by the petitioners and promised to take the necessary measures to compensate the victims.

8. On August 26, 2003, in the city of Lima, the representatives of the victims and the State signed the Agreement for Friendly Settlement, requesting that the Commission ratify the entire contents.

III. FACTS

9. They alleged that the case of Ms. María Mamérita Mestanza is one more among a large number of cases of women affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, Indian, and rural women. They noted that the Ombudsman had received several complaints on this matter, and that between November 1996 and November 1998 CLADEM had documented 243 cases of human rights violations through the performance of birth control surgery in Peru.

10. They stated that Ms. María Mamérita Mestanza, a rural woman about 33 years old and mother of seven children, was pressured to accept sterilization starting in 1996 by the Health Center of Encañada District. She and her husband Jacinto Salazar Suárez were subjected to various forms of harassment, including several visits in which health personnel threatened to report her and Mr. Salazar Suárez to the police, and told them that the government had approved a law requiring anyone who had more than five children to pay a fine and go to jail.

11. They state that finally, under coercion, Ms. Mestanza agreed to have tubal ligation surgery. The procedure was performed on March 27, 1988 at the Cajamarca Regional Hospital, without any pre-surgery medical examination. Ms. Mestanza was released the next day, March 28, 1988, although she had serious symptoms including nausea and sharp headaches. In the following days Mr. Jacinto Salazar reported to personnel of La Encañada Health Center on Ms. Mestanza's condition, which worsened daily, and was told by them that this was due to post-operative effects of the anesthesia.

12. They state that Ms. Mestranza Chavez died at home on April 5, 1998, and that the death certificate specified a "sepsis" as the direct cause of death and bilateral tubal blockage as a precedent cause. They report that a few days later a doctor from the Health

Center offered a sum of money to Mr. Jacinto Salazar in an effort to put an end to the matter.

13. They indicate that on April 15, 1998 Mr. Jacinto Salazar filed charges with the Provisional Combined Prosecutor of Baños del Inca against Martín Ormeño Gutiérrez, Chief of La Encañada Health Center, in connection with the death of Ms. Mestanza, for crimes against life, body, and health, in premeditated homicide (first degree murder). They add that on May 15, 1998 this Provincial Prosecutor indicted Mr. Ormeño Gutiérrez and others before the local Provincial Judge, who on June 4, 1998 ruled that there were insufficient grounds to prosecute. This decision was confirmed on July 1, 1998 by the Circuit Criminal Court, so on December 16, 1998 the Provincial Prosecutor ordered the case dismissed.

IV. FRIENDLY SETTLEMENT

14. The State and the petitioner signed the friendly settlement agreement, the text of which follows:

FIRST: BACKGROUND

Ms. María Mamérita Mestanza Chávez was forced to undergo sterilization surgery, which ultimately resulted in her death. The petitioner organizations allege that her rights to life, personal integrity, and equality before the law were violated, in contravention of Articles 4, 5, 1, and 24 of the American Convention on Human Rights, Articles 3, 4, 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, and Articles 12 and 14.2 of the Convention on the Elimination of All Forms of Discrimination Against Women.

On July 14, 1999 the Inter-American Commission on Human Rights transmitted the pertinent parts of the complaint to the Peruvian State and requested information. On October 3, 2000 the IACHR approved Report No. 66/00 on admissibility, and continued reviewing the substance of the case, concerning alleged violations of the American Convention and the Convention of Belém do Pará.

On March 2, 2001 during the 110th regular session of the IACHR a Preliminary Agreement for Friendly Settlement was reached.

SECOND: RECOGNITION

The Peruvian State, aware that protection and total respect for human rights is the cornerstone for a just, honorable, and democratic society, in strict compliance with its obligations assumed with the signing and ratification of the American Convention on Human Rights and other international human rights instruments to which it is a party, and aware that any violation of an international obligation that results in injury brings with it the duty for adequate reparation, which can most justly be done through compensation of the victim, investigation of the facts, and administrative, civil, and criminal penalties for the responsible parties, recognizes its international responsibility for the violation of Articles 1.1, 4, 5, and 24 of the American Convention on Human Rights, as well as Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against women in the harm done to victim María Mamérita Merstanza Chávez.

This recognition was reflected in the Preliminary Agreement for Friendly Settlement signed between the Peruvian State and the victim's legal representatives, with intervention and approval by the Inter-American Commission on Human Rights, on March 2, 2001 during the 110th session of the Inter-American Commission on Human Rights. In that agreement the Peruvian State admitted International responsibility for the facts described and pledged to take steps for material and moral reparation of the harm done and to initiate a thorough investigation and trial of the perpetrators and take steps to prevent the recurrence of similar incidents in the future.

THIRD: INVESTIGATION AND PUNISHMENT

The Peruvian State promises to make a thorough investigation of the facts and apply legal punishments to any person determined to have participated in them, as either planner, perpetrator, accessory, or in other capacity, even if they be civilian or military officials or employees of the government.
In this regard, the Peruvian State pledges to carry out administrative and criminal investigations into the attacks on the personal liberty, life, body, and health of the victim, and to punish:

a. Those responsible for the acts of pressuring the consent of Ms. María Mamérita Mestanza Chávez to submit to tubal ligation.

b. The health personnel who ignored the need for urgent care for Ms. Mestanza after her surgery.

c. Those responsible for the death of Ms. María Mamérita Mestanza Chávez.

d. The doctors who gave money to the spouse of the deceased woman in an attempt to cover up the circumstances of her demise.

e. The Investigative Commission, named by Cajamara Sub-Region IV of the Health Ministry, which questionably exonerated the health personal from responsibility for Ms. Mestanza's death.

Apart from the administrative and criminal penalties, the Peruvian state pledges to report any ethical violations to the appropriate professional association so that it can apply sanctions to the medical personnel involved in these acts, as provided in its statutes.

In addition, the State pledges to conduct administrative and criminal investigations into the conduct of agents of the Office of Public Prosecution and the judicial branch who failed to take action to clarify the facts alleged by Ms. Mamérita Mestanza's widower.

FOURTH: INDEMNIFICATION

1. Beneficiaries of this Agreement

The only persons recognized by the Peruvian State as beneficiaries of any indemnification are Jacinto Salazar Suárez, huband of María Mamérita Mestanza Chávez, and her children: Pascuala Salazar Mestanza, Maribel Salazar Mestanza, Alindor Salazar Mestanza, Napoleón Salazar Mestanza, Amancio Salazar

Chávez. That sum shall be paid in trust to a public or private institution, designated as the trustee, which will administer the resources spent on providing psychological care needed by the beneficiaries. The institution will be chosen jointly by the State and representatives of the Salazar Mestanza family, with support from the National Human Rights Coordination, DEMUS, APRODEH, and the Archbishop of Cajamarca. Expenses for legal establishment of the trust shall be paid by the Peruvian State.

In addition, the Peruvian State promises to give the husband and children of María Mamérita Mestanza Chávez permanent health insurance with the Ministry of Health or other competent entity. The surviving spouse's health insurance will be permanent, as will that of the children until they have their own public and/or private coverage.

NINTH: EDUCATION PAYMENTS

The Peruvian State promises to give the victim's children free primary and secondary education in public schools. The victim's children will receive tuition-free university education for a single degree at state schools, provided they qualify for admission.

TENTH: OTHER PAYMENTS

The Peruvian State agrees to make an additional payment of twenty thousand U.S. dollars ($20,000.00) to Mr. Jacinto Salazar Suárez to buy land or a house in the name of the children he had with Ms. María Mamérita Mestanza. Within one year of the date of this agreement Mr. Salazar Suárez must register the purchase by delivering the deed to the Executive Secretariat of the National Human Rights Council of the Ministry of Justice. Furthermore, Mr. Salazar Suárez agrees not to sell or lease the property purchased until the youngest of his children is of legal age, unless authorized by the court.

Peru's National Coordinator of Human Rights will be responsible for the necessary follow-up to ensure compliance with the provisions of this clause.

ELEVENTH: CHANGES IN LAWS AND PUBLIC POLICIES ON REPRODUCTIVE HEALTH AND FAMILY PLANNING

The Peruvian State pledges to change laws and public policies on reproductive health and family planning, eliminating any discriminatory approach and respecting women's autonomy.
The Peruvian State also promises to adopt and implement recommendations made by the Ombudsman concerning public policies on reproductive health and family planning, among which are the following:

a. Penalties for human rights violators and reparation for victims

1) Conduct a judicial review of all criminal cases on violations of human rights committed in the execution of the National Program of Reproductive Health and Family Planning, to break out and duly punish the perpetrators, requiring them to pay the appropriate civil damages, including the State if it is determined to have some responsibility for the acts that gave rise to the criminal cases.

2) Review the administrative proceedings initiated by the victims and/or

their family members, linked to the cases in the previous paragraph, which are pending or have concluded concerning denunciations of human rights violations.

b. Methods for monitoring and guaranteeing respect for human rights of health service clients

1) Adopt drastic measures against those responsible for the deficient pre-surgery evaluation of women who undergo sterilization, including health professionals in some of the country's health centers. Although the rules of the Family Planning Program require this evaluation, it is not being done.

2) Continuously conduct training courses for health personnel in reproductive rights, violence against women, domestic violence, human rights, and gender equity, in coordination with civil society organizations that specialize in these topics.

3) Adopt the necessary administrative measures so that that rules established for ensuring respect for the right of informed consent are scrupulously followed by health personnel.

4) Guarantee that the centers that offer sterilization surgery have proper conditions required by standards of the Family Planning Program.

5) Take strict measures to ensure that the compulsory reflection period of 72 hours is faithfully and universally honored.

6) Take drastic action against those responsible for forced sterilization without consent.

7) Implement a mechanism or channels for efficient and expeditious receipt and processing of denunciations of violation of human rights in the health establishments, in order to prevent or redress injury caused.

TWELFTH: LEGAL BASIS

This agreement is signed in accordance with the provisions of Articles 1, 2, and 48.1.f of the American Convention on Human Rights and Article 41 of the Regulations of the Inter-American commission on Human Rights; on Articles 2 (paragraphs 1 and 24, point 8), 44, 55, 205 and fourth final provision of Peru's Constitution; and on the provisions of Articles 1205, 1306, 1969, and 1981 of the Civil Code of Peru.

THIRTEENTH: INTERPRETATION

The meaning and scope of this agreement will be interpreted in accordance with Article 29 and 30 of the American Convention on Human Rights as applicable, and the principle of good faith. In case of doubt or disagreement between the parties on the content of this agreement, the Inter-American Commission on Human Rights shall resolve the interpretation. It shall also be responsible for monitoring the agreement's compliance; the parties shall report to it every three months on the status of compliance.

FOURTEENTH: HOMOLOGATION

The parties hereto agree to refer this Agreement for Friendly Settlement to the

Mestanza, Delia Salazar Mestanza, and Almanzor Salazar Mestanza.

2. Monetary compensation

a. Moral damages

The Peruvian State awards one-time compensation to each of the beneficiaries of ten thousand U.S. dollars ($10,000.00) for reparation of moral injury, which totals eighty thousand U.S. dollars ($80,000.00).

The State will deposit the amount due the minors in a trust account in accordance with the best terms available under sound banking practice. Arrangements will be made jointly with the Salazar Mestanza family's legal representatives.

b. Corollary damages

Injury caused as a direct consequence of the event giving rise to the claim consists of expenses incurred by the family as a direct result of the acts. These expenses were incurred to file and follow-up criminal charges with the Office of Public Prosecutions for aggravated homicide of María Mamérita Mestanza, as well as the costs of Ms. Mestanza's funeral and burial. The amount expended for these purposes is two thousand U.S. dollars ($2,000.00), which the Peruvian State shall pay to the beneficiaries.

FIFTH: INDEMNIFICATION FROM THOSE CRIMINALLY RESPONSIBLE FOR THE ACTS

The Agreement for Peaceful Settlement does not include the beneficiaries' right to damages from all those responsible for violation of Ms. María Mamérita Mestanza's human rights, as determined by a competent court in accordance with Article 92 of the Peruvian Penal Code, a right which is recognized by the Peruvian State. This agreement expressly waives any other claim by the beneficiaries against the Peruvian State as responsible party, a co-defendant, or in any other capacity.

SIXTH: RIGHT OF RECOVERY

The Peruvian State reserves the right of recovery against all persons found to be responsible in this case through the definitive sentence of a competent national tribunal, in accordance with current domestic law.

SEVENTH: TAX EXEMPTION, COMPLIANCE, AND LATE PENALTY

The damages awarded by the Peruvian State shall not be subject to payment of any present or future tax, assessment, or fee, and shall be paid no later than six months after the Inter-American Commission on Human Rights has sent notification of this agreement's ratification, after which the State shall pay the maximum late fee and interest required or permitted by domestic legislation.

EIGHTH: MEDICAL PAYMENTS

The Peruvian State promises to make a one-time payment to the beneficiaries of seven thousand U.S. dollars ($7,000.00) for psychological rehabilitation treatment they require as a result of the death of María Mamérita Mestanza

Inter-American Commission on Human Rights for confirmation and ratification of all aspects.

FIFTEENTH: ACCEPTANCE

The parties signing this agreement express their free and voluntary acceptance of and concurrence with each and every one of its clauses, stating for the record that it resolves the dispute and any claim regarding the international responsibility of the Peruvian State for violation of the human rights of Ms. María Mamérita Mestanza Chávez.
Signed with three copies in the City of Lima this twenty-sixth day of August of the year two thousand three.

V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

15. The IACHR reiterates that as provided in Articles 48.1.f and 49 of the Convention, this procedure is intended for "reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the Convention."[GDM1] Agreement to follow this procedure reflects the State's good will to comply with the purposes and objectives of the Convention by virtue of the *pacta sunt servanda* principle, according to which states must show good faith in honoring obligations assumed in treaties. It also wishes to reiterate that the friendly settlement procedure contemplated in the Convention permits settlement of individual cases without recourse to litigation, and has demonstrated in the case of several countries that it is an important tool for solution that can be used by both parties.

16. The Inter-American Commission has closely followed development of the friendly settlement reached in this case. The Commission greatly appreciates the effort shown by both parties to reach a solution that is compatible with the objective and purpose of the Convention. As the Commission has said repeatedly, protection and promotion of women's rights is a priority for our hemisphere, in order that women may attain the full and effective enjoyment of their basic rights, especially equality, nondiscrimination, and living free from gender-based violence.

VI. CONCLUSIONS

17. On the basis of the preceding considerations, and by virtue of the proceeding envisioned in Articles 48.1.f and 49 of the American Convention, the Commission wishes to reiterate its deep appreciation for the parties' efforts and its satisfaction with the friendly settlement agreement reached in this case in keeping with the objective and purpose of the American Convention.

18. Taking into account the considerations and conclusions expressed in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To approve the terms of the Agreement for Friendly Settlement signed by the parties on August 26, 2003.

2. To continue following up and monitoring each and every point of the friendly settlement, and in this context to remind the parties of their obligation to submit reports to the IACHR every three months on compliance with this agreement.

3. To publish this report and include it in its annual report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 22nd day of the month of October, 2003. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.

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[1] Pursuant to the provisions of Article 17(2)(a) of the Commission's Regulations, Commissioner Susana Villarán, of Peruvian nationality, did not participate in the consideration or decision of this case.

Edited - footnotes may vary from original

SOJOURNER A., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM FOR HER INFANT Y.A.; ANGELA B., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM FOR HER INFANT W.B., PLAINTIFFS-APPELLANTS, AND ROSA C., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM FOR HER INFANT Y.C.; AND CRYSTAL D., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM FOR HER INFANT S.D., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, v. THE NEW JERSEY DEPARTMENT OF HUMAN SERVICES AND WILLIAM WALDMAN, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF HUMAN SERVICES, DEFENDANTS-RESPONDENTS.

SUPREME COURT OF NEW JERSEY

828 A.2d 306 (2003)

OPINION:

The opinion of the Court was delivered by

PORITZ, C.J. [**308]

In this appeal, plaintiffs challenge the constitutionality of a provision in the Work First New Jersey Act (WFNJ) that "caps" the amount of cash assistance for families at the level set when the family enters into the State welfare system. *N.J.S.A. 44:10-61(a)*. Although families in the assistance program are eligible to receive additional Medicaid and food stamp benefits on the birth of another child, the statute prohibits an increase in cash assistance benefits for any child born more than ten months after the family initially applies for and obtains such benefits. *N.J.S.A. 44:10-61(a), (b), and (e)*. Plaintiffs claim that the "family cap" violates the right to privacy and equal protection guarantees of the New Jersey Constitution. More specifically, plaintiffs allege that Section 61(a) impinges on a welfare recipient's right to bear a child and, if she chooses to have that child, denies her and her unsupported child equal treatment under the law.

I

A brief description of the two families before the Court provides context for our review of the constitutional claims raised herein.

In 1987, shortly after giving birth to her first child, plaintiff Angela B. began receiving family Medicaid benefits in addition to a monthly allowance in the form of food stamps and cash assistance. Subsequently, in 1988, 1989, and 1995 Angela B. gave birth to three more children. She received an increase in combined welfare benefits for the two children born in 1988 and 1989, but due to the enactment of New Jersey's first family cap provision in the interim, was unable to obtain additional cash assistance when her fourth child was born.

In 1994, also after bearing her first child, plaintiff Sojourner A. began receiving Medicaid family coverage as well as monthly assistance in food stamps and cash payments. When Sojourner A. became pregnant with her second child in 1996, however, the State notified her that she was not eligible for an increase in cash assistance as her child would be born more than ten months after she had started receiving welfare benefits. According to Sojourner A., she again became pregnant in 1997 and 1998, but terminated those pregnancies because of financial difficulties and because "she was not ready . . . for more children." By 1998, Sojourner A. was working five days a week and was therefore ineligible for cash assistance under WFNJ, although her family remained entitled to Medicaid and an increase in food stamps.

Both Angela B. and Sojourner A. have stated in depositions that the lack of additional cash assistance has imposed an extreme financial hardship on their families and left them without adequate food, shelter and other necessities. At the time of filing, Sojourner A. was receiving $ 322 in cash assistance, $ 163 in food stamps, and Medicaid benefits for her two children. Angela B. was receiving $ 424 in cash assistance, $ 396 in food stamps, and Medicaid benefits for the three children then residing with her.

[**309] II

On September 5, 1997, plaintiffs filed a class action lawsuit against the New Jersey Department of Human Services and its Commissioner (collectively Department or DHS), claiming that *N.J.S.A. 44:10-61(a)* and *N.J.A.C. 10:90-2.18* iolate New Jersey's Constitution. The gravamen of plaintiffs' complaint is that the family cap provision has been designed impermissibly to coerce the procreative and child-bearing decisions of plaintiffs

and other women similarly situated by penalizing them for "exercis[ing] their fundamental right to bear children." Plaintiffs further contend that the "family cap" violates the equal protection rights of certain classes of poor children "based on their parents' reproductive choices and the timing of [their] birth."

> all purposes including, but not limited to, the existing cash assistance benefit, child support, medical assistance and food stamp benefits provided to the assistance unit.

Plaintiffs sought preliminary injunctive and declaratory relief, which relief was denied on October 28, 1997. On July 17, 2000, however, the trial court granted class certification to:

> all women who have conceived or will conceive a child while they or someone in their family received welfare benefits (or within a year of such receipts) under the former AFDC program or under the Work First program any time after October 1, 1992, and all children born to such women after August 1, 1993 who have been or will be subject to *N.J.S.A. 44:10-61* and *N.J.A.C. 10:90-2.18* or their predecessor statute and regulations, *N.J.S.A.* 44:10-3.5 and *N.J.A.C.* 10:81-3.8 and 10.81-1.11.

Subsequently, plaintiffs and the DHS filed a motion and cross-motion for summary judgment.

On December 18, 2000, the court entered an order granting the Department's cross-motion and dismissing plaintiffs' complaint with prejudice. In an oral opinion upholding the family cap under the New Jersey Constitution, the court applied the balancing test established by this Court in *Greenberg v. Kimmelman, 99 N.J. 552, 494 A.2d 294 (1985)*, and *Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982)*. In respect of plaintiffs' right to privacy claim, the court stated that the right "may be restricted only when necessary to promote a compelling governmental interest." Distinguishing our decision in *Planned Parenthood of Central New Jersey v. Farmer, 165 N.J. 609, 762 A.2d 620 (2000)*, wherein the data indicated that a significant burden was created when a minor's right to obtain an abortion was conditioned on parental notification, the court found that in this case the plaintiffs had failed to submit any evidence that the family cap materially affected a woman's right to make procreative choices. The court concluded:

> [T]he State has demonstrated a legitimate and a substantial relationship between the statutory classification and the ends asserted. The interest here of the Legislature, [which] represents all of us, in promoting self-sufficient citizens, diminishing the dependency upon welfare and creating [parity] between welfare recipients and working people . . . greatly outweighs an[y] slight imposition [**310] or mere burden on . . . the plaintiffs' right to privacy.

The Appellate Division affirmed the trial court in a published opinion issued on April 2, 2002. Judge Winkelstein, writing for the panel, first observed that the Third Circuit Court of Appeals previously had affirmed a federal district court determination that the family cap does "not violate the procreative privacy and equal protection guarantees of the United States Constitution." *Sojourner A. v. New Jersey Dep't of Human Servs., 350 N.J. Super. 152, 163 2002). See C.K. v. N.J. Dep't of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996)* (hereinafter *C.K. II), affirming, sub nom., C.K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995)* (hereinafter *C.K. I*). Nonetheless, because "'there may be circumstances in which the [New Jersey] Constitution provides greater protections'", *Id. at 166, 794 A.2d 822* (quoting *Barone v. Dep't of Human Servs., 107 N.J. 355, 368 (1987)*), than does the Federal Constitution, and because state restrictions on a woman's right to privacy and equal protection guarantees under our Constitution have been read expansively by our courts, the panel deemed those federal cases "not dispositive," *Id. at 163, 794 A.2d 822*.

