

THE HUMAN RIGHTS TO WATER AND SANITATION IN COURTS WORLDWIDE

A SELECTION OF NATIONAL, REGIONAL
AND INTERNATIONAL CASE LAW



WASH United[®]



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FOREWORD

The consequences of a lack of safe water and sanitation for human health and dignity are severe. Millions of lives and livelihoods are disturbed by a lack of access to water and sanitation, and people are forced to risk their health and wellbeing by resorting to unsafe sources and facilities.

This crisis is entirely avoidable. The world has the technologies, the financial resources, as well as the water resources to make safe drinking water, sanitation and hygiene for all people a reality. What has been lacking is the political will to make access to safe drinking water and sanitation for all people – including the poorest and most marginalized – a clear political and developmental priority.

However, the full recognition of the human right to safe drinking water and sanitation by the United Nations General Assembly and the United Nations Human Rights Council in 2010 has fundamentally changed the relationship between the State and deprived individuals. Human rights law entails the concept of people as rights holders and governments as primary duty bearers of not only the rights to water and sanitation, but of all human rights.

States are obliged to implement the rights to water and sanitation into their national legal systems. Jurisprudence on these human rights adds another crucial layer to ensure these rights are enforced in practice and will become a reality for everyone, not just on paper.

A progressive judiciary that is cognisant of the linkages between different human rights can give real impetus to the advancement of the full range of economic, social and cultural rights. Courts and other accountability and remedial mechanisms must ensure that laws are interpreted consistently with international human rights as well as to further the overarching aims of dignity and equality. Furthermore, the role of the judiciary is to enforce the law by ensuring accountability and by providing remedies in cases of violation. Remedies can range from interim measures to far reaching orders that require the executive to review or newly devise programmes. In fulfilling its role, the judiciary thereby also sets important precedents that can impact future practices.

This compilation of case law shows that judges are increasingly willing to apply the human rights to water and sanitation. In doing so, the judiciary

may base judgments explicitly on the rights to water and/or sanitation. In other cases, judges arrive at the conclusion that other human rights are rendered meaningless without at least minimum levels of water and sanitation services.

This publication contains cases where rights to water and sanitation are derived from the rights to education, health and housing – none of which can be effectively realised without adequate water and sanitation services. Other cases speak to the importance of controlling pollution of the environment to safeguard human rights, including particularly the rights to health and water. The rights of indigenous peoples are dependent on both accessing water resources and their protection from contamination. The impact of extreme poverty on the realisation of rights to water and/or sanitation also becomes apparent in judgements which expose problems with affordability of services or a general neglect by the state to provide minimum levels of service. Last but not least, a number of cases concern racist practices where minority communities received inferior services or, in South African Courts, where the long-term impacts of apartheid still result in major inequalities in service provision.

This publication thereby shows that all human rights are interdependent, interconnected and indivisible. This gives the judiciary scope to base their judgements not only on the rights to water and/or sanitation, but also on other human rights.

As Special Rapporteurs and experts for a diverse range of human rights, we hope that this publication will serve as inspiration to all those working for the realisation of the rights to water and sanitation and the totality of human rights.

Ms Catarina de Albuquerque

Special Rapporteur on the human right to safe drinking water and sanitation (2008 – 2014)

Mr Anand Grover

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2008 – 2014)

Mr John Knox

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Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (2012 – 2014, in memoriam)

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THEMATIC GUIDE

This Thematic Guide provides for an overview of both the human rights principles of most relevance to the realisation of the rights to water and sanitation, and the categories that define the normative content of the rights to water and sanitation.

Each case summarised in this publication revolves around one or several principles (non-discrimination and equality, access to information, participation, accountability and sustainability) as defined in international human rights law and/or around one or several human rights criteria (availability, physical accessibility, acceptability, affordability, and quality and safety).¹

Together, they form a list of ten principles and criteria. The objective of this guide is to allow readers to easily identify other cases – also from other jurisdictions – that are related to the same topic. Cases are therefore classified under the principles and criteria that they relate to.

Human rights principles

The human rights principles as listed below constitute general human rights safeguards that are of particular importance in the realisation of the rights to water and sanitation.

Principle 1: Non-discrimination and equality

International human rights law envisages the equal enjoyment of all rights by all people. The principle of non-discrimination and equality is therefore a cornerstone of human rights practice. It encompasses both the prohibition of discrimination and the obligation for states to work towards equality in water and sanitation service provision. The principle of non-discrimination and equality requires paying attention to a number of issues:

- It governs the prohibition of discrimination of individuals or groups on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²

1. UN CESCR 'General Comment 15' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (UN CESCR 'General Comment 15').

2. See for example Art. 2 (2) International Covenant on Economic, Social and Cultural Rights and Art. 2 (1) International Covenant on Civil and Political Rights : International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

- States must furthermore be mindful of *de facto* discrimination and – where this is revealed – take immediate measures to effectively end it. Certain practices or legislation may have a (unintended) discriminatory effect on certain people.
- In order to reach substantive equality of water and sanitation service provision for all, states must work towards eliminating existing inequalities. This requires knowledge of disparities, which typically not only include income groups but also rural – urban populations, disparities based on gender and the *de facto* exclusion of marginalised groups. Targeted affirmative measures must be taken to ensure that gaps between those served and those unserved are narrowed and eventually closed.

Some places, persons and groups will often require particular attention in the realisation of the rights to water and sanitation, as they often are often marginalised and excluded or are potentially vulnerable:

- **Informal settlements, rural and urban deprived areas and water scarce regions:** States have the responsibility to provide water and sanitation facilities and services for all, irrespective of land tenure and property rights. Some cases in this publication refer to the obligations of states with regard to the supply of water and sanitation in informal settlements, where lack of secure tenure is often used as a justification for a lack of services. In order to close the gap between those served and unserved, states need to give particular attention to people in rural and urban deprived areas and water scarce regions who often disproportionately suffer from a lack of water and sanitation.
- **Groups that are potentially vulnerable and/or marginalised:** States are obliged to take positive measures to fulfil the rights to water and sanitation of the most marginalised and vulnerable individuals and groups. Individuals and groups who have been identified as potentially vulnerable or marginalised include in particular: Indigenous peoples, nomadic and traveller communities, refugees, asylum seekers, internally displaced persons and returnees, victims of natural disasters, prisoners, older persons, people with disabilities, people with serious or chronic illnesses, children, women and transgender and intersex individuals.

CASES THAT RELATE TO THE PRINCIPLE OF NON-DISCRIMINATION AND EQUALITY:

NATIONAL JURISDICTIONS

Africa

- KENYA, High Court of Kenya at Embu (2011): *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* eKLR **p. 37**
- SOUTH AFRICA, High Court (2011): *Beja and Others v Premier of the Western Cape and Others* **p. 49**
- SOUTH AFRICA, Constitutional Court (2009): *Mazibuko and Others v City of Johannesburg and Others* **p. 58**
- SOUTH AFRICA, Constitutional Court (2000): *Government of the Republic of South Africa and Others v Grootboom and Others* **p. 64**

Americas

- ARGENTINA, Corte Suprema (2007): *Defensor del Pueblo de la Nación c/ Estado Nacional y Provincia del Chaco* **p. 67**
- ARGENTINA, Tribunal Buenos Aires (2007): *Asociación Civil por la Igualdad y la Justicia c/ Gobierno de la Ciudad de Buenos Aires* **p. 70**
- UNITED STATES OF AMERICA, District Court (2008): *Kennedy v City of Zanesville* **p. 149**
- UNITES STATES OF AMERICA, Court of Appeal (1983): *Dowdell v City of Apopka Florida* **p. 152**

Asia

- ISRAEL, Supreme Court, (2011): *Abadallah Abu Massad and others v Water Commissioner and Israel Lands Administration* **p. 175**

Europe

- FRANCE, Cour de Cassation (2010): *Laurent X* **p. 202**
- FRANCE, Conseil d'Etat (2009): *Commune de Saint-Jean d'Aulps c/ Syndicat des copropriétaires de l'immeuble Relais de la Terche et autre* **p. 204**

Principle 2: Access to information

Access to information refers to the public entitlement to seek and receive information about current and planned water and sanitation law, policies and programmes. This encompasses the duty of the state to make information available, including for example on the provision of services, tariff systems and the quality of water and sanitation. Only informed users of water and sanitation services will be able to voice concerns and hold entities to account.

Consequently, states must make resource allocations and relevant financial information on public and private water service providers publicly available.³ States should disseminate information through channels that are easily accessible by all and ensure the widest possible circulation.⁴ This includes the dissemination through for example local radio, billboards, newspapers or information centres.⁵ In some countries the digitalisation of information and the use of internet may be a good way to reach out to people. States must ensure that information is translated in all relevant languages and dialects and ensure that people who are unable to read can access information through other means, such as radio and through information centres. In any case, it is crucial that states always consider the particular needs of the individuals or groups that have an interest in the information available.

As states must always ensure equality in access to information, special measures may have to be undertaken in order to make information available to people who are often not reached. States must furthermore ensure that everyone can equally access awareness raising programs and education (on for example hygiene education and the effect of sanitation on health and the environment).⁶

CASES THAT RELATE TO THE PRINCIPLE OF ACCESS TO INFORMATION:

NATIONAL JURISDICTIONS

Africa

- SOUTH AFRICA, High Court (2012): *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* **p. 40**

Americas

- COLOMBIA, Corte Constitucional (2010): *Hernán Galeano Díaz c/ Empresas Públicas de Medellín ESP, y Marco Gómez Otero y Otros c/ Hidropacífico SA ESP y Otros* **p. 107**

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3. UNHRC 'Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation' (2011) UN Doc A/HRC/18/33 (UNHRC Planning Report) [72].
 4. UNHRC 'Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque' (2009) UN Doc A/HRC/12/24 (UNHRC Sanitation Report) [66].
 5. UNHRC Planning Report (n 3) [71].
 6. UN CESCR 'General Comment 15' (n 1) [26].

- PERU, Corte Superior de Justicia (2005): *Red de Vigilancia y Exigibilidad de los Derechos Económicos, Sociales y Culturales Región Junín c/Municipalidad Provincial de Huancayo* p. 146

Europe

- FRANCE, Conseil constitutionnel (2012): *Fédération Départementale des Syndicats d'Exploitants Agricoles du Finistère* p. 197

Principle 3: Participation

The human rights to water and sanitation can only be realised in an effective manner when people become part of all processes that relate to the realisation of these rights. Participation ensures better implementation and enhances the effectiveness and sustainability of interventions, as it ensures that local conditions and needs can be taken into account. 'Opportunities for participation, including community needs assessments, must be established as early as possible. Any plan or decision-making that relates to the realisation of the rights to water and to sanitation must be developed through a participatory and transparent process.

Participation must be active, free and meaningful. It must go beyond mere information-sharing and superficial consultation, and involve people in decision-making; providing real opportunities to influence the planning process. The organisation of a truly participatory process is challenging. Different mechanisms and approaches are to be adopted, including consultations with various stakeholders, public meetings and hearings as well as the opportunity to submit written comments and feedback⁷.

'Systematic participation is crucial in every phase of the planning cycle; from diagnosis to target setting, and from implementation to monitoring and evaluation⁸. Also, all decision-making, actions and development of legislation must be based on meaningful participation of stakeholders. This includes that people must be made aware of the possibilities to participate, and opportunities to participate must reach out to all stakeholders and be organised at times and locations convenient for them to attend.

'Disadvantaged and at-risk people and communities must be represented, to ensure that participation is not only for a few well-established

7. UNHRC Planning report (n 3) [68].

8. *Ibid.*, [68].

non-governmental organisations or local elites⁹. States must ensure equal access to participation opportunities, especially for those that are often excluded or marginalised, for example for women.

CASES THAT RELATE TO THE PRINCIPLE OF PARTICIPATION:

NATIONAL JURISDICTIONS

Africa

- SOUTH AFRICA, High Court (2012): *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* **p. 40**
- SOUTH AFRICA, High Court (2011): *Beja and Others v Premier of the Western Cape and Others* **p. 49**

Americas

- CANADA, Supreme Court (2011): *Halalt First Nation v. British Columbia (Environment)* **p. 95**

Europe

- FRANCE, Conseil constitutionnel (2012): *Fédération Départementale des Syndicats d'Exploitants Agricoles du Finistère* **p. 197**

REGIONAL JURISDICTIONS

Special Mechanism: Tribunal Latinoamericano del Algu

- TLA/PERU (2012): *Grupo de Formación e Intervención para el Desarrollo (Gufides) y Plataforma Interinstitucional Celendina (PIC) c/ Estado Peruano y Minera Yanacocha SRL* **p. 287**
- TLA/ARGENTINA (2012): *Fundación Chadileuvú c/ Estado Nacional Argentino y Provincia de Mendoza* **p. 281**
- TLA/EL SALVADOR (2008): *Comunidades Indígenas del Vantón de Sisimitepet y Pushtan del Municipio de Nahuizalco c/ Presidencia de la República de El Salvador y Otros* **p. 290**

Principle 4: Accountability

For the rights to water and to sanitation to be realised, service providers and public officials must be accountable to users. There are two different requirements that need to be taken into account to ensure accountability:

9. *Ibid.*, [70]; also 'groups that should have opportunities to participate include civil society organizations, community-based organizations, national human rights institutions, academia and research institutions, the private sector and above all the communities and people concerned themselves, with a special emphasis on women's input.'

- **Right to a remedy:** Individuals or groups who feel that their rights have been violated must have access to independent review mechanisms and courts to have their complaints heard and resolved. Remedies provided for should include restitution, compensation, legally binding assurances of non-repetition and corrective action.¹⁰ States must raise awareness and make information on remedies available to all.¹¹
- **Oversight responsibilities:** Mechanisms must be enacted that establish oversight and control between both public and private actors in water and sanitation provision. Clear institutional mandates must be defined to build accountability into the entire system of water and sanitation provision. Actions taken or decisions made under those mandates must be accountable and regulated through a system of oversight responsibilities.¹² Monitoring is essential in order to ensure all actors can be held accountable. This is especially relevant when water and sanitation service provision is decentralised, in order to prevent fragmentation of responsibilities and a lack of coordination and control.

States are free to delegate the operation of water and sanitation services to private operators on the condition that independent monitoring and remedies are in place to ensure accountability of private actors towards users and the states. (*Quevedo, Miguel Angel*) With regards to monitoring, states must set up effective bodies and enforceable processes to ensure that public or private service providers will comply with human rights.¹³ Service providers must furthermore assess the actual and potential impact of their activities in the realisation of the human rights to water and sanitation.¹⁴

CASES THAT RELATE TO THE PRINCIPLE OF ACCOUNTABILITY:

NATIONAL JURISDICTIONS

Africa

- SOUTH AFRICA, High Court (2012): *Mandla Bushula v Ukhahlamba District Municipality* p. 46

10. C. de Albuquerque, V. Roaf, On the right track – Good practices in realising the rights to water and sanitation, p. 177, 2012, available at www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx

11. *Ibid* [41].

12. C. de Albuquerque, V. Roaf, On the right track – Good practices in realising the rights to water and sanitation, p. 206, 2012, available at www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx

13. UN CESCR 'General Comment 15' (n 1) [24].

14. UNHRC 'Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque' (2010) UN Doc A/HRC/15/31 (UNHRC Non-State actors Report) [63(h)].

Americas

- ARGENTINA, Cámara Federal de Apelaciones (2003): *Asociación para la Protección del Medio Ambiente y Educación Ecológica '18 de Octubre' c/ Aguas Argentinas SA y Otros* **p. 77**
- ARGENTINA, Juez Sustituta de Primera Instancia Civil y Comercial (2002): *Quevedo, Miguel Ángel y Otros c/ Aguas Cordobesas SA* **p. 81**
- ARGENTINA, 2nd Chamber of Appeals for Civil Matters of the Province of Neuquén (1997): *Children of the Paynemil Community c/ Acción de amparo* **p. 87**
- COLOMBIA, Corte constitucional (2010): *Hernán Galeano Díaz c/ Empresas Públicas de Medellín ESP, y Marco Gómez Otero y Otros c/ Hidropacífico SA ESP y Otros* **p. 107**
- UNITED STATES OF AMERICA, Court of Appeal (2011): *Newton-Enloe v Horton* (not included)

Asia

- BANGLADESH (2005): *Rabia Bhuiyan v Ministry of LGRD* **p. 157**
- INDIA, Supreme Court (1980): *Municipal Council, Ratlam v. Shri Vardhichand & Others* **p. 169**
- INDONESIA, Constitutional Court (2005): *Judicial Review of the Law of the Republic of Indonesia no 7 Year 2004 regarding Water Resources* **p. 172**

REGIONAL JURISDICTIONS

African Commission on Human and Peoples' Rights

- ACHR/SUDAN (2009): *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan* **p. 233**

European Court of Human Rights

- ECHR/ROMANIA (2008): *Butan and Dragomir v Romania* **p. 247**
- ECHR/SWEDEN (1993): *Zander v Sweden* **p. 253**

Inter-American Court of Human Rights

- IACHR/PARAGUAY (2006): *Case of the Sawhoyamaya Indigenous Community v. Paraguay* **p. 271**

Principle 5: Sustainability

The rights to water and sanitation must be realised for present and future generations.¹⁵ Water and sanitation facilities, services, and water as a resource,

15. UN CESCR 'General Comment 15' (n 1) [11].

must be economically, environmentally and socially sustainable.¹⁶ The sustainability of water and sanitation services relies on various factors:

- **Operation and maintenance** is crucial for the sustainability of facilities and services. When infrastructure fails due to a lack of operation and maintenance, a false impression of availability of services is created.¹⁷ States must therefore establish clear responsibilities for the sustainable operation of service provision. For example, deteriorating water and sanitation infrastructure causes yearly water losses of millions of cubic meters in many mega-cities' supply systems.¹⁸
- **Prioritisation of uses** for personal and domestic needs must be guaranteed in order to ensure sufficient amounts of water are available, including for future generations. The world population continues to grow, water needs are increasing and freshwater will become scarcer due to climate change.¹⁹ However, even under those conditions, the available fresh water is still sufficient to meet the personal and domestic needs of all people.²⁰ The overall increase of water uses by other sectors makes prioritisation of water for personal and domestic use crucial to ensure its sustainable availability for all.
- **Non-retrogression:** Article 2 (1) ICESCR demands that water and sanitation must be progressively realised for all. This includes the obligation of non-retrogression and of water and sanitation to be available over the long term, including for future generations.²¹ States must ensure that all can enjoy a minimum level of services; also when resources are constrained due to for example financial crisis, measures must include the use of targeted programs aimed at those most in need.²²
- **Resource protection:** General Comment 15 states that: 'States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future

16. UNHRC Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, 'Good Practices' related to Access to Safe Drinking Water and Sanitation: Questionnaire' (2010) [question no 10].