As had the trial court, the Appellate Division applied the balancing test set forth in *Right to Choose, supra* and *Greenberg, supra* acknowledged the fundamental nature of a woman's right to make procreative decisions under *Article I, paragraph 1 of the New Jersey Constitution*, and found that the family cap "at best, indirect[ly] and insignificant[ly]" intrudes on that right. *Id. at 169, 794 A.2d 822*. The panel concluded that the cap "does not present a direct obstacle to bearing children. It merely introduces one of many factors that a woman considers when deciding whether to become pregnant and carry the child to term[,] a choice that remains hers and hers alone." *Id. at 171, 794 A.2d 822*. Similarly, the panel found that the cap does not

> completely deprive either the family unit of the benefits it is already receiving, or eliminate all benefits to the newborn child. Although the welfare recipient will not receive an additional cash stipend for the child, she continues to receive benefits designed to assist her to obtain and retain employment, and

significantly, Medicaid coverage and food stamps are provided for the additional child. [*Ibid.*]

Agreeing with the trial court that the purposes of the statute--reducing the welfare rolls and putting welfare families on the same footing as working families--are "'laudable state objectives,'" the Appellate Division held that the family cap provision bears a substantial relationship to those legitimate and reasonable goals. *Id. at 172, 794 A.2D 822* (quoting *Sanchez v. Dep't of Human Servs., 314 N.J. Super. 11, 17 (App. Div. 1998)).*

III

A

New Jersey has, since 1959, engaged in a cooperative effort with the federal government to provide aid to families in need of assistance. *42 U.S.C.A. § 601 et seq.* [**311]; *see In re Petitions for Rulemaking N.J.A.C. 10:82-1.2 and 10:85-4.1, 223 N.J. Super. 453, 456-58, 538 A.2d 1302 (App. Div. 1988)* (outlining history of State's participation in federal welfare programs), *aff'd, 117 N.J. 311, 566 A.2d 1154 (1989).* In a shift in approach related to that effort, the State Legislature enacted the FDA in 1992 to "offer[] intensified and coordinated services that . . . address the educational, vocational and other needs of the public assistance recipient's family. . . ." *N.J.S.A.* 44:10-20. That legislation included a provision that denied an incremental increase in benefits for children who were born when the family was eligible for AFDC benefits. *N.J.S.A.* 44:10-3.5 (repealed by *L.* 1997, c. 38, § 17). Implementation of Section 3.5 required a waiver from the United States Department of Health and Human Services that was obtained by DHS on July 20, 1992.

In 1996, Congress replaced AFDC with the Temporary Assistance to Needy Families (TANF) block grant program, *42 U.S.C.A. § § 601-608.* Under TANF, Congress provided the states with the flexibility to implement welfare reform in their jurisdictions, subject to a mandatory national welfare-to-work feature similarly designed to motivate welfare recipients to become [*327] self-sufficient. *See, e.g., 42 U.S.C.A. § 607(a)* (requiring percentage of recipients to work) and *§ 608(a)(7)* (imposing time limits on cash assistance). In March of 1997, the New Jersey Legislature responded to the federal initiative by replacing the FDA with WFNJ, *N.J.S.A. 44:10-55 to -70.*

Under WFNJ, the level of cash benefits is determined pursuant to a schedule administered by the DHS. That schedule, with certain important limitations, provides incremental increases based on the size and need of the family. *N.J.A.C. 10:69-10.2(a) and 90-3.3.* One such limitation is the family cap found at *N.J.S.A. 44:10-61(a)*, which states:

> The level of cash assistance benefits payable to an assistance unit with dependent children shall not increase as a result of the birth of a child during the period in which the assistance unit is eligible for benefits. . . .

The Act defines an "Assistance unit" as

> a single person without dependent children; . . . dependent children only; or a person or couple with one or more dependent children who are legally or blood-related, or who is their legal guardian, and who live together as a household unit.[*N.J.S.A. 44:10-57.*]

As noted earlier, the family cap does not apply "to an individual . . . who gives birth to a child fewer than 10 months after applying for and receiving cash assistance benefits." *N.J.S.A. 44:10-61(e).* The family cap also does not apply when the new child is the product of rape or incest. *N.J.S.A. 44:10-61(f).*

Like its predecessor New Jersey statute, and consonant with the TANF approach, the primary purpose of WFNJ is to encourage employment, self-sufficiency and family stability. *See generally N.J.S.A. 44:10-56.* Toward that end, WFNJ contains mechanisms designed to promote independence and decrease long-term reliance on welfare payments. One such mechanism reallocates the savings achieved by application of the family cap to a variety of programs aimed at developing adult welfare recipients' educational and vocational skills to enable them to get and keep stable employment.

Prior to receiving benefits, eligible welfare recipients are assessed as to their educational level, prior work experience and other indicators of their "potential . . . readiness for work." *N.J.S.A. 44:10-62f.* [**312] After the assessment is completed, "individual responsibility plan[s]" are developed to set specific goals in respect of employment, education obligations, medical care and schooling for the recipient's dependent children. *Ibid.* Once recipients agree to follow the plan, they must "continuously and actively seek employment" or accept placement in an approved "work activity" to continue in the program. *N.J.S.A. 44:10-62a.* Recipients are not on their own in this endeavor; WFNJ provides or subsidizes a panoply of such activities, including actual "employment; on-the-job training; job search and job readiness assistance; vocational educational training; job skills training related directly to employment; community

work experience; alternative work experience; supportive work; community service programs . . . [and] education that is necessary for employment. . . ." *N.J.S.A. 44:10-57.* The statute encourages education by reducing the hourly work requirements for adult recipients who are "full time post-secondary student[s]," *N.J.S.A. 44:10-62b*, and permitting young parents under the age of nineteen to fulfill the "work activity" requirement by completing high school or a high school equivalency program, *N.J.S.A. 44:10-57.*

WFNJ also aims to remove barriers so that persons receiving welfare can maintain employment or stay in school. Under *N.J.S.A. 44:10-38*, recipients receive "supportive services" such as child care, transportation to and from work, and stipends for necessary "work-related expenses, . . . as determined by the commissioner." Moreover, to enable those who have gained steady employment to remain in the workforce, the State continues to subsidize medical and child care expenses for two years after recipients have become ineligible for cash benefits. *Ibid.*

B

The DHS has contracted with Mathematica Policy Research, Inc. (Mathematica), to examine the effectiveness of the WFNJ program. *See N.J.S.A. 44:10-41* (calling for periodic public reports and evaluations of WFNJ). The Department's agreement with Mathematica requires a series of six reports that evaluate how families are faring under the program. Mathematica's first report, released in 1999, found that during the initial eighteen months of WFNJ implementation, approximately one in three WFNJ participants exited the welfare system and entered the workforce. A survey of those who remained on welfare revealed that they faced a variety of more substantial impediments to employment, including low skills levels and less prior work experience.[1]

We note, as did the researchers themselves, that the first Mathematica report covered a period of strong economic growth and may not reflect real gains due to WFNJ. Further, information obtained after the first eighteen months of any new program may not be indicative of long term improvements, whereas subsequent evaluations are likely to provide more reliable data. In any event, the evaluations provided in the record before the Court do [**313] not indicate whether WFNJ has achieved (or will achieve) its goals.

IV

A

Plaintiffs bring this action under the New Jersey Constitution. Nonetheless, when cognate provisions of the Federal Constitution are implicated, we have turned to case law relating to those provisions for guidance. *See, e.g., State v. Schmid, 84 N.J. 535, 549 (1980)* (discussing free speech protections in [*330] New Jersey within federal *First Amendment* framework), *appeal dismissed sub nom. Princeton Univ. v. Schmid, 455 U.S. 100, 102 (1982)*; *State v. Johnson, 68 N.J. 349, 352-53 (1975)* (analyzing defendant's search and seizure rights in light of federal *Fourth Amendment* jurisprudence).

The *Fourteenth Amendment of the United States Constitution* provides that the state governments shall not "deny to any person within [their] jurisdiction the equal protection of the law," and shall not "deprive any person of life, liberty, or property[] without due process of law." *U.S. Const.* amend. XIV, § 1. Under the latter provision, citizens enjoy the right to be free from governmental intrusion in making procreative decisions. *Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).* The extent to which statutory provisions are scrutinized under federal equal protection and right to privacy claims depends on the class of persons affected, the nature of the right implicated, and the level of interference. When a state statute directly impinges on a fundamental right or a suspect class, then the provision is strictly scrutinized, *City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)*; *Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977)*; when a statute impairs a lesser interest, the federal courts ask only whether it is "rationally related to legitimate government interests." *Washington v. Glucksberg, 521 U.S. 702, 728 (1997).* It follows, then, that the rational basis test is applied when economic legislation, including statutes that establish benefit programs, is challenged. *See Dandridge v. Williams, 397 U.S. 471, 485-87 (1970)* (upholding limits on welfare benefits as rationally related to legitimate government interest "in encouraging employment and . . . avoiding discrimination between welfare families and the families of the working poor").

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[1] The record also contains a Rutgers School of Social Work study of the FDP and a 1999 study conducted by Legal Services of New Jersey and the New Jersey Poverty Research Institute. Legal Services and the Poverty Research Institute surveyed Work First New Jersey participants and found that most knew about the goals of the Work First program and wanted to enter the workforce. Those surveyed also expressed concern about the adequacy of such necessary components of the program as transportation, child care and rent subsidies. The Rutgers study was not directed specifically toward the effects of the family cap combined with the provision of back-to-work services.

As noted earlier, the Third Circuit Court of Appeals and the federal District Court for New Jersey have considered the same claims that are now before this Court. In *C.K. I, supra* plaintiffs brought a class action challenging a decision of the Secretary of the United States Department of Health and Human Services to waive certain federal welfare requirements and [**314] thereby to permit implementation of the family cap provision under FDA. *883 F. Supp. at 996-97.* In addition to contesting the Secretary's authority to grant the waiver, plaintiffs claimed that the family cap violated their equal protection and fundamental privacy rights. *Id. at 1012.*[2] The court held that the family cap provision was "rationally related to the legitimate state interests of altering the cycle of welfare dependency . . . [and] promoting individual responsibility and family stability." *Id. at 1015.* It reasoned that "by maintaining the level of . . . benefits despite the arrival of an additional child, [the family cap] puts the welfare household in the same situation as that of a working family, which does not automatically receive a wage increase" when a new child is born. *Id. at 1013-14.*

C.K. I also rejected plaintiffs' privacy claims. The court observed that the birth of an additional child in a family on welfare does not result in a decrease in benefits under the cap. Rather, it "remove[s] the automatic benefit increase associated with an additional child under the federal program." *Id. at 1015.* The court held that although women have a fundamental right to make procreative decisions, there is no constitutional right to government subsidies in furtherance of that right. *Ibid.* (citing *Harris v. McRae, 448 U.S. 297, 316 (1980)).*

The Third Circuit "ha[d] nothing to add to the district court's opinion [that plaintiffs' procreative rights are not burdened by the family cap] except to observe that it would be remarkable to hold that a state's failure to subsidize a reproductive choice burdens that choice." *C.K. II, supra, 92 F. 3d at 195.*

B

In the New Jersey Constitution, both equal protection and the right to privacy derive from the same broad constitutional language, which states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." *N.J. Const. art. I, P 1.* Although Article I does not contain the terms "equal protection" or "right to privacy," it is well settled law that the expansive language of that provision is the source for both of those fundamental constitutional guarantees. *See Planned Parenthood, supra, 165 N.J. at 629 Right to Choose, supra, 91 N.J. at 303.*

Thirty years ago, Chief Justice Weintraub rejected "[m]echanical approaches to the delicate problem of judicial intervention under either the equal protection or due process clauses" of the New Jersey Constitution. *Robinson v. Cahill, 62 N.J. 473, 491 (1973).* He described the balancing process by which a court "[u]ltimately" decides equal protection and due process challenges:

> [A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.
>
> [*Id. at 492, 303 A.2d 273* (citation omitted).]

[**315] Later, in *Right to Choose, supra* and in *Greenberg, supra* the Court reaffirmed that approach, finding that it provided a more flexible analytical framework for the evaluation of equal protection and due process claims. In keeping with Chief Justice Weintraub's direction, we "'consider[] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" *Planned Parenthood, supra, 165 N.J. at 630* (quoting *Greenberg, supra, 99 N.J. at 567* (citing *Right to Choose, supra, 91 N.J. at 308-09 (1982))).* By deviating from the federal tiered model, we are able to examine each claim on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction. *See Planned Parenthood, supra, 165 N.J. at 630* (noting "that in cases involving a classification that 'indirectly infringes on a fundamental right,' the inflexibility of the tiered framework prevents a full understanding of the clash between individual and governmental interests") (internal citations omitted). We point out, however, that although our mode of analysis differs in form from the federal tiered approach, the tests weigh the same factors and often produce the same result. *See Barone, supra, 107 N.J. at 368,*

Greenberg, supra, 99 N.J. at 567.

C

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[2] As in this case, the *C.K. I* plaintiffs asserted that the cap impermissibly infringed on their decision to bear children and denied equal protection to children born when the family was receiving welfare benefits. *Id. at 1012-13.*

We turn now to plaintiffs' claims that the family cap provision of WFNJ unconstitutionally infringes on a woman's right to make procreative decisions by penalizing her for choosing to bear a child and, further, that the cap improperly singles out classes of poor children "based on their parents' reproductive choices and the timing of [their] birth."

Our discussion begins with an inquiry into the nature of the affected right. In *Right to Choose, supra* we adverted to the "body of law . . . in New Jersey acknowledging a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion." *91 N.J. at 303-304* (citing *Gleitman v. Cosgrove, 49 N.J. 22, 62-63 (1967)* (Weintraub, C.J., dissenting in part) (suggesting that woman with rubella had right to choose abortion); *Berman v. Allan, 80 N.J. 421, 432 (1979)* (establishing cause of action for deprivation of right to decide whether to bear child with Down's Syndrome); *Schroeder v. Perkel, 87 N.J. 53, 66 (1981)* (declaring right to abort second child when first child was born with cystic fibrosis)). Later, in *Planned Parenthood, supra* we emphasized "the importance of a woman's right to control her body and her future, a right we as a society consider fundamental to individual liberty." *165 N.J. at 631-32*. The Court was "keenly aware of the principle of individual autonomy that lies at the heart of a woman's right to make reproductive decisions and of the strength of that principle as embodied in our own Constitution." *Id. at 632*. That most basic right, plaintiffs allege, has been burdened impermissibly by the family cap provision of WFNJ.

It is, then, the nature of that burden or the extent of the governmental intrusion that we must consider. Plaintiffs claim that the family cap functions as a coercive tool designed to encourage poor women to avoid having children or to abort their pregnancies when the family unit is receiving welfare. By withholding an incremental increase in cash assistance, plaintiffs argue, the State unduly influences their procreative choices. But even if we assume that procreative choices are influenced by a cap on cash assistance to the family unit, we do not find that influence to be "undue," or that a new burden is thereby [**316] created. We expect that the income of a family unit, whatever the source, is likely to influence a woman's decision to conceive or bear a child. That is true for most families in New Jersey. As noted by the federal courts, working families do not receive automatic wage increases when additional children are born. Indeed, the family cap appears to do no more than place welfare families "on a par with working families."[3] *C.K. I, supra, 883 F. Supp. at 1013*.

We also find that the DHS has presented ample justification for the family cap. The record informs us that resources available as a result of the cap have been diverted to job training, child care, and other programs established and expanded under WFNJ. The goals of promoting self-sufficiency and decreased dependency on welfare are laudable; the focus on education, job training and child care should advance those goals and, ultimately, result in improving the lives of children born into welfare families.

In *Right to Choose, supra* the Court was presented with a challenge to legislation that denied Medicaid funding for abortions except when an abortion was medically necessary to save the life of the mother. *91 N.J. at 292*. On considering plaintiffs' equal protection challenge, we stated:

> [T]here [is no] fundamental right to funding for an abortion. The right to choose whether to have an abortion, however, is a fundamental right of all pregnant women, including those entitled to Medicaid reimbursement for necessary medical treatment. *As to that group of women*, the challenged statute discriminates between those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary. Under [the statute] those needing abortions receive funds only when their lives are at stake. By granting funds when life is at risk, but withholding them when health is endangered, the statute denies equal protection to those women entitled to necessary medical services under Medicaid.
>
> [*91 N.J. at 305-06* (citations omitted; emphasis added).]

The *Right to Choose* dichotomy is directly relevant to this case. There we held that the state could not distinguish between "those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary." *Id. at 305. See also Planned Parenthood, supra, 165 N.J. at 634* (expressing concern that delay in obtaining abortion increases risk to health of mother). Most important, we also held that "[e]lective, nontherapeutic abortions . . . do not involve the life or health of the mother, and the State may pursue its interest in potential life by excluding those abortions from the Medicaid program." *Right to Choose, supra, 91 N.J. at 310*. Here, the life or health of the mother is not at issue.

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[3] We point out that medical benefits and food stamp assistance are provided for children born after the family receives welfare and regardless of the family cap. Unlike working families, those benefits establish an "assistance floor" for welfare recipients.

Whatever the impact of the family cap on the family unit, that impact is no different from the impact of another child on any family with a fixed income. Like most women in New Jersey, a woman receiving welfare assistance will likely weigh the extent of the economic strain caused by the addition of a child to the family unit. Ultimately, however, the decision to bring a child to term or to have an abortion remains wholly with the woman.

Plaintiffs also rely on the distinction created in WFNJ between children [**317] born before the family begins receiving welfare benefits, and similarly situated children born ten months after the receipt of such benefits. The family cap treats these classes disparately, plaintiffs argue, based on when mothers choose to exercise their fundamental right to conceive and bear children. In fact, the *family* does not receive additional cash assistance when a new child is born, although the family does receive additional food stamps and Medicaid benefits. All of the children in the family unit share presumably in the total amount of cash assistance available, as is the case in other similarly situated family units.

V

This case is not about a woman's right to choose whether and when to bear children, but rather, about whether the State must subsidize that choice. In *Right to Choose, supra* we held that the State may decline to fund a woman's choice to obtain an abortion when the abortion is not medically necessary. We hold today that the State is not required to provide additional cash assistance when a woman chooses to bear a child more than ten months after her family has received welfare benefits. In so holding, we reject plaintiffs' claim that the family cap provision of WFNJ violates the equal protection and due process guarantees of our State Constitution.

The judgment of the Appellate Division is affirmed.

CASE NO.:
Writ Petition (civil) 302 of 2001

Javed & Others v. State of Haryana & Others

DATE OF JUDGMENT: 30/07/2003

BENCH:
R.C. LAHOTI, ASHOK BHAN & ARUN KUMAR.

JUDGMENT

R.C. LAHOTI, J.

Leave granted in all the Special Leave Petitions. In this batch of writ petitions and appeals the core issue is the vires of the provisions of Section 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994 (Act No.11 of 1994) (hereinafter referred to as the Act, for short). The relevant provisions are extracted and reproduced hereunder:-
175. (1) No person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who -

(q) has more than two living children :

Provided that a person having more than two children on or upto the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified;

"177(1) If any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad -

(a) who is elected, as such, was subject to any of the disqualifications mentioned in section 175 at time of his election;
(b) during the term for which he has been elected, incurs any of the disqualifications mentioned in section 175,shall be disqualified from continuing to be a member and his office shall become vacant.

(2) In every case, the question whether a vacancy has arisen shall be decided by the Director. The Director may give its decision either on an application made to it by any person, or on its own motion. Until the Director decides that the vacancy, has arisen, the members shall not be disqualified under sub-section (1) from continuing to be a member. Any person aggrieved by the decision of the Director may, within a period of fifteen days from the date of such decision, appeal to the Government and the orders passed by Government in such appeal shall be final :

Provided that no order shall be passed under this sub-section by the Director against any member without giving him a reasonable opportunity of being heard."

Act No.11 of 1994 was enacted with various objectives based on past experience and in view of the shortcomings noticed in the implementation of preceding laws and also to bring the legislation in conformity with Part IX of the Constitution of India relating to 'The Panchayats' added by the Seventy-third Amendment. One of the objectives set out in the Statement of Objects and Reasons is to disqualify persons for election of Panchayats at each level, having more than 2 children after one year of the date of commencement of this Act, to popularize Family Welfare/Family Planning Programme (Vide Clause (m) of Para 4 of SOR).

Placed in plain words the provision disqualifies a person having more than two living children from holding the specified offices in Panchayats. The enforcement of disqualification is postponed for a period of one year from the date of the commencement of the Act. A person having more than two children upto the expiry of one year of the commencement of the Act is not disqualified. This postponement for one year takes care of any conception on or around the commencement of the Act, the normal period of gestation being nine months. If a woman has conceived at the commencement of the Act then any one of such couples would not be disqualified. Though not disqualified on the date of election if any person holding any of the said offices incurs a disqualification by giving birth to a child one year after the commencement of the Act he becomes subject to disqualification and is disabled from continuing to hold the office. The disability is incurred by the birth of a child which results in increasing the number of living children, including the additional child born one year after the commencement of the Act, to a figure more than two. If the factum is disputed the Director is entrusted with the duty of holding an enquiry and declaring the office vacant. The decision of the Director is subject to appeal to the Government. The Director has to afford a reasonable opportunity of being heard to the holder of office sought to be disqualified. These safeguards satisfy the requirements of natural justice.

Several persons (who are the writ petitioners or appellants in this batch of matters) have been disqualified or proceeded against for disqualifying either from contesting the elections for, or from continuing in, the office of Panchas/Sarpanchas in view of their having incurred the disqualification as provided by Section 175(1)(q) or Section 177(1) read with Section 175(1)(q) of the Act. The grounds for challenging the constitutional validity of the abovesaid provision are very many, couched differently in different writ petitions. We have heard all the learned counsel representing the different petitioners/appellants. As agreed to at the Bar, the grounds of challenge can be categorized into five :- (i) that the provision is arbitrary and hence violative of Article 14 of the Constitution; (ii) that the disqualification does not serve the purpose sought to be achieved by the legislation; (iii) that the provision is discriminatory; (iv) that the provision adversely affects the liberty of leading personal life in all its freedom and having as many children as one chooses to have and hence is violative of Article 21 of the Constitution; and (v) that the provision interferes with freedom of religion and hence violates Article 25 of the Constitution.

The State of Haryana has defended its legislation on all counts. We have also heard the learned Standing Counsel for the State. On notice, Sh. Soli J. Sorabji, the learned Attorney General for India, has appeared to assist the Court and he too has addressed the Court. We would deal with each of the submissions made.

Submissions (i),(ii) & (iii)

The first three submissions are based on Article 14 of the Constitution and, therefore, are taken up together for consideration.

Is the classification arbitrary?

It is well-settled that Article 14 forbids class legislation; it does not forbid reasonable classification for the purpose of legislation. To satisfy the constitutional test of permissibility, two conditions must be satisfied, namely (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that such differentia has a rational relation to the object sought to be achieved by the Statute in question. The basis for classification may rest on conditions which may be geographical or according to objects or occupation or the like. [See : Constitution Bench decision in Budhan Choudhry and Ors. Vs. The State of Bihar, (1955) 1 SCR 1045]. The classification is well-defined and well-perceptible. Persons having more than two living children are clearly distinguishable from persons having not more than two living children. The two constitute two different classes and the classification is founded on an intelligible differentia clearly distinguishing one from the other. One of the objects sought to be achieved by the legislation is popularizing the family welfare/family planning programme. The disqualification enacted by the provision seeks to achieve the objective by creating a disincentive. The classification does not suffer from any arbitrariness. The number of children, viz., two is based on legislative wisdom. It could have been more or less. The number is a matter of policy decision which is not open to judicial scrutiny.

The legislation does not serve its object?

It was submitted that the number of children which one has, whether two or three or more, does not affect the capacity, competence and quality of a person to serve on any office of a Panchayat and, therefore, the impugned disqualification has no nexus with the purpose sought to be achieved by the Act. There is no merit in the submission. We have already stated that one of the objects of the enactment is to popularize Family Welfare/Family Planning Programme. This is consistent with the National Population Policy.

Under Article 243G of the Constitution the Legislature of a State has been vested with the authority to make law endowing the Panchayats with such powers and authority which may be necessary to enable the Gram Panchayat to function as institutions of self-Government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such

conditions as may be specified therein. Clause (b) of Article 243G provides that Gram Panchayats may be entrusted the powers to implement the schemes for economic development and social justice including those in relation to matters listed in the Eleventh Schedule. Entries 24 and 25 of the Eleventh Schedule read:

24. Family Welfare.

25. Women and child development.

In pursuance to the powers given to the State Legislature to enact laws the Haryana Legislature enacted the Haryana Panchayati Raj Act, 1994 (Haryana Act No.11 of 1994). Section 21 enumerates the functions and duties of Gram Panchayat. Clause XIX (1) of Section 21 reads:

"XIX. Public Health and Family Welfare -

(1) Implementation of family welfare programme."

The family welfare would include family planning as well. To carry out the purpose of the Act as well as the mandate of the Constitution the Legislature has made a provision for making a person ineligible to either contest for the post of Panch or Sarpanch having more than two living children. Such a provision necessarily be identical. So is the case with the laws governing legislators and parliamentarians.

It is not permissible to compare a piece of legislation enacted by a State in exercise of its own legislative power with the provisions of another law, though pari materia it may be, but enacted by Parliament or by another State legislature within its own power to legislate. The sources of power are different and so do differ those who exercise the power. The Constitution Bench in The State of Madhya Pradesh Vs. G.C. Mandawar, (1955) 2 SCR 225, held that the power of the Court to declare a law void under Article 13 has to be exercised with reference to the specific legislation which is impugned. Two laws enacted by two different Governments and by two different legislatures can be read neither in conjunction nor by comparison for the purpose of finding out if they are discriminatory. Article 14 does not authorize the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject, its provisions are discriminatory. When the sources of authority for the two statutes are different, Article 14 can have no application. So is the view taken in The Bar Council of Uttar Pradesh Vs. The State of U.P. and Anr. (1973) 1 SCC 261, State of Tamil Nadu and Ors. Vs. Ananthi Ammal and Ors. (1995) 1 SCC 519 and Prabhakaran Nair and Ors. Vs. State of Tamil Nadu and Ors. (1987) 4 SCC 238.

Incidentally it may be noted that so far as the State of Haryana is concerned, in the Haryana Municipal Act, 1973 (Act No. 24 of 1973) Section 13A has been inserted to make a provision for similar disqualification for a person from being chosen or holding the office of a member of municipality.

A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented in one-go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance.

The implementation of policy decision in a phased manner is suggestive neither of arbitrariness nor of discrimination. In Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna etc., Vs. State of Bihar and Ors., (1988) 2 SCC 433, the policy of nationalizing educational institutes was sought to be implemented in a phased manner. This Court held that all the institutions cannot be taken over at a time and merely because the beginning was made with one institute, it could not complain that it was singled out and, therefore, Article 14 was violated. Observations of this Court in Pannalal Bansilal Pitti and Ors. Vs. State of A.P. and Anr. (1996) 2 SCC 498, are apposite. In a pluralist society like India, people having faiths in different religions, different beliefs and tenets, have peculiar problems of their own. "A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages."

To make a beginning, the reforms may be introduced at the grass-root level so as to spiral up or may be introduced at the top so as to percolate down. Panchayats are grass-root level institutions of local self-governance. They have a wider base. There is nothing wrong in the State of Haryana having chosen to subscribe to the national movement of population control by enacting a legislation which would go a long way in ameliorating health, social and economic conditions of rural population, and thereby contribute to the development of the nation which in its turn would benefit the entire citizenry. We may quote from the National Population Policy 2000 (Government of India Publication, page 35):-

"Demonstration of support by elected leaders, opinion makers, and religious leaders with close involvement in the reproductive and child health programme greatly influences the behaviour and response patterns of individuals and communities. This serves to enthuse communities to be attentive towards the quality and coverage of maternal and child health services, including referral care."....."The involvement and enthusiastic participation of elected leaders will ensure dedicated involvement of administrators at district and sub-district levels. Demonstration of strong support to the small family norm, as well as personal example, by political, community, business, professional, and religious leaders, media and film stars, sports personalities and opinion makers, will enhance its acceptance throughout society."

No fault can be found with the State of Haryana having enacted the legislation. It is for others to emulate.

We are clearly of the opinion that the impugned provision is neither arbitrary nor unreasonable nor discriminatory. The disqualification contained in Section 175(1)(q) of Haryana Act No.11 of 1994 seeks to achieve a laudable purpose - socio-economic welfare and health care of the masses and is consistent with the national population policy. It is not violative of Article 14 of the Constitution.

Submission (iv) & (v) : the provision if it violates Article 21 or 25?

Before testing the validity of the impugned legislation from the viewpoint of Articles 21 and 25, in the light of the submissions made, we take up first the more basic issue - Whether it is at all permissible to test the validity of a law which enacts a disqualification operating in the field of elections on the touchstone of violation of fundamental rights?

Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a Statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right __ a right originating in Constitution and given shape by statute. But even so it cannot be equated with a fundamental right. There is nothing wrong in the same Statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.

* * *

In our view, disqualification on the right to contest an election by having more than two living children does not contravene any fundamental right nor does it cross the limits of reasonability. Rather it is a disqualification conceptually devised in national interest.

With this general statement of law which has application to Articles 21 and 25 both, we now proceed to test the sustainability of attack on constitutional validity of impugned legislation separately by reference to Articles 21 and 25.

The disqualification if violates Article 21 ?

Placing strong reliance on Mrs.Maneka Gandhi Vs. Union of India & Anr. - (1978) 1 SCC 248, and M/s. Kasturu Lal Lakshmi Reddy and Ors. Vs. State of Jammu and Kashmir and Anr. - (1980) 4 SCC 1, it was forcefully urged that the fundamental right to life and personal liberty emanating from Article 21 of the Constitution should be allowed to stretch its span to its optimum so as to include in the compendious

term of the Article all the varieties of rights which go to make up the personal liberty of man including the right to enjoy all the materialistic pleasures and to procreate as many children as one pleases.

At the very outset we are constrained to observe that the law laid down by this Court in the decisions relied on is either being misread or read divorced of the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice - economic, social and political - cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners.

It is necessary to have a look at the population scenario, of the world and of our own country.

India has the (dis)credit of being second only to China at the top in the list of the 10 most-populous countries of the world. As on 1.2.2000 the population of China was 1,277.6 million while the population of India as on 1.3.2001 was 1,027.0 million (Census of India, 2001, Series I, India - Paper I of 2001, page 29).

The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio-economic progress. Everyday, about 50,000 persons are added to the already large base of its population. The Karunakaran Population Committee (1992-93) had proposed certain disincentives for those who do not follow the norms of the Development Model adopted by National Public Policy so as to bring down the fertility rate. It is a matter of regret that though the Constitution of India is committed to social and economic justice for all, yet India has entered the new millennium with the largest number of illiterates in the world and the largest number of people below the poverty line. The laudable goals spelt out in the Directive Principles of State Policy in the Constitution of India can best be achieved if the population explosion is checked effectively. Therefore, the population control assumes a central importance for providing social and economic justice to the people of India (Usha Tandon, Reader, Faculty of Law, Delhi University, - Research Paper on Population Stabilization, Delhi Law Review, Vol. XXIII 2001, pp.125-131).

In the words of Bertand Russell, "Population explosion is more dangerous than Hydrogen Bomb." This explosive population over-growth is not confined to a particular country but it is a global phenomenon. India being the largest secular democracy has the population problem going side by side and directly impacting on its per capita income, and resulting in shortfall of food grains in spite of the green revolution, and has hampered improvement on the educational front and has caused swelling of unemployment numbers, creating a new class of pavement and slum-dwellers and leading to congestion in urban areas due to the migration of rural poor. (Paper by B.K. Raina in Population Policy and the Law, 1992, edited by B.P. Singh

Sehgal, page 52).

In the beginning of this century, the world population crossed six billions, of which India alone accounts for one billion (17 per cent) in a land area of 2.5 per cent of the world area. The global annual increase of population is 80 millions. Out of this, India's growth share is over 18 millions (23 per cent), equivalent to the total population of Australia, which has two and a half times the land space of India. In other words, India is growing at the alarming rate of one Australia every year and will be the most densely populous country in the world, outbeating China, which ranks first, with a land area thrice this country's. China can withstand the growth for a few years more, but not India, with a constricted land space. Here, the per capita crop land is the lowest in the world, which is also shrinking fast. If this falls below the minimum sustainable level, people can no longer feed themselves and shall become dependent on imported food, provided there are nations with exportable surpluses. Perhaps, this may lead to famine and abnormal conditions in some parts of the country. (Source - Population Challenge, Arcot Easwaran, The Hindu, dated 8.7.2003). It is emphasized that as the population grows rapidly there is a corresponding decrease in per capita water and food. Women in many places trek long distances in search of water which distances would increase every next year on account of excessive ground water withdrawals catering to the need of the increasing population, resulting in lowering the levels of water tables.

Arcot Easwaran has quoted the China example. China, the most populous country in the world, has been able to control its growth rate by adopting the 'carrot and stick' rule. Attractive incentives in the field of education and employment were provided to the couples following the 'one-child norm'. At the same time drastic disincentives were cast on the couples breaching 'one-child norm' which even included penal action. India being a democratic country has so far not chosen to go beyond casting minimal disincentives and has not embarked upon penalizing procreation of children beyond a particular limit. However, it has to be remembered that complacence in controlling population in the name of democracy is too heavy a price to pay, allowing the nation to drift towards disaster.

The growing population of India had alarmed the Indian leadership even before India achieved independence. In 1940 the sub-Committee on Population, appointed by the National Planning Committee set up by the President of the Indian National Congress (Pandit Jawaharlal Nehru), considered 'family planning and a limitation of children' essential for the interests of social economy, family happiness and national planning. The committee recommended the establishment of birth control clinics and other necessary measures such as raising the age at marriage and a eugenic sterilization programme. A committee on population set up by the National Development Council in 1991, in the wake of the census result, also proposed the formulation of a national policy. (Source - Seminar, March 2002, page 25)

Every successive Five Year Plan has given prominence to a population policy. In the first draft of the First Five Year Plan (1951-56) the Planning Commission recognized that population policy was essential to planning and that family planning was a

step forward for improvement in health, particularly that of mothers and children. The Second Five Year Plan (1956-61) emphasized the method of sterilization. A central Family Planning Board was also constituted in 1956 for the purpose. The Fourth Five Year Plan (1969-74) placed the family planning programme, "as one amongst items of the highest national priority". The Seventh Five Year Plan (1985-86 to 1990-91) has underlined "the importance of population control for the success of the plan programme...." But, despite all such exhortations, "the fact remains that the rate of population growth has not moved one bit from the level of 33 per thousand reached in 1979. And in many cases, even the reduced targets set since then have not been realised. (Population Policy and the Law, ibid, pages 44-46).

The above facts and excerpts highlight the problem of population explosion as a national and global issue and provide justification for priority in policy-oriented legislations wherever needed.

None of the petitioners has disputed the legislative competence of the State of Haryana to enact the legislation. Incidentally, it may be stated that Seventh Schedule, List II - State List, Entry 5 speaks of 'Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration'. Entry 6 speaks of 'Public health and sanitation' inter alia. In List III - Concurrent List, Entry 20A was added which reads 'Population control and family planning'. The legislation is within the permitted field of State subjects. Article 243C makes provision for the Legislature of a State enacting laws with respect to Constitution of Panchayats. Article 243F in Part IX of the Constitution itself provides that a person shall be disqualified for being chosen as, and for being, a member of Panchayat if he is so disqualified by or under any law made by the Legislature of the State. Article 243G casts one of the responsibilities of Panchayats as preparation of plans and implementation of schemes for economic development and social justice. Some of the schemes that can be entrusted to Panchayats, as spelt out by Article 243G read with Eleventh Schedule is - Scheme for economic development and social justice in relation to health and sanitation, family welfare and women and child development and social welfare. Family planning is essentially a scheme referable to health, family welfare, women and child development and social welfare. Nothing more needs to be said to demonstrate that the Constitution contemplates Panchayat as a potent instrument of family welfare and social welfare schemes coming true for the betterment of people's health especially women's health and family welfare coupled with social welfare. Under Section 21 of the Act, the functions and duties entrusted to Gram Panchayats include 'Public Health and Family Welfare', 'Women and Child Development' and 'Social Welfare'.

Family planning falls therein. Who can better enable the discharge of functions and duties and such constitutional goals being achieved than the leaders of Panchayats themselves taking a lead and setting an example.

Fundamental rights are not to be read in isolation. They have to be read along with the Chapter on Directive Principles of State Policy and the Fundamental Duties enshrined in Article 51A. Under Article 38 the State shall strive to promote the welfare of the

people and developing a social order empowered at distributive justice - social, economic and political. Under Article 47 the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular the constitutionally down-trodden. Under Article 47 the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.
None of these lofty ideals can be achieved without controlling the population inasmuch as our materialistic resources are limited and the claimants are many. The concept of sustainable development which emerges as a fundamental duty from the several clauses of Article 51A too dictates the expansion of population being kept within reasonable bounds.

The menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld in Air India Vs. Nergesh Meerza and Ors. (1981) 4 SCC 335. The Court found no fault with the rule which would terminate the services of Air Hostesses on the third pregnancy with two existing children, and held the rule both salutary and reasonable for two reasons - "In the first place, the provision preventing a third pregnancy with two existing children would be in the larger interest of the health of the Air Hostess concerned as also for the good upbringing of the children. Secondly, ... when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world."

To say the least it is futile to assume or urge that the impugned legislation violates right to life and liberty guaranteed under Article 21 in any of the meanings howsoever expanded the meanings may be.

The provision if it violates Article 25 ?

It was then submitted that the personal law of muslims permits performance of marriages with 4 women, obviously for the purpose of procreating children and any restriction thereon would be violative of right to freedom of religion enshrined in Article 25 of the Constitution. The relevant part of Article 25 reads as under:-
25. Freedom of conscience and free profession, practice and propagation of religion. - (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

A bare reading of this Article deprives the submission of all its force, vigour and charm. The freedom is subject to public order, morality and health. So the Article itself permits a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation's people.

The Muslim Law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. In our view, the question of the impugned provision of Haryana Act being violative of Article 25 does not arise. We may have a reference to a few decided cases.

The meaning of religion - the term as employed in Article 25 and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in Dr. M. Ismail Faruqui and Ors. Vs. Union of India & Ors. (1994) 6 SCC 360. The protection under Articles 25 and 26 of the Constitution is with respect to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25.

In Sarla Mudgal (Smt.), President, Kalyani and Ors. Vs. Union of India and Ors. (1995) 3 SCC 635, this Court has judicially noticed it being acclaimed in the United States of America that the practice of polygamy is injurious to 'public morals', even though some religions may make it obligatory or desirable for its followers. The Court held that polygamy can be superseded by the State just as it can prohibit human sacrifice or the practice of Sati in the interest of public order. The Personal Law operates under the authority of the legislation and not under the religion and, therefore, the Personal Law can always be superseded or supplemented by legislation.

In Mohd. Ahmed Khan Vs. Shah Bano Begum and Ors., (1985) 2 SCC 556, the Constitution Bench was confronted with a canvassed conflict between the provisions of Section 125 of Cr.P.C. and Muslim Personal Law. The question was: when the Personal Law makes a provision for maintenance to a divorced wife, the provision for maintenance under Section 125 of Cr.P.C. would run in conflict with the Personal Law. The Constitution Bench laid down two principles; firstly, the two provisions operate in different fields and, therefore, there is no conflict and; secondly, even if there is a conflict it should be set at rest by holding that the statutory law will prevail over the Personal Law of the parties, in cases where they are in conflict.

In Mohd. Hanif Quareshi & Ors. Vs. The State of Bihar, (1959) SCR 629, the State Legislation placing a total ban on cow slaughter was under challenge. One of the submissions made was that such a ban offended Article 25 of the Constitution because

such ban came in the way of the sacrifice of a cow on a particular day where it was considered to be religious by Muslims. Having made a review of various religious books, the Court concluded that it did not appear to be obligatory that a person must sacrifice a cow. It was optional for a Muslim to do so. The fact of an option seems to run counter to the notion of an obligatory duty. Many Muslims do not sacrifice a cow on the Id day. As it was not proved that the sacrifice of a cow on a particular day was an obligatory overt act for a Mussalman for the performance of his religious beliefs and ideas, it could not be held that a total ban on the slaughter of cows ran counter to Article 25 of the Constitution.

In The State of Bombay Vs. Narasu Appa Mali, AIR 1952 Bombay 84, the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act (XXV (25) of 1946) was challenged on the ground of violation of Article 14, 15 and 25 of the Constitution. A Division Bench, consisting of Chief Justice Chagla and Justice Gajendragadkar (as His Lordship then was), held - "A sharp distinction must be drawn between religious faith and belief and religious practices. What the Stateprotects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."

Their Lordships quoted from American decisions that the laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Their Lordships found it difficult to accept the proposition that polygamy is an integral part of Hindu religion though Hindu religions recognizes the necessity of a son for religious efficacy and spiritual salvation. However, proceeding on an assumption that polygamy is recognized institution according to Hindu religious practice, their Lordships stated in no uncertain terms - "The right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion."

What constitutes social reform? Is it for the legislature to decide the same? Their Lordships held in Narasu Appa Mali's case (supra) that the will expressed by the legislature, constituted by the chosen representatives of the people in a democracy who are supposed to be responsible for the welfare of the State, is the will of the people and if they lay down the policy which a State should pursue such as when the legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the Courts of Law to sit in judgment upon that decision. Such legislation does not contravene Article 25(1) of the Constitution.

We find ourselves in entire agreement, with the view so taken by the learned Judges whose eminence as jurists concerned with social welfare and social justice is recognized

without any demur. Divorce unknown to ancient Hindu Law, rather considered abominable to Hindu religious belief, has been statutorily provided for Hindus and the Hindu marriage which was considered indissoluble is now capable of being dissolved or annulled by a decree of divorce or annulment. The reasoning adopted by the High Court of Bombay, in our opinion, applies fully to repel the contention of the petitioners even when we are examining the case from the point of view of Muslim Personal Law.