17. For a brief overview of failures in water and sanitation infrastructure, see: UNHRC 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation' (2013) A/HRC/24/44 [4].

18. *Ibid.* Para. 4

19. *Ibid.* Para. 5

20. *Ibid.*

21. UN CESCR 'General Comment 3' in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 [10] (UN CESCR 'General Comment 3'); UNHRC Report of the Special Rapporteur on the human right to safe drinking water and sanitation (2013) A/HRC/24/44 [12].

22. UN CESCR 'General Comment 15' (no 1)[13].

generations'.²³ This for example includes the need to protect resources from contamination, over-extraction, monitoring existing resources and increasing the efficient use of water by end-users. With the growing recognition of environmental rights, judges worldwide have shown sensitivity to the protection of the interests of future generation and the prevention of irreversible damage. The precautionary principle is among the principles the judiciary has integrated for the protection of future interests.

CASES THAT RELATE TO THE PRINCIPLE OF SUSTAINABILITY:

NATIONAL JURISDICTIONS

Africa

- SOUTH AFRICA, High Court (2012): *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* **p. 40**

Americas

- ARGENTINA, Juzgado de Primera Instancia Civil y Comercial (2004): *Marchisio José Bautista y Otros c/ Superior Gobierno de la Provincia de Córdoba y Otros* **p. 73**
- ARGENTINA, Cámara Federal de Apelaciones (2003): *Asociación para la Protección del Medio Ambiente y Educación Ecológica '18 de Octubre' c/ Aguas Argentinas SA y Otros* **p. 77**
- CANADA, Supreme Court (2011): *Halalt First Nation v. British Columbia (Environment)* **p. 95**
- COSTA RICA, Corte Suprema de Justicia (2009): *Gad Amit Kaufman y Otros c/ Municipalidad de Carrillo y Otros* **p. 127**
- COSTA RICA, Corte Suprema de Justicia (2004): *Comité Pro-No Construcción de la Urbanización Linda Vista, San Juan Sur de Poás c/ Ministerio de Ambiente y Energía y Otros* **p. 131**
- PERU, Corte Superior de Justicia (2005): *Red de Vigilancia y Exigibilidad de los Derechos Económicos, Sociales y Culturales Región Junin c/ Municipalidad Provincial de Huancayo* **p. 146**

23. UN CESCR 'General Comment 15' (n 1) [28]. 'Such strategies and programmes may include: (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; (b) reducing and eliminating contamination of watersheds and water-related eco-systems by substances such as radiation, harmful chemicals and human excreta; (c) monitoring water reserves; (d) ensuring that proposed developments do not interfere with access to adequate water; (e) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity; (f) increasing the efficient use of water by end-users; (g) reducing water wastage in its distribution; (h) response mechanisms for emergency situations; (i) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.'

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- INDIA, High Court (2003): *Perumatty Grama Panchayat v State of Kerala* **p. 164**
- INDIA, High Court (1990): *Attakoya Thangal v Union of India* **p. 167**
- NEPAL, Supreme Court (2001): *Advocate Prakash Mani Sharma and Others v Nepal Water Supply Corporation and Others* **p. 181**
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- TLA/PERU (2012): *Grupo de Formación e Intervención para el Desarrollo (Gufides) y Plataforma Interinstitucional Celendina (PIC) c/ Estado Peruano y Minera Yanacocha SRL* **p. 287**
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The normative content of the human rights to water and sanitation

The normative content categories of the rights to water and sanitation serve to describe the range of issues that states need to take into account in the context of water and sanitation service provision.

Criterion 6: Availability

The normative content category of ‘availability’ demands that water and sanitation must be accessible to everyone in the household or its immediate vicinity, in sufficient quantity and on a continuous basis, for personal and domestic use.

- **Water:** The supply of water must be sufficient and continuous, for personal and domestic use, which includes drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene.²⁴ There must be a sufficient number of water outlets to ensure that collection and waiting times are not unreasonably long.²⁵
- **Sanitation:** There must be a sufficient number of sanitation facilities with associated services to ensure that the needs of people are met and collection and waiting times are not unreasonably long.²⁶ Although it could be tempting to determine a specific minimum number of toilets needed to meet the requirement of availability, such determinations can be counterproductive in human rights terms as they must be assessed along with the sanitation requirements of any community.²⁷ Also, sanitation is only considered available when the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene is ensured.²⁸

Water, sanitation and hygiene facilities and services must be available at the household level or its immediate vicinity and in all places where people spend significant amounts of time. States bear a special responsibility to provide access to water and sanitation to people in public institutions (e.g. prisons, schools, hospitals, refugee camps) and public places (e.g. markets). States must furthermore ensure regulation, including in the context of places controlled by non-state actors, such as (rented) homes, workplaces, private health institutions and schools.

To ensure a sufficient amount of water for personal and domestic use – especially where water is scarce – the use of water for personal and domestic use must be prioritised over other uses.

24. UN CESCR 'General Comment 15' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 [12(a)], [37(a)] and [37(c)]; UNHRC 'Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque' (2009) UN Doc A/HRC/12/24 (Sanitation Report) [70]; UNHRC 'Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation' (2011) UN Doc A/HRC/18/33 (Planning Report) [8(a)]; UNHRC 'Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque' (2010) UN Doc A/HRC/15/31 (Non-State actors Report) [47(a)] and [47(c)].

25. UN CESCR 'General Comment 15' (n 1) [37(a)].

26. UN CESCR 'General Comment 15' (n 1) [37(a)].

27. UNHRC Sanitation Report (n 4) [71].

28. UNHRC Sanitation Report (n 4) [63].

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- ARGENTINA, Tribunal Buenos Aires (2007): *Asociación Civil por la Igualdad y la Justicia c/ Gobierno de la Ciudad de Buenos Aires* **p. 70**
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- COLOMBIA, Corte Constitucional (2010): *Hernán Galeano Díaz c/ Empresas Públicas de Medellín ESP, y Marco Gómez Otero y Otros c/ Hidropacífico SA ESP y Otros* **p. 107**
- COLOMBIA, Corte Constitucional (1992): *Carlos Alfonso Rojas Rodríguez c/ ACUAVENORTE y Otros* **p. 124**
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- ISRAEL, Supreme Court (2011): *Abadallah Abu Massad and others v Water Commissioner and Israel Lands Administration* **p. 175**
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- PAKISTAN, Supreme Court (1994): *General Secretary, West Pakistan Salt Miners Labour Union v The Director, Industries and Mineral Development* **p. 187**

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- ACHPR/ANGOLA (2008): *Institute for Human Rights and Development in Africa v Angola* **p. 230**

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Criterion 7: Physical accessibility

The normative content category of 'physical accessibility' demands that infrastructure must be built and located in a way that facilities are accessible for all at all times, including for people with particular needs, such as

children, older persons, persons with disabilities or chronically ill persons. The location of public sanitation and water facilities must furthermore ensure minimal risks to the physical security of users. In order to ensure that all needs are considered, participation is vital.

- **Time and distance:** The amount of water users are able to collect and whether they will use sanitation facilities depends on the time and distance taken to collect water and to reach a sanitation facility. Sanitation and water facilities must be physically accessible for everyone within or in the immediate vicinity of each household, health or educational institution, public institution and workplace, or any other place where people spend significant amounts of their time.²⁹ States should set minimum standards with regard to the location of water and sanitation facilities. To determine national standards, states may use international minimum standards as guidance,³⁰ while ensuring that these are not used as absolute values. Moreover, states should always aim for the highest standard and progressive improvement.
- **Physical security:** The location of water and sanitation facilities must ensure physical security of all users. Facilities must be within easy reach and with safe paths to get there and located in a safe area, including at night.³¹ The knowledge of the community will be crucial to determine a location that is safe and easily accessible for all and at all times. States must take positive measures to ensure physical security when accessing water and sanitation facilities.³²
- **Design of facilities:** Water and sanitation facilities must be designed in such a way that users can physically access them, in an easy manner. Mechanisms to extract water from pipes or wells, and the designs of sanitation facilities need be adapted to the needs of older persons, children, persons with disabilities, and chronically ill people, and pregnant women. For sanitation facilities, the needs of these individuals have implications for the entrance size of the sanitation facility, the interior space, handrails

29. UN CESCR 'General Comment 15' (n 1) [12(c)(i)] and [37(c)]; UNHRC Sanitation Report (n 4) [75-76].

30. Water outlets should be placed so that a round trip to fetch water will take a maximum of 30 minutes. Where household sanitation is not possible in the short term, sanitation facilities should be shared by a maximum of five households. See: WHO, UNICEF Joint Monitoring Programme, JMP, Report of the Second Consultation on Post-2015 Monitoring of Drinking-Water, Sanitation and Hygiene, 2012, available at http://www.wssinfo.org/fileadmin/user_upload/resources/WHO_UNICEF_JMP_Hague_Consultation_Dec2013.pdf. Also see G. Howard, J. Bartram, Domestic Water Quantity, Service Level and Health, WHO, 2003.

31. UNHRC Sanitation Report (n 4) [75].

32. UN CESCR 'General Comment 15' (n 1) [12(c)(i)]; UNHRC Sanitation Report (n 4) [75].

or other support mechanisms, the position of defecation, as well as other aspects.³³

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- BOTSWANA, Court of Appeal (2011): *Matsipane Moseithanyane and Gakenyatsiwe Matsipane v The Attorney General* **p. 34**
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- CHILE, Corte Suprema (2004): *Comunidad Atacameña de Toconce c/Essan SA* **p. 101**
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- FRANCE, Conseil d'Etat (2010): *Mme Sandra A c/ Commune de Gouvernes* **p. 200**
- FRANCE, Cour de cassation (2010): *Laurent X* **p. 202**

33. UNHRC Sanitation Report (n 4) [76].

- FRANCE, Cour de Cassation (2004): *Madame X c/ Commune d'Amiens* p. 211
- IRELAND, High Court (2011): *Kinsella v Governor of Mountjoy Prison* p. 213

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- FIJI, High Court (2001): *Naba v The State* p. 227

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- IACHR/GRENADA (2002): *Paul Lallion v Grenada* p. 261
- See also IACHR/GRENADA (2002): *Benedict Jacob v Grenada* (not included)

European Court of Human Rights

- ECHR/BELGIUM (2008): *Riad and Idiab v Belgium* p. 239
- See also: ECHR/GREECE (2011): *MSS v Belgium and Greece* (not included)
- ECHR/ARMENIA (2008): *Tadevosyan v Armenia* p. 236
- ECHR/RUSSIA (2005): *Fedotov v Russia* p. 250
- See also, ECHR/RUSSIA (2008): *Shchebet v Russia* (not included)
- See also ECHR/LATVIA (2006): *Kadiķis v Latvia* (not included)

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- IACHR/PARAGUAY (2010): *Xákmok Kásek Indigenous Community v Paraguay* p. 267
- IACHR/PARAGUAY (2005): *Yakye Axa Indigenous Community v Paraguay* p. 275

Criterion 8: Acceptability

The principle of acceptability requires that water and sanitation services take into account the cultural needs and preferences of users.³⁴ Therefore, participation is of particular importance to ensure acceptability.

- **Water** must be of an acceptable colour, odour and taste for each personal or domestic use, as people may otherwise resort to unsafe alternatives.³⁵ The water facility itself must also be acceptable for use, especially with regard to personal hygiene. The quantity of water facilities alone will not determine the actual usage; in order for facilities to be 'acceptable', facilities must also provide for the privacy and dignity of users.³⁶

34. UNHRC Sanitation Report (n 4) [80]; UNHRC Planning Report (n 3) [8(c)] and [71].

35. UN CESCR General Comment 15' (n 1) [12(b)].

36. UNHRC 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation' (2013) UN Doc A/HRC/24/44/Add.3 [25] (Mission to Thailand).

- **Sanitation** facilities will only be acceptable to users if the design and conditions of use correspond to the preferences of users. Acceptability often requires privacy, as well as separate facilities for women and men in public places, and for girls and boys in schools.³⁷ Facilities will need to accommodate common hygiene practices in specific cultures, such as for anal and genital cleansing. Toilets for women and girls must have facilities for the disposal of menstrual materials and for menstrual hygiene management.³⁸

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Criterion 9: Affordability

Access to sanitation and water facilities and services must be affordable for everyone.³⁹ The payment for services must not limit one's capacity to acquire other basic goods and services, including food, housing, health and education, guaranteed by other human rights. Affordability of water and sanitation services as well as associated hygiene must ensure people are not forced to resort to other, unsafe alternatives. While human rights do not generally call for services to be provided free of charge, this necessitates free services when people are unable to pay.⁴⁰

37. See for example the case summary of the Indian supreme Court of 2012: *Environment & Consumer Protection Foundation v Delhi Administration and Others*.

38. UNHRC Sanitation Report (n 4) [80].

39. UN CESCR 'General Comment 15' (n 1) [12(c)(ii)] and [37(h)]; UNHRC Non-State actors Report (n 14) [47] and [50]; UNHRC Planning Report (n 3) [57(i)].

40. UN CESCR 'General Comment 15' (n 1) [12].

Affordability needs to be considered with regard to two types of costs:

- **Connection and construction costs and operation and maintenance.** These costs are relatively high and not paid regularly. For these kinds of costs, subsidies, payment waivers and other mechanisms must be established in order to ensure affordability.
- **Affordability of ongoing costs.** This includes the payment of regular user fees for an ongoing service delivery. This requires the development and monitoring of tariff systems, set by an independent regulatory body that operates on the basis of human rights and ensures that tariffs are affordable for all.

Affordability must be considered in tariff systems for water and sanitation service provision and can be regulated through social security and subsidy schemes. Affordability can be evaluated by considering financial means that have to be reserved for the fulfilment of other basic needs and purposes, and those for payment of water and sanitation services. States may refer to international guidance in establishing affordability. These however vary significantly and no one standard is appropriate for all or even within countries. Generally, international standards recommend either 3% (UNDP) or 5% (OECD) as a maximum percentage of household income that should be devoted to water and sanitation bills.

When water disconnections are carried out due to defaulting payment, due process must be followed prior to disconnection and it must be ensured that individuals still have at least access to a minimum essential level of water. Likewise, when water-borne sanitation is used, water disconnections must not result in denying access to sanitation.⁴¹

41. UNHRC Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, 'Good Practices' related to Access to Safe Drinking Water and Sanitation: Questionnaire' (2010)[Question n° 3].

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- THE NETHERLANDS, Gerechtshof (2010): *Case HD 200.018.358* **p. 216**

- PORTUGAL, Tribunal Constitucional (2004): *A x EPAL – Empresa Pública das Águas de Lisboa* p. 219
- SLOVENIA, Constitutional Court (1999): *Ruling No Up-156/98* p. 221

Criterion 10: Quality and safety

Water and sanitation services should be provided in such a way as to protect the health of users and the general public. Water must be safe for human consumption and for personal and domestic hygiene. It must be free from microorganisms, chemical substances and radiological hazards that constitute a threat to a person's health. Sanitation facilities must be hygienically and technically safe to use and must effectively prevent human, animal and insect contact with human excreta to protect the health of users and the community.⁴² All toilets must allow for anal and genital cleansing, commonly with toilet paper or water. Furthermore, toilets must provide hygiene facilities for washing hands with soap and water and must enable menstrual hygiene management for women and girls, including the disposal of menstrual products.⁴³

Water must be protected from contamination, including through the prohibition of dumping sewage or waste and the containment of seepage of fertilizers, industrial effluents and other pollutants into the groundwater.

States should develop and implement water quality standards that must be monitored and enforced. The WHO developed guidelines⁴⁴ on water quality, which states may use as guidance. States must however always consider the national and local situation. States must also bear in mind that minimum standards may fail to meet individual's particular needs, such as for persons that are particularly vulnerable to infections, and must therefore never be used as absolute standards. Also, the obligation to progressively realise the rights requires standards to improve over time.

States must take positive measures to ensure hygiene promotion and education to all,⁴⁵ and to take positive measures to monitor water quality standards, tackle water pollution and ensure compliance with national wastewater purification regulations, especially for drinking water suppliers.

42. UN CESCR 'General Comment 15' (n 1) [12(b)]; UNHRC Sanitation Report (n 4) [72].

43. UN CESCR 'General Comment 15' (n 1) [12(b)]; UNHRC Sanitation Report (n 4) [72].

44. Guidance for water quality: WHO, *Guidelines for drinking-water quality*, 4th edition, (Geneva, 2011).

45. *Ibid* [74].

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- ARGENTINA, Chamber of Appeals for Civil Matters (1997): *Children of the Paynemil Community* **p. 87**
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***Matsipane Moselelhanyane and Gakenyatsiwe Matsipane
v The Attorney General***

Court of Appeal (Lobatse)

27 January 2011⁴⁶

Keywords [Availability – Water – Degrading treatment (violation) – Water rights – Community rights – Land rights – Obligation to respect – Restitution]

Abstract Preventing a well-established Bushmen community from using a borehole, their traditional source of water, amounts to inhuman and degrading treatment contrary to article 7 of the Constitution of Botswana and the international consensus reflected by General Comment 15 and UNGA Res 64/292. As lawful occupiers of land, they had a right to access water for domestic use.

Facts The Colonial Government created the Central Kalahari Game Reserve (CKGR) in 1961 for two purposes: conserving the wildlife of the area, and providing residence for the Bushmen community who lived in the CKGR prior to and after its creation [para. 4]. Since the mid-1980s, this community had drawn water for domestic use from a borehole in Mothomelo that had originally been drilled by but no longer used by a private company. Until 2002, the District Council maintained the borehole engine and provided fuel and water to different communities in the CKGR [para. 5]. In January 2002, the Bushmen were relocated against their will outside the Reserve on the grounds that human settlements were incompatible with the objective of wildlife conservation [para. 6]. The pump engine and water tank were removed so that the borehole could not be used [para. 7]. As a result, the community was left without access to water and had to rely on fruits and roots to take in fluids. Water for food preparation and hygiene was unavailable. The lack of water greatly increased the community's vulnerability to sickness. A report described them as 'very dirty, due to lack of adequate water for drinking and other domestic use' [para. 8].

46. *Matsipane Moselelhanyane and Gakenyatsiwe Matsipane v The Attorney General* [2011] Court of Appeal (Lobatse) CACLBo7410 <<http://assets.survivalinternational.org/documents/545/bushmen-water-appeal-judgement-jan-2011.pdf>>.