The Division Bench of the Bombay High Court in Narasu Appa Mali (supra) also had an occasion to examine the validity of the legislation when it was sought to be implemented not in one go but gradually. Their Lordships held - "Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community-wise."

Rule 21 of the Central Civil Services (Conduct) Rules, 1964 restrains any government servant having a living spouse from entering into or contracting a marriage with any person. A similar provision is to be found in several service rules framed by the States governing the conduct of their civil servants. No decided case of this court has been brought to our notice wherein the constitutional validity of such provisions may have been put in issue on the ground of violating the freedom of religion under Article 25 or the freedom of personal life and liberty under Article 21. Such a challenge was never laid before this Court apparently because of its futility. However, a few decisions by the High Courts may be noticed.

In Badruddin Vs. Aisha Begam, 1957 ALJ 300, the Allahabad High Court ruled that though the personal law of muslims permitted having as many as four wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution.

In Smt. R.A. Pathan Vs. Director of Technical Education & Ors. - 1981 (22) GLR 289, having analysed in depth the tenets of Muslim personal law and its base in religion, a Division Bench of Gujarat High Court held that a religious practice ordinarily connotes a mandate which a faithful must carry out. What is permissive under the scripture cannot be equated with a mandate which may amount to a religious practice. Therefore, there is nothing in the extract of the Quaranic text (cited before the Court) that contracting plural marriages is a matter of religious practice amongst Muslims. A bigamous marriage amongst Muslims is neither a religious practice nor a religious belief and certainly not a religious injunction or mandate. The question of attracting Articles 15(1), 25(1) or 26(b) to protect a bigamous marriage and in the name of religion does not arise.

In Ram Prasad Seth Vs. State of Uttar Pradesh and Ors. (1957 L.L.J. (Vol.II) 172 = AIR 1961 Allahabad 334) a learned single Judge held that the act of performing a second marriage during the lifetime of one's wife cannot be regarded as an integral part of Hindu religion nor could it be regarded as practising or professing or propagating Hindu religion. Even if bigamy be regarded as an integral part of Hindu religion, the Rule 27

of the Government Servants' Conduct Rules requiring permission of the Government before contracting such marriage must be held to come under the protection of Article 25(2)(b) of the Constitution.

The law has been correctly stated by the High Court of Allahabad, Bombay and Gujarat, in the cases cited hereinabove and we record our respectful approval thereof. The principles stated therein are applicable to all religions practised by whichever religious groups and sects in India.

In our view, a statutory provision casting disqualification on contesting for, or holding, an elective office is not violative of Article 25 of the Constitution.

Looked at from any angle, the challenge to the constitutional validity of Section 175 (1)(q) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practise or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.

If anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and that is of depriving himself from holding an office in Panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attaches to it.

Some incidental questions. It was submitted that the enactment has created serious problems in the rural population as couples desirous of contesting an election but having living children more than two, are feeling compelled to give them in adoption. Subject to what has already been stated hereinabove, we may add that disqualification is attracted no sooner a third child is born and is living after two living children. Merely because the couple has parted with one child by giving the child away in adoption, the disqualification does not come to an end. While interpreting the scope of disqualification we shall have to keep in view the evil sought to be cured and purpose sought to be achieved by the enactment. If the person sought to be disqualified is responsible for or has given birth to children more than two who are living then merely because one or more of them are given in adoption the disqualification is not wiped out.

It was also submitted that the impugned disqualification would hit the women worst, inasmuch as in the Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so. This contention need not detain

us any longer. A male who compels his wife to bear a third child would disqualify not only his wife but himself as well. We do not think that with the awareness which is arising in Indian women folk, they are so helpless as to be compelled to bear a third child even though they do not wish to do so. At the end, suffice it to say that if the legislature chooses to carve out an exception in favour of females it is free to do so but merely because women are not excepted from the operation of the disqualification it does not render it unconstitutional.

Hypothetical examples were tried to be floated across the bar by submitting that there may be cases where triplets are born or twins are born on the second pregnancy and consequently both of the parents would incur disqualification for reasons beyond their control or just by freak of divinity. Such are not normal cases and the validity of the law cannot be tested by applying it to abnormal situations. Exceptions do not make the rule nor render the rule irrelevant. One swallow does not make a summer; a single instance or indicator of something is not necessarily significant.

Conclusion

The challenge to the constitutional validity of Section 175(1)(q) and 177(1) fails on all the counts. Both the provisions are held, intra vires the Constitution. The provisions are salutary and in public interest. All the petitions which challenge the constitutional validity of the above said provisions are held liable to be dismissed.

Certain consequential orders would be needed. The matters in this batch of hundreds of petitions can broadly be divided into a few categories. There are writ petitions under Article 32 of the Constitution directly filed in this Court wherein the only question arising for decision is the constitutional validity of the impugned provisions of the Haryana Act. There were many a writ petitions filed in the High Court of Punjab & Haryana under Articles 226/227 of the Constitution which have been dismissed and appeals by special leave have been filed in this Court against the decisions of the High Court. The writ petitions, whether in this Court or in the High Court, were filed at different stages of the proceedings. In some of the matters the High Court had refused to stay by interim order the disqualification or the proceedings relating to disqualification pending before the Director under Section 177(2) of the Act. With the decision in these writ petitions and the appeals arising out of SLPs the proceedings shall stand revived at the stage at which they were, excepting in those matters where they stand already concluded. The proceedings under Section 177(2) of the Act before the Director or the hearing in the appeals as the case may be shall now be concluded. In such of the cases where the persons proceeded against have not filed their replies or have not appealed against the decision of the Director in view of the interim order of this Court or the High Court having been secured by them they would be entitled to file reply or appeal, as the case may be, within 15 days from the date of this judgment if the time had not already expired before their initiating proceedings in the High Court or this Court. Such of the cases where defence in the proceedings under Section 177(2) of the Act was raised on the ground that the disqualification was not attracted on account of a child or more having been given in adoption, need not be re-opened as we have held that such a defence is not available.

Subject to the abovesaid directions all the writ petitions and civil appeals arising out of SLPs are dismissed.

SLP (C) No.22312 of 2001 Though this petition was heard with a batch of petitions on 17.07.2003, raising constitutional validity of certain provisions of Haryana Panchayati Raj Act, 1994, no such question is raised in this petition. List for hearing on 04.08.2003.

There are three sets of petitions. In petitions under Article 32 of the Constitution, directly filed in this Court, the only question arising for decision is the constitutional validity of the impugned provisions of the Haryana Act. There were some writ petitions filed in the High Court of Punjab and Haryana under Article 226/227 of the Constitution which have been dismissed, appeals by special leave have been filed there against. All the writ petitions and appeals shall also stand dismissed. In some of the matters the High Court had by interim order stayed the disqualification and in some cases proceedings before the Director under Section 177 (2) of the Act. With the decision in these writ petitions, the proceedings shall stand revived at the stage where they were. Within 15 days from the date of this judgment the person proceeded against, may file appeal against the decision of the Director, as the case may be. In such of the cases where defence to the proceedings under Section 177(2) of the Act was raised on the ground of disqualification, being not attracted on account of the child having been given in adoption, the defence shall not be available. The proceedings shall stand concluded and the disqualification shall apply. All the appeals and writ petitions be treated as disposed of in terms of the above said directions.

III. Minors and Reproductive Rights

Even when lawmakers recognize that women have a basic human right to reproductive self-determination, there is a strong likelihood that a woman's reproductive rights will be made subordinate to another's interest when the woman in question is a minor. In these cases, yet another interest – that of a parent who may have a competing human right to make decisions concerning his/her child – must be balanced against those of the woman. This balancing applies to cases involving access to sexual and reproductive health care as well as the right to receive or impart information regarding sexual and reproductive health. In the United States, between 1982 and 2009, the federal government spent over $1.3 billion on grants to promote abstinence-only-until-marriage education programs in public schools that precluded teaching comprehensive sex education with information necessary to avoid pregnancy and sexually transmitted diseases. Additionally, in *Planned Parenthood v. Casey*, the Supreme Court held that legislation requiring parental involvement in abortion decision-making is constitutional so long the regulations do not place an "undue burden" on a woman's ability to acquire an abortion.

While proponents of minors' reproductive rights argue that young people have a fundamental right to receive scientifically accurate and objective information on reproductive health and access to reproductive health care, courts around the world have grappled with whether and when those rights are outweighed by parents' rights to make decisions about the education and health of their children. In *Kjeldsen v. Denmark*, the European Court of Human Rights discusses whether the mandate that states "respect rights of parents to ensure education and teaching in conformity with their own philosophical and religious convictions" required Denmark to remove sex education from public school curriculums in deference to certain Christian parents. In making its determination, the Court weighs the importance of providing youth with objective and scientific reproductive health information against parents' right and duty to educate their children in accordance with their convictions. Alternatively, in *Christian Lawyers Association v. Minister of Health*, the High Court of South Africa grapples with whether minors can obtain an abortion without parental consent. In making its determination, the Court discusses the importance of informed consent and the difficulty of determining when a girl forms the "independent will" that creates the capacity to consent. In so doing, the Court balances the interests of minors to make independent choices against the interest in ensuring that children have the support, guidance, and care of their parents and guardians. Collectively, these cases explore the complex overlap of minors' and parents' rights and offer compelling illustrations of how these competing rights have been discussed and adjudicated.

CONSEIL DE L'EUROPE COUNCIL OF EUROPE COUR EUROPÉENNE DES DROITS DE L'HOMME EUROPEAN COURT OF HUMAN RIGHTS

CASE OF KJELDSEN, BUSK MADSEN AND PEDERSEN v. DENMARK

7 December 1976

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PROCEDURE

1. The case of Kjeldsen, Busk Madsen and Pedersen was referred to the Court by the European Commission of Human Rights (hereinafter referred to as "the Commission"). The case originated in three applications (nos. 5095/71, 5920/72 and 5926/72) against the Kingdom of Denmark lodged with the Commission in 1971 and 1972 by Viking and Annemarie Kjeldsen, Arne and Inger Busk Madsen, and Hans and Ellen Pedersen, all parents of Danish nationality....

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AS TO THE FACTS

14. The applicants, who are parents of Danish nationality, reside in Denmark.... All three couples, having children of school age, object to integrated, and hence compulsory, sex education as introduced into State primary schools in Denmark by Act No. 235 of 27 May 1970, amending the State Schools Act (... hereinafter referred to as "the 1970 Act"). [All the applicants had asked that their children be exempted from compulsory sex education; all of their requests for exemption had been denied.]

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Sex education

19. In Denmark, sex education in State schools has been a topic of discussion for thirty-five years. As early as 1945, sex education was introduced in the State schools of Copenhagen and several institutions outside the capital copied this example. Nevertheless, the Minister of Education spoke against compulsory sex education when the question was raised in 1958.

In 1960, the Curriculum Committee published a "Guide to teaching in State schools" which distinguished between instruction on the reproduction of man and sex education proper. The Committee recommended that the former be integrated in the biology syllabus while the latter should remain optional for children and teachers and be provided by medical staff. The Committee also advised that guidelines for schools be drawn up on the contents of, and the terminology to be used in, sex education.

In a Circular of 8 April 1960, the Minister of Education adopted the Committee's conclusions: as from the school year 1960/61 reproduction of man became a compulsory part of biology lessons whereas an official guide issued by the Ministry, dating from September 1961,

specified that only those children whose parents had given their express consent should receive sex education proper.

20. The Danish Government, anxious to reduce the disconcerting increase in the frequency of unwanted pregnancies, instructed a committee in 1961 to examine the problem of sex education .... The setting up of such a committee had been urged, among others, by the National Council of Danish Women ... under the chairmanship of Mrs. Else-Merete Ross, a Member of Parliament, and by the Board of the Mothers' Aid Institutions .... Every year the latter bodies received applications for assistance from about 6,000 young unmarried mothers of whom half were below twenty years of age and a quarter below seventeen. In addition, many children, often of very young parents, were born within the first nine months after marriage. Legal abortions, for their part, numbered about 4,000 every year and, according to expert opinions, illegal abortions about 15,000 whereas the annual birth rate was hardly more than 70,000.

21. In 1968, after a thorough examination of the problem, the above-mentioned committee, which was composed of doctors, educationalists, lawyers, theologians and government experts, submitted a report (No. 484) entitled "Sex Education in State Schools" .... Modelling itself on the system that had been in force in Sweden for some years, the committee recommended in its report that sex education be integrated into compulsory subjects on the curriculum of State schools. However, there should be no obligation for teachers to take part in this teaching.

The report was based on the idea that it was essential for sexual instruction to be adapted to the children's different degrees of maturity and to be taught in the natural context of other subjects, for instance when questions by the children presented the appropriate opportunity. This method appeared to the committee particularly suited to prevent the subject from becoming delicate or speculative. The report emphasised that instruction in the matter should take the form of discussions and informal talks between teachers and pupils. Finally it gave an outline of the contents of sex education and recommended the drawing up of a new guide for State schools.

22. In March 1970, the Minister of Education tabled a Bill before Parliament to amend the State Schools Act. The Bill provided, inter alia, that sex education should become obligatory and an integrated part of general teaching in State primary schools. In this respect, the Bill was based on the recommendations of the committee on sex education, with one exception: following a declaration from the National Teachers' Association, it did not grant teachers a general right of exemption from participation in such instruction.

The Bill had received the support not only of this Association but also of the National Association of School and Society representing on the national level education committees, school boards and parents' associations, and of the National Association of Municipal Councils.

Section 1 para. 25 of the 1970 Act, which was passed unanimously by Parliament and became law on 27 May 1970, added "library organisation and sex education" to the list of subjects to be taught, set out in Section 17 para. 6 of the State Schools Act. Accordingly the latter text henceforth read as follows (Bekendtgørelse No. 300 of 12 June 1970):

"In addition to the foregoing, the following shall also apply to teaching in primary schools:

road safety, library organisation and sex education shall form an integral part of teaching in the manner specified by the Minister of Education.

..."

The Act entered into force on 1 August 1970. As early as 25 June, a Circular from the Minister of Education ... had advised municipal councils, school commissions, school boards, teachers' councils and headmasters of schools outside Copenhagen "that further texts, accompanied by new teaching instructions, on sex education would be issued". The Circular specified that "henceforth, parents (would) still have the possibility of exempting their children from such education and teachers that of not dispensing it".

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24. ...[T]he Minister of Education laid down [an] Executive [in] 8 June 1971.... The Executive Order - which applied to primary education and the first level of secondary education in State schools outside Copenhagen – was worded as follows:

"Section 1

(1) The objective of sex education shall be to impart to the pupils knowledge which could:

(a) help them avoid such insecurity and apprehension as would otherwise cause them problems;

(b) promote understanding of a connection between sex life, love life and general human relationships;

(c) enable the individual pupil independently to arrive at standpoints which harmonise best with his or her personality;

(d) stress the importance of responsibility and consideration in matters of sex.

(2) Sex education at all levels shall form part of the instruction given, in the general school subjects, in particular Danish, knowledge of Christianity, biology (hygiene), history (civics) and domestic relations. In addition, a general survey of the main topics covered by sex education may be given in the sixth and ninth school years.

Section 2

(1) The organisation and scope of sex education shall be laid down in or in accordance with the curriculum. Assistance in this respect is to be obtained from the Guide issued by the State Schools' Curriculum Committee.....

(2) Restrictions may not be imposed upon the range of matters dealt with in accordance with sub-section 1 so as to render impossible the fulfilment of the purpose of sex education.

***

Section 3

(1) Sex education shall be given by the teachers responsible for giving lessons on the subjects with which it is integrated in the relevant class and in accordance with the directives of the principal of the school. If it is not clear from the curriculum which subjects are linked to the various topics to be taught, the class teachers shall distribute the work, as far as need be, in accordance with the recommendation of the teachers' council; this latter opinion must be approved by the school board pursuant to section 27 para. 5 of the School Administration Act.

(2) A teacher cannot be compelled against his will to give the special instruction in the sixth and ninth years referred to in the second sentence of section 1 para. 2.

Section 4

(1) The present Order shall come into force on 1 August 1971.

(2) At the same time the right of parents to have their children exempted from sex education given at school shall cease. They may nevertheless, on application to the principal of the school, have them exempted from the special instruction referred to in the second sentence of section 1 para. 2.

***

26. The objectives set out in the Executive Order of 8 June 1971 were identical with those of the Guide, except that the latter contains an addition to the effect that schools must try to develop in pupils openness with regard to the sexual aspects of human life and to bring about such openness through an attitude that will make them feel secure.

27. The principle of integration, provided for in paragraph 2 of section 1 of the Executive Order, is explained as follows in the Guide:

"The main purpose of integration is to place sex guidance in a context where the sexuality of man does not appear as a special phenomenon. Sexuality is not a purely physical matter ... nor is it a purely technical matter .... On the other hand it is not of such emotional impact that it cannot be taken up for objective and sober discussion. ... The topic should therefore form an integral part of the overall school education ..."

28. As for the definition of the manner and scope of sex education (section 2 para. 1 of the Executive Order), the Guide indicates the matters that may be included in the State school curricula.

In the first to fourth years instruction begins with the concept of the family and then moves on to the difference between the sexes, conception, birth and development of the child, family planning, relations with adults whom the children do not know and puberty.

The list of subjects suggested for the fifth to seventh years includes the sexual organs, puberty, hormones, heredity, sexual activities (masturbation, intercourse, orgasm), fertilisation, methods of contraception, venereal diseases, sexual deviations (in particular homosexuality) and pornography.

The teaching given in the eighth to tenth years returns to the matters touched on during the previous years but puts the accent on the ethical, social and family aspects of sexual life. The Guide mentions sexual ethics and sexual morals; different views on sexual life before marriage; sexual and marital problems in the light of different religious and political viewpoints; the role of the sexes; love, sex and faithfulness in marriage; divorce, etc.

29. The Guide advocates an instruction method centred on informal talks between teachers and children on the basis of the latter questions. It emphasises that "the instruction must be so tactful as not to offend or frighten the child" and that it "must respect each child's right to adhere to conceptions it has developed itself". To the extent that the discussion bears on ethical and moral problems of sexual life, the Guide recommends teachers to adopt an objective attitude; it specifies:

> "The teacher should not identify himself with or dissociate himself from the conceptions dealt with. However, it does not necessarily prevent the teacher from showing his personal view. The demand for objectivity is amplified by the fact that the school accepts children from all social classes. It must be possible for all parents to reckon safely on their children not being influenced in a unilateral direction which may deviate from the opinion of the home. It must be possible for the parents to trust that the ethical basic points of view will be presented objectively and soberly."

The Guide also directs teachers not to use vulgar terminology or erotic photographs, not to enter into discussions of sexual matters with a single pupil outside the group and not to impart to pupils information about the technique of sexual intercourse (section 2 para. 3 of the Executive Order).

The applicants claim, however, that in practice vulgar terminology is used to a very wide extent. They refer to a book by Bent H. Claësson called "Dreng og Pige, Mand og Kvinde" ("Boy and Girl, Man and Woman") of which 55,000 copies have been sold in Denmark. According to them it frequently uses vulgar terminology, explains the technique of coitus and shows photographs depicting erotic situations.

30. On the subject of relations between school and parents, the Guide points out, inter alia:

> "In order to achieve an interaction between sex education at the school and at home respectively, it will be expedient to keep parents acquainted with the manner and scope of the sex education given at school. Parent class meetings are a good way of establishing this contact between school and parents. Discussions there will provide the opportunity for emphasising the objective of sexual instruction at the school and for making it clear to parents that it is not the school's intention to take anything away from them but rather ... to establish co-operation for the benefit of all parties. It can also be pointed out to parents that the integrated education allows the topic to be taken up exactly where it arises naturally in

the other fields of instruction and that, generally, this is only practicable if sex education is compulsory for pupils. ... Besides, through his contacts with the homes the class teacher will be able to learn enough about the parents' attitude towards the school, towards their own child and towards its special problems. During discussions about the sex education given by the school, sceptical parents will often be led to realise the justification for co-operation between school and home in this field as well. Some children may have special requirements or need special consideration and it will often be the parents of these children who are difficult to contact. The teacher should be aware of this fact. When gradually the teacher, homes and children have come to know each other, a relationship of trust may arise which will make it possible to begin sex education in a way that is satisfactory to all parties."

31. The Executive Order No. 313 of 15 June 1972, which came into force on 1 August 1972, repealed the Executive Order of 8 June 1971. The new Order reads:

"Section 1

(1) The objective of the sex education provided in Folkeskolen shall be to impart to the pupils such knowledge of sex life as will enable them to take care of themselves and show consideration for others in that respect.

(2) Schools are therefore required, as a minimum, to provide instruction on the anatomy of the reproductive organs, on conception and contraception and on venereal diseases to such extent that the pupils will not later in life land themselves or others in difficulties solely on account of lack of knowledge. Additional and more far-reaching goals of instruction may be established within the framework of the objective set out in sub-section (1) above.

(3) Sex education shall start not later than in the third school year; it shall form part of the instruction given in the general school subjects, in particular Danish, knowledge of Christianity, biology (hygiene), history (civics) and domestic relations. In addition, a general survey of the main topics covered by sex education may be given in the sixth or seventh and in the ninth school years.

Section 2

The organisation and scope of sex education shall be laid down in or in accordance with the curriculum. If the special instruction referred to in the second sentence of section 1 para. 3 is provided, a small number of lessons shall be set aside for this purpose in the relevant years.

Section 3

(1) Sex education shall be given by the teachers responsible for giving lessons on the subjects with which it is integrated in the relevant class and in accordance with the directives of the principal of the school. If it is not clear from the curriculum which subjects are linked to the various topics to be taught, the class teachers shall distribute the work, as far as need be, in accordance with the recommendation of the teachers' council; this latter opinion must be approved by the school board pursuant to section 27 para. 5 of the School Administration Act.

(2) A teacher cannot be compelled against his will to give the special instruction referred to in the second sentence of section 1 para. 3. Nor shall it be incumbent upon the teacher to impart to pupils information about coital techniques or to use photographic pictures representing erotic situations.

Section 4

On application to the principal of the school, parents may have their children exempted from the special instruction referred to in the second sentence of section 1 para. 3.

..."

32. In a Circular of 15 June 1972 ...., the Minister of Education stated that the aim of the new Executive Order was to enable local school authorities and, consequently, parents to exert greater influence on the organisation of the teaching in question. In addition, sex education, which "remains an integral part of school education, which is to say that it should form part of the instruction given in obligatory subjects", was to have a more confined objective and place greater emphasis on factual information.

The Circular pointed out that henceforth sex education could be postponed until the third school year....

33. ...[T]he Christian People's Party tabled an amendment according to which parents would be allowed to ask that their children be exempted from attending sex education. This amendment was rejected by 103 votes to 24.

34. Although primary education in private schools must in principle cover all the topics obligatory at State schools (paragraph 18 above), sex education is an exception in this respect. Private schools are free to decide themselves to what extent they wish to align their teaching in this field with the rules applicable to State schools. However, they must include in the biology syllabus a course on the reproduction of man similar to that obligatory in State schools since 1960 (paragraph 19 above).

35. The applicants maintain that the introduction of compulsory sex education did not correspond at all with the general wish of the population. A headmaster in Nyborg allegedly collected 36,000 protest signatures in a very short space of time. Similarly, an opinion poll carried out by the Observa Institute and published on 30 January 1972 by a daily newspaper, the Jyllands-Posten, is said to have shown that, of a random sample of 1,532 persons aged eighteen or more, 41 per cent were in favour of an optional system, 15 per cent were against any sex education whatsoever in primary schools and only 35 per cent approved the system instituted by the 1970 Act.

According to the authors of two articles, published in 1975 in the medical journal Ugeskrift for Læger and produced to the Court by the Commission, the introduction of sex education has not, moreover, brought about the results desired by the legislator. On the contrary indeed, the number of unwanted pregnancies and of abortions is said to have increased substantially between 1970 and 1974. The Government argue that the statistics from 1970 to

1974 cannot be taken as reflecting the effects of legislation whose application in practice began only in August 1973.

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PROCEEDINGS BEFORE THE COMMISSION

44. All the applicants maintained that integrated, and hence compulsory, sex education, as introduced into State schools by the 1970 Act, was contrary to the beliefs they hold as Christian parents and constituted a violation of Article 2 of Protocol No. 1 (P1-2).

In their written pleadings on the merits, Mr. and Mrs. Kjeldsen also invoked Articles 8, 9 and 14 (art. 8, art. 9, art. 14) of the Convention.

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AS TO THE LAW

I. ON THE ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 1 (P1-2)

49. The applicants invoke Article 2 of Protocol No. 1 (P1-2) which provides:

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

50. ...[The Court notes that] the second sentence of Article 2 (P1-2) must be read together with the first which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching.

...

The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised....

51. The Government pleaded ... that the second sentence of Article 2 (P1-2), assuming that it governed even the State schools where attendance is not obligatory, implies solely the right for parents to have their children exempted from classes offering "religious instruction of a denominational character".

The Court does not share this view. Article 2 (P1-2), which applies to each of the State's functions in relation to education and to teaching, does not permit a distinction to be drawn

between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme.

52. ...The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education (paragraph 50 above). It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.

On the other hand, "the provisions of the Convention and Protocol must be read as a whole" (above-mentioned judgment of 23 July 1968, ibid., p. 30, para. 1). Accordingly, the two sentences of Article 2 (P1-2) must be read not only in the light of each other but also, in particular, of Articles 8, 9 and 10 (art. 8, art. 9, art. 10) of the Convention which proclaim the right of everyone, including parents and children, "to respect for his private and family life", to "freedom of thought, conscience and religion", and to "freedom ... to receive and impart information and ideas".

53. ...[T]he second sentence of Article 2 of the Protocol (P1-2) does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature.

The second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded. Such an interpretation is consistent at one and the same time with the first sentence of Article 2 of the Protocol (P1-2), with Articles 8 to 10 (art. 8, art. 9, art. 10) of the Convention and with the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society.

54. In order to examine the disputed legislation under Article 2 of the Protocol (P1-2), interpreted as above, one must, while avoiding any evaluation of the legislation's expediency, have regard to the material situation that it sought and still seeks to meet.

The Danish legislator, who did not neglect to obtain beforehand the advice of qualified experts, clearly took as his starting point the known fact that in Denmark children nowadays discover without difficulty and from several quarters the information that interests them on sexual life. The instruction on the subject given in State schools is aimed less at instilling knowledge they do not have or cannot acquire by other means than at giving them such

knowledge more correctly, precisely, objectively and scientifically. The instruction, as provided for and organised by the contested legislation, is principally intended to give pupils better information; this emerges from, inter alia, the preface to the "Guide" of April 1971.

Even when circumscribed in this way, such instruction clearly cannot exclude on the part of teachers certain assessments capable of encroaching on the religious or philosophical sphere; for what are involved are matters where appraisals of fact easily lead on to value-judgments. The minority of the Commission rightly emphasised this. The Executive Orders and Circulars of 8 June 1971 and 15 June 1972, the "Guide" of April 1971 and the other material before the Court (paragraphs 20-32 above) plainly show that the Danish State, by providing children in good time with explanations it considers useful, is attempting to warn them against phenomena it views as disturbing, for example, the excessive frequency of births out of wedlock, induced abortions and venereal diseases. The public authorities wish to enable pupils, when the time comes, "to take care of themselves and show consideration for others in that respect", "not ... [to] land themselves or others in difficulties solely on account of lack of knowledge" (section 1 of the Executive Order of 15 June 1972).

These considerations are indeed of a moral order, but they are very general in character and do not entail overstepping the bounds of what a democratic State may regard as the public interest. Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour. It does not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible. Further, it does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions.

Certainly, abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism. However, it follows from the Commission's decisions on the admissibility of the applications that the Court is not at present seised of a problem of this kind (paragraph 48 above).

The Court consequently reaches the conclusion that the disputed legislation in itself in no way offends the applicants' religious and philosophical convictions to the extent forbidden by the second sentence of Article 2 of the Protocol (P1-2), interpreted in the light of its first sentence and of the whole of the Convention.

Besides, the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidised by the State (paragraphs 15, 18 and 34 above), or to educate them or have them educated at home, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions.

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II. ON THE ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 2 OF PROTOCOL No. 1 (art. 14+P1-2)

56. The applicants also claim to be victims, in the enjoyment of the rights protected by Article 2 of Protocol No. 1 (P1-2), of a discrimination, on the ground of religion, contrary to Article 14 (art. 14) of the Convention. They stress that Danish legislation allows parents to have their children exempted from religious instruction classes held in State schools, whilst it offers no similar possibility for integrated sex education (paragraphs 70, 80 and 171-172 of the Commission's report).

The Court first points out that Article 14 (art. 14) prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ("status") by which persons or groups of persons are distinguishable from each other. However, there is nothing in the contested legislation which can suggest that it envisaged such treatment.

Above all, the Court, like the Commission (paragraph 173 of the report), finds that there is a difference in kind between religious instruction and the sex education concerned in this case. The former of necessity disseminates tenets and not mere knowledge; the Court has already concluded that the same does not apply to the latter (paragraph 54 above). Accordingly, the distinction objected to by the applicants is founded on dissimilar factual circumstances and is consistent with the requirements of Article 14 (art. 14).

III. ON THE ALLEGED VIOLATION OF ARTICLES 8 AND 9 (art. 8, art. 9) OF THE CONVENTION

57. The applicants, without providing many details, finally invoke Articles 8 and 9 (art. 8, art. 9) of the Convention taken together with Article 2 of Protocol No. 1 (art. 8+P1-2, art. 9+P1-2). They allege that the legislation of which they complain interferes with their right to respect for their private and family life and with their right to freedom of thought, conscience and religion (paragraphs 54, 55, 72, 89 and 170 of the Commission's report).

However, the Court does not find any breach of Articles 8 and 9 (art. 8, art. 9) which, moreover, it took into account when interpreting Article 2 of Protocol No. 1 (P1-2) (paragraphs 52 and 53 above).

***

FOR THESE REASONS, THE COURT

1. Holds by six votes to one that there has been no breach of Article 2 of Protocol No. 1 (P1-2) or of Article 14 of the Convention taken together with the said Article 2 (art. 14+P1-2);

2. Holds unanimously that there has been no breach of Articles 8 and 9 of the Convention taken together with Article 2 of Protocol No. 1 (art. 8+P1-2, art. 9+P1-2).

file me
/BB

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
DATE: 28 MAY 2004
CASE NO: 7728/2000

IN THE MATTER BETWEEN:

THE CHRISTIAN LAWYERS' ASSOCIATION	PLAINTIFF
AND	
NATIONAL MINISTER OF HEALTH	FIRST DEFENDANT
PREMIER OF THE PROVINCE OF GAUTENG	SECOND DEFENDANT
MEMBER OF THE EXECUTIVE COUNCIL OF HELATH	THIRD DEFENDANT
THE REPRODUCTIVE RIGHTS ALLIANCE	AMICUS CURIAE

JUDGMENT

MOJAPELO, J

Introduction

This is a judgment on an exception filed by the defendants against the plaintiff's particulars of claim on the grounds that the particulars of claim do not disclose a cause of action.

The plaintiff entitled an action in which it seeks an order declaring sections 5(2) and 5(3) read with the definition of "woman" in sections 1 and 5(1) of the Choice on Termination of Pregnancy Act 92 of 1998 ("the Choice Act") to be unconstitutional and an order striking down sections 5(2) and 5(3) and the definition of "woman" in section 1 of the Choice Act.

The provisions of the Act and Constitution

In section 1 of the Choice Act the word "woman" is defined as follows:

> " 'woman' means any female person of any age"

Subsections 5(1), 5(2) and 5(3) provide as follows:

> "(1) Subject to the provisions of (4) and (5) the termination of a pregnancy may only take place with the informed consent of the pregnant woman .
>
> (2) Notwithstanding any other law or the common law, but subject to the provisions of subsection (4) and (5), no consent other than that of the

pregnant woman shall be required for the termination of a pregnancy.

(3) In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: provided that the termination of the pregnancy shall not be denied because such minor chooses not consult them."

Subsections (4) and (5) deal with exceptional cases such as the case of a woman who is severely mentally disabled, is in a state of continuous unconsciousness or where the medical practitioners involved are of the opinion that continued pregnancy would pose the risk of injuries to the woman's physical or mental health, where there exist substantial risk that the fetus would suffer from severe physical or mental abnormality, where continued pregnancy would endanger the woman's life, result in severe malformation of the fetus or pose a risk of injuries to the fetus. The provisions of both subsections are therefore not in issue in the present case.

The constitutional pegs on which the plaintiff hangs its case are the following sections of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), read with section 7(1): claim A – section 28(1)(b), 28(1)(d), claim B – sections 28(2) and claim C – section 9(1).

The relevant sections of the Constitution read as follows:

Claim A-

Section 28(1)(b):

"Every child has the right to family care or parent care"

Section 28(1)(d):

"Everyone has the right to be protected from mal-treatment, neglect, abuse or degradation"

Claim B –

Section 28(2):

"A child's best interests are of paramount importance in every matter concerning the child."

Claim C

Section 9(1):

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

In addition to the above provisions section 7(1) of the Constitution provides as follows that:

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

The essence of the claim and the Exception

The provisions of the Choice Act that the plaintiff's claim is directed at are the provisions that allow women under the age of 18 years to choose to have their pregnancies terminated without (a) the consent of the parents or guardians, (b) consulting the parent' or guardians, (c) first undergoing counselling, and (d) reflecting on their decision or decisions for a prescribed period. The measures in (a) to (d) are for the sake of convenience collectively hereafter referred to as parental consent control.

It is the plaintiff's case in essence that young women or girls below that of age are not capable on their own, that is, without parental consent control to take an informed decision whether or not to have an abortion which serves their best interests.

(f) The termination may only be performed at a facility designated by the Minister (section 3(1)).

(g) A pregnancy may not be terminated unless two medical practitioners or a medical practitioner and a registered midwife who has completed a prescribed course consent thereto (proviso to section 5).

The Choice Act also has the following ancillary provisions regulating the termination of the pregnancy: The State is obliged to promote the provision of counselling to women before and after the termination of pregnancy. The counselling is, however, not mandatory or directive (section 4). Young women (below the age of 18 years) are encouraged to consult with their parents, guardians, family members or friends before termination of their pregnancy. The medical practitioner or midwife who performs the termination, must advise them to do so before their pregnancy is terminated. The actual final decision is, however, left to them to decide whether or not to consult with their parents, guardians, family members and/or friends. (section 5(3)). The medical practitioner or midwife who performs a termination, must inform the woman of their rights under the Choice act (section 6).

It is therefore not as if the legislature left the termination of pregnancy totally unregulated. The cornerstone of the regulation of the termination of pregnancy of a girl and indeed of any woman under the Choice Act is the requirement of her informed consent. No women, regardless of her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so.

I accordingly now turn to consider the meaning and effect of the requirement of informed consent.

The requirement of "informed consent" at law:

The Choice Act does not define or elaborate on what is meant by the requirement of "informed consent" for the termination of pregnancy.

The concept is, however, not alien to our common law. It forms the basis of the doctrine of *volenti non fit injuria* that justifies conduct that would otherwise have constituted a delict or crime if it took place without the victim's informed consent. More particularly, day to day invasive medical treatment that would have otherwise have constituted a violation of a patient's right to privacy and personal integrity, is justified

and it is lawful only because as a requirement of the law, it is performed with the patient's informed consent. See *Van Wyk v Lewis* 1924 AD 438 at 451; *Castell v Greef* 1994 (4) SA 408 (C) at 425; *C v Minister of Correctional Services* 1996 (4) SA 292 (T) at 300; Neethling, Potgieter and Visser: *Law of Delict*, 3rd ed pp100-101; Neethling: *Persoonlikheidsreg*, 4th ed pp121-122.

It has come to be settled in our law that in this context, the informed consent requirement rests on three independent legs of knowledge, appreciation and consent.

The courts have often endorsed the following statements by *INNES, CJ*, in *Waring & Gillow v Sherborne* 1904 TS 340 at 344 to found a defence of consent:

> "... it must be clearly shown that the risk was known, that it was realised, that it was voluntary undertaken. Knowledge, appreciation, consent – these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent. ..."

The requirement of "knowledge" means that the woman who consents to the termination of a pregnancy must have full knowledge "of the nature and extent of the harm or risk". See *Castell v De Greef (supra)* at 425, *Neethling Potgieter & Visser* (op cit) at 100-101 and *Neethling* (op cit) at 121-122.

The requirement of "appreciation" implies more than mere knowledge. The woman who gives consent to the termination of her pregnancy, "must also comprehend and understand the nature and extent of the harm or risk." See *Castell v De Greef* (*supra* at 425); *Neethling, Potgieter & Visser* (op cit) at 101 and *Neethling* (op cit) at 122.

The last requirement of "consent", means that the woman must "in fact subjectively consent" to the harm or risk associated with the termination of her pregnancy and her consent "must be comprehensive" in that it must "extend to the entire transaction, inclusive of its consequences". *Castell v De Greef, (supra),* at 425, *Neethling Potgieter & Visser,* (op cit) at 120 and *Neethling* (op cit) at 122.

The capacity to consent

In this context, valid consent can only be given by someone with the intellectual and emotional capacity for the required knowledge, appreciation and consent. Because consent is a manifestation of will "capacity to consent depends on the ability to form an intelligent will on the basis of an appreciation of the nature and consequences of the act consented to." *Van Heerden and Others Boberg's Law of Persons and the Family*, 2nd ed at p849.

Young and immature children do not have the capacity or real knowledge, appreciation and consent. *S v Marx* 1962 (1) SA 848 (N) at 854. A girl has the capacity to consent to the termination of her pregnancy and its concomitant invasion of her privacy and personal integrity, only if she is, "in fact mature enough to form an intelligent will" (*Van Heerden and Others op cit* at 850) and is "verstandelik ryp genoeg om die implikasie van (haar) handelinge te besef ..." (*Neetling, Potgieter & Visser op cit* at 100, *Neethling op cit* at 212).

Within the context of the Choice Act, actual capacity to give informed consent, as determined in each and every case by the medical practitioner based on the emotional and intellectual maturity of the

individual concerned and not arbitrarily predetermined and inflexible age as determined by a number of years is the distinguishing line between those who may access the option to terminate their pregnancies unassisted on the one hand and those who require assistance on the other.

The critical portions of plaintiff's particulars of claim:

As I have already stated above the plaintiff structured its claims into fine parts: an introduction (paragraphs 1-22), claim A (paragraphs 23-25), claim B (paragraphs 26-28), claim C (paragraphs 29-32) and conclusion (paragraphs 33-35).

In the particulars of claim the plaintiff makes a number of allegations in paragraphs 5 to 18 about *inter alia* the effect of the termination of pregnancy on a girl, the vulnerability of the girl when making such decisions, certain changes in the developmental stages of a girl and characteristics of such changes. In paragraphs 19 to 20 the plaintiff makes the following allegations which have far reaching consequences/implications for its claim –

> "19. Given paragraphs 16 to 18 above, a girl is not in a position to make an informed decision about whether

or not to have an abortion which serves her best interests without the assistance and/or guidance of her parents/guardian and/or counsellor."

20. Given paragraphs 16 to 18 above, a girl:

20.1 is unablefully to appreciate the need for and value of parental care and support, and the assistance and/or guidance of a counsellor;

20.2 is not capable of giving consent as required in section 5(1) of the Act."

These introductory paragraphs of the plaintiff's particulars of claim then conclude as follows in paragraph 21:

"21. Given paragraphs 10 to 20 above a pregnant girl requires special protection by the state, *inter alia* by ensuring that when enacting of legislation which affects her, she is not deprived in any way of the support, guidance and care of her parents/guardian and/or counsellor."

It is on the basis of these conclusionary factual allegations that the plaintiff concludes in its particulars of claim in paragraph 23 to 35 that the Choice Act is in conflict with the Constitution in the specific respects specified in claims A, B and C.

The essence of the various causes of action relied upon by the plaintiff is that the provisions under attack are unconstitutional because they permit a woman under the age of 18 years to choose to have her pregnancy terminated without (a) the consent of her parents or guardian, (b) consulting her parents for guidance, (c) first undergoing counselling, and (d) without reflecting on her decision for a prescribed period, in brief without parental consent or control.

Back to informed consent

As already mentioned above the Act makes informed consent, and not age, the cornerstone of its regulation of access to termination of pregnancy. Subject to the provisions of subsections (4) and (5), of the Choice Act, the termination of a pregnancy may only take place with the informed consent of the pregnant woman. Notwithstanding any other law but subject to the provisions of the said subsections, no consent other than that of the pregnant woman shall be required for the termination of the

pregnancy. The Act is, however, not totally blind to the question of minority or immaturity. In the case of a pregnant minor, a medical practitioner or registered midwife, is enjoined in peremptory language to advise such minor to consult with her parents, guardian, family members or friends, before the pregnancy is terminated. This is subject to the proviso that the termination of pregnancy shall not be denied because such minor should choose not to consult with them. A medical practitioner or registered midwife who is not satisfied that the pregnant minor has the capacity to give informed consent should therefore not perform the termination of pregnancy on such minor. This of course applies equally to pregnant adults. If in such a case the medical practitioner or registered midwife performs the termination of pregnancy, then his or her conduct will not be in accordance with the Choice Act and would therefore be unlawful. Informed consent required by the Act is therefore a consent that can be given by each and every person having the capacity to do so. It is a threshold with both intellectual and emotional attributes and those performing termination of pregnancy operations have to satisfy themselves that it is met.

Implications

The plaintiff alleges in paragraph 20.2 quoted above, that a girl below 18 years is not capable of giving informed consent as required in section 5(1) of the Choice Act, that is, to make the decision whether or not to have a termination of her pregnancy which serves her best interest without the assistance and/or guidance of her parents/guardian and/or counsellor. The plaintiff argues that it is because such a person is not in a position to appreciate the need for and value of parental care and support.

The plaintiff, the defendants and the *amicus curiae* are agreed that for the purposes of the exception, the allegations in the plaintiff's particulars of claim must be accepted as true. This is indeed the correct position. See in this regard *Nata Produce Growers Association and Others versus Agroserve (Pty) Ltd* 1990 (4) 749 (N) at 754J-755B and *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651E-F.

Claims A, B and C of the plaintiff's particulars of claim must, for the present purposes, therefore be considered on the basis that a girl under the age of 18 years is not capable of giving informed consent.

In the leading judgment on the requirement of informed consent, *ACKERMAN, J* on behalf of the full bench of the CPD in *Castell v De Greef (supra)* made it clear that the ratio for that requirement was to give

effect to the patient's fundamental right to self determination. At 420J the court said that it was: "clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self determination." He explained again at 426E that: "it is in accord with the fundamental right of individual autonomy and self determination to which South African law is moving. This formulation also set its face against paternalism, from many other species whereof South Africa is now turning away."