Procedure Mr Matsipane Moselelhanyane and his wife applied for declaratory relief to the High Court (Lobatse), which dismissed their application [para. 1]. They appealed before the Court of Appeal. Mr Matsipane Moselelhanyane was one of the applicants in the matter of *Sesana and Others v The Attorney General*⁴⁷ [para. 2], on which the present dispute is based [para. 3].

Claims The appellants argued that the failure of the Government to allow them to re-commission at their own expense and for domestic and personal purposes the borehole in Mothomelo [para. 1(1)], and to recognise their right to sink wells in the CKGR for the same purposes [para. 1(3)] was unlawful and unconstitutional, contrary to section 6 of the Water Act [para. 1(3)] and section 7 of the Constitution [para. 20] respectively.

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Republic of Botswana, s 7⁴⁸
- UNGA Resolution 64/292⁴⁹
- UN CESCR General Comment 15, paras 1 and 16(d)⁵⁰
- UNHRC Resolution 15/9, para 8(b)⁵¹
- Water Act, ss 6 and 9⁵²

Court Rationale The Court first dismissed the Government's argument that the latter could not consider that 'whatever hardship the appellants are facing are of their own making inasmuch as they freely chose to go and live where there is no water' due to the zoning of the CKGR as a protected area in order to avoid 'encroachment of settlement onto wildlife area' since '[h]uman settlement in the area would "endanger the life of wild animals and fauna generally' [para. 10]. Considering the applicants were lawful occupiers of land as held in the *Sesana* case, the Court dismissed the zoning argument [para. 12].

Regarding the applicants' claim that the language of section 6(1)(a) of the Water Act means that 'any person who lawfully occupies or owns land has a right to sink a borehole on such land for domestic purposes without a

47. *Sesana and Others v The Attorney-General* [2006] High Court (Lobatse) 52/2002, [2006] BWHC 1 (*Sesana* case).

48. Constitution of Botswana 1966 (as amended).

49. UNGA Res 64/292 (28 July 2010) UN Doc A/RES/64/292.

50. UN CESCR 'General Comment 15' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9.

51. UNHRC Res 15/9 (30 September 2010) UN Doc A/HRC/RES/15/9.

52. Water Act 1968 (Cap 34:01).

water right', the Court found this argument 'not only attractive but also unanswerable'. It declared that:

...it is not [the applicants'] case that they should be granted a water right to Abstract water 'at will, in unlimited quantities, from an unspecified number of boreholes' as the court a quo incorrectly held. All that they need [...] is permission to use the existing or an alternative borehole at their own expense and not Government's expense [para. 16].

It further asserted that 'it cannot be emphasised strongly enough ... that in Botswana water is at a premium. Lawful occupiers of land such as the appellants must be able to get underground water for domestic purposes; otherwise their occupation would be rendered meaningless' [para. 16]. The Court found that section 6 of the Water Act therefore prevails over section 9 which requires an explicit water right for any extraction that exceeds domestic water use. Consequently, the applicants, as lawful occupiers of land, did not require a water right to use the borehole in Mothomelo for domestic purposes [para. 16].

Regarding the application of section 7(1) of the Constitution, which provides that 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment', the Court considered this right as 'absolute and unqualified' and 'not subject to any limitation'. While underlining that assessing such rights entails a value judgment, it was found 'appropriate to stress that in the exercise of a value judgment, the Court is entitled to have regard to international consensus on the importance of access to water. Reference to two important documents will suffice: [General Comment 15, paragraphs 1 and 16(d), and UNGA Res 64/292, paragraph 8(b)].' [para. 19]. Noting that the respondent seemed to tell the applicants 'you can live in your settlement in the CKGR as long as you don't Abstract water other than from plants', the Court condemned such an attitude and found that the facts stated in paragraph 8 of the case amounted to degrading treatment. It 'accept[ed] that there is a constitutional requirement based on international consensus ... for Government to refrain from inflicting degrading treatment' [para. 22].

Decision The Court granted the appeal and recognised the applicants' right as lawful occupiers of land to re-commission the borehole at their own expense, to sink new boreholes, to bring into the Reserve the necessary machinery for these aims and to service boreholes in order to Abstract water for personal and domestic purposes only [para. 25]

KENYA

Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security eKLR

High Court of Kenya at Embu, Constitutional Petition n° 2 of 2011
16 November 2011⁵³

Keywords [Availability – Equality – Informal Settlement – Water – Sanitation – Right to adequate housing (violation) – Forced eviction – Restitution]

Abstract This case involves an informal settlement which was forcibly evicted, resulting in, *inter alia*, cut off from access to water and sanitation. The Court found a violation of constitutionally protected social rights as informed by international human rights law. The Court made reference to sanitation and water as essential for human dignity, recognizing the indivisibility and interdependence of human rights as well as the basis for locating the rights to water and sanitation within the right to an adequate standard of living and the overarching rights of human dignity, freedom and equality.

Facts A petition was filed on behalf of 1,122 persons (the petitioners) who were evicted from areas referred to as the ‘Medina Location’ in Garissa, Kenya. The evictions cut off the petitioner’s access to, *inter alia*, water and sanitation. The petitioners had lived in the Medina Location since the 1940s.

The Petitioners made numerous attempts to have audience with the Government, but were not successful [paras.1, 2]. On 24 December 2010, the Government began to demolish houses without prior written notice, court order or consultation, and without provision of alternative housing, thus leaving the petitioners homeless. In all, 149 houses and structures were demolished. The petitioners were forced to live and sleep in the open or in make-shift temporary structures without access to water and sanitation and exposed to the vagaries of nature, health risks and insecurity [para. 4].

Procedure In February 2011, the petitioners filed a petition for an interim order at the High Court of Kenya at Embu.

53. *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security eKLR* [2011] High Court (Embu) Constitutional Petition n° 2 of 2011 <http://www.esccr-net.org/usr_doc/Decision_Garissa.pdf>.

Claims In February 2011, the petitioners filed a petition for an interim order to stop the respondents from evicting them and demolish their houses without a court order and without provision of suitable alternative accommodation. The petitioners further sought declarations that the respondents had violated their fundamental rights, including the right to life, protection of property, accessible and adequate housing, clean and safe water, sanitation and health care services [paras. 4-6]. They furthermore requested the Court to order the respondents to provide suitable and permanent alternative housing, to not carry out further demolitions and to provide punitive damages [para. 7].

Applicable law and reference to regional or international instruments

- Constitution of Kenya⁵⁴,
- International Covenant on Economic Social and Cultural Rights⁵⁵
- International Covenant on Civil and Political Rights⁵⁶

Court Rationale The Court applied the Constitution of Kenya⁵⁷, the ICESCR and the ICCPR in its decision. The Court explained that *'the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities'* (para. 8). The Court held that the State has the duty to address the needs of vulnerable groups within society. The Court held that the *'Petitioners were entitled to the fundamental rights to accessible and adequate housing and to reasonable standards of sanitation, health care, clean and safe water in adequate quantities and education'* as guaranteed by Article 43 of the Constitution and international treaties, and pursuant to Article 47 were entitled to be given written reasons regarding the evictions (para. 12). Citing Article 21(3) of the Constitution, the Court also indicated that *'it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights'* (para. 10) and held that the forced eviction *'grossly undermined their right to be treated with dignity and respect'* [para. 12].

Decision The Court ordered that the petitioners be allowed to return to the land they were evicted from and that the respondents reconstruct reasonable residences or build alternative housing with all amenities, facilities and schools that were on the land prior to the demolition [para. 11]. The Court further granted a permanent injunction to prevent any future evictions or

54. The Constitution of Kenya, 2010. Available at: <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> .

55. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

56. Available at: <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>

57. The Constitution of Kenya, 2010. Available at: <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> .

demolitions. It awarded 200,000 Kenyan Shillings in damages to each of the petitioners [para. 12]

***Federation for Sustainable Environment and Others
v Minister of Water Affairs and Others***

High Court (North Gauteng, Pretoria)

10 July 2012⁵⁸

Keywords [Participation – Access to information – Quality – Water – Right to water (violation) – Progressive realization – Emergency relief – Mining pollution]

Abstract A municipality must ‘engage actively and meaningfully’ with the community on steps taken to restore the supply of safe drinking water and provide temporary drinking water, and also inform its members accordingly.

Facts Because of contamination by ‘acid mine water’ of the water supply in Silobela and Carolina, about 20 water tanks were brought in from the neighbouring towns of Breyten and Chrissiesmeer around February 2012 to provide water to these localities [para. 4]. While seven tanks were set up around Silobela, the system proved to be inadequate to supply drinking water from March to May 2012, as several tanks were not refilled or had been left empty. Some of the residents had to walk long distances to access the water from the tanks. [para. 5]. To tackle the pollution issue, the Minister of Water Affairs and other public authorities mobilised the Rapid Response Unit and engaged an engineer to assess whether the water works and adaptations were subsequently undertaken. ZAR 410,000 was spent to set up water tanks, and ZAR 2.4 million to accelerate the Infrastructure Committee Program [para. 21]. Residents in Silobela also burnt several water tanks [para. 22].

Procedure Considering the urgency caused by the dire water situation [para. 8], the Federation for Sustainable Environment [para. 2] and the Silobela Concerned Community [para. 3] applied to the High Court (North Gauteng, Pretoria) for mandamus relief (urgent motion) [para. 1].

Claims The applicants alleged that the lack of ‘access to an effective and reliable supply of potable water’ constituted a breach of the right to water as

58. *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* [2012] High Court (North Gauteng, Pretoria) 35672/12, [2012] ZAGPPHC 128<<http://www.saflii.org/za/cases/ZAGPPHC/2012/128.html>>.

guaranteed under Sec. 27 of the South African Constitution [para. 6], and that the allocation of 25 litres of water per household per day was not sufficient [para. 23]. They notably requested the Court to declare the failure of the various respondents to provide the residents of the Carolina area ‘with reliable supply of drinking water for more than seven full days’ [para. 1(2)], together with the provision of ‘temporary potable water’ within 24 hours [para. 1(3)], as unlawful. They further requested the Court to order respondents ‘to engage actively and meaningfully’ with them on steps taken to ensure the provision of drinking water, and on information on the volume and regularity of the supply of temporary water [para. 1(4)]. They eventually requested that the respondents report to the Court within a month regarding the measures undertaken to ensure such supply of potable water [para. 1(5)].

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Republic of South Africa s 27 and s 152⁵⁹
- Regulations Relating to Compulsory National Standards and Measures to Conserve Water, reg 3(b)⁶⁰

Court Rationale The Court first observed that ‘Silobela, like many other such areas, invariably still bears the brunt of the legacy of the apartheid, under developed, under resourced’. It set the application within the framework of ‘[t]he legacy of apartheid era’ and ‘[t]he unjust and unequal allocation of resources over decades’⁶¹ [para. 9]. The Court declared that ‘the State is enjoined to take measures that are progressively geared towards eradicating the incongruity in living areas of communities, structured on racial divide by the hitherto apartheid regime’. In that respect, courts ‘must also strive to encourage the national government and all its structures, to boldly and with haste march towards the cherished objective encapsulated in the preamble’ [para. 17].⁶² Building on the rationale of the *Grootboom* case,⁶³ the Court subsequently stated that the present matter was ‘relate[d] to [the] Constitutionally entrenched fundamental right to access to water’. Accordingly, it found that ‘when fundamentally entrenched rights are violated or

59. Constitution of the Republic of South Africa 1996 (as amended).

60. Regulations Relating to Compulsory National Standards and Measures to Conserve Water, Government Notice R509 in *Government Gazette* 22355 of 8 June 2001.

61. *Democratic Alliance and Another v Mazono NO and Another* [2002] Constitutional Court CCT29/02, [2002] ZACC 28 [57].

62. One of the objectives stated in the preamble is to ‘[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights’.

63. *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] Constitutional Court CCT11/00, [2000] ZACC 19.

compromised or restoration to normality the enjoyment of those rights, the matter intrinsically becomes urgent' [para. 18].

The Court noted that despite the respondents' assertion that the water issue was resulting from the mining activities, they did not specify the steps they had taken against the mines in order to permanently settle this problem [para. 21]. It also declared that the alleged respondents' failure to supply drinking water within seven days could not be fairly attributed solely to the respondents since it was established that Silobela residents burnt several water tanks [para. 22]. Furthermore, the applicants alleged that several tanks were not always refilled and sometimes left empty, and that an amount of 25 litres of water per household per day was not sufficient. The Court noted that the respondents denied these allegations, however, the Court also found that the respondents failed to provide any data to support this argument [para. 23].

Regarding the objectives provided under section 152 of the Constitution, including the objective to provide services to communities in a sustainable manner, the Court found that 'within these obligations, the municipality must strive to resolve as speedily as possible the water problem in Silobela and Carolina. It must equally have a progressive plan to achieve this objective and must engage and inform the community of the steps and progress of doing so', since the 'respondents are accountable to the communities' [para. 24].

Decision The Court granted the urgent motion [para. 26(1)], ordering the relevant respondents to supply 'temporary potable water' to residents of Silobela and Carolina within 72 hours, in accordance with regulations 3(b) [para. 26(2)]. It further ordered the relevant respondents 'to engage actively and meaningfully' with the applicants as regards steps undertaken to ensure that drinking water can be supplied again, and as to 'where, when what volume and how regularly temporary water will be made available in the interim' [para. 26(3)]. The Court further ordered relevant respondents to report within one month to the Court on measures adopted to ensure the supply of water through the water service [para. 26(4)].

SOUTH AFRICA

City of Cape Town v Strümpher

Supreme Court of Appeal

30 March 2012⁶⁴

Keywords [Affordability – Water – Right to water (violation) – Obligation to respect – Principle of fairness and equity (violation) – Disconnection of water supply – Defaulting payment]

Abstract The ‘right to the supply of water’ cannot be construed as only resulting from contractual obligations without giving any consideration to the principles of fairness and equity which apply in case of disconnection of water supply under South African law.

Facts Mr Marcel Mouzakis Strümpher had been operating a caravan park for 37 years, which was rented for permanent residential purposes on his property. On 16 May 2007, the City of Cape Town informed him that the water supply would be disconnected to his property within two days should his outstanding debt of ZAR 182,000 remain unpaid [para. 2]. The property owner replied on 28 May 2007 that he contested the amount claimed by the City, since it appeared that the recorded water consumption at his property was much higher than his actual water use. This was subsequently explained by a flaw in the water meter, which was therefore replaced together with the main connection by the City. A leakage was also identified and reported to the City. The latter then requested the property owner to replace several pipes, which then resulted in a reduction of the recorded water consumption [para. 3]. Without having replied to the letter of 28 May 2007, the City disconnected the water supply on 17 August 2007 [para. 4].

Procedure The Strand Magistrates’ Court granted the property owner a spoliation order⁶⁵ instructing the City to reconnect the water supply to the property. The High Court (Western Cape) upheld this decision. The City of Cape Town further appealed to the Supreme Court of Appeal [para. 1].

64. *City of Cape Town v Strümpher* [2012] Supreme Court of Appeal 104/2011, [2012] ZASCA 54 <<http://www.saflii.org/za/cases/ZASCA/2012/54.html>>.

65. A spoliation order – also called mandament van spolie – is granted by a court in order to return without delay an item of property to its owner.

Claims The applicant alleged that it was entitled to disconnect the water supply to the respondent's premises since the latter's 'right to the water supply' was merely of a contractual nature, and likely to be limited under the City's Water and Debt Collection by-laws [para. 6]. Moreover, it argued that the water user bears an obligation to pay reasonable charges under the Water Services Act and the Water By-Law [para. 7].

Applicable Law and Reference to Regional or International Instruments

- City of Cape Town Water By-law⁶⁶
- City of Cape Town Credit Control and Debt Collection By-law, s 7⁶⁷
- Constitution of the Republic of South Africa, s 27(1)(b)⁶⁸
- Water Services Act, ss 3(1), 4(3)(a), 11(1)⁶⁹

Court Rationale Considering the first claim, the Court declared that: 'The fact that a contract must be concluded does not, however, relegate the consumer's right to water to a mere personal right flowing from that contractual relationship. It does not relieve the City of its constitutional and statutory obligation to supply water to users, such as the respondent.' It further held, pursuant to section 27(1)(b) of the Constitution and section 3(1) of the Water Services Act, that the 'right to water is a basic right', that 'Everyone has the right in terms of the Constitution to have access to sufficient water' and that 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'. The Court then referred to the matter in *Impala Water Users and Association v Lourens NO & others*,⁷⁰ where the Supreme Court of Appeal granted a spoliation order to a water user as it found that 'it is not correct to say that the right in question was merely contractual'⁷¹ [para. 10]. The Court subsequently declared that:

Water users have a statutory right to the supply of water in terms of s 11(1) of the Water Services Act which imposes a duty on a water services authority to ensure access to water to consumers. It follows that the respondent's right to a water supply to the property could not be classified as purely contractual. As in the *Impala* case the respondent's right

66. City of Cape Town Water By-law *Provincial Gazette* (Western Cape) 6378 of 1 September 2006.

67. City of Cape Town Credit Control and Debt Collection *Provincial Gazette* (Western Cape) 6364 of 15 June 2006.

68. Constitution of the Republic of South Africa 1996 (as amended).

69. Water Services Act 1997 (n° 108).

70. *Impala Water Users Association v Lourens NO & Others* [2004] Supreme Court of Appeal 087/2003, [2004] ZASCA 15.

71. *Ibid* [18].

to a water supply was subsumed into rights under the Water Services Act and cannot be described as merely personal rights resulting from a contract as contended by counsel for the City. [para. 11]

Considering the second claim, the Court emphasised that the latter ‘appear[ed] to have overlooked the provisions of s 4(3)(a) of the Water Services Act, which requires that ‘the limitation or discontinuation of water services must be fair and equitable’. Besides, a specific dispute settlement procedure is provided under section 7 of the Credit Control and Debt Collection By-law [para. 14]. The Court then asserted that: ‘The notification in the statement of account sent to a consumer (debtor) suggesting that payment should be made even if the debtor is involved in a dispute with the City, appears to fly in the face of the provision of fairness and equity referred to in s 4(3)(a)’. It considered that an arrangement satisfying to the principles of fairness and equity would have been to allow the respondent to ‘continue to pay his ... usual monthly average water charge while an attempt is being made to resolve the dispute’ [para. 15]. Moreover, no ‘acceptable reason’ was given by the applicant in order to explain why the procedure described under section 7 of the Credit Control and Debt Collection By-law was not applied in the case at issue [para. 16]. Consequently, it found that the City was not entitled to disconnect the water supply to the respondent’s property [para. 18]. The Court also found that the spoliation order was an appropriate remedy to allow the respondent to request the reconnection of his property to the water supply system since ‘[t]he respondent’s use of the water was an incident of possession of the property. Clearly interference by the City with the respondent’s access to the water supply was akin to deprivation of possession of property.’ [para. 19].