This court more recently endorsed the approach in *Castell* on the basis of the patient's right to exercise her "fundamental right to self determination". See *C v Minister of Correctional Services* 1996 (4) SA 292 (T) at 300.

The recognition of the right of every individual to self determination, has now become an imperative under the constitution and particularly the following provisions of the Bill of Rights:

(a) In terms of section 12(2), "everyone" has the right to bodily and psychological integrity which includes the right "to make decisions concerning reproduction" and "the security and control over their body".

(b) In terms of section 27(1)(a) "everyone" has the right to have access to "reproductive health care".

(c) In terms of section 10, "everyone" has "inherent dignity and the right to have their dignity respected and protected."

(d) In terms of section 14, "everyone" has "the right to privacy".

The Constitution accordingly not only permits the Choice Act to make a pregnant woman's informed consent the cornerstone of its regulation of the termination of her pregnancy, but indeed requires the Choice Act to do so. To provide otherwise would be unconstitutional.

The South African Constitution recognises and protects the right to termination of pregnancy or abortion in two ways, firstly under section 12(2)(a), that is the right to bodily and psychological integrity which include the right to make decisions concerning reproduction, and secondly, under section 12(2)(b), that is, the right to control over ones body.

Evidence to establish cause of action

Throughout argument on the exception the plaintiff repeatedly alluded to evidence that will be lead at the trial. It is unnecessary to examine in detail the plaintiff's argument and submissions insofar as it relates to what the plaintiff will demonstrate at the trial, or to extent that it is based on what evidence the plaintiff undertakes to lead at the trial in order to establish or proof the cause of action. The cause of action must be disclosed in the particulars of claim the exception relates only to the particular's of claim and not to evidence or trial. It is equally not necessary for this court to deal in any detail with the defendant's or the *amicus curiae*'s argument which relate to the merits that may or may not be established at the trial.

It should be no answer to an exception based on the grounds that the plaintiff's particulars of claim do not disclose a cause of action, for the plaintiff to assert that evidence that will be lead to establish the cause of action. A cause of action must be established in the pleadings and evidence is required to proof and not to establish a cause of action. A pleading which does not disclose a cause of action is fatal and exceptable on that ground. It may be cured by an amendment and not by evidence.

The essence of an exception on this ground is to provide a speedy remedy and avoid a matter being dragged to the evidence stage at the trial where no cause of action exist.

Furthermore, evidence which seeks to establish a cause of action other than one disclosed on the pleadings may well be liable to be struck off on the basis of irrelevance.

Allegations in particulars of claim accepted as truth:

For the purposes of the exception this court must accept all the allegations the plaintiff's particulars of claim as true. I am indeed urged to do so but plaintiff, in paragraph 8 of its written heads of argument where I am referred to *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651E-F. See also *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) at 754B-755B. What has to be accepted as true include the allegation in paragraph 20.2 to the effect that a woman under the age of 18 "is not capable of giving informed consent" as required in section 5(1) of the Choice Act. If this is so then such woman or girl is incapable of giving the "informed consent" required for termination of pregnancy. While reserving for themselves the right to challenge the truth of the statement, the defendants and the Amicus also

argued that for the present purposes the truth of the allegations, particularly of the contents of paragraphs 20.2 must be accepted.

Section 5(1) of the Choice Act provides that the termination of pregnancy may only take place with the "informed consent of the pregnant woman". The implications of paragraphs 20.2 of the particulars of claim is therefore that girls under 18 years cannot (on their own) have their pregnancy terminated under the Choice Act.

The plaintiff's claim A, B and C complain about the legislative failure to impose stricter or additional control on the termination of pregnancies of girls under 18. It should, however, never be permissible for a girl under 18 years to have her pregnancy terminated because she is never capable of meeting the threshold required for termination imposed by section 5(1) of that Act, which is informed consent. The plaintiff therefore complains about the failure of the Choice Act to impose stricter regulation on something which the Act does not permit at all. The Act cannot possibly impose stricter control on something it prohibit altogether.

I specifically invited Mr Mathee SC who appeared for the plaintiff to address me on paragraph 20.5 as in my view it is clearly post

difficulties for the plaintiff, if one accepts its truth albeit for the present purposes (exception stage) only. He still maintained that one must accept its truth. He argued further that the allegations in the paragraph must be read and understood in the context of the preceeding allegations and that in the context the paragraph meant that such a girl is not capable of giving informed consent as required in the section without the assistance and/or guidance of parents, guardians and/or counsellors.

That argument, however, does not help the plaintiff. If the people who are in terms of paragraph 20.2 incapable of giving informed consent are unassisted girls under 18 years, then that becomes a category of persons in respect of whom the plaintiff complains. They are by virtue of their incapacity to give informed consent, excluded in the category of people for whom it is permissible to terminate pregnancy.

For the particulars of claim to disclose a cause of action the allegations contained in them must support the conclusion of fact reached by operation of law as well as the remedy sought. Because a category of persons to whom the plaintiff's complaint relate are those excluded by incapacity to give informed consent, the allegations in the particulars of claim do not support the conclusion. Claims A, B and C are excepiable because they assume that the Choice Act permits girls under 18 years to

have their pregnancies terminated when it in fact never permits them to do so. On the basis that it is true that a girl under the age of 18 years is not capable of giving informed consent required by section 51(1) of the Choice Act, and if in practice the pregnancy of such girls is terminated on the bases of their purported consent, then the plaintiff's remedy is not to attack the Choice Act but to stop the medical practitioners and midwife's who terminate the pregnancies of girls under the age of 18 because they are doing so and lawfully in violation of section 5(1) of the Choice Act. The constitutionality attack can therefore not be sustained on the particulars of claim.

Conclusion recapped:

To recap, the defendant has excepted to that the plaintiff's particulars of claim on the basis that they do not disclose a cause of action. In order to determine whether the particulars of claim disclose a cause of action, one must determine whether, the allegations contained in the particulars of claim, if proven, would entitle the plaintiff to the relief sought by the plaintiff as prayed for in such particulars of claim. To determine whether the allegations in the particulars of claim support the relief prayed for therein, the allegations must be presumed to be true. The test is therefore whether the allegations/statements in the particulars

of claim read together with the correct position of the law support the relief. The law requires "informed consent" from a person in order for such person to exercise the right to terminate pregnancy. The particulars of claim say that children under the age of 18 are incapable of giving "informed consent". The conclusion must therefore be that girls under 18 years of age cannot exercise the right to terminate pregnancy.

The particulars of claim, however, conclude that the law allows girls under 18 years of age to exercise the right to terminate pregnancy – and leave them unprotected, unassisted, isolated and without counselling when they do so. The remedy is sought on this assumption is a correct conclusion.

The assumption is, however, wrong because if any person, whether under 18 years or not, cannot give "informed consent" then such a person cannot exercise the right.

A girl under the age of 18 years can, however, not lawfully exercise that right because she does not meet the jurisdictional threshold or informed consent. The factual allegations in the particulars of claim read with the law do not learnt support for the relief prayed for in the

particulars of claim. The particulars of claim therefore do not disclose a cause of action.

On the plaintiff's case, as pleaded, therefore there is no cause of action disclosed and the exception must be upheld.

Correctness or the assertion not accepted

If court, however, does not accept the correctness of the assertion, without clear evidence, but as a general position, girls below the age of 18 are incapable of giving informed consent. The true position will depend on the particular individual in position and circumstance of each and every woman. In enacting the Choice Act the, legislature assumed that there will be woman below and above the age of 18 who will be incapable of giving informed consent and for this category the legislature requires parental or some other assistance in giving the informed consent. The legislature also recognised that there will be women above and below the age of 18 who are capable of giving informed consent, and for this category the legislature requires no assistance when they give consent to termination of pregnancy. As to whether a particular individual, irrespective of age, is capable of giving such consent, the legislature has left the determination of the "factual position" to the medical professional

or registered midwife who performs the act. I cannot find that the exercise of this legislative choice is so unreasonable or otherwise flawed that judicial interference is called for in what is essentially a legislative function. Women or children under the age of 18 are not unprotected for as long as they are incapable of giving informed consent. What is more, the legislature makes provision to ensure that all young women below the age of 18 are encouraged to seek parental support and guidance when seeking to exercise the right to reproductive choice. I cannot find that the legislation is unconstitutional when it provides for what is constitutionally permissible and regulates it without affronting the constitution. The exercise of the right is not unregulated. For this reason too the plaintiff's particulars of claim do not disclose a cause of action.

The exception is accordingly upheld with costs.

P M MOJAPELO
JUDGE OF THE HIGH COURT

IV. Pregnancy Discrimination

The right of a woman to be free from discrimination on the basis of pregnancy has been recognized in the United States and upheld in several international cases. While advocates for protecting women from pregnancy discrimination argue that such protection is essential to ensuring women's equality, the link between pregnancy discrimination and sex discrimination has not been consistently or uniformly recognized by United States courts and legislators. In 1974, the United States Supreme Court ruled that pregnancy discrimination does not violate equal protection guarantees, stating in *Geduldig v. Aiello* that the denial of insurance benefits for work loss resulting from normal pregnancy did not constitute invidious discrimination in violation the equal protection clause. In 1978, Congress passed the Pregnancy Discrimination Act, which partially superseded the Supreme Court's holding in *Geduldig*, stating that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. Nonetheless, in 2009, the Supreme Court ruled in *AT&T Corp. v. Hulteen* that maternity leave taken before the passage of the 1978 Pregnancy Discrimination Act cannot be retroactively considered in calculating employee pension benefits, thereby limiting the Act's impact.

Some foreign courts and international tribunals have provided a contrasting approach to the restrictive holdings of the U.S. Supreme Court, describing pregnancy discrimination as a form of sex discrimination and finding that it is a violation of guarantees of non-discrimination to restrict access to health services necessary to women. In *Brooks v. Canada Safeway Ltd.*, the Supreme Court of Canada addresses whether differential treatment of pregnant women under their employer's insurance plan constitutes discrimination on the basis of sex contrary to s. 6 (1) of the Human Rights Act of Manitoba. In doing so, the Court explores the question of whether pregnancy discrimination is a form of sex discrimination and whether pregnancy, though it does not affect all women, can be separated from gender. The Court holds that pregnancy discrimination is a form of sex discrimination simply because of the basic biological fact that only women have the capacity to become pregnant. Notably, the Supreme Court of Canada does not suggest that pregnancy discrimination claims cannot be retroactively considered as the Supreme Court of the United States held in *Hulteen*. Query whether a limit on the retroactive application of a right against pregnancy discrimination ensures equality for some women, but not all. When such a limit is put in place, whose interests are protected? Similarly, the South African legislature has included a prohibition against pregnancy discrimination in its constitutional guarantee of equality. Section 9.3 of the South African Constitution states that the state may not directly or indirectly discriminate against anyone on the grounds of pregnancy. In the international arena, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) seeks to ensure women's equality and human dignity by condemning discrimination against women in all forms. Articles 11 and 12 of the Convention explicitly provide protections to pregnant women, ensuring that women in countries that have signed on to the Convention have healthy pregnancies that are not hampered by discrimination in the workplace. In Article 11, CEDAW calls for maternity leave with pay, encourages supporting social services to enable parents to combine family obligations with work responsibilities, and proscribes protections for women during pregnancy in types of work proved to be harmful to them. Further, in Article 12, CEDAW requires that member states provide women with appropriate health services in connection with pregnancy and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. Consider whether the explicit guarantees of freedom from pregnancy discrimination in the South African Constitution and CEDAW provide greater protections than does the Pregnancy Discrimination Act in the United States.

Collectively, these legal frameworks provide a counterpoint to American jurisprudence on pregnancy discrimination and grapple with pregnant women's status as a discernable "class." Further, both U.S. and international case law on pregnancy discrimination shed light on whether it is just to impose the costs of pregnancy upon one half of the population and call into question whether women's full and equal participation in society can be achieved without protection from pregnancy discrimination.

Brooks *v.* Canada Safeway Ltd., [1989] 1 S.C.R. 1219

Susan Brooks *Appellant*

v.

Canada Safeway Limited *Respondent*

and between

Patricia Allen and Patricia Dixon and the Manitoba Human Rights Commission *Appellants*

v.

Canada Safeway Limited *Respondent*

and

Women's Legal Education and Action Fund (L.E.A.F.) *Intervener*

indexed as: brooks *v.* canada safeway ltd.

File No.: 20131.

1988: June 15; 1989: May 4.

Present: Dickson C.J. and Beetz, McIntyre, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the court of appeal for manitoba

Civil rights -- Employment -- Sex discrimination -- Pregnancy -- Company's accident and sickness plan excluding pregnant women from benefits during a seventeen-week period -- Whether plan discriminates against pregnant employees -- Whether discrimination on the basis of pregnancy is discrimination on the basis of sex -- The Human Rights Act, S.M. 1974, c. 65, s. 6(1).

Respondent's group insurance plan provided weekly benefits for loss of pay due to accident or sickness. The plan covered pregnant employees, subject to an exclusion from coverage during the period commencing the tenth week prior to the expected week of confinement and ending with the sixth week after the week of confinement. During that seventeen-week period, pregnant women, even if they suffered from an ailment totally unrelated to pregnancy, were not entitled to any compensation under the plan. The appellants, who worked for the respondent, all became pregnant in 1982 and were denied under the plan weekly benefits during the seventeen-week disentitlement period. They received instead pregnancy benefits under the *Unemployment Insurance Act, 1971*. The appellants filed complaints with the Manitoba Human Rights Commission alleging that the differential treatment of pregnancy in the respondent's plan constituted discrimination on the basis of sex contrary to s. 6(1) of *The Human Rights Act* of Manitoba. The adjudicator dismissed the claims. The Court of Queen's Bench and the Court of Appeal upheld the adjudicator's decisions.

Held: The appeals should be allowed.

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* Le Dain J. took no part in the judgment.

(1) *Discrimination on the Basis of Pregnancy*

The complete disentitlement of pregnant women during a seventeen-week period from receiving accident or sickness benefits under the respondent's plan constitutes discrimination by reason of pregnancy. Pregnant employees receive significantly less favourable treatment under the plan than other employees. The plan singles out pregnancy for disadvantageous treatment, in comparison with any other health reason which may prevent an employee from reporting to work.

Pregnancy, while it is not properly characterized as a sickness or an accident, is a valid health-related reason, in our society, for absence from work and as such should not have been excluded from the respondent's plan. The respondent's plan is designed to compensate employees who are absent from work for valid health-related reasons. Further, in distinguishing pregnancy from all other health-related reasons for not working, the plan imposed unfair disadvantages on pregnant women. Everyone in society benefits from procreation but one of its major costs is placed, under this plan, on one group in society -- pregnant women. Removal of unfair disadvantages imposed on groups in society is a key purpose of anti-discrimination legislation. Finding that the respondent's plan is discriminatory furthers this purpose. In sum, where an employer enters the field of compensation for health conditions and then excludes pregnancy as a valid reason for compensation, the employer has acted in a discriminatory fashion. A plan would be considered discriminatory even if it did not exclude coverage for non-pregnancy-related illness and accidents. It is enough that the plan excludes compensation for pregnancy.

The respondent alleged that the decision to exclude pregnancy from the scope of its plan was not a question of discrimination, but a question of deciding to compensate some risks and to exclude others. Underinclusion may be simply a backhanded way of permitting discrimination.

Once an employer decides to provide an employee benefit package, exclusions from such schemes may not be made, like in this case, in a discriminatory fashion.

Section 19(*h*)(vii) of the *Unemployment Insurance Act, 1971* regulations, while it addresses employer plans which do not compensate pregnant women during the 17-week period, does not constitute a permissible distinction pursuant to s. 7(2) of the Manitoba *Human Rights Act*. Distinction along sex lines might have been permissible in employee benefit plans only if such regulations had been passed pursuant to s. 7(2). In the absence of regulations under that provision, discrimination in employee benefit packages is not permissible.

(2) *Discrimination on the Basis of Sex*

Discrimination on the basis of pregnancy is discrimination on the basis of sex. The decision of this Court in *Bliss*, which reached the opposite conclusion, is inconsistent with the Court's approach to interpreting human rights legislation taken in subsequent cases and should no longer be followed. Pregnancy discrimination is a form of sex discrimination simply because of the basic biological fact that only women have the capacity to become pregnant. Appellants' disfavoured treatment under the plan flowed entirely from their state of pregnancy, a condition unique to women. Those who bear children and benefit society as a whole should not be economically or socially disadvantaged. It is thus unfair to impose all of the costs of pregnancy upon one half of the population.

It is also wrong to believe that pregnancy related discrimination could not be sex discrimination because not all women become pregnant. While pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group. Indeed, pregnancy cannot be separated from gender. The fact, therefore, that the plan did

not discriminate against all women, but only against pregnant women, did not make the impugned distinction any less discriminating.

Cases Cited

Overruled: *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; **not followed**: *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); **referred to**: *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *Century Oils (Canada) Inc. v. Davies* (1988), 22 B.C.L.R. (2d) 358; *Canada Safeway Ltd. v. Manitoba Food and Commercial Workers Union, Local 832*, [1981] 2 S.C.R. 180; *Canada Safeway Ltd. v. Steel*, [1985] 1 W.W.R. 479 (Man. C.A.), application for leave to appeal dismissed, [1985] 1 S.C.R. x (*sub nom. Manitoba Human Rights Commission v. Canada Safeway Ltd.*)

Statutes and Regulations Cited

Act to amend the Unemployment Insurance Act, 1971 (No. 3), S.C. 1980-81-82-83, c. 150, s. 4.

Human Rights Act, S.M. 1974, c. 65, ss. 6(1) [am. 1976, c. 48, s. 6; am. 1977, c. 46, ss. 2, 3; am. 1982, c. 23, s. 9], 7(2) [rep. & subs. 1976, c. 48, s. 11; am. 1977, c. 46, s. 2; am. 1982, c. 23, s. 20], 19 [am. 1978, c. 43, s. 4].

Human Rights Code, S.M. 1987-88, c. 45, s. 9(2)(f).

Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 30(2) [am. 1974-75-76, c. 66, s. 22; 1976-77, c. 54, s. 38(2)].

Unemployment Insurance Regulations, C.R.C. 1978, c. 1576, s. 19(*h*)(vii) [en. SOR/85-3, s. 2].

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MacPherson, James. "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980), 1 C.H.R.R. c/7.

Pannick, David. *Sex Discrimination Law*. Oxford: Clarendon Press, 1985.

APPEALS from a judgment of the Manitoba Court of Appeal (1986), 42 Man. R. (2d) 27, 7 C.H.R.R. D/3475, affirming a judgment of Simonsen J. (1985), 38 Man. R. (2d) 192, 86 CLLC {PP} 17, 010, 7 C.H.R.R. D/3185, which affirmed the decisions of a Board of Adjudication (1985), 6 C.H.R.R. D/2560 and D/2840. Appeals allowed.

Aaron L. Berg and *Gordon Hannon*, for the appellants.

Roger J. Hansell, Q.C., and *Bruce Bowman*, for the respondent.

C. Lynn Smith and *Kathryn Thomson*, for the intervener.

//The Chief Justice//

The judgment of the Court was delivered by

THE CHIEF JUSTICE -- The principal issue to be considered in these appeals is whether a company accident and sickness plan which exempts pregnant women from benefits during a

seventeen-week period discriminates because of sex, as prohibited by *The Human Rights Act* of Manitoba, S.M. 1974, c. 65.

In March of 1983, Susan Brooks, of Brandon, Manitoba, laid a complaint before the Manitoba Human Rights Commission against her employer, Canada Safeway Ltd. (Safeway), on the ground that Safeway's employee benefit plan contravened s. 6(1) of *The Human Rights Act* of Manitoba. Mrs. Brooks said the plan discriminated on the basis of sex and family status in denying certain benefits to pregnant women. At a later date Patricia Allen and Patricia Dixon laid similar complaints. The Attorney General of Manitoba, the Honourable Roland Penner, Q.C., appointed J. F. Reeh Taylor, Q.C., a Board of Adjudication to hear and decide the three complaints. The adjudicator held against the complainants, as did the Court of Queen's Bench and the Court of Appeal for Manitoba. Leave was granted to appeal to this Court, [1987] 1 S.C.R. vi.

I

Facts

Susan Brooks, Patricia Allen and Patricia Dixon were part-time cashiers employed by Safeway. All three became pregnant during 1982. Safeway maintains a group insurance plan that, among other forms of coverage, provides weekly benefits for loss of pay due to accident or sickness. Safeway describes its benefit package to employees in a pamphlet entitled *Group Insurance Benefits For You and Your Dependents* as follows:

> Weekly benefits are payable in event of loss of earnings due to accident or sickness which prevents you from performing any and every duty pertaining to your employment or

occupation. You need not be house-confined; however, you must be under the direct care of a physician.

To qualify for coverage under the plan, an employee must have worked for Safeway for three consecutive months. Benefits are payable to a maximum of 26 weeks during any continuous period of disability. Employees receive two-thirds of weekly salary up to a ceiling of $189 per week.

Prior to an amendment on January 1, 1981, pregnancy was exempted from coverage under the plan. At the time each of the appellants became pregnant the plan provided:

> Disability benefits will also be made available for pregnancy related illness. However, disability benefits will not be payable:
>
> a) during the period commencing with the tenth week prior to the expected week of confinement and ending with the sixth week after the week of confinement;
>
> b) during any period of formal maternity leave taken by the employee pursuant to provincial or federal law or pursuant to mutual agreement between the employee and the Company, or
>
> c) during any period for which the employee is paid Unemployment Insurance maternity benefits.

There is no dispute that the Safeway plan treats pregnancy differently from other health-related causes of inability to work. Pregnant employees are excluded from receiving any benefits during what is referred to as the "10-1-6" period, namely, the ten weeks before the anticipated date of birth, the actual birth week, and six weeks after. During this seventeen-week period, the exemption from coverage is absolute regardless of the reason an employee is unable to report to work. Pregnant women suffering from non-pregnancy-related afflictions are ineligible for benefits simply because they are pregnant. Women who are unable to work because of pregnancy-related complications are also not eligible to receive weekly benefits. The mere fact

of pregnancy disentitles Safeway's female employees from receiving standard compensation for temporary disability during the "10-1-6" period.

For part of the period during which pregnant women are ineligible to receive disability benefits, some coverage is available under the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, as amended. At the relevant time s. 30 of that Act provided for the payment of weekly benefits for unemployment resulting from pregnancy for a maximum of fifteen weeks in the following periods:

> **30.** . . .
>
> (2) Benefits under this section are payable for each week of unemployment in the period
>
> (*a*) that begins
>
> (i) eight weeks before the week in which her confinement is expected, or
>
> (ii) the week in which her confinement occurs,
>
> whichever is the earlier, and
>
> (*b*) that ends
>
> (i) seventeen weeks after the week in which her confinement occurs, or
>
> (ii) fourteen weeks after the first week for which benefits are claimed and payable in any benefit period under this section,
>
> whichever is the earlier,
>
> if such a week of unemployment is one of the first fifteen weeks for which benefits are claimed and payable in her benefit period.

Section 30 was substantially amended in *An Act to amend the Unemployment Insurance Act, 1971 (No. 3)*, S.C. 1980-81-82-83, c. 150, s. 4.

The maternity benefits available under the *Unemployment Insurance Act, 1971* did not constitute an exact substitute for the coverage that would be provided by the Safeway plan. Women were only entitled to a maximum of fifteen weekly payments under the *Unemployment Insurance Act, 1971* but were deprived of seventeen weeks of benefits under the Safeway plan. For two weeks Safeway employees unable to work by reason of pregnancy were without a source of unemployment benefits. Employees also received less money per week under the *Unemployment Insurance Act, 1971* provisions than they would have if they were entitled to recover under the Safeway plan. Benefits under the *Unemployment Insurance Act, 1971* were calculated on the basis of 60 per cent of eligible income. The Safeway plan, in contrast, provided 66 2/3 per cent of weekly earnings. The qualifying period for benefits under the *Unemployment Insurance Act, 1971* was also significantly longer than the qualifying period under the Safeway plan. During the relevant period, s. 30(1) of the *Unemployment Insurance Act, 1971* required a woman to have ten weeks of insurable earnings in the twenty-week period immediately preceding the thirtieth week before the expected date of childbirth, in other words, to have commenced work at least forty weeks before the anticipated date of birth. The Safeway plan entitled employees to full coverage after only three months of employment.

All three appellants applied for weekly benefits under the Safeway plan for a period of pregnancy related disability that included the seventeen-week disentitlement period. All three claims were refused. The appellants applied for, and received, pregnancy benefits under the *Unemployment Insurance Act, 1971*. Each appellant received less money than she would have received had she been eligible under the Safeway plan. We were told, for example, that in the case of Mrs. Brooks, Unemployment Insurance provided $133.47 weekly, compared to approximately $188 weekly she might have received under the Safeway plan.

Each of the appellants filed a complaint with the Manitoba Human Rights Commission alleging that the differential treatment of pregnancy in the Safeway plan constituted discrimination on the basis of sex and on the basis of family status contrary to s. 6(1) of *The Human Rights Act* of Manitoba.

II

Legislation

At the time of the applications, the relevant sections of the Manitoba *Human Rights Act* provided:

Discrimination prohibited in employment

6 (1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment or in respect of training for employment or in respect of an intended occupation, employment, advancement or promotion, and in respect of his membership or intended membership in a trade union, employers' organization or occupational association; and, without limiting the generality of the foregoing

> (a) no employer or person acting on behalf of an employer, shall refuse to employ, or to continue to employ or to train the person for employment or to advance or promote that person, or discriminate against that person in respect of employment or any term or condition of employment;
>
> (b) no employment agency shall refuse to refer a person for employment, or for training for employment, and
>
> (c) no trade union, employers' organization or occupational association shall refuse membership to, expel, suspend or otherwise discriminate against that person; or negotiate, on behalf of that person, an agreement that would discriminate against him;

because of the race, nationality, religion, colour, sex, age, marital status, physical or mental handicap, ethnic or national origin, or political beliefs or family status of that person.

Exception

7 (2) No provision of section 6 or subsection (1) shall prohibit a distinction on the basis of age, sex, family status, physical or mental handicap or marital status

> (a) of any employee benefit plan or in any contract which provides an employee benefit plan, if the Commission is satisfied on the basis of the guidelines set out in the regulations that the distinction is not discriminatory or that the employee benefit can be provided only if the distinction is permitted;

In 1987 the Manitoba *Human Rights Act* was repealed and replaced by *The Human Rights Code*, S.M. 1987-88, c. 45. Section 6 of the former Act was replaced by s. 9 which prohibits discrimination on a number of grounds including:

9 (2) . . .

(f) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;

III

The Human Rights Tribunal

1. *The Complaint of Susan Brooks*

The complaint of Mrs. Brooks was heard before the complaints of the other two appellants: (1984), 6 C.H.R.R. D/2560. Adjudicator Taylor concluded that the complaint of Mrs. Brooks had been filed out of time. Section 19 of *The Human Rights Act* required a complaint to be filed with the Commission "not later than 6 months after the date of the alleged contravention or, where a continuing contravention is alleged, after the date of the last alleged contravention . . ." Mrs. Brooks filed her complaint on March 22, 1983. The adjudicator found that the contravention, if any, occurred at the beginning of the disentitlement period, on or about August

30, 1982, when Safeway notified Mrs. Brooks that she was denied benefits. Adjudicator Taylor did not regard Safeway's refusal to pay benefits throughout the seventeen-week period as a continuing contravention within the meaning of the statute.

In anticipation of the two other complaints, and in the event he had erred in holding the complaint by Mrs. Brooks to be out of time, Adjudicator Taylor dealt with the merits of Mrs. Brooks' complaint. He considered first the question whether the Safeway plan did in fact discriminate against pregnant employees. The adjudicator made the following remarks (at p. D/2562):

> It is a simple fact, undisputed by the Respondent, that the treatment accorded a pregnant employee under the Canada Safeway Limited accident and sickness plan is markedly different from that accorded any other employee. Indeed, it is not merely pregnancy-related problems that are not covered under the plan during the seventeen-week period referred to above; any accident or sickness, whether pregnancy-related or not, occurring during the same seventeen weeks is excluded from the Canada Safeway Limited plan, and the pregnant employee must, during that limited time, rely upon benefits obtainable from the Unemployment Insurance Commission. Even if she qualified to receive U.I.C. benefits during the entire seventeen weeks, the pregnant employee will receive a lesser amount during that period than would a non-pregnant employee who was away from work by reason of some other physical disability.

Adjudicator Taylor had no difficulty in concluding that Safeway's plan, "while by all accounts a generous one, does in fact discriminate against pregnant employees."

Having established the existence of pregnancy-based discrimination, the adjudicator then focussed his attention on the question whether to discriminate against someone because of her pregnancy is to discriminate against her "because of (her) sex or family status". He was of the view that the concept of family status was inapplicable to pregnancy since in his view an unborn child is not yet a member of a "family" and therefore could not be considered as part of a complaint of discrimination because of family status.

Adjudicator Taylor then rejected the argument that discrimination on the basis of pregnancy is discrimination on the basis of sex. He relied on the decision of this Court in *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183. In *Bliss*, the Court held that s. 46 of the *Unemployment Insurance Act, 1971*, which disentitled pregnant women from receiving basic unemployment benefits, restricting them to special maternity benefits during a portion of their pregnancy, did not deny women the right to equality free from discrimination on the basis of sex, guaranteed by s. 1(*b*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III. Adjudicator Taylor noted that *Bliss* had been followed across the country and that courts in England and in the United States had also concluded that discrimination on the basis of pregnancy did not amount to sex discrimination. He observed that after the Supreme Court of the United States of America had held in *Geduldig v. Aiello*, 417 U.S. 484 (1974), *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), that discrimination by reason of pregnancy was not synonymous with discrimination by reason of sex, the Congress of the United States enacted a bill amending Title VII of the *Civil Rights Act of 1964* so as to include, within the meaning of discrimination on the basis of sex, discrimination based upon pregnancy, childbirth or related medical conditions. The adjudicator also pointed to the fact that some provinces had amended their human rights legislation in the wake of *Bliss* to add pregnancy as a prohibited ground of discrimination. Adjudicator Taylor interpreted these amendments as recognition that sex discrimination does not include discrimination on the basis of pregnancy. Absent a broadened definition, the adjudicator concluded he was bound by *Bliss* to hold that discrimination on the basis of pregnancy was not sex discrimination.

2. *The Complaints of Patricia Allen and Patricia Dixon*

The complaints of the appellants Mrs. Allen and Mrs. Dixon were heard by Adjudicator Taylor one month after the decision in Mrs. Brooks' complaint. For the reasons given in *Brooks*, the

adjudicator held that the appellants had not suffered discrimination on the basis of sex or family status contrary to s. 6(1) of the Manitoba *Human Rights Act*: (1985), 6 C.H.R.R. D/2840.

IV

The Manitoba Court of Queen's Bench

Mrs. Brooks, Mrs. Allen, Mrs. Dixon and the Human Rights Commission of Manitoba appealed the decisions of Adjudicator Taylor. Simonsen J. delivered brief reasons: (1985), 38 Man. R. (2d) 192, 86 CLLC {PP} 17,010, 7 C.H.R.R. D/3185. He began by rejecting the adjudicator's conclusion that the complaint of Mrs. Brooks was out of time. In Simonsen J.'s view, the refusal to pay benefits for seventeen weeks amounted to continuing discrimination. There was nothing in the Manitoba *Human Rights Act* requiring the limitation period to commence during the first week for which benefits could have been claimed. Simonsen J. took the view that the alleged seventeen weeks of discrimination commenced on August 21, 1982 and ended on December 22, 1982 and that the limitation period would begin to run on the later date. Mrs. Brooks' complaint, filed on March 22, 1983, was therefore timely, that is, within the six-month limitation period.

Simonsen J. agreed with the adjudicator's finding, as well as his reasoning, that the Safeway plan discriminated against pregnant employees. He said:

> It must be recognized . . . that no benefits were payable for accident or sickness to a pregnant employee during the 17 week exclusion period whether related to pregnancy or not. Coverage under the policy for a pregnant employee was suspended for 17 weeks.

He continued:

> Was it discrimination to have a group policy which suspended coverage to a pregnant employee for the 17 week period during which some alternate coverage in the form of unemployment insurance was available? There was no obligation on the pregnant employee to take leave for the 17 week period but when leave was taken unemployment insurance was the only option available.
>
> The learned adjudicator found discrimination. I agree with his reasoning and conclusions.

Simonsen J. then considered whether discrimination on the basis of pregnancy was prohibited by the Manitoba *Human Rights Act*. He agreed with the adjudicator's conclusion that pregnancy was not encompassed in "family status" and held that the Safeway plan could not be faulted for discriminating on the basis of family status. Simonsen J. was also of the view, largely on the authority of *Bliss* and cases subsequent to that decision, that the adjudicator was correct in finding that discrimination on the basis of pregnancy was not included in the phrase "discrimination by reason of sex". In the absence of an expanded statutory definition of sex, Simonsen J. felt he could reach no other conclusion.

V

The Court of Appeal of Manitoba

In very brief reasons, the Manitoba Court of Appeal (O'Sullivan, Huband and Twaddle JJ.A.) unanimously dismissed the appeal: (1986), 42 Man. R. (2d) 27, 7 C.H.R.R. D/3475. The decision of the Manitoba Court of Appeal may be set out in full:

> The facts are amply canvassed by Simonsen J., with whose reasons we substantially agree, but we go further and say we are not satisfied that in the context of this case there was any discrimination at all.

It may be noted that the disability plan in question is only part of a health benefit package agreed to between employer and union. One questions why complaint was not made against the union as well as against the company.

The appeal is dismissed with costs.

VI

Issues and Interventions

The appellants appealed the decision of the Manitoba Court of Appeal on the following issues:

1. Did the Court of Appeal for Manitoba err in concluding that the disability plan offered by the respondent to its employees was not discriminatory?

2. Did the Court of Appeal for Manitoba err in law in adopting the conclusion of the learned judge and adjudicator below that discrimination due to "pregnancy" does not constitute discrimination because of "sex", as prohibited by the Manitoba *Human Rights Act*?

3. Did the Court of Appeal for Manitoba err in law in adopting the conclusion of the learned judge and adjudicator below that discrimination due to "pregnancy" did not constitute discrimination on "family status", as set out in the Manitoba *Human Rights Act*?

The question of the timeliness of Mrs. Brooks' complaint was not raised before this Court.

The Women's Legal Education and Action Fund (L.E.A.F.) intervened in support of the appellants' position.

VII

Was the Disability Plan Discriminatory?

What does discrimination mean? The most recent pronouncement on this point will be found in the judgment of my colleague, McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 173-75:

> What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition. In *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 551, discrimination (in that case adverse effect discrimination) was described in these terms: "It arises where an employer . . . adopts a rule or standard . . . which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force". It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint. At page 547, this proposition was expressed in these terms:
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> > The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.
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> In *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, better known as the *Action Travail des Femmes* case, where it was alleged that the Canadian National Railway was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, in denying employment to women in certain unskilled positions, Dickson C.J. in giving the judgment of the Court said, at pp. 1138-39:
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> > A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of

systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report.

> Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . .
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> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

There are many other statements which have aimed at a short definition of the term discrimination. In general, they are in accord with the statements referred to above. I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

The first issue in these appeals is whether the complete disentitlement of pregnant women during a seventeen-week period from receiving disability benefits under the Safeway plan constitutes discrimination by reason of pregnancy. In my view, this ground of appeal may be addressed briefly. I have no difficulty in concluding that the Safeway sickness and accident plan discriminates against pregnant women.

As I have indicated, Adjudicator Taylor found the treatment accorded a pregnant employee (at p. D/2562):

> . . . markedly different from that accorded to any other employee. Indeed, it is not merely pregnancy-related problems that are not covered under the plan during the seventeen week period . . . ; any accident or sickness, whether pregnancy related or not, occurring during that same seventeen weeks is excluded . . . .

He also observed that even if the employee qualifies for maternity benefits from the Unemployment Insurance Commission, the pregnant employee would receive (at p. D/2562):

> . . . a lesser amount during that period than would a non-pregnant employee who was away from work by reason of some other physical disability.

Simonsen J. shared the view that the plan discriminated against pregnant women.

The Court of Appeal for Manitoba was not satisfied that in the context of the case there was any discrimination at all. Apart from noting that the disability plan in question was only part of a health benefit package agreed to between employer and union, the Court gave no reason for finding an absence of discrimination.

In my view, it is beyond dispute that pregnant employees receive significantly less favourable treatment under the Safeway plan than other employees. For a seventeen-week period, pregnant women are not entitled to any compensation under the plan, regardless of the reason they are unable to work. During those seventeen weeks, even if a pregnant woman suffers from an ailment totally unrelated to pregnancy, she is ineligible for benefits simply because she is pregnant. The plan singles out pregnancy for disadvantageous treatment, in comparison with any other health reason which may prevent an employee from reporting to work. With the sole exception of pregnancy, eligibility for compensation under the plan is available on broad and general terms. It is indeed generous, save in respect of pregnant women. For any single continuous period during which an employee is incapable of performing at work for health reasons, 26 weeks of benefits are available. Employees may recover under the plan without being house confined. No restrictions are placed on disability, with the solitary exception of pregnancy. It is difficult to conclude otherwise than that, as a result of the unfavourable

treatment accorded to pregnancy *vis-à-vis* all other medical conditions, the Safeway plan discriminates on the basis of pregnancy.

Counsel for Safeway advanced a number of arguments in support of the proposition that the disability plan does not discriminate by reason of pregnancy. The submissions can be grouped into five main headings. First, it was argued that pregnancy is neither "a sickness or an accident" and therefore, it need not be covered by a sickness and accident plan; second, that pregnancy is a voluntary state and, like other forms of voluntary leave, it should not be compensated; third, the plan could not be discriminatory because there was no intention to discriminate; fourth, the plan was not discriminatory but was underinclusive in that it exempted certain disabilities from coverage; finally, on the basis of a rather novel interpretation of the relationship between regulations under the *Unemployment Insurance Act, 1971,* and the Manitoba *Human Rights Act* it was claimed that *The Human Rights Act* implicitly permits employee benefit plans to exclude compensation for pregnancy. In my view, none of these arguments can assist Safeway in escaping the conclusion that its sickness and accident plan discriminates on the basis of pregnancy.

The first two claims, that pregnancy is neither an accident nor an illness and that it is voluntary, are closely related. I agree entirely that pregnancy is not characterized properly as a sickness or an accident. It is, however, a valid health-related reason for absence from the workplace and as such should not have been excluded from the Safeway plan. That the exclusion is discriminatory is evident when the true character, or underlying rationale, of the Safeway benefits plan is appreciated. The underlying rationale of this plan is the laudable desire to compensate persons who are unable to work for valid health-related reasons. Pregnancy is clearly such a reason. By distinguishing "accidents and illness" from pregnancy, Safeway is attempting to disguise an untenable distinction. It seems indisputable that in our society

pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society. Indeed, its importance makes description difficult. To equate pregnancy with, for instance, a decision to undergo medical treatment for cosmetic surgery -- which sort of comparison the respondent's argument implicitly makes -- is fallacious. If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason. Viewed in its social context pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan. In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence from the workplace.

Furthermore, to not view pregnancy in this way goes against one of the purposes of anti-discrimination legislation. This purpose, which was noted earlier in the quotation from *Andrews*, *supra*, is the removal of unfair disadvantages which have been imposed on individuals or groups in society. Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan. It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy

upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the Safeway plan is discriminatory furthers this purpose.

In sum, if an employer such as Safeway enters into the field of compensation for health conditions and then excludes pregnancy as a valid reason for compensation, the employer has acted in a discriminatory fashion. In view of this finding, it should be noted that the Safeway plan would be considered discriminatory even if it did not exclude coverage for non-pregnancy-related illness and accidents. It is enough that the plan excludes compensation for pregnancy. That it makes a further exclusion for non-pregnancy-related conditions compounds the discrimination and highlights how the plan's designers viewed pregnancy.

It is also noteworthy that the plan by its own terms, does not exclude pregnancy-related absence from compensation for the major part of the nine months of pregnancy. Although a normal pregnancy is somewhat less than forty weeks in duration, pregnant women, under the plan, are not disentitled until ten weeks before the anticipated week of child birth. During the first twenty-nine weeks of pregnancy, Safeway does not refuse to compensate pregnant employees on the ground that pregnancy is neither an accident nor an illness. It is not compelling to argue that pregnancy is not compensated after twenty-nine weeks because it is a voluntary condition, when, to that point, pregnancy has been compensated under the sickness and disability plan.

The third argument, that the plan cannot be discriminatory because the respondent had no intention to discriminate, has little or no force in light of the decision of this Court in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536. In that case, the Court held that the effect of an impugned practice, not the underlying intent, was the

governing factor in determining whether the practice gave rise to discrimination. Intent to discriminate is not a necessary element of discrimination.

The fourth argument is that the plan is not discriminatory but merely underinclusive of the potential risks it could conceivably insure. Safeway alleges that the decision to exclude pregnancy from the scope of its plan is not a question of discrimination, but a question of deciding to compensate some risks and to exclude others. It seeks support for this argument from two American cases in which the Supreme Court of the United States held that the exclusion of pregnancy from compensation schemes did not constitute discrimination on the basis of sex. In *Geduldig v. Aiello*, *supra*, the Court held that a disability insurance system which did not provide compensation for pregnancy did not violate the equal protection clause of the Fourteenth Amendment. Two years later, in *General Electric Co. v. Gilbert*, *supra*, the Court affirmed this conclusion in the context of Title VII of the *Civil Rights Act of 1964*. In both cases the Court held the group insurance plans to be underinclusive of the risks they chose to insure but held that underinclusiveness did not necessarily amount to discrimination.

In my view, the reasoning in those two cases does not fit well within the Canadian approach to issues of discrimination. In both *General Electric* and *Geduldig* the United States Supreme Court held that distinctions involving pregnancy were constitutionally permissible if made on a reasonable basis, unless the distinctions were designed to effect invidious discrimination against members of one sex or another. In Canada, as I have noted, discrimination does not depend on a finding of invidious intent. A further consideration militating against the application of the concept of underinclusiveness in this context, stems, in my view, from the effects of so-called "underinclusion". Underinclusion may be simply a backhanded way of permitting discrimination. Increasingly, employee benefit plans have become part of the terms and conditions of employment. Once an employer decides to provide an employee benefit package,

exclusions from such schemes may not be made in a discriminatory fashion. Selective compensation of this nature would clearly amount to sex discrimination. Benefits available through employment must be disbursed in a non-discriminatory manner.