Decision The Court of Appeal dismissed the appeal with costs [para. 20] and affirmed the lower Court’s granted relief [para. 19].

Mandla Bushula v Ukhahlamba District Municipality

High Court (Eastern Cape Division)

12 January 2012⁷²

Keywords [Accountability – Water – Right to water (non-violation) – Obligation to fulfil – Progressive realisation – Reasonableness standard – Interruption of water supply]

Abstract Installing pipes and tanks in order to tackle the illegal diversion of water undertaken by a community is a reasonable legislative measure taken by a municipality within its available resources to achieve the progressive realisation of the right to water under the South African Constitution and law.

Facts In 2001, the Ukhahlamba District Municipality installed water pipes in the Kwa-Ngquba Locality of the District. The service worked well until October 2008, when it abruptly stopped working without prior notice to the community. Residents then resorted to contaminated springs for their water supply [para. 9]. The District Municipality explained that after the initial installation of the water pipes in 2001, community members constructed unauthorized connections. The increase in the number of connections led to problems with water quality and quantity that had not been planned or budgeted for by the District Municipality. The District Municipality therefore decided to upgrade the water system to ensure better water quality [para. 13]. During this time, from February 2009 onwards, the District Municipality supplied water with tanker trucks. However, residents argued that this service was insufficient for the number of people living in the area and that supply was unpredictable and did not reach everyone [para. 10]. At the end of September 2009, the District Municipality installed three water tanks within a distance of 1,5 kilometres from the nearest household. [para. 12]. The finalization of the upgrading project to ensure that piped water could again be supplied was planned for 2012, while providing water to the populations by the aforementioned tanks in the meantime [para. 15].

Procedure Mr Bushula, a resident of the Kwa-Ngquba community, applied in his personal capacity – and allegedly on behalf of the whole community

72. *Mandla Bushula v Ukhahlamba District Municipality* [2012] High Court (Eastern Cape Division) 2200/09, [2012] ZAECGHC 1 <<http://www.saflii.org/za/cases/ZAECHC/2012/1.html>>.

although this could not be proven [para. 8] – to the High Court (Eastern Cape) for a writ of mandamus [para. 3].

Claims The applicant sought a Court order to oblige the Ukhahlamba District Municipality to restore the piped water supply that was discontinued in 2008. [para. 3].

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Republic of South Africa, ss 27(1)(b) and 27(2)⁷³
- Water Services Act, preamble and s 3(3)⁷⁴

Court Rationale The Court determined that section 27(1) and (2) of the Constitution must be read together as to define the scope of the positive rights that everyone has, and the corresponding obligations of the state to respect, protect, promote and fulfil such rights. [para. 16]. The Court recalled the findings of the Constitutional Court in the matter of *Minister of Health and Others v Treatment Action Campaign and Others*,⁷⁵ and explained that ‘the socio-economic rights of the constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. It is impossible to give everyone access even to a core service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in section 26 and 27 on a progressive basis’ [para. 16].

In light of section 27(1)(b) of the Constitution, which recognises that ‘everyone has a right to have access to sufficient food and water’, and of section 27(2) which specifies that ‘The state must take reasonable legislative and other measures within the available resources, to achieve the progressive realization of each of these rights’, the Court declared that ‘the installation of the water pipes on a drought relief budget was a reasonable legislative measure taken by the municipality within its available resources to achieve the progressive realization of the right to have access to sufficient water’. In addition, action to upgrade the water supply system was underway in order to address the problem caused by illegal connections, and tanks had been set up in order to ensure that the community was not left without water in the meantime. Regarding the question whether the tanks were ‘sufficient or not to provide adequate supply to the community’, the Court asserted that:

73. *Constitution of the Republic of South Africa 1996* (as amended).

74. *Water Services Act 1997* (n° 108).

75. *Minister of Health and Others v Treatment Action Campaign and Others* (n° 2) [2002] Constitutional Court CCT8/02, [2002] ZACC 15 [35].

'if they are not sufficient, it is for the community to request the municipality to supply some more tanks to cater for their need' [para. 17].

The Court observed that the applicant was not contradicting these facts. Considering that the discontinuation of water supply occurred because of the unauthorised diversion undertaken by the community, the Court found that 'the Municipality took reasonable measures in terms of the Constitution and the law to ensure that the community of Kwa-Ngquba was not left without the supply of water' [para. 18].

Decision Considering the applicant's failure to show that the respondent breached the aforementioned provisions of the Constitution and of the Water Services Act, the Court dismissed the application and ordered the applicant to pay costs [para. 19].

SOUTH AFRICA

Beja and Others v Premier of the Western Cape and Others

High Court (Western Cape)

29 April 2011⁷⁶

Keywords [Participation – Sanitation – Human dignity (violation) – Right to freedom and security of the person (violation) – Right to privacy (violation) – Right to adequate housing (violation) – Right to health (violation) – Marginalized or vulnerable persons – Informal settlement]

Abstract The provision of unenclosed toilets to a poor community amounts to a violation of fundamental rights as guaranteed under the Constitution of the Republic of South Africa and relevant legislation, and notably the right to human dignity and the right to adequate housing. Furthermore, the failure to provide for the meaningful participation of the community and failure to take account of the needs of vulnerable groups also rose to violations of the Constitution and relevant legislation.

Facts Within the framework of its international commitments⁷⁷ addressing ‘the plight of persons without adequate housing’ and in particular the Millennium Development Goals,⁷⁸ the South African Government designed an Upgrading of Informal Settlements Programme (UISP) to answer the special development needs of informal settlements [para. 9]. Accordingly, the City of Cape Town decided to upgrade three areas of informal settlements comprising 1,316 households located in Silvertown, Khayelitsha, called the ‘Silvertown Project’, in order to provide ‘interim services, full engineering infrastructure and relocation assistance’ [para. 11-13]. A Memorandum of Understanding governing the conduct of the project was signed by the Province of the Western Cape and the City [para. 14]. The City decided to set up one communal toilet for every five families living in the area on the three project sites [para. 15]. The installation started in 2007, and while the

76. *Beja and Others v Premier of the Western Cape and Others* [2011] High Court (Western Cape) 21332/10, [2011] ZAWCHC 97 <<http://www.saflii.org/za/cases/ZAWCHC/2011/97.html>>.

77. Vancouver Declaration on Human Settlements in ‘Report of Habitat: United Nations Conference on Human Settlements’ (Vancouver 31 May–11 June 1976) (11 June 1976) UN Doc A/CONF.70/15; Istanbul Declaration on Human Settlements and Habitat Agenda in ‘Report of the United Nations Conference on Human Settlements (Habitat II)’ (14 June 1996) UN Doc A/CONF.165/14.

78. UNGA Res 55/2 (8 September 2000) ‘United Nations Millennium Declaration’ UN Doc A/RES/55/2.

contractor had set up 63 toilets and 62 were being installed, the community required the installation to be suspended and communal toilets to be replaced by individual ones [para. 16]. The City then decided to construct individual toilets with cistern and water pipes, albeit without enclosing them. Community members were expected to enclose the toilets themselves [para. 17]. Construction of these toilets was carried out between May and December 2009. Most of these toilets were indeed enclosed by residents themselves, but some remained unenclosed. These were completely open and in full view of every person in the community, mostly situated close to the road, and referred to as ‘a loo with a view’ [para. 19]. Residents resorted to using blankets to cover themselves when using these toilets. The South African Human Rights Commission subsequently investigated a complaint regarding the lack of privacy provided by these toilets. As a result, the City attempted to enclose the remaining ‘open’ toilets. However, unknown members of the community resisted the works and broke down some of the structures built, so that the City interrupted construction. [para. 21-22].

In March 2010, the City enclosed 26 toilets but they were readily demolished by African National Congress Youth League members [para. 22]. Mrs Beja, aged 76, was attacked and stabbed after using one of the unenclosed toilets [para. 23]. The installation of toilets started again on 24 May 2010 but community members also demolished those [para. 25]. After judicial proceedings were initiated, the High Court undertook an on-site inspection [para. 28]. The judge deciding the case undertook a site visit to observe the situation on the ground. He found that the toilets which had to be enclosed by residents themselves were fixed with whatever mixed material that could be found, and most were unsatisfactory to satisfy dignity and privacy. Also, the toilets were not suited for handicapped, elderly or other vulnerable groups [para. 29]. Communal toilets were ‘in a bad state’, ‘filthy and underserviced with doors positioned in front of the road’ [para. 30].

Procedure Mrs Beja and two other individuals applied to the High Court against the City of Cape Town and others in November 2012 [para. 28]. Interim relief was granted by the Court in November 2010 consisting of, *inter alia*, temporary enclosures of the toilets [paras 31-32]. The City reported in December 2010 that it was unable to implement the interim order in part due to vandalism by some in the community [para. 35].

Claims The applicants sought to obtain an order from the Court which would recognise the violation of their constitutional rights on account of provision of open toilets in Makhaza [para. 7(1)]; declare any agreement

allegedly concluded by the community regarding the provision of unenclosed toilets to be unlawful and contrary to the Constitution [para. 7(1)]; enjoin the respondents to enclose all 1,316 toilets of the Silvertown Project in accordance with the UISP [para. 7(2)] and to comply with their obligations under the National Housing Code, the National Housing Act, and the Regulations Relating to Compulsory National Standards and Measures to Conserve Water [para. 7(3)].

Applicable Law and References to Regional or International Instruments

- Constitution of the Republic of South Africa, ss 1(a), 7(2), 10, 12, 14, 26 and 27⁷⁹
- National Housing Act, ss 2(1) and 9(1)⁸⁰
- National Housing Code⁸¹
- Regulations Relating to Compulsory National Standards and Measures to Conserve Water, reg 2

Court Rationale The Court observed that the issue of toilets or sanitation was not at the agenda of the meeting of November 2007 [para. 80] and that no minutes were taken and that the identity of the 60 people of the community who allegedly attended was not known [para. 83]. ‘Effective interactive participation’ is required under the National Housing Code and the UISP [para. 86]. The Court then referred to previous case law to conclude that ‘Community participation must preferably further be undertaken within the context of a structured agreement between the municipality and the community’ [para. 90]. It declared that ‘It is uncontentionous that the State’s housing policy ... contemplates consultation with the affected community’ and that ‘any agreement must reflect a proper consensus achieved with representatives and legitimate community leaders [para. 91]. While the municipality claimed to have collected ‘happy letters’ from the majority of the community [para. 93], the Court emphasised that ‘reference to a vague agreement is simply not good enough’ [para. 94]. It further highlighted that ‘Poor people enclosed toilets which were open, it seems, in desperation to salvage some basic element of human dignity. They did not do so as evidence of an agreement.’ [para. 95]. The Court then specified that:

The conclusion of agreements with communities for the purposes of giving effect to socio-economic rights is commendable. These agreements, to be enforceable, ought to at least satisfy four minimum requirements:

79. *Constitution of the Republic of South Africa* 1996.

80. National Housing Act 1997 (n° 107).

81. National Housing Code 2009.

(i) it must be concluded with duly authorised representatives of the community; (ii) it must be concluded at meetings held with adequate notice for those representatives to get a proper mandate from their constituencies; (iii) it must be properly minuted and publicised; (iv) it must be preceded by some process of information sharing and where necessary technical support so that the community is properly assisted in concluding such an agreement. None of these requirements were met in this matter [para. 98].

Even if an agreement satisfies all four requirements, an agreement cannot be a vehicle through which a majority within a community approve arrangements in terms of which the fundamental rights of a vulnerable community within that community will be violated. [para. 99]

Noting that in any case less than 1 per cent of the community took part in the November 2007 meeting [para. 100], the Court declared that ‘A collective agreement of this nature ... cannot amount to a waiver of individual fundamental rights to dignity and privacy’, which are of an individual nature [para. 101]. Furthermore, ‘[t]he alleged agreement made no provision for those who were unemployed and poor and could not fund the enclosure of their own toilets’, despite the obligation to take into account while ‘the needs of the most vulnerable and desperate’ under section 26(2) of the Constitution. Therefore, the Court found that ‘All of these are to be considered as a violation of fundamental rights of human beings’ [para. 102] and declared the agreement as not valid and enforceable, which ‘could not legitimise the installation of the unenclosed toilets’ [para. 106].

Moreover, the Court referred to section 9(1) of the Housing Act and paragraph 13.7.1 of the Housing Code which provide that access to adequate housing has to be realised on a progressive basis [para. 112]. It observed that the Court did not follow the norms and standards of the UISP as regards water, sanitation and hygiene [para. 115] as its ‘interpretation in relation to the upgrading of informal settlements that is entirely inconsistent with the programme itself’ [para. 116].

Eventually, while the City contended that ‘no-one was ever expected or compelled to use the individual unenclosed toilets in Makhaza before they were enclosed’ [para. 135], the Court referred to the right to bodily and physical integrity and rights to decent living conditions under section 12(2) and 14 of the Constitution [paras. 137-138]. It found the fact that ‘a 76 year old female, had to cover herself with a blanket to relieve herself’ ‘is neither humane nor

dignified.’ [para. 140]. The Court declared that the ‘minimum level of basic municipal services’ under section 73(1)(c) of the Local Government: Municipal System Act [para. 142] ‘would include the provision of sanitation and toilet services. Irrespective whether it is built individually on separate erven, or communally, it must provide for the safety and privacy of the users and be compliant with the fundamental rights guaranteed in the Constitution’ [para. 143]. Therefore, ‘the City lost sight of the needs of the poorest of the poor and their human dignity’ [para. 144] and did not comply with section 26 of the Constitution [para. 145]. The Court found that ‘[t]he City’s decision to install unenclosed toilets lacked reasonableness and fairness;’ and ‘was unlawful and violated constitutional rights’. It underlined that:

The legal obligation to reasonably engage the local community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents ‘with respect and care for their dignity’ was not taken into account when the City decided to install the unenclosed toilets. [para. 146]

Thereby, the Court found that Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water [para. 149] and sections 10, 12, 14, 24, 26 and 27 of the Constitution were violated [para. 150].

Decision The Court declared that the conduct of the respondent violated the provisions of sections 10, 12, 14, 26, 27 of the Constitution [Order para. 1] and any agreement concluded between the respondent and the community to be ‘unlawful and inconsistent with constitutional duties’ [Order para. 2]. It further ordered the respondent to enclose all 1,316 toilets of the Silvertown Project [Order para. 3] and to pay costs [Order para. 5].

Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others

Constitutional Court
19 November 2009⁸²

Keywords [Accessibility – Sanitation – Obligation to fulfil – Reasonableness standard – Minimum core obligations – Right to adequate housing (non-violation) – Informal settlement]

Abstract The right of access to adequate housing cannot be construed as encompassing basic sanitation since South African law does not purport to establish minimum standards to which everyone should be entitled to. However, the delay in reaching a decision on whether to upgrade the status of the informal settlement to that of a township, which would result in provision of sanitation, was unreasonable and thus in violation of the right to adequate housing enshrined in section 26 of the Constitution of the Republic of South Africa.

Facts Residents of the Harry Gwala Informal Settlement, including Mr Johnson Matotoba Nokotyana, were deprived of basic services, in particular sanitation facilities. The settlement originated from the occupation of empty land owned by the South African Iron and Steel Industrial Corporation (ISCOR) in Wattville Township. While ISCOR began a relocation process, Mr Nokotyana and others residents refused to leave the settlement. In 2006, the Ekurhuleni Metropolitan Municipality (EMM) submitted a proposal to upgrade the Settlement to a formal township, which would entitle them to basic services. Three years later, no final decision was taken and thus no improvement of the situation was realized [page 5].

Procedure Mr Nokotyana and other residents applied to the High Court (South Gauteng) to obtain that the EMM provide them with, *inter alia*, temporary sanitation facilities and communal water taps until a final decision on whether their informal settlement would be upgraded to a formal township is made. The High Court partially granted the application as it ordered

82. *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] Constitutional Court CCT31/09, [2009] ZACC 33 <<http://www.saflii.org/za/cases/ZACC/2009/33.pdf>>.

the EMM to immediately provide water taps and refuse removal services. The High Court however rejected the claim for the provision of temporary sanitation facilities and high-mast lighting, as a request for these services would only apply after a decision had been taken to upgrade the informal settlement. The Court also found no suggestion that the Municipality was not carrying out its obligations to take all reasonable and necessary steps, within the framework of national and provincial housing legislation and policy, to ensure that services are provided in a manner which is economically efficient. [page 7]. Mr Nokotyana appealed to the Constitutional Court [page 8].

Claims The applicants alleged that they were entitled to a mandatory minimum core content of free basic sanitation services in accordance with the right to adequate housing in conjunction with the Housing Act, the National Housing Code and the Water Services Act [page 13]. They contended that the new policy of the respondent aiming at providing one chemical toilet per ten families could not be regarded as an adequate measure to realise the right to adequate housing under section 26(1) and (2) of the Constitution [page 10]. The applicants sought to obtain an order directing the respondent to provide one ventilated improved pit latrine (referred to as ‘VIP latrine’) per household or alternatively one VIP latrine per two households [page s. 11-12].

Applicable Law and Reference to Regional or International instruments

- Constitution of the Republic of South Africa, s 26⁸³
- Housing Act, s 9(1)⁸⁴
- National Housing Code, ch 13⁸⁵
- Regulations Relating to Compulsory National Standards and Measures to Conserve Water, reg 2⁸⁶
- Water Services Act, s 3⁸⁷

Court Rationale

The Court first declared that the claim of the applicants regarding the new policy of the respondent was inadmissible because it was not part of their case before the High Court [page 17]. The Court then declared that Chapter 12 of the National Housing Code, which provides for housing assistance

83. Constitution of the Republic of South Africa 1996 (as amended).

84. Housing Act 1997 (n° 107).

85. National Housing Code 2009.

86. Regulations Relating to Compulsory National Standards and Measures to Conserve Water, Government Notice R509 in *Government Gazette* 22355 of 8 June 2001.