Safeway's fifth argument derives from a creative interpretation of s. 7(2) of the Manitoba *Human Rights Act*. Section 7(2)(a) provides for exceptions to the general prohibition of discrimination embodied in s. 6 of the Act. The section explicitly permits employee benefits plans to draw distinctions on the basis of age, sex, marital status, physical or mental handicap, or family status where "the Commission is satisfied on the basis of the guidelines set out in the regulations that the distinction is not discriminatory or that the employee benefit can be provided only if the distinction is permitted . . .". No regulations were ever prescribed pursuant to this section. Safeway attempts to "read in" regulations by pointing to regulations passed under the *Unemployment Insurance Act, 1971* dealing with employer-provided wage loss plans. Section 19(*h*)(vii) of the *Unemployment Insurance Act, 1971* regulations specifically discusses employer plans which do not compensate pregnant women during the seventeen-week "10-1-6" period. The presence of this regulation, the respondent asserts, indicates that exceptions of this nature must have been envisioned by the drafters of *The Human Rights Act* as constituting a permissible distinction pursuant to s. 7(2).

I cannot agree with the respondent's interpretation. The Manitoba legislature clearly considered the issue of discrimination in benefits plans. Distinction along sex lines might have been permissible in employee benefit plans, had regulations been passed pursuant to s. 7(2). The only conclusion to be reached from the absence of regulations under that provision is that discrimination in employee benefit packages is not permissible. It is not correct to attribute regulations to the *Human Rights Act* where no regulations have been passed under that Act.

For the foregoing reasons, I am of the view that the respondent's accident and sickness plan discriminates on the basis of pregnancy.

VIII

Is Discrimination on the Basis of Pregnancy Sex Discrimination?

Having found that the Safeway plan discriminates by reason of pregnancy, it is necessary to consider whether pregnancy-based discrimination is discrimination on the basis of sex. I venture to think that the response to that question by a non-legal person would be immediate and affirmative. In retrospect, one can only ask -- how could pregnancy discrimination be anything other than sex discrimination? The disfavoured treatment accorded Mrs. Brooks, Mrs. Allen and Mrs. Dixon flowed entirely from their state of pregnancy, a condition unique to woman. They were pregnant because of their sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.

As I have noted, the respondent relies primarily on the decision of this Court in *Bliss v. Attorney General of Canada*, *supra*, to argue that discrimination by reason of pregnancy is not discrimination on the basis of sex. In *Bliss*, the Court was asked to decide whether s. 46 of the *Unemployment Insurance Act, 1971*, which restricted the eligibility of pregnant women to unemployment benefits, constituted sex discrimination contrary to s. 1(*b*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III. Section 1(*b*) provides that each individual is entitled to "equality before the law" without discrimination due to, amongst other things, sex. The Court held that the complainant had not been deprived of the right to equality before the law. Section 30 of the *Unemployment Insurance Act, 1971* provided pregnancy benefits for the fifteen- week period

commencing eight weeks before the anticipated date of childbirth. Section 46 limited the eligibility of pregnant women who were unable to work during this fifteen-week period to benefits under s. 30. The qualifying conditions for benefits under s. 30 were more onerous than those for other types of unemployment benefits. To receive benefits under s. 30, a woman had to have accumulated ten or more weeks of insurable earnings in the twenty weeks immediately preceding the expected date of birth. Basic employment insurance benefits merely required eight weeks of insurable employment in the relevant qualifying period. Ritchie J., speaking for the Court, acknowledged that the effect of ss. 30 and 46 of the Act was to impose conditions on women from which men were excluded, but stated that "[a]ny inequality between the sexes in this area is not created by legislation but by nature". He continued by quoting with approval the following *obiter* passage from the reasons of Pratte J. in the Federal Court of Appeal (at pp. 190-91):

> The question to be determined in this case is therefore, not whether the respondent had been the victim of discrimination by reason of sex but whether she has been deprived of "the right to equality before the law" declared by s. 1(*b*) of the *Canadian Bill of Rights*. Having said this, I wish to add that I cannot share the view held by the Umpire that the application of section 46 to the respondent constituted discrimination against her by reason of sex. Assuming the respondent to have been "discriminated against", it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.

On this reasoning, pregnancy discrimination was held not to be discrimination on the basis of sex.

Over ten years have elapsed since the decision in *Bliss*. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and

jurisprudence arising therefrom, I am prepared to say that *Bliss* was wrongly decided or, in any event, that *Bliss* would not be decided now as it was decided then. Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women. It is difficult to accept that the inequality to which Stella Bliss was subject was created by nature and therefore there was no discrimination; the better view, I now venture to think, is that the inequality was created by legislation, more particularly, the *Unemployment Insurance Act, 1971*. The capacity to become pregnant is unique to the female gender. As the appellants state in their factum: "The capacity for pregnancy is an immutable characteristic, or incident of gender and a central distinguishing feature between men and women. A distinction based on pregnancy is not merely a distinction between those who are and are not pregnant, but also between the gender that has the capacity for pregnancy and the gender which does not". Distinctions based on pregnancy can be nothing other than distinctions based on sex or, at least, strongly, "sex related". The Safeway plan was no doubt developed, as Brennan J. noted in the *General Electric* case, at pp. 149-50, "in an earlier era when women openly were presumed to play a minor and temporary role in the labor force".

The decision of this Court in *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, augured the demise of *Bliss*. Writing for the Court, Beetz J. said, at p. 301:

> For present purposes I note simply that the improbable distinction in *Bliss* between discrimination based on sex and discrimination based on pregnancy has been called into question and, even if it were to stand, the case might not be decided in the same manner today given this Court's recent recognition of adverse effect discrimination in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

The approach to interpreting human rights legislation taken in *Bliss* is inconsistent with that enunciated by this Court in a number of decisions since *Bliss*. I refer, for example, to *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., supra*; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, and *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145. La Forest J. summed up the thrust of these more recent cases in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90:

> The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre J., speaking for this Court, recently explained in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"; see also *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, *per* Lamer J., at pp. 157-58. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society. More recently still, Dickson C.J., in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* (*the Action Travail des Femmes* case), [1987] 1 S.C.R. 1114, emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the *Interpretation Act* that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.

In the case mentioned earlier, *Andrews v. Law Society of British Columbia,* McIntyre J. rejected a "similarly situated" test in an equality rights challenge under the *Canadian Charter of Rights and Freedoms*. *Bliss* was not a *Charter* case, nor is the case at bar, but the comment of McIntyre J. respecting *Bliss* is of surpassing interest. He stated (at pp. 167-68):

> Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.
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> A similarly situated test focussing on the equal application of the law to those to whom it has application could lead to results akin to those in *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183. In *Bliss*, a pregnant woman was denied unemployment benefits to which she would have been entitled had she not been pregnant. She claimed that the *Unemployment Insurance Act, 1971* violated the equality guarantees of the *Canadian Bill of Rights* because it discriminated against her on the basis of her sex. Her claim was dismissed by this Court on the grounds that there was no discrimination on the basis of sex, since the class into which she fell under the Act was that of pregnant persons, and within that class, all persons are treated equally.

Professor Peter Hogg in *Constitutional Law of Canada* (2nd ed. 1985), speaking of the *Bliss* case, commented at p. 791:

> Ritchie J., who wrote the unanimous opinion of the Court, denied that the discrimination in the Act was based on sex. He quoted with approval a dictum in the lower court to the effect that the disadvantaged class was defined by pregnancy rather than by sex, and Ritchie J. concluded that "any inequality between the sexes in this area is not created by legislation but by nature." This part of the reasoning is open to criticism. Bliss was not claiming the special maternity benefits, for which a longer period of qualification might well have been justifiable. She was claiming the regular benefits, to which she would have been entitled if her employment had been interrupted by layoff, illness or any cause other than pregnancy. The denial of benefits was the result of her pregnancy. Since pregnancy is a condition to which only women are vulnerable, the denial should have been characterized as sexual discrimination. It is true that the Act did not discriminate against all women, only pregnant women, but discrimination against some women should not be treated any differently than discrimination against all women.

I am not persuaded by the argument that discrimination on the basis of pregnancy cannot amount to sex discrimination because not all women are pregnant at any one time. While pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group. Many, if not most, claims of partial discrimination fit this pattern. As numerous decisions and authors have made clear, this fact does not make the impugned distinction any less discriminating.

David Pannick, Barrister and Fellow of All Souls College, Oxford, observed in his work *Sex Discrimination Law* (1985), at pp. 147-48, that:

> The EAT [Employment Appeals Tribunal] was, however, correct to assume that the less favourable treatment (if any) of the pregnant woman was on the ground of her sex. Because only women can become pregnant, the complainant who is dismissed because she is pregnant can argue that she would not have been less favourably treated but for her sex. It requires a very narrow construction of the statute to exclude less favourable treatment on the ground of a characteristic unique to one sex. It is quite true that not all women are (or become) pregnant. But it is important to note that direct discrimination exists not merely where the defendant applies a criterion that less favourably treats all women. It also exists where special, less favourable, treatment is accorded to a class consisting only of women, albeit not all women. Suppose an employer announces that it will employ any man with stated qualifications but only a woman who has those qualifications and who is over six feet tall. Albeit not all women are excluded, the employer has directly discriminated against women because it has imposed a criterion which less favourably treats a class composed entirely of women.

I would make note also of the article "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980), 1 C.H.R.R. c/7, at c/11, by Professor James MacPherson:

> In *Bliss v. Attorney-General (Canada)* provisions of the federal Unemployment Insurance Act which treated pregnant women more harshly than all other applicants for unemployment insurance were held not to constitute sex discrimination. "Any inequality between the sexes in this area", wrote Mr. Justice Ritchie for a unanimous Court, "is not created by legislation but by nature".
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> The argument that can be advanced in support of this conclusion is that the unemployment insurance legislation treats all women, except pregnant women, on an equal footing with men with respect to eligibility for benefits, and that the differentiation based on pregnancy works against women not qua women, but rather on the basis of a physical condition. It follows, the argument runs, that the differentiation in the legislation is between two classes of women, not between women and men.
>
> In my view, this argument is not valid. The fact that discrimination is only partial does not convert it into non-discrimination. For example, federal legislation that treated some, but not all, Indians more harshly than whites would be discriminatory. Equally, an employer's decision not to hire a particular black solely because of his blackness would run afoul of provincial human rights legislation even though the employer hired other blacks. Legislation or the practice of individuals cannot be saved because they work only a partial discrimination. The legislation in *Bliss* works such a partial discrimination. Although most women are treated equally with men, a certain class, namely those women who are pregnant, are treated more harshly because they are pregnant. Since pregnancy is a condition unique to

women, the legislation denies these women their equality before the law. By not recognizing this, and by concluding that differentiation on the basis of pregnancy is not sex-related, the Supreme Court of Canada has decided not to strike against one of the most long-standing and serious obstacles facing women in Canada, namely legislation and employer practices directed against pregnant women.

Reference might also be made to the judgment of Oppal J. of the Supreme Court of British Columbia in *Century Oils (Canada) Inc. v. Davies* (1988), 22 B.C.L.R. (2d) 358, delivered January 28, 1988, in which the following appears, at pp. 364-65:

> It may be unduly restrictive and somewhat artificial to argue that a distinction based on a characteristic such as pregnancy, which is shared only by some members of a group, is not discrimination against the whole group. It is no answer to say that, since pregnancy discrimination is not usually applicable to all women, it is not discrimination on the basis of sex, for discrimination which is aimed at or has its effect upon some people in a particular group as opposed to the whole of that group is not any the less discriminatory. This point was made by a board of inquiry under the former Human Rights Code, R.S.B.C. 1979, c. 186, in the case of *Zarankin v. Johnstone* (1984), 5 C.H.R.R. D/2274, at p. D/2276, . . . wherein the board stated:
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> > . . . an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminating by reason of sex because the harassment affects only one group adversely.
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> It cannot be said that discrimination is not proven unless all members of a particular class are equally affected. The interpretation of sex discrimination which is suggested by the petitioner is unduly restrictive and probably runs contrary to contemporary societal expectations.

Finally, on this point, the respondent referred to *Canada Safeway Ltd. v. Manitoba Food and Commercial Workers Union, Local 832*, [1981] 2 S.C.R. 180, in which this Court restored an arbitration award which found Safeway's "no beards" rule to be a "reasonable" rule. Safeway argues that, by analogy, this Court has already found that discrimination because of pregnancy is not discrimination because of sex. Reference was also made to *Manitoba Human Rights Commission v. Canada Safeway Ltd.*, [1985] 1 S.C.R. x, in which a panel of this Court dismissed the Human Rights Commission's application for leave to appeal the decision that Safeway's "no beards" rule was not discrimination because of sex. The Manitoba Court of Appeal in a

unanimous decision stated that the "no beards" rule was "definitely not a matter of sexual discrimination" ([1985] 1 W.W.R. 479, at p. 480). It is contended that there is an analogy between that case and the present situation; beards are peculiar to men as pregnancy is peculiar to women; however, not all men grow beards and not all women become pregnant. I do not find these cases helpful; I cannot find any useful analogy between a company rule denying men the right to wear beards and an accident and sickness insurance plan which discriminates against female employees who become pregnant. The attempt to draw an analogy at best trivializes the procreative and socially vital function of women and seeks to elevate the growing of facial hair to a constitutional right.

I am also unpersuaded by the respondent's argument that legislative amendments to preclude pregnancy-based discrimination in the aftermath of *Bliss* indicate that the term sex discrimination does not include pregnancy. One cannot conclude from the fact that some provinces have added pregnancy as an express prohibited ground of discrimination in light of a restrictive definition of sex, that discrimination on the basis of sex does not encompass pregnancy-based discrimination.

IX

Discrimination on the Basis of Family Status

In addition to arguing that discrimination based on pregnancy is sex discrimination, the appellants allege that it is discrimination by reason of family status. As I have already found pregnancy discrimination to violate the prohibition on sex discrimination in the Manitoba *Human Rights Act*, it is not necessary to consider this issue and I refrain from doing so at this time.

X

Disposition

I am of the view that the respondent's accident and sickness plan discriminates on the basis of sex by excluding compensation for pregnant women during a seventeen-week period. I would therefore allow these appeals, and set aside the judgment of the Court of Appeal for Manitoba, with costs of the proceedings before the Manitoba courts and this Court. I would remit the complaints of the appellants to the adjudicator for determination of the appropriate remedy pursuant to the Manitoba *Human Rights Act*.

Appeals allowed with costs.

Solicitor for the appellants: Tanner Elton, Winnipeg.

Solicitors for the respondent: Aikins, MacAulay & Thorvaldson, Winnipeg.

Solicitor for the intervener: C. Lynn Smith, Vancouver.

South African Const. Sec 9

(*b*) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions—

(*a*) are appropriately qualified; and

(*b*) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions—

(*a*) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(*b*) must issue policy directives which must be observed in the prosecution process;

(*c*) may intervene in the prosecution process when policy directives are not complied with; and

(*d*) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

180. Other matters concerning administration of justice.—National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including—

(*a*) training programmes for judicial officers;

(*b*) procedures for dealing with complaints about judicial officers; and

(*c*) the participation of people other than judicial officers in court decisions.

CHAPTER 9

STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

181. Establishment and governing principles.—(1) The following state institutions strengthen constitutional democracy in the Republic:

(*a*) The Public Protector.

(*b*) The South African Human Rights Commission.

(*c*) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

(*d*) The Commission for Gender Equality.

(*e*) The Auditor-General.

(*f*) The Electoral Commission.

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Public protector

182. Functions of Public Protector.—(1) The Public Protector has the power, as regulated by national legislation—

(*a*) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(*b*) to report on that conduct; and

(*c*) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

183. Tenure.—The Public Protector is appointed for a non-renewable period of seven years.

South African Human Rights Commission

184. Functions of South African Human Rights Commission.—(1) The South African Human Rights Commission must—

(*a*) promote respect for human rights and a culture of human rights;

(*b*) promote the protection, development and attainment of human rights; and

(*c*) monitor and assess the observance of human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power—

(*a*) to investigate and to report on the observance of human rights;

(*b*) to take steps to secure appropriate redress where human rights have been violated;

(*c*) to carry out research; and

(*d*) to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

185. Functions of Commission.—(1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are—

(*a*) to promote respect for the rights of cultural, religious and linguistic communities;

(*b*) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and

(*c*) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

(2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

(3) The Commission may report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation.

(4) The Commission has the additional powers and functions prescribed by national legislation.

186. Composition of Commission.—(1) The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and their appointment and terms of office must be prescribed by national legislation.

(2) The composition of the Commission must—

(*a*) be broadly representative of the main cultural, religious and linguistic communities in South Africa; and

(*b*) broadly reflect the gender composition of South Africa.

COMMISSION FOR GENDER EQUALITY

187. Functions of Commission for Gender Equality.—(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

AUDITOR-GENERAL

188. Functions of Auditor-General.—(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of—

(*a*) all national and provincial state departments and administrations;

(*b*) all municipalities; and

(*c*) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of—

(*a*) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or

(*b*) any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

189. Tenure.—The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

ELECTORAL COMMISSION

190. Functions of Electoral Commission.—(1) The Electoral Commission must—

(*a*) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;

(*b*) ensure that those elections are free and fair; and

(*c*) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

191. Composition of Electoral Commission.—The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation.

Independent Authority to Regulate Broadcasting

192. Broadcasting Authority.—National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

General Provisions

193 Appointments.—(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who—

(*a*) are South African citizens;

(*b*) are fit and proper persons to hold the particular office; and

(*c*) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of—

(*a*) the South African Human Rights Commission;

(*b*) the Commission for Gender Equality; and

(*c*) the Electoral Commission.

(5) The National Assembly must recommend persons—

(*a*) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(*b*) approved by the Assembly by a resolution adopted with a supporting vote—

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59 (1) (*a*).

194. Removal from office.—(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—

(*a*) the ground of misconduct, incapacity or incompetence;

(*b*) a finding to that effect by a committee of the National Assembly; and

(*c*) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of—

(*a*) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

(*b*) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President—

(*a*) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

(*b*) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

CHAPTER 10

PUBLIC ADMINISTRATION

195. Basic values and principles governing public administration.—(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(*a*) A high standard of professional ethics must be promoted and maintained.

(*b*) Efficient, economic and effective use of resources must be promoted.

(*c*) Public administration must be development-oriented.

(*d*) Services must be provided impartially, fairly, equitably and without bias.

(*e*) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(*f*) Public administration must be accountable.

(*g*) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(*h*) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(*i*) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Excerpt from the
Convention on the Elimination of All Forms of Discrimination Against Women

Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979

***entry into force* 3 September 1981, in accordance with article 27(1)**

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of man and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

...

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

...

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

...

Have agreed on the following:

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

a. The right to work as an inalienable right of all human beings;

b. The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

c. The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

d. The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

e. The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

f. The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
   a. To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

   b. To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

   c. To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

   d. To provide special protection to women during pregnancy in types of work proved to be harmful to them.
3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

V. Funding Reproductive Health Care

Even where law makers recognize the right to terminate an unwanted pregnancy, access to funding for abortion care can often be limited or nonexistent. In the United States, government funding for abortion services remains one of the most controversial aspects of the abortion debate. The Hyde Amendment, passed by Congress in 1976, limits the use of federal funds to reimburse the cost of abortions under the Medicaid program. The constitutionality of the Hyde Amendment was challenged in *Harris v. McRae*, where opponents asserted that the Amendment unfairly targets poor women. The U.S. Supreme Court found that the limits the Amendment imposes on governmental funding of abortion services does not impinge on a woman's "liberty" under the due process clause to decide whether to terminate her pregnancy. Thus, the United States Supreme Court effectively drew a distinction between the "liberty" interest in the choice to terminate a pregnancy and the provision of government funding to a woman seeking to exercise that right. In contrast, numerous countries throughout the world view funding for abortion as an essential component of access to abortion, particularly countries with health care policies that ensure access to medical services for the poor. This view is exemplified by cases in Mexico City, Nepal, South Africa, and to some extent, regimes in Europe, where funding for abortion has been provided as part of the state-run healthcare system.

In 2007, Mexico City legalized abortion. Included as part of that legislation was a provision for access to abortion through fourteen of the city's public hospitals. The Mexican Supreme Court upheld Mexico City's law in 2008. Similarly, in 2009, the Supreme Court of Nepal ordered Nepal to set up an abortion fund to ensure access to abortion. While abortion was legalized in Nepal in 2002, the legislation failed to provide funding to ensure access to abortion. When the law was challenged for its failure to provide funding, Nepal's Supreme Court ordered the Nepalese government to enact a comprehensive abortion law to guarantee women access to safe and affordable abortion services. The Court's ruling specifically requires the Nepalese government to create a fund to cover the cost of abortion for rural and poor women. This fund must include enough resources to meet the demand for abortion services and to educate the public and health service providers about the existing abortion law. In that vein, in 1997, South Africa passed the Choice on Termination of Pregnancy Act. The Act establishes women's right to abortion and ensures access by providing abortion care for free at designated state hospitals or clinics. Further, twenty-one countries in Europe provide abortion services on request and provide funding to ensure that disadvantaged women can receive access to abortion services. Notable among them are the policies of Denmark, the Netherlands, Sweden, and Norway, whose broad view of access to abortion includes total or near total coverage of the cost of an abortion.

Collectively, the policies and case law of these countries provide a useful comparison to the U.S. Supreme Court's view in *Harris* that governments are not responsible for providing financial assistance for abortion services. Further, they call into question whether a fundamental right that is provided in theory can be considered "guaranteed" if access to that right is denied in practice.