87. Water Services Act 1997 (n° 106).

in emergency circumstances, was not applicable in the case at issue since no emergency situation was found by the Member of the Executive Council for Local Government and Housing of the Province of Gauteng nor did the applicants apply for a declaration to that effect. Furthermore, Chapter 12 does not purport to establish minimum standards but rather how to regulate the situation pending a decision on whether or not to upgrade [page s. 20-21]. It further stated that Chapter 13 of the National Housing Code, which deals with the upgrading of informal settlements, could only be relied upon after the decision to upgrade the settlement had been taken. Consequently, the applicants could not invoke these provisions [page 22].

Regarding the issue of VIP latrines, the Court ruled that it could not adjudicate on the Municipality's new policy to supply the settlement with one chemical toilet per every ten families, since this argument was added on appeal (pp. 22-23). On this issue, the Court did explain that it justified the decision of the Municipality to not provide this particular settlement with more toilets per households, as many more settlements under this Municipality were facing similar situations, and it would '*not be just and equitable to make an order that would benefit only those who approached a court*' (p. 27). The Court further did not accept the applicants' claim that the right of access to adequate housing must be interpreted in such a way as to include basic sanitation, considering that Chapters 12 and 13 of the National Housing Code 'do not purport to establish minimum standards' [page 24]. Considering the application of the right to human dignity to the case at issue, the Court agreed that '[i]t is incontestable that access to housing and basic services is important and relates to human dignity.' However, it specified that '[i]t remains most appropriate to rely directly on the right of access to adequate housing, rather than on the more general right to human dignity.' [page 25].

Regarding the delay of more than three years to reach a decision to upgrade the Settlement to a township, however, the Court recalled that '[t]he provincial government should take decisions for which it is constitutionally responsible, without delay.' It found that '[a] delay of this length is unjustified and unacceptable' [page 27], as it does not comply in particular 'with the requirement of reasonableness imposed on the government by section 26(2) of the Constitution with regard to access to adequate housing' It argued; '*As long as the status of the Settlement is in limbo, little can be done to improve their situation regarding sanitation, sufficient lighting to enhance community safety and access by emergency vehicles, as well as a range of other services*' [page s. 27-28].

Decision The Court dismissed the appeal but ordered the respondent provincial government to take a decision on the upgrade of the settlement within 14 months [page 30].

Mazibuko and Others v City of Johannesburg and Others
(Centre on Housing Rights and Evictions, Amicus Curiae)

Constitutional Court of South Africa (CCT 39/09) [2009]
ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC)
8 October 2009⁸⁸

Keywords [Non-discrimination – Availability – Right to water (non-violation) – Obligation to Fulfil – Constitutional guarantees – Disconnection of water supply – Pre-paid water meter]

Abstract The Mazibuko case concerned the constitutionality of Johannesburg's Free Basic Water Policy and of the installation of pre-paid water meters in poorer sections of the municipality.

Facts The applicants in this case were five residents of Phiri in Soweto, an area of Johannesburg that was developed during apartheid, when black people were not allowed to live in the same areas as white people. The residents of Phiri are generally poor. In Phiri, as in all residential areas established for black African people during apartheid, residents were charged for water using a deemed consumption system, so that charges did not correspond with the actual amount used. Monthly consumption far exceeded the amount of water that was charged for, but it was unclear how much of this excess amount was due to leakages. Many residents of Phiri did not pay the deemed consumption charges, so that an estimated 75% of the water supplied to Phiri was unaccounted for. In response to this problem, the City of Johannesburg developed a plan to reduce unaccounted for water, rehabilitate the network, reduce water demand and improve the rate of payment. The City abandoned the deemed consumption system and offered three levels of service provision: (1) a tap within 200 metres of each dwelling; (2) a yard connection with a restricted flow of 6 kilolitres per month; and (3) a pre-paid metered connection. Phiri was selected as the pilot area for the project and implementation began in February 2004. Community facilitators then visited all households. All but eight of the 1,771 households selected option 2 or 3, with a vast majority choosing option 3 (pre-paid meter) over option 2 (restricted flow). Some households contended that they were not given an option but had to opt for pre-paid meters. If households refused both

88. Original version available at: <http://www.saflii.org.za/za/cases/ZACC/2009/28.pdf>.

options 2 and 3, their water connection was cut off with seven days notice. [paras.10-17].

Procedure The applicants challenged the water services as outlined in the facts at the High Court. The High Court decided in favour of the applicants. The respondents then appealed the High Court order to the Supreme Court of Appeal. The Supreme Court of Appeal varied the High Court's order by mandating that 42 litres of water per day would constitute a sufficient quantity for residents, within the meaning of section 27 of the Constitution. The applicants subsequently sought leave to appeal to the Constitutional Court in part against the order made by the Supreme Court of Appeal. The respondents sought leave to cross appeal the order of the Supreme Court [paras. 30-32].

Claims The applicants argued that the City's policy of supplying 6 kilolitres of water for free to every household was in violation of section 27 of the Constitution. They also sought a declaration that the installation of pre-paid meters was unlawful [para. 25]. The High Court decided in favour of the applicants. It argued that pre-paid meters that halt water supply until residents buy new credit gives rise to unlawful and unreasonable discontinuation of supply. It also found the service to be discriminatory because residents of Phiri were not given the same options as residents in other areas, particularly inhabited by white people [para. 26].

The respondents appealed the High Court order to the Supreme Court of Appeal. The Supreme Court varied the High Court's order by mandating that 42 litres of water per day would constitute a sufficient quantity for residents, within the meaning of section 27 of the Constitution. The Court directed the City to reformulate its policy in accordance with its order. The Court also held that the installation of pre-paid water meters was unlawful on the ground that the City's by-laws did not make provision for them in these circumstances. The Court gave the City two years to rectify the by-laws, thus suspending the order of invalidity for this period [paras. 28-29].

The applicants subsequently sought leave to appeal to the Constitutional Court in part against the order made by the Supreme Court of Appeal. They sought the reinstatement of the High Court order. They did not seek to appeal against the order declaring the use of pre-paid water meters unlawful, but they did seek to appeal against the suspension of the order of invalidity of pre-paid meters for two years. They argued that the Supreme Court of Appeal had not considered the manner in which the pre-paid meters had

been installed. [para. 30]. The respondents sought leave to cross appeal the order of the Supreme Court [paras. 30-32].

Applicable law and reference to regional or international instruments

- Constitution of the Republic of South Africa⁸⁹
- Water Services Act⁹⁰
- National Water Standards Regulations⁹¹
- City of Johannesburg Metropolitan Municipality Water Services By-Laws⁹²
- International Covenant on Economic Social and Cultural Rights⁹³

Court Rationale The Constitutional Court concluded that the City's efforts to counteract the problem of acute water losses and a history of non-payment for water use were appropriate and not discriminatory against the applicants [paras.148 -157]. The Court explained: *'If we now consider the three matters relevant to the determination of fairness, we can see that although the group that is affected by the installation of pre-paid water meters is a vulnerable group, the purpose for which the meters are installed is a laudable, indeed necessary, government objective, clearly tailored to its purpose. Moreover, the difference between the pre-paid meter system and a credit meter system is not disadvantageous to the residents of Phiri. In the circumstances, it cannot be said that the introduction of a pre-paid water meter system in Phiri was unfairly discriminatory. It found the fact of the City having changed its FBW [Free Basic Water] policy in the course of the litigation evidence of flexibility and therefore reasonableness, as required in South African law in order for a programme to be constitutional.'* Furthermore: *'Underlying the preceding consideration of the unfair discrimination argument is the fact that government has the authority to decide how to provide essential services, as long as the mechanism it selects is lawful, reasonable and not unfairly discriminatory. The prohibition on unfair discrimination does not mean that government, in deciding how to provide essential services, must always opt for a uniform system if local circumstances vary. The conception of equality in our Constitution recognises that, at times, differential treatment will not be unfair. Indeed, correcting the deep inequality which characterises our society, as a consequence of apartheid policies, will*

89. Constitution of the Republic of South Africa, 1996. Available at: <http://www.info.gov.za/documents/constitution/>.

90. Water Services Act 108 of 1997. Available at: <http://www.dwaf.gov.za/Documents/Legislature/a108-97.pdf>.

91. National Water Standards Regulations, Government Gazette n° 22355, Notice R509 of 2001. Available at: http://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/SA/SA1%20-%20South%20Africa%20Watsan%20Regulations.pdf.

92. City of Johannesburg Metropolitan Municipality Water Services By-Laws. Available at: http://www.johannesburgwater.co.za/uploads/documents/Customr_Services/water_bylawso8.pdf.

93. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

often require differential treatment.' [para. 156]. Having accepted that pre-paid meters were not discriminatory, it also found them to be lawful, particularly since the supply was only suspended and not discontinued [paras.120, 158]. Applying the 'reasonableness standard', the Court concluded that it was not unreasonable for the City not to have supplied more free basic water than provided under the City's Free Basic Water policy, and that the City's policy had changed in the course of the litigation, which was evidence of the constitutionality of the City's Free Basic Water programme.. The appeal by the City of Johannesburg, Johannesburg Water (Pty) Ltd. and the Minister of Water Affairs and Forestry was upheld. And the orders of the South Gauteng High Court and the Supreme Court of Appeal were set aside [paras. 166-171].

Decision

The Constitutional Court dismissed the appeal of the residents of Phiri (the applicants) and upheld the cross-appeal by the respondents. However, the Court noted that 'This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy-making process. The applicants, in argument, rued the fact that the City had continually amended its policies during the course of the litigation. In fact, that consequence of the litigation (if such it was) was beneficial. Having to explain why the Free Basic Water policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation.'⁹⁴

94. Ibid.

Highveldridge Residents Concerned Party v Highveldridge TLC and Others

High Court (Transvaal Provincial Division)
17 May 2002⁹⁵

Keywords [Affordability – Water – Right to water (violation) – Children – Vulnerable persons – Disconnection of water supply – Defaulting payment – Informal settlement]

Abstract Any pecuniary losses that a water company might suffer cannot outweigh human needs occurring due to drinking water shortage and justify arbitrary disconnections of water supply under the Constitution of the Republic of South Africa.

Facts The water supply of several households in the Lebohang Township had been disconnected from 1 July 2001 onwards [para. 2]. While 28 residents reported that they paid their bills or had been overcharged, these arguments failed to have the water supply re-established [para. 27]. The public water company Highveldridge TLC argued that there was no such disconnection, and that a possible interruption of the water supply could have been due to the erection of a new water reservoir or a 'faulty valve'. It also emphasised that according to agreements with consumers, water supply is disconnected in case of non-payment [para. 28].

Procedure The Highveldridge Residents Concerned Party, a voluntary association representing the residents of the Lebohang Township, applied to the High Court seeking a spoliation order⁹⁶ [para. 3].

Claims The applicant notably alleged that the termination of the water supply was an administrative action of an unlawful, unreasonable and procedurally unfair character under section 33(1) [para. 3]. It further sought interim relief and requested the Court to order the immediate reconnection of residents' premises to the water supply [para. 4].

95. *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others* [2002] High Court (Transvaal Provincial Division) 28521, (2002) (6) SA 66.

96. A spoliation order – also called *mandament van spolie* – is granted by a court in order to return without delay an item of property to its owner.

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Republic of South Africa, ss 27, 28(1)(c), 28(1)(d) and 33(1)

Court Rationale The Court first found that the applicant had locus standi in the matter at issue, taking into account ‘the interests of the ‘poorest in our society’ who are often not in a position where legal advice is readily accessible and who are more often than not, dependent upon action taken by informally structured associations of civil society’ [para. 24]. The Court considered that a ‘well-grounded apprehension of irreparable harm’ to the applicant existed if the interim relief was not granted [para. 32]. The Court made an assessment of the balance of convenience and emphasised that ‘any pecuniary losses which the respondents might suffer cannot outweigh human need (and possibly human suffering) which will probably occur due to a lack of fresh water’ [para. 33]. The Court further declared that the matter at issue was justiciable in light of sections 27, 28(1)(c) and (d) of the Constitution [para. 34].

Decision The Court granted leave to the applicant to act as representative in the interest of inhabitants whose water supply had been disconnected, should clear consent from the residents and identification of their names and addresses be provided. The Court further granted interim relief and ordered the water supply to be reinstated pending the judgment on the merits. The respondents were ordered to pay costs [para. 40].

Government of the Republic of South Africa and Others v Grootboom and Others

Constitutional Court

4 October 2000⁹⁷

Keywords [Availability – Accountability – Non-discrimination and Equality – Obligation to Fulfil – Informal Settlements – Forced Eviction]

Abstract In this seminal case, the Constitutional Court held that the State is obliged to take positive action to meet the needs of people living in extreme poverty, in particular homeless people or those living in intolerable living conditions. Access to water and sanitation were key components of the Grootboom case, which provided the first occasion for the Constitutional Court to affirm the full justiciability of the obligation to fulfil socio-economic rights with the development of the ‘reasonableness standard’ as a means of measuring implementation of that obligation.

Facts Mrs. Irene Grootboom and others (510 children and 390 adults) were evicted from the ‘New Rust’ informal settlement on private land that was earmarked for low-cost housing development [paras.3, 4, 7]. The eviction took place in May 1999, at the beginning of winter. The homes and possessions of community members were destroyed and many were unable to salvage their belongings. The community then took shelter on a nearby sports field, using mostly plastic sheeting that gave little protection against winter rains. The way the eviction was carried out was described as reminiscent of apartheid times. No mediation took place [paras.10-11].

Procedure Mrs. Irene Grootboom and others from her community applied to the High Court to enforce their Constitutional right to adequate housing, after the Municipality failed to provide them with sufficient food and shelter. The High Court’s decision was in favour of the applicants. The national and provincial governments, the Cape Metropolitan Council and the Oostenberg Municipality (the appellants) appealed to the Constitutional Court against this High Court judgement.

97. *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] Constitutional Court CCT11/00, [2000] ZACC 19 <<http://www.saflii.org/za/cases/ZACC/2000/19.html>>.

Claims While the community never challenged the eviction order itself, they did demand the provision of temporary accommodation from the Municipality. The Municipality offered food and shelter at a community hall, which could only accommodate 80 persons. The community then applied to the High Court for an order requiring Government to provide adequate basic shelter or housing until they obtained permanent accommodation and were granted relief.⁹⁸

Applicable law and reference to regional or international instruments

- South African Constitution⁹⁹
- Convention on the Rights of the Child¹⁰⁰
- International Covenant on Economic Social and Cultural Rights¹⁰¹
- CESCR General Comment n° 3, 1990¹⁰²

Court Rationale The High Court ordered the government authorities to provide the children and their parents with shelter. The judgement provisionally concluded that *'tents, portable latrines and regular supply of water (albeit transported) would constitute the minimum'*¹⁰³[para. 4].

The Constitutional Court in appeal held that the State is obliged to take positive action to meet the needs of people living in extreme poverty, in particular homeless people or those living in intolerable living conditions: *'The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.'* [para. 24].

In the *Grootboom* judgement, the Constitutional Court developed the notion of reasonableness, laying down that section 26 (2) and 27 (2) of the Constitution respectively oblige the State to establish a coherent programme directed toward the progressive realisation of the rights enshrined in these

98. *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

99. The South African Constitution. Available at: <http://www.info.gov.za/documents/constitution/>.

100. Available at: <http://www.ohchr.org/en/professionalinterest/page s/crc.aspx>

101. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

102. UN CESCR 'General Comment 3' (n 21),

103. *Ibid.* para. 293A.

sections. State measures must be reasonable in their conception as well as in their implementation, which includes that a programme is balanced and flexible and takes account of short-, medium- and long-term needs [para. 43]. In particular, the Court explained, '*[A] programme that excludes a significant segment of society cannot be said to be reasonable*' [para. 43]. This referred in particular to those in society whose needs are most urgent, with the Court explicitly stating that measures that fail to respond to the needs of the most desperate do not pass the test of reasonableness [para. 44].

Although the rationale of this case was the right to adequate housing, the Court stated repeatedly that all socio-economic rights have to be read and interpreted jointly [paras. 25, 75] and made explicit allusion to section 27 of the Constitution which protects the right to water [paras. 36, 78]. The Court emphasized that; '*the poor are particularly vulnerable and their needs require special attention*' [para. 36].

Decision The Constitutional Court held that even if resources are not immediately available, the State must have a reasonable plan of action to progressively fulfill the right, must devote reasonable resources to implement that plan, and that any plan that leaves marginalized or vulnerable communities out, is inherently unreasonable. Specifically, the Court held that section 26 obliges the State to '*devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations*' [para. 95]. The Court then ordered the government to '*devise, fund, implement and supervise measures to provide relief to those in desperate need*' [paras. 96 & 99(2)(a)]. In its conclusion, the Court held that '*the Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants*' [para. 93].

ARGENTINA

Defensor del Pueblo de la Nación c/ Estado Nacional y Provincia del Chaco

Suprema Corte

18 September 2007¹⁰⁴

Keywords [Availability – Water (obligation to fulfill) – Rights to life and health (threat) – right to an adequate standard of living (positive obligations) – Indigenous people – Precautionary measures]

Abstract The Government is obliged to provide drinking water, food and health assistance to the indigenous communities living in areas under its control.

Facts According to a survey by the National Ombudsman Office (August 2007), reports from the Chaco Aboriginal Institute (*Instituto del Aborigen Chaqueño*), the Ministry of Justice and Human Rights, and the news, the indigenous communities, mostly of Toba ethnic origin, living in certain areas of the Province of Chaco lived in extreme poverty, which caused most of the population to suffer from endemic illnesses (malnutrition, chagas, tuberculosis, bronchial infections, parasitosis, scabies, etc), lacking in food, access to clean water, housing and necessary medical care. As a result of this health and food crisis, in the month prior to the injunction application, 11 people have died [p.5, 6].

Procedure In September 2007, the National Ombudsman (*Defensor del Pueblo*) applied for an injunction to the National Supreme Court of Justice against the National State of Argentina (*Estado Nacional*) and the Province of Chaco, seeking, as a matter of urgency, the adoption of concrete interim measures to satisfy the most basic needs of the indigenous communities [p. 7].

Claims The Ombudsman claimed that the Government, at national and provincial levels, had allegedly failed to comply, through omission, with its obligations to guarantee the enjoyment, by these indigenous communities,

104. *Defensor del Pueblo de la Nación c/ Estado Nacional y Provincia del Chaco* [2007] Suprema Corte D.587.XLIII, <http://odhpi.org/wp-content/uploads/2012/07/Fallo-Chaco-defensor-del-pueblo.pdf>.

of the rights to an adequate standard of living, life, health, food, drinking water, education, housing, work, and social inclusion, all guaranteed by the Constitution and laws of Argentina and of the Province of Chaco, as well as by international human rights treaties [p. 5]. The Ombudsman sought, through the injunction, the urgent provision, by the national and provincial authorities, of medical assistance, food, drinking water, clothes, blankets, etc in sufficient quantities. Also periodically and in a documented way, the defendants should show evidence of the measures they have taken [p. 7].

Applicable law and reference to regional or international instruments:

- National Constitution of Argentina – Arts. 14 bis, 19, 33 and 75, paras. 17 and 19¹⁰⁵
- Provincial Constitution of Chaco – Preamble and Arts. 14, 15, 35-37¹⁰⁶
- American Convention on Human Rights – Arts 4, 25¹⁰⁷
- American Declaration of the Rights and Duties of Man – Arts. 11, 12, 28¹⁰⁸
- Universal Declaration of Human Rights – Arts. 1, 3, 8, 25¹⁰⁹
- International Covenant on Economic, Social and Cultural Rights – Arts. 11, 12¹¹⁰
- Convention on the Elimination of all Forms of Discrimination Against Women¹¹¹
- ILO Indigenous and Tribal Peoples Convention (Nº 169)¹¹²

Court Rationale The Supreme Court held that there was a sufficient likelihood for the claims to be justified and in particular, there was the possibility of permanent or irreparable damage to rights guaranteed by the Constitution if no action was taken [p. 8].

Decision The Supreme Court granted the injunction. Without prejudice to the main proceedings, the Court ordered the National State of Argentina and the Province of Chaco to provide drinking water and food to the indigenous communities living in the area, as well as adequate means of transport and communication to each of the health posts. It further ordered that the

105. National Constitution of Argentina (Constitución Nacional de Argentina). Available at: <http://www.hcdn.gov.ar/dependencias/dip/congreso/Constitucion%20osola.pdf>

106. Available at: http://www.ambiente.gov.ar/archivos/web/biblioteca/File/Contituciones/cp_chaco.pdf

107. Available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

108. Available at: <http://www.oas.org/en/iachr/mandate/Basics/declaration.asp>

109. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III). Available at: <http://www.un.org/en/documents/udhr/>

110. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

111. Available at: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

112. Available at: <http://www.ilo.int/indigenous/Conventions/no169/lang--en/index.htm>

defendants inform the Court, within 30 days, about the implementation of a number of protection measures and programmes related to water supply, health care, food, housing, education and others, as well as budget allocations and data on the number of communities and community members living in the area [p. 9].

The annual report of the National Ombudsman of 2007 indicates that the National State of Argentina and the Province of Chaco were in the process of implementing the interim measures as a result of the injunction.¹¹³ However, in 2014, the National Ombudsman again brought the case to the attention of the Supreme Court over concerns that the interim measures to ensure access to food and safe water were not being complied with.¹¹⁴

113. Decimo Cuarto Informe Anual – 2007, Defensor del Pueblo de la Nación, p. 6. Available at: http://www.dpn.gob.ar/informes_anuales/ianual2007.pdf.

114. Defensor del Pueblo, Province of Chaco, 'Pedido ante la Corte para que se cumpla la cautelar de protección a los derechos de aborígenes', <http://www.defensorchaco.gov.ar/index.php/prensa/519-pedido-ante-la-corte-para-que-se-cumpla-la-cautelar-de-proteccion-a-los-derechos-de-aborigenes>

Asociación Civil por la Igualdad y la Justicia c/ Gobierno de la Ciudad de Buenos Aires

Cámara de Apelaciones en lo Contencioso Administrativo y Tributario (Ciudad Autónoma de Buenos Aires) 18 July 2007¹¹⁵

Keywords [Availability – interruption of emergency water supply – vulnerable groups – right to water – Obligation to fulfil]

Abstract The State has the obligation to adopt positive measures to ensure the enjoyment of, at least, minimum essential levels, of the right to water to its population, especially those who live in an extremely precarious situation.

Facts Four areas in Villa 31 bis, an informal settlement in central Buenos Aires, are not connected to the water supply network. The residents of these areas have been supplied water for domestic purposes by means of water cistern trucks as an emergency solution. This supply was interrupted by the City of Buenos Aires in June 2006. Residents first approached the Housing Institute of the City of Buenos Aires, but received no reply.

Procedure The residents represented by the Civil Association for Equality and Justice (*Asociación Civil por la Igualdad y la Justicia*) applied for an injunction against the City of Buenos Aires at the local Administrative and Fiscal Court. The Court granted the injunction. The City of Buenos Aires appealed to the Appeal Chamber for Administrative and Fiscal Matters against this decision. The Appeal's Chamber upheld the decision of the Court in first instance.

Claims The applicants applied for an injunction against the City of Buenos Aires to seek, as a matter of urgency, the adoption of the necessary measures to reestablish their water supply.

Applicable law and reference to regional or international instruments

- Constitution of the City of Buenos Aires – Arts. 10, 17, 27, 31¹¹⁶

115. Spanish original version available at: www.acij.org.ar/blog/2011/12/13/sentencia-por-agua-en-la-villa-31-bis/. Translation of court quotations by the authors.

116. Constitution of the City of Buenos Aires (Constitucion de la Ciudad de Buenos Aires). Available at: http://www.buenosaires.gob.ar/areas/com_social/constitucion/completa.php.

- National Constitution of Argentina – Art. 19¹¹⁷
- Universal Declaration of Human Rights – Art. 25¹¹⁸
- International Covenant on Economic, Social and Cultural Rights – Arts. 2, 11¹¹⁹
- Convention on the Elimination of all Forms of Discrimination Against Women – Art. 14, para. 2 (h)¹²⁰
- International Convention on the Elimination of All Forms of Racial Discrimination – Art. 5¹²¹
- Convention on the Rights of the Child – Arts. 24, para. 2 (c) and 27, para. 3¹²²
- CESCR General Comment N°15¹²³
- CESCR General Comment N°14, para. 15¹²⁴
- CESCR General Comment N° 3, para. 10¹²⁵
- The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 9¹²⁶

Court Rationale In first instance, the local Administrative and Fiscal Court granted the injunction. It ruled that the City of Buenos Aires must guarantee, as an interim measure, the provision of water to all the residents of areas 11 to 14, until such time as it can offer another alternative, which ensures the normal provision of water services. Until this is possible, water must be provided by means of three cistern trucks that should supply as much water as necessary, *‘between 8 am and 10 pm every day of the week, including Sundays, not forgetting the filling up of reserve tanks’*. On appeal, the Appeal’s Chamber applied the Constitution of the City of Buenos Aires¹²⁷, the National Constitution of Argentina¹²⁸, the ICESCR, General Comment N°3 and General Comment N°15. It also referred to a series of international human rights treaties and instruments, which recognise the right to water and in some cases the right to sanitation.

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117. Constitution of Argentina (Constitución Nacional de Argentina). Available at: <http://www1.hcdn.gov.ar/dependencias/dip/congreso/Constitucion%20osola.pdf>.
118. Universal Declaration of Human Rights. Available at: <http://www.un.org/en/documents/udhr/>
119. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>
120. Available at: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>
121. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>
122. Available at: <http://www.ohchr.org/en/professionalinterest/page/s/crc.aspx>
123. Available at: <http://www.unhchr.ch/tbs/doc.nsf/o/a5458d1d1bbd713fc1256cc400389e94>
124. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)
125. Available at: <http://www.unhchr.ch/tbs/doc.nsf/o/94bdbaf59b43a424c12563ed-0052b664?Opendocument>
126. Available at: http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html
127. Constitution of the City of Buenos Aires (Constitucion de la Ciudad de Buenos Aires). Available at: http://www.buenosaires.gob.ar/areas/com_social/constitucion/completa.php.
128. Constitution of Argentina (Constitución Nacional de Argentina). Available at: <http://www1.hcdn.gov.ar/dependencias/dip/congreso/Constitucion%20osola.pdf>.

The Appeal's Chamber held that the right to water is a fundamental human right that can not be overlooked by State authorities (through action or omission), as it constitutes an essential component of the most elementary human rights such as the right to life, autonomy and human dignity. Any violation of the access to this basic and fundamental human right gives grounds to an injunction order with a view to re-establish its enjoyment, as it happens in this case [p. 13]. When an individual or group of individuals can not enjoy a fundamental right such as access to potable water, the State has the obligation to adopt the relevant measures to provide basic levels of its enjoyment [p. 14]. This obligation prevails even in exceptional times of crisis or emergencies, especially in relation to groups that live in an extremely precarious situation. The right to water is an operative right that must be complied with, without delays and without the need to pre-establish regulations determining in which ways it should be enjoyed [p. 14].

The Court added that it is possible in this case to distinguish between the State obligation to guarantee minimum levels of access to water to the residents of areas 11 to 14 of Villa 31 bis and the duty of the City of Buenos Aires to implement measures to gradually improve the provision and the distribution systems of this essential element for human life. In this case, the supply of potable water through cistern trucks every day of the week and in sufficient quantities for the personal and domestic uses of the residents of areas 11-14, is the minimum the State is obliged to provide them. The Court concluded that the measure imposed by the decision in first instance, constitutes precisely that '*minimum obligation to ensure the enjoyment of, at least, essential levels*' of the rights recognised in the ICESCR, in the terms of General Comment N°3, para. 10. Furthermore, the decision of the Court in first instance respected the principle of non-retrogression, which prohibits public authorities to adopt measures that reduce the level of enjoyment of social rights by the population, especially those living in precarious situations and affected by social exclusion [p. 16]. The Court concluded that while the State may chose different alternatives to implement its health policy, in the interim, it must guarantee without exception, delay and interruption, the water supply in accordance with the basic needs of the affected population [p. 17]. The Appeals Court confirmed the decision of the Court in first instance.

Decision The Chamber for Administrative Matters upheld the decision of the Court in first instance. In August 2007, the City of Buenos Aires resumed the supply of water by means of cistern trucks . In October 2007, the City began constructing drinking water networks and sewage systems.

ARGENTINA

Marchisio José Bautista y Otros c/ Superior Gobierno de la Provincia de Córdoba y Otros

Juzgado de Primera Instancia Civil y Comercial (Ciudad de Córdoba)

14 October 2004¹²⁹

Keywords [Quality – Accountability – Water – Right to health and Right to a healthy environment (violation) – wastewater treatment – Water resources pollution – Obligation to respect – Obligation to fulfil]

Abstract The pollution of the water of the river Suquía and, as a result, the contamination of water wells, supplying water for human consumption, due to the malfunctioning of a wastewater treatment plant, under the control of the municipality compromises the right to health and to a healthy environment as protected by the National Constitution of Argentina and the Consitution of the Province of Córdoba.

Facts The Municipality of Córdoba authorised new connections to the sewage network of a wastewater treatment plant (EDAR) without taking into consideration the necessary expansion of the plant. The plant's maximum treatment capacity should not exceed 111.000m³ per day or 4.625 m³/per hour, but it was currently receiving an average flow of 6.250m³/per hour, disposing into the Suquía river an effluent exceeding the permitted legal parameters [V]. This led to a malfunctioning of the plant, which in the last five years had been lacking minimum maintenance works. The saturation of the plant's operational capacity had, as an immediate and direct effect, the contamination of the Suquía river and the contamination of the applicants' water wells. The applicants and their families do not have access to the water network or any other water system other than the wells. They use the water from the wells for personal and domestic purposes. Analysis to the water by the Centre of Applied Chemistry revealed high levels of coliform bacteria and specifically of fecal coliform. During the course of the dispute

129. *Marchisio José Bautista y Otros c/ Superior Gobierno de la Provincia de Córdoba y Otros* [2004] Juzgado de Primera Instancia Civil y Comercial (Ciudad de Córdoba) 500003/36 <<http://wp.cedha.net/wp-content/uploads/2011/06/Sentencia-Chacras.pdf>>. Neither paragraph nor page numbers are available for this case.

the Municipality recognised that some of the current plant's facilities are on the verge of collapse and urgently need to be repaired or replaced.

Procedure Mr José Bautista and others applied for an injunction order (acción de amparo) to the Civil and Commercial First Instance Court against the Municipality of Córdoba (first respondent) and the Province of Córdoba (second respondent).

Claims The applicants alleged that their rights to health, to a healthy environment and to a decent quality of life were violated and that the enjoyment of these rights urgently needed to be restored through the provision of safe drinking water. The applicants claimed that the Municipality of Córdoba is responsible for the operation of the wastewater treatment plant, which was contaminating the river Suquía and that the Province of Córdoba is responsible for ensuring that the watercourses/aquifers (cursos de agua) of the Province were not contaminated, and it had the obligation to guarantee the right to health to the Province's inhabitants and consequently provide the applicants with safe, potable water.

Applicable Law and Reference to Regional or International Instruments

- CESCR General Comment N° 15¹³⁰
- National Constitution of Argentina – Art. 41¹³¹
- ICESCR – Arts. 11 and 12¹³²
- General Environmental Law – Art. 4¹³³
- Provincial Constitution of Córdoba – Arts. 59, 66 and 174¹³⁴
- Regulatory Framework for the Provision of Public Water and Sanitation Services in the Province of Córdoba – Art. 55¹³⁵
- Universal Declaration of Human Rights – Art. 25¹³⁶
- Córdoba's Citizen's Charter (Law 8835) – Art. 8 (c)

130. UN CESCR 'General Comment 15' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9.

131. Constitución de la Nación Argentina 1994 (as amended).

132. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

133. Ley n° 25.675 de Política Ambiental (also referred to as follows: Ley General del Ambiente 2002 (n° 25675)).

134. Constitución de la Provincia de Córdoba 1987 (as amended).

135. Decreto n° 529/94 Aprobación del Marco Regulador para la Prestación de Servicios Públicos de Agua Potable y Desagüe Cloacales de la Provincia de Córdoba 1994.

136. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

Court Rationale The Court referred to article 4 of the General Environmental Law, which highlights the ‘immediacy with which environmental issues must be resolved, and states that the causes and sources of environmental problems shall be addressed as a priority’. It added that when such an essential element for life and health, as potable water, is at stake, measures must be taken immediately [Cons.IV]. The Court found a clear violation of article 55 of the *Regulatory Framework for the Provision of Public Water and Sanitation Services in the Province of Córdoba*, which states that ‘the provision of drinking water and sanitation services must be delivered taking specially into account the protection of public health and the environment. The non-compliance with the Regulatory Framework ‘clearly affects the constitutional right to a healthy environment recognised under article 41 of the National Constitution and is not in conformity with the special protection conferred to water by article 66 of the Provincial Constitution of Córdoba. [Cons.V].

Regarding the Municipality (first respondent), the Court observed that while a Comprehensive Sewage Plan foreseeing the rehabilitation and expansion of the plant had been presented, no concrete and effective measures had been adopted to, at least, mitigate the environmental damage caused by the plant. The Court highlighted that it was imperative to, at least, adopt provisional measures to reduce the environmental impact caused by the plant. [Cons.VI].

Regarding the Province of Córdoba (second respondent), the Court found that there had been no omission or lack of monitoring of the safety of the river water. [Cons.VII]. Concerning the contamination of the water wells, the Court considered as proved that the applicants’ only source of water had been contaminated with fecal coliforms and as a result was not fit for human consumption. It referred that the Universal Declaration of Human Rights, in its article 25, states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family; and that this is reiterated in more detail by Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. It further referred to General Comment N° 15 where the Committee noted that ‘*the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights*’. The Court concluded that ‘access to clean water is a right, which is implicit in the right to health’, and is recognised as such in the Regulatory Framework. The right to health comprises positive obligations and the supply of safe drinking water is a preventive measure, which is indispensable for the enjoyment of the right to health. The Court stated that ‘the provision of potable water and sanitation services is one of

the most important needs' that must be satisfied to the inhabitants of the Province. In this case, given the scarce means of the applicants and the fact that their families included, children and elderly people, the Court applied Córdoba's Citizen's Charter, which foresees direct assistance to those in a situation of extreme need and unable to satisfy their basic needs. [Cons.VIII].

Decision The Court granted the injunction and ordered the Municipality to take all the necessary measures in relation to the operations of the plant in order to minimise its current environmental impact until such time as a definitive solution is found regarding its functioning. It further ordered the Province of Córdoba to guarantee a minimum daily provision of 200 litres of drinking water per household until the necessary works allowing full access to the public water service is undertaken, in the terms of the Regulatory Framework[Res.I].

ARGENTINA

Asociación para la Protección del Medio Ambiente y Educación Ecológica '18 de Octubre' c/ Aguas Argentinas SA y Otros

Cámara Federal de Apelaciones (La Plata)

8 July 2003¹³⁷

Keywords [Quality – Sustainability – Water pollution – Right to health (threat) – Right to a healthy environment (violation) – Lack of water treatment – Obligation to protect – Obligation to fulfil]

Abstract Activities creating environmental damage, and subsequent risks to health, which are undertaken by a private company (under a public concession contract), and are not monitored by the competent public authorities at different levels, are illegal and violate, the constitutionally protected, right to a healthy environment.

Facts Due to the rise of the groundwater level in Quilmes, the health of its inhabitants is at risk and their properties have been damaged considerably, requiring constant repairs in walls, floors, basements and the installation of water pumps to alleviate minimally the problem. The septic tanks of the properties affected, (given the absence of sewers), overflow frequently, threatening to cause a public health crisis. The rise of the groundwater level was the result of: the constant water imports from the Plata river by the private water company, Aguas Argentinas SA, (for human consumption); the deactivation by the company of the system of groundwater extraction and of the exploitation of local wells; the deficit in the treatment of wastewater and sewage; and the negligence of both the company and the control mechanism (ETOSS) for the technical losses of the water distribution networks [para. 1]. This situation had already been contemplated in 2001, in an agreement concluded between the Province of Buenos Aires, the Municipality of Quilmes, the private company Aguas Argentinas and the Tripartite Body for Sanitation Works and Services (ETOSS), where the spending for the required sanitation works were anticipated. [para. 2]. In an attempt to overcome the crisis, several public organizations have requested the urgent installation of water

137. *Asociación para la Protección del Medio Ambiente y Educación Ecológica '18 de Octubre' c/ Aguas Argentinas SA y Otros* [2003] Cámara Federal de Apelaciones (La Plata) 3156/02, RDAMB 2004-0-193 <<http://www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-143728S.pdf>>.

extraction pumps in different points of the affected areas in order to contain the rise of the groundwater levels [para. 12]. According to an assessment by professionals, water could be found 30 cm below the ground surface.

Procedure The Association for the Protection of the Environment and Ecological Education ‘18 of October’ applied for an injunction order against Aguas Argentina, ETOSS, the Province of Buenos Aires and the Municipality of Quilmes [para. 1]. The Court in first instance granted the injunction and ordered that measures to restore the water balance in Quilmes be taken. The respondents appealed the decision to the Federal Chamber of Appeals. [para. 2].

Claims The applicant sought to restore the water balance in Quilmes by requesting the immediate cessation of acts and omissions by the respondents, which were allegedly violating the right to a healthy environment protected under article 41 of the National Constitution. They requested the immediate startup of the operating wells which had been transferred to Aguas Argentinas with the concession of the public water service and also the startup of all the existing wells under the management of the private company, the municipality or the Province of Buenos Aires ; and the operationalization of the necessary water depression pumps to balance Quilmes hydraulic system [para. 1].

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Argentine Nation – Arts. 41-43¹³⁸
- Law on the National Environmental Policy (Law 25675) – Arts. 1, 27, 30-33¹³⁹
- Provincial Constitution of Buenos Aires – Art. 28¹⁴⁰
- Rio Declaration on Environment and Development¹⁴¹
- Stockholm Declaration on the Human Environment¹⁴²
- Law 11723 – Art. 5
- Water Code of the Province of Buenos Aires¹⁴³

Court Rationale The Court in first instance held that the serious situation described by the applicant involves and holds responsible not only the pri-

138. Constitución de la Nación Argentina 1994 (as amended).

139. Ley n° 25.675 de Política Ambiental

140. Constitución de la Provincia de Buenos Aires 1994 (as amended).

141. ‘Report of the United Nations Conference on Environment and Development’ (Rio de Janeiro 3-14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (Vol. I) Annex I.

142. ‘Report of the United Nations Conference on the Human Environment’ (Stockholm 5-16 June 1972) (16 June 1972) UN Doc A/CONF.48/14.

143. Ley n° 12.257 Código de Aguas.

vate company, Aguas Argentinas (under a public concession), and ETOSS (the body responsible for the public service), but also the Province of Buenos Aires (as the Provincial water resources title-holder and directly responsible due to the obligations of the Ministry for Public Works and Services), and the Municipality of Quimes who delegated the public water service (through a concession) to the private company. The Court of Appeal held that the contamination actions were illegal as they expressly violated article 41 of the Constitution, which protects the right to a healthy environment, international treaties and national laws, and as a result generate the obligation to restore the environment. The Court mentioned that article 41 of the National Constitution incorporates the sustainable development concept as defined by the Brundtland Report and also the polluter-pays concept adopted by the UN Conference on the Human Environment [para. 16]. The right to enjoy a healthy environment is also protected under the Provincial Constitution of Buenos Aires (article 28), which stipulates, amongst other things, that the Province must control the environmental impact of all the activities that damage the environment and promote actions to avoid its pollution. In this regard, the Water Code of the Buenos Aires Province foresaw the creation of a municipal body whose monitoring mandate included, to supervise and control all the activities and operations related to the study, collection, use, conservation and evacuation of water. [para. 18]. The Court further held that the Municipality has the ‘essential duty to prevent and eliminate the pollution of the environment and of water courses and to ensure the conservation of natural resources’ [para. 19].

The Court noted that, under the competing responsibilities of the National State, ETOSS and Aguas Argentinas, the imports of water from the river Plata were initiated without the realization of impact studies foreseen in the initial contract, and without the sewage works needed [para. 26]. The Court referred that when the user is affected by the defective or irregular provision of the service, this generates an obligation of reparation on the part of the service provider, irrespective of the responsibility of the State for its lack of control through its competent bodies [para. 27], The Court added, that in such cases ‘it is essential to guarantee the effective enjoyment of personal rights, such as the rights to life and health’ [para. 27].

The Court emphasized that the dimension and seriousness of the situation, as well as what generated it, had been expressly recognised and admitted, not only by ETOSS, but also by the other appellants, as it results from the agreement celebrated between the Province of Buenos Aires and the Municipalities affected in 2000 and its subsequent approval in 2001 by ETOSS

and Aguas Argentinas [para. 21]. The Court concluded that the right to live in a healthy environment is to be understood as a human fundamental attribute [para. 31]

Decision The Court of Appeal dismissed the appeal and upheld the previous judgment by confirming the injunction (amparo). It however, changed the terms of the injunction and ordered the appellants to, within 60 days, adopt the necessary measures in order to set up the mechanisms and procedures as planned in the agreement celebrated in 2000 between the provincial government of Buenos Aires and the Municipality of Quilmes, and subsequently approved by ETOSS and Aguas Argentinas in 2001, which foresaw, amongst the main works to be developed, an assessment of the situation of the groundwater aquifer and the establishment of priorities for the implementation of the depression projects. In addition to that, the appellants must present a progress report, every fifteen days, to the first instance Court, with details of the progress of the public works foreseen in the agreement [para. 33].

ARGENTINA

Quevedo, Miguel Ángel y Otros c/Aguas Cordobesas SA

Juez Sustituta de Primera Instancia Civil y Comercial

(Ciudad de Córdoba)

8 April 2002¹⁴⁴

Keywords [Affordability – Accountability – Water – Right to health (threat) – Vulnerable groups – Disconnection of water supply – non-payment – Public service – Privatization – Minimum supply – Obligation to protect – Obligation to fulfil]

Abstract Given the public service nature of water provision, private water companies (under a public concession contract) must provide a minimum daily amount of 200 litres of water per household, in the event of disconnection of the water supply for non-payment due to a lack of means.

Facts The private water company Aguas Cordobesas SA disconnected the water supply of Mr Miguel Ángel Quevedo and other low-income families due to non-payment. These families included children and were living under a vulnerable socioeconomic situation, some affected by unemployment, others by low-incomes and some were single parent families. Realising their lack of capacity to pay for the water supply the applicants sought the intervention of the provincial authorities, which was systematically denied to them. Furthermore, the company did not supply the daily provision of 50 litres of water, contrary to its own regulatory framework.

Procedure Mr Miguel Ángel Quevedo and others applied for an injunction order (acción de amparo) to the Civil and Commercial First Instance Court (City of Córdoba).

Claims The applicants claimed that the disconnection of the water supply was illegal, and contrary to the National and Provincial Constitutions. Also that the company had failed to comply with its regulatory obligation to provide 50 litres of water per day and furthermore that the minimum supply obligation should be increased to a daily amount of 200 litres per household.

144. *Quevedo, Miguel Ángel y Otros c/ Aguas Cordobesas SA* [2002] Juez Sustituta de Primera Instancia Civil y Comercial (Ciudad de Córdoba) <<http://www.cedha.org.ar/docs/doc220-spa.doc>>.

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Argentine Nation – Arts. 42 and 43¹⁴⁵
- Provincial Constitution of Córdoba – Arts. 4, 59 and 66, 68¹⁴⁶
- Regulatory Framework for the Provision of Public Water and Sanitation Services in the Province of Córdoba – Art. 48, para. 2¹⁴⁷
- Córdoba's Citizen's Charter (Law 8835) – Art. 8 (c)

Court Rationale The Court held that one must emphasise the nature of the right whose protection is claimed – the provision of drinking water –, as its violation definitely compromises the health and the physical integrity of individuals, which is recognised not only by the National Constitution and the international covenants there mentioned, but also by the Provincial Constitution of Córdoba (articles 59 and 66). It added that ‘the absence of a drinking water service has numerous implications, affecting the health of the population, especially those living in poverty. [Cons.Cuarto].

In order to decide whether the disconnection of the water supply was illegal or arbitrary, the Court noted that there were two issues at stake: 1) the possibility of disconnecting or restricting the water supply in case of non-payment; and 2) the guarantee of a minimum supply of water for citizens.

Regarding the first, the Court held that, given the onerous nature of the concession contract (between the Province and the respondent), users have the obligation to pay for the provision of the water service, which cannot be carried out for free. The concession contract foresees the interruption of the water supply in cases of non-payment, in conformity with the Regulatory Framework. The Court noted that the respondent was making efforts to establish a payment system that takes into consideration the socioeconomic situation of the users. Consequently, it concluded that the disconnection of the water service, which should instead be understood as a reduction of water provision, was not illegal and that the injunction would not be granted in that respect [Cons.Sexto].

Regarding the supply of a minimum amount of water, the Court held that the water service is by nature a public service that should be guaranteed to all citizens. It noted that, although public services had been privatised, the

145. Constitución de la Nación Argentina 1994 (as amended).

146. Constitución de la Provincia de Córdoba 1987 (as amended).

147. Decreto n° 529/94 Aprobación del Marco Regulador para la Prestación de Servicios Públicos de Agua Potable y Desagüe Cloacales de la Provincia de Córdoba 1994.

State retains the responsibility of regulating and controlling the activities of private service providers, given the public nature of the services in question. It added that the State is the ultimate holder of public services, irrespective of whether it decides to provide them directly, indirectly or through concessions, as in this case. Moreover, the Court stated that it results unquestionable, from the special protection conferred to water by the Provincial Constitution (article 66) and Law 8835 (article 4), that the State is responsible for providing drinking water services to all citizens, as this is an essential service [Cons.Septimo].

The Court further held that by not providing efficient, quality, low-cost and regulated public services, the State, was not only violating its ‘raison d’être’ but also violating article 42 of the National Constitution. It considered the supply of 50 litres of water per household established in the Regulatory Framework in the case of disconnections to be insufficient, as it does not guarantee the minimum, basic hygiene and health conditions of an average family. Thereby, the Court found that a minimum daily provision of 200 litres per household should be guaranteed [Cons.Octavo]. The Court based its reasoning on the essential nature of the public service, holding that when the State delegates the provision of a public service to a private company, the private provider becomes in fact an administration body as the object of the concession is the public service and its cause is the public interest.

Decision The Court partially granted the injunction order (acción de amparo) and sentenced the respondent to guarantee to the applicants, a minimum daily supply of 200 litres of water per household for the duration of the disconnection of the water service due to non-payment [Res].

***Usuarios y Consumidores en Defensa de sus Derechos
Asociación Civil c/ Aguas del Gran Buenos Aires SA***

Juez de paz (Moreno, Buenos Aires)

21 August 2002¹⁴⁸

Keywords [Affordability – Right to water (violation) – Children – Disconnection of water supply – Monopoly – Non-payment – Private company – Obligation to protect]

Abstract The disconnection of the water supply for non-payment, by a private company, while preventing users from being provided by alternative sources of water, amounts to a violation of the right to water under international human rights law, the National Constitution and the Provincial Constitution of Buenos Aires.

Facts The private water company 'Aguas del Gran Buenos Aires SA' (AGBA) disconnected the premises of several consumers living in Moreno from the water supply network due to non-payment. The users cannot be provided with water from an alternative source as this is expressly prohibited by Law 11820 of the Provincial State. However, even if the Regulatory body (ORAB) was to authorise it, it is of public knowledge that the aquifers are polluted and that the water from the wells is not fit for human consumption.

Procedure The 'Civil Association of Users and Consumers for the Defence of their Rights' applied for an injunction order (*acción de amparo*) to the Justice of the Peace (*Juez de Paz*) seeking for the protection of their constitutional rights [Res.I]. The 'Justicia de Paz' is a judicial institution of the Province of Buenos Aires, foreseen in articles 172-174 of the Provincial Constitution. It works through '*Juzgados de Paz*' (Peace Courts), established in all municipalities (*partidos*), where it doesn't exist a first instance court.

Claims The applicant claimed that the disconnection of the water supply, due to non-payment, by the respondent was contrary to the National Constitution and the Provincial Constitution of Buenos Aires. It requested that

148. *Usuarios y Consumidores en Defensa de sus Derechos Asociación Civil c/ Aguas del Gran Buenos Aires SA* [2002] Juez de paz (Moreno, Buenos Aires)44.453 <http://www.legalmania.com.ar/derecho/fallo_asociacion_consumidor.htm>.

the respondent be ordered to, firstly, annul the disconnections and restore the disrupted services, and secondly, that it abstains from disconnecting the water supply in Moreno until the matter is resolved [Res.I].

Applicable Law and Reference to Regional or International Instruments

- American Declaration of the Rights and Duties of Man – Art. XI¹⁴⁹
- Constitution of the Argentine Nation – Arts. 33 and 41¹⁵⁰
- Provincial Constitution of Buenos Aires – Arts. 20, 28, 36 and 38
- Convention on the Rights of the Child – Art. 24, para. 2 (c)¹⁵¹
- ICESCR – Art. 11¹⁵²
- Regulatory Framework for the Provision of Public Water and Sanitation Services in the Province of Buenos Aires (Law 11820) – Art. 34¹⁵³
- Universal Declaration of Human Rights – Art. 25¹⁵⁴

Court Rationale The *Juzgado de Paz* considered that, in practice, the private water company held a monopoly over the water supply, position that was legitimised by the Regulatory Framework for the Provision of Public Water and Sanitation Services (Law 11820), which prohibited the users of the company's services to be provided or provide themselves from an alternative source. It held that the provision of water for human consumption cannot be compared to the sale of any other good or the provision of any other service as water is indispensable for human survival at the most basic level [Cons. XI]. It found the disconnection of the water supply, as a penalty for non-payment, unacceptable in a case where a family does not have neither the financial means to pay for the service, nor an alternative source of water [Cons. XII]. It questioned how do public authorities reconcile allowing a private company to disconnect the water supply to a family for non-payment, with their positive obligation to take the appropriate measures to provide clean drinking-water to the children of this same family (article 24, para. 2 c) CRC). It emphasized that access to potable water is a right that must be guaranteed to all of the country's inhabitants, irrespective of their capacity to

149. American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

150. Constitución de la Nación Argentina 1994 (as amended).

151. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

152. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976 993 UNTS 3 (ICESCR).

153. Ley n° 11.820 Marco Regulatorio para la Prestación de los Servicios Públicos de Provisión de Agua Potable y Desagüe Cloacales en la Provincia de Buenos Aires.

154. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

pay for the supply. It held that the disconnection of the water supply threatens the health of those affected and it undermines the constitutional rights to life and health, besides constituting a failure of the State to comply with its obligations under international treaties and the Constitution. It clarified that it did not object to three rights of the private company that provided the service: 1) the right to count on sufficient revenues in order to cover its operational costs; 2) the right to count on revenues in order to improve and extend the service under the terms agreed with the State; and 3) the right to obtain a reasonable profit for its shareholders. Once recognised these rights, it is up to the political level to harmonise them with the inhabitants' right to water, especially of those who lack the necessary means to pay for it. In this last case, it is the State who has to compensate the service provider in accordance with the principle of subsidiarity [Cons. XV].

Decision The Court held that article 34 of the Regulatory Framework (Law 11820), which authorises the disconnection of the water supply in case of non-payment is unconstitutional for violating the rights consecrated in article 42 of the National Constitution, articles 28, 36 and 38 of the Provincial Constitution of Buenos Aires, article 25 of the Universal Declaration of Human Rights, article XI of the American Declaration of the Rights and Duties of Man, article 11 of the ICESCR, and article 24(2)(c) of the Convention on the Rights of the Child [Res.1].

The Court prohibited the respondent, or any other company holding the same mandate, to disconnect the water supply of individual users living in Moreno in case of non-payment [Res.2]. It further ordered the respondent to restore, within 72 hours, the water supply to the premises where the service had been disconnected [Res.3].

ARGENTINA

Children of the Paynemil Community c/ Acción de amparo

2nd Chamber of Appeals for Civil Matters of the Province of Neuquén, File 311–CA – 1997
19 May 1997¹⁵⁵

Keywords [Quality – groundwater source pollution indigenous communities– right to health (violation) – positive obligations]

Abstract The Government must control the pollution of drinking water sources that seriously affect the health of indigenous communities and provide the necessary resources and remedial measures to those affected in the terms of the constitutionally protected rights to health and to a safe environment.

Facts In October 1995, the Paynemil and Kaxipayiñ Mapuche indigenous communities in Neuquén, Argentina realised that their groundwater source for drinking and other domestic purposes had been contaminated with lead and mercury by a private oil company.¹⁵⁶ Laboratory analyses to test the quality of the water revealed that it was unsuitable for drinking. In May 1996, provincial authorities were informed of the water contamination. Studies to the blood and urine of members of the community, especially children, ordered by the provincial authorities in November 1996, confirmed that they had high levels of lead in their bloodstream and/or mercury in their urine. In January 1997, the community requested to the provincial authorities the immediate provision of potable water for their personal use, animals and irrigation. They obtained no reply from the provincial authorities. It had been recognised, however, in a meeting of provincial health officials held in December 1996, that the water was not fit for human consumption, that the traditional methods for disinfection were not advisable and recommending the urgent provision of safe water to the community. This information was transmitted to the Health Minister's Office.

155. Original judgement on file with WASH United. Translation of court quotations by the authors.

156. For more information on this case, see: Carlos Falaschi O. and Nara Osés, 'CIDH: La causa N° 12.010. Comunidades Mapuche Paynemil y Kaxipayiñ, Neuquén, Argentina, August 2001. Available at: <http://www.escri-net.org/docs/ij/400620>.

Procedure In March 1997, Neuquén’s ‘Public Defender of Minors’ (*Defensora Oficial de la Primer Circunscripción Judicial*) filed an injunction (*acción de amparo*) against the Provincial Government. The Court in first instance granted the injunction. On appeal, the Provincial Court of Appeal confirmed the decision of the Court in first instance. On appeal to Neuquén’s High Court of Justice (*Tribunal Superior de Justicia*) the previous decisions were also confirmed. However, the Government only partially complied with the Courts’ decisions as no examination or treatment had been provided for the children affected, and no measure had been taken to restore the ecosystem and clean the soil and water previously contaminated. As a result, the Public Defender brought the case before the Inter-American Commission on Human Rights.

Claims In first instance, the Public Defender claimed that the Government had allegedly failed in its obligation to safeguard public health by providing safe drinking water to the affected communities [p.1/amparo]. Additionally, the Public Defender requested that the Provincial Government be ordered to conduct the diagnosis and treatment of affected minors, and to adopt adequate measures to prevent future soil and water contamination. [p. 1, 2/amparo].

Applicable law and reference to regional or international instruments:

- National Constitution of Argentina – Art. 41¹⁵⁷
- Provincial Constitution of Neuquén – Art. 134¹⁵⁸
- Universal Declaration of Human Rights – Art. 25¹⁵⁹
- Convention on the Rights of the Child, ratified by Law 23.849 – Art. 24¹⁶⁰
- International Covenant on Economic, Social and Cultural Rights, ratified by Law 23.313 – Art. 12¹⁶¹

Court Rationale The Court in first instance granted the injunction, on the basis that the provincial authorities’ delays in adopting measures to safeguard the right to health of the young members of the community implied a denial of this right, which was arbitrary and illegitimate, representing a constitutional omission [p.7/first instance decision]. The Court, thus, condemned the Provincial Government of Neuquén to implement the following

157. National Constitution of Argentina. Available at: <http://infoleg.mecon.gov.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

158. Available at: http://www.jusneuquen.gov.ar/share/legislacion/leyes/constituciones/constitucion_nqn/cnqn_aindice.htm

159. Available at: <http://www.un.org/en/documents/udhr/>

160. Available at: http://www.ohchr.org/en/professionalinterest/page_s/crc.aspx

161. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

measures [p. 8/first instance decision]: 1; Provide, within two days notice of the decision, 250 litres of drinking water per person per day; 2, Ensure, within 45 days, a more permanent provision of drinking water to the affected people by any appropriate means; 3, Set up, within 7 days, a procedure to determine whether the health of the community members was damaged by the pollution of water, and provide any necessary treatment; 4, Provide for adequate environmental remediation if necessary.

On appeal, the Provincial Court of Appeal confirmed the injunction. It held that the injunction was valid on the basis of the National Constitution of Argentina¹⁶² [p. 5/appeal's decision]. The Court explained that even though the Provincial Government had performed some activities as to the situation of contamination, in fact there has been a failure in adopting timely measures in accordance with the gravity of the problem [p. 4/appeal's decision]. Given the serious health impacts of the water contamination with heavy metals, the Court concluded that any delay in providing the necessary resources and remedial measures represented an arbitrary omission on the part of the authorities and was in violation of the constitutional rights to health and to a safe environment [p. 4/appeal's decision]. On appeal to Neuquén's High Court of Justice, the rulings of the first two Courts were confirmed.

Decision Both the Provincial Court of Appeal and Neuquén's High Court of Justice confirmed the decision of the Court in first instance.

Following the decisions of both Appeal Courts, the Government provided the community with drinking water in tanker trucks on a daily basis. However, it failed to examine and treat the children and did not take any measures to de-contaminate the environment.¹⁶³ The Public Defender therefore brought the case before the Inter-American Commission on Human Rights¹⁶⁴. The State argues that the case should not have been accepted for consideration by the IACHR.

162. National Constitution of Argentina. Available at: <http://infoleg.mecon.gov.ar/infolegInternet/anexos/o-4999/804/norma.htm>.

163. See: Carlos Falaschi O. and Nara Osés, 'CIDH: La causa N° 12.010. Comunidades Mapuche Paynemil y Kaxipayiñ, Neuquén, Argentina, August 2001. Available at: <http://www.escr-net.org/docs/i/400620>.

164. See [escr-net.org](http://www.escr-net.org): Mapuche Paynemil and Kaxipayiñ Communities v. Argentina, Case N° 12.010. Available at: <http://www.escr-net.org/docs/i/400616>. For more information see: Carlos Falaschi O. and Nara Osés, 'CIDH: La causa N° 12.010. Comunidades Mapuche Paynemil y Kaxipayiñ, Neuquén, Argentina, August 2001. Available at: <http://www.escr-net.org/docs/i/400620>.

***Santa Casa de Misericórdia de Santa Rosa do Viterbo
x Companhia de Saneamento Básico do Estado de São Paulo
– SABESP***

Superior Tribunal de Justiça, First Chamber
28 August 2007¹⁶⁵

Keywords [Affordability – Availability – Water – Continuous supply (violation) – Hospital – Disconnection of water supply – Non-payment – Essential public service – Obligation to protect]

Abstract The indiscriminate disconnection of water services for non-payment is illegal and abusive, when it puts at considerable risk the population, as in the case of a public hospital and it constitutes a breach of the principle of ‘mandatory continuity of the provision of essential public services’ under Brazilian legislation.

Facts The private water service provider ‘*Companhia de Saneamento Básico do Estado de São Paulo*’ (under a public concession contract), disconnected the water supply to the hospital of Santa Casa de Misericórdia de Santa Rosa do Viterbo due to non-payment of water bills [page 3].

Procedure The hospital applied for a ‘*mandado de segurança*’ (an expedited constitutional procedure), seeking to obtain the re-connection to the water supply network. The lawfulness of the disconnection was confirmed on appeal (São Paulo). The hospital further filed a special appeal before the High Court of Justice (*Superior Tribunal de Justiça*) [page 3].

Claims The applicant claimed that disconnecting the water supply would amount to a violation of article 6(3)(II) of the Legal Framework of Concession and Permission for the Provision of Public Services, and of article 22 of the Consumer Protection Code [page 3]

165. *Santa Casa de Misericórdia de Santa Rosa do Viterbo x Companhia de Saneamento Básico do Estado de São Paulo – SABESP* [2007] Superior Tribunal de Justiça REsp nº 943.850 <https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=715699&s-Reg=200700884516&sData=20070913&formato=PDF>. nº paragraph numbers being available for this case, pinpoints refer here to page numbers.

Applicable Law and Reference to Regional or International Instruments

- Consumer Protection Code – Arts. 4, 6, 22, 42, 71¹⁶⁶ Legal Framework of Concession and Permission for the Provision of Public Services (Law n° 8987/95) – Art. 6(3) (II), 7¹⁶⁷
- Constitution of the Federative Republic of Brazil – Arts. 1 (III), 170 (V), 175 (IV)¹⁶⁸

Court Rationale On Appeal, the High Court held that water supply is an indispensable public service, subordinated to the principle of continuous and regular provision, which should make its interruption impossible. It referred that according to article 22 of the Consumer Protection Code, public bodies, per se or through their companies or concessionaires are obliged to provide adequate, efficient and safe services and when it comes to essential services these must also be continuous. It further referred to article 42, which prohibits the indebted to be threatened or constrained when a debt is to be collected. The Court held that both provisions are to be applied to private companies under public service concessions. It compared the matter at issue with related case law on disconnection of the electric power supply where it was considered that the indiscriminate disconnection of services, affecting areas that put at risk the population, such as hospitals, is not legitimate [page 55-7]. The Court held that such an understanding applies to the disconnection of water services. It declared that the disconnection of the water supply was an illegal and abusive act. It clarified that water supply is a public service, which is provided and characterised as a consumption relationship and as a consequence the principle of non-interruption applies. The Court highlighted that it ‘does not authorise the suspension of essential services, that are subject to the principle of continuity in their provision, which is made in the public interest and essential to human dignity’ [page 9]. It further held that consumer’s rights are amongst the fundamental rights protected by the Constitution and that any infra constitutional norm contrary to the rights enshrined in the Consumer’s Code should be declared unconstitutional. In this case, the law regulating public services’ concessions (Law n° 8.987/95), by not qualifying as discontinuation of the service, its interruption due to non-payment by the user (article 6 (3) (II)), is in fact adopting a regressive step vis-à-vis the protection conferred to the user by article 22 of the Consumer Protection Code. For these reasons, article 6 (3)

166. Lei n° 8.078 de 11 de setembro de 1990 dispõe sobre a proteção do consumidor e dá outras providências.

167. Lei n° 8.987 de 13 de fevereiro de 1995 dispõe sobre o regime de concessão e permissão da prestação de serviços públicos previsto no art. 175 da Constituição Federal, e dá outras providências.

168. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=8755>

(II) authorising the interruption of an essential service, due to non-payment is unconstitutional as it is contrary to the principle of non-regression.

Decision The High Court unanimously decided to grant the special appeal [page 31]

BRAZIL

Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN

Superior Tribunal de Justiça, First Chamber
20 April 1999¹⁶⁹

Keywords [Affordability – Water – Continuous supply (violation) – Inhuman and illegal act – Disconnection of water supply – State water utility – Obligation to protect – Obligation to fulfil]

Abstract The disconnection of the water supply for non-payment is an inhuman and illegal act. Water supply is an essential public service that cannot be interrupted, especially in case of non-payment for a lack of means.

Facts In July 1997, the residence of Mr Ademar Manoel Pereira and his family (a wooden shack) burnt down and nothing could be recovered. Due to the financial difficulties this situation caused, the applicant could not afford to pay his water bills. Mr. Pereira’s wife requested for the payment of the debt in installments but the State water utility (CASAN) denied this request and proceeded to disconnect their property from the water supply network due to non-payment of the bills [page 3].

Procedure Mr. Ademar Pereira applied for a ‘*mandado de segurança*’ (an expedited constitutional procedure) against the State water utility for the disconnection of the water supply for non-payment. The Court in first instance granted the ‘*mandado*’. The water company appealed to the Court of Justice of Santa Catarina (*Tribunal de Justiça de Santa Catarina*), which confirmed the decision of the Court in first instance. The water company filed a special appeal before the High Court of Justice (*Superior Tribunal de Justiça*).

Claims On appeal, the water company alleged that since the water supply is a service paid by a fee, its interruption should be permitted in case of non-payment of bills [page 2].

169. *Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN*[1999] Superior Tribunal de Justiça Resp nº 201.112
<https://ww2.stj.jus.br/processo/jsp/ita/abreDocumento.jsp?num_registro=199900043987&dt_publicacao=10-05-1999&cod_tipo_documento>.

Applicable Law and Reference to Regional or International Instruments

- Consumer Protection Code – Arts. 22 and 42¹⁷⁰

Court Rationale On appeal, the High Court first noted that Mr. Pereira was 'humble, poor, only able to litigate due to judicial assistance' while the State water utility refused to facilitate the payment of the debt in installments and disconnected the supply of water leaving Mr. Pereira and his family without the ability to use it. The Court asserted that: *'the Catarinense Water Company committed a reprehensible, inhuman and illegal act. It is obliged to provide water to the population in an adequate, efficient, safe and continuous manner and, in case of delay of payment on the part of the user, it could not disconnect the supply, exposing the consumer to ridicule and embarrassment'* (Consumer Protection Code, articles 22 and 42).

The Court specified that in order to recover its credit, the water company must use the appropriate legal means available and it cannot take justice in its own hands as we live in the rule of law and disputes are decided by the judiciary and not by individuals. It further emphasised that: 'Water is an essential and indispensable good for the health and hygiene of the population. Its supply is an indispensable public service, which is subordinated to the principle of continuity, making impossible its interruption especially due to late payment.' [page 3]

The Court made its own the rationale applied in case n° 8.915 – MA, DJ of 17 August 1998 in which it was ruled that: *'Water supply, because it is a fundamental public service, essential and vital for human beings, cannot be suspended for late payment of respective fees, as the public administration has reasonable means to recover user debts. Moreover, if the public services are provided on behalf of all the community, it is an illegal measure to deny it to a consumer merely for late payment'* [page 4]

Decision The High Court unanimously dismissed the special appeal of the State water utility [page 5].

170. Código de Defesa do Consumidor, Lei N°8.078 de 11 de Setembro de 1990.

CANADA

Halalt First Nation v British Columbia (Environment)

Supreme Court (British Columbia)

13 July 2011¹⁷¹

Keywords [Participation – Water – Right to participate in public decision-making having an impact on the environment (violation) – Indigenous people – Excessive groundwater extraction – Environmental impact assessment]

Abstract Public authorities have to engage in extensive consultations concerning a project with an impact on the environment when the context entails indigenous peoples asserting rights over the area affected by the project.

Facts The Chemainus Wells Project involved the construction and operation of a well field next to the Halalt's (an indigenous people) reserve with a view to extracting groundwater from the Chemainus aquifer, which is partly located under the Halalt's reserve [paras. 1-3 and 16]. While the aim of the project was to entirely substitute the surface water supply system by a groundwater system and involving year-round extraction so as to guarantee the provision of drinking water in the area [para. 20], the District of North Cowichan later considered to exclude groundwater extraction over the drier summer period [para. 24] to take into account the environmental impact of the project [para. 23]. The Environmental Assessment Office (EAO) did not consult with the Halalt prior to designing these amendments [para. 30]. The community was subsequently consulted, but the project was again subsequently modified without further consultation. Furthermore, the Halalt were not provided with information provided to other interested parties that would have informed their participation in the process. The EAO drafted an environmental assessment report where it ensured the Crown that Halalt had been 'adequately consulted' [para. 31], which the community denied [para. 32]. The project was nonetheless approved by the District, which issued a certificate of construction [para. 33]. This certificate did not give the Halalt any role in the monitoring of effects of the project [para. 35].

171. *Halalt First Nation v British Columbia (Environment)* [2011] Supreme Court (British Columbia) S098232, 2011 BCSC 945 <<http://canlii.ca/en/bc/bcsc/doc/2011/2011bcsc945/2011bcsc945.html>>.

Procedure The Halalt First Nation applied to the Supreme Court (British Columbia) for judicial review (quashing order) of the District's decision to issue an environment assessment certificate.

Claims The applicant alleged that the respondent had failed to comply adequately with its constitutional duty to consult with the community and reasonably accommodate its interests regarding the project, considering the applicant's Aboriginal rights and title to the area [paras. 4-5].

Applicable Law and reference to regional and international instruments

- Constitution of Canada, s 35(1) and 52¹⁷²
- Environmental Assessment Act¹⁷³
- Water Protection Act ¹⁷⁴

Court Rationale The Court notably referred to the Environmental Assessment Act which details the procedure to be followed in such cases [paras. 37-47], section 35(1) of the Constitution which explicitly recognises and asserts the 'existing aboriginal and treaty rights of the aboriginal peoples of Canada' [para. 48], and the Water Protection Act of British Columbia. It held that the meetings regarding the project between the applicant and the respondent did neither constitute consultation nor adequate consultation. It appeared clearly that the respondent had no clear understanding of its obligations in that respect. The Court considered that the EAO should have made clear to the respondent and the applicant that it was delegating the respondent's responsibility to consult with the applicant. The Court found that the respondent had a duty to engage in deep consultation but failed to do so [paras. 675-682] as the consultation process was inadequate [para. 710]. The Court further held that relief to the applicant could not be denied [para. 746]. Furthermore, the applicant was entitled to consultation on the 'actual scope' of the project, notably the year-round extraction of groundwater from the aquifer, and to 'reasonable interim accommodation for the potential infringements of its interests posed by the project' [para. 750].

Decision The Court held that the respondent had failed to its duty to engage in deep consultation and ordered the implementation of actions or decisions regarding the certificate 'to be stayed pending adequate consultation concerning year-round operation of the well field and, resulting from such consultation' [para. 753]. No directions were issued regarding the accommo-

172. Constitution of Canada (Canadian Constitutions Acts 1867 to 1982) (as amended).

173. Canadian Environmental Assessment Act 1992.

174. British Columbia Water Protection Act 1996.

dation of the applicant's interest in order not to impair future negotiations between the respondent and the defendant [para. 754].

Alejandro Papic Domínguez con Comunidad Indígena Aimara Chusmiza y Usmagama

Corte Suprema

25 November 2009¹⁷⁵

Keywords [Availability– Water – Ancestral water rights (Recognition/Violation) – Indigenous people – Customary water uses – Obligation to protect]

Abstract Customary water rights can be recognised in favour of indigenous communities, even if the water source is located on land currently owned by third parties, or even if other water rights have subsequently been registered since the recognition of immemorial water use by indigenous communities is protected under the Chilean Indigenous Law and the ILO Indigenous and Tribal Peoples Convention.

Facts The Aimara de Chusmiza-Usmagama indigenous community sought to regularise its ancestral water rights, but it was prevented from doing so by the company ‘Agua Mineral Chusmiza SAIC’ (AMC), which had gained registered water rights.

Procedure The Aimara de Chusmiza-Usmagama indigenous community applied to the Court of Letters of Pozo Almonte (*Juzgado de Letras*), seeking the regularisation of their water rights. The Court of Letters accepted the request and recognised ancestral indigenous property rights to the water up to a flow of ten litres per second. Mr Alejandro Papic Domínguez, representing the water company AMC, appealed to the Court of Appeals of Iquique which upheld the judgment of first instance in its entirety. The company further appealed to the Supreme Court with a motion for cassation against the Appeals Court decision.

Claims The appellant (water company/AMC) alleged that the regularisation of the indigenous community’s water rights amounted to a violation of

175. *Alejandro Papic Domínguez con Comunidad Indígena Aimara Chusmiza y Usmagama* [2009] Corte Suprema 2.840-2008
 <http://www.poderjudicial.cl/juris_pjud/muestra_doc.php?docid=61013&row_id=&ciudad_palabras=&rol_buscar=2840?2008;2840?08;2.840?2008;2.840?08&todos_ministros=&sala_buscar=&flag_ninguna=0>.
<http://www.politicaspUBLICAS.net/panel/jp/439-2009-chusmiza.html>

article 19 (n° 24, last paragraph) of the Political Constitution, protecting private property, by not recognising the company's property rights over the water emanating from the Socavón Chusmiza. He also contended that this regularisation was not only contrary to articles 2, 20 and 121 of the Water Code, as AMC's water rights had been competently registered but was also in breach of article 64 and Transitory article 3 of the Indigenous Law (*Ley Indígena*) as the water source was not within the territories of the communities but rather in the company's property.

Applicable Law and Reference to Regional or International Instruments

- ILO Indigenous and Tribal Peoples Convention (N° 169) – Arts. 13, para. 2, 15¹⁷⁶
- Law on the Protection, Promotion and Development of Indigenous Communities (Indigenous Law N° 19,253 of 1993) – Art. 64¹⁷⁷
- Political Constitution of the Republic of Chile – Art. 19 (n° 24, last para.)¹⁷⁸
- Water Code – Arts. 2, 20 and 121¹⁷⁹

Court Rationale Article 19 (n° 24, last paragraph) of the Political Constitution provides that *'the rights of individuals over water, recognised or constituted in conformity with the law, shall grant their title-holders property over them'*. From the expressions *'recognised or constituted'* one can clearly conclude that the Constitution protects not only water rights originally created by an act of authority, in the terms of article 20 of the Water Code, but also extends its protection to those rights recognised in conformity with the law, from different and special factual situations, which include water customary uses recognised in favor of the indigenous communities in article 64 of the Indigenous Law. The Court added that it was important to clarify that the eventual lack of registration of customary water rights does not imply its inexistence, but merely the lack of a registration formality as the right exists and is recognised by law. The Court declared that the acceptance of regularisation of indigenous water rights by the lower courts, guaranteed to the indigenous community the enjoyment of their, constitutionally protected, property rights over the water, recognised in their favor by the legislator. Moreover, it specified that this recognition did not deny or overlook the existence, nor the property of water rights by the water company, on the contrary, it established there was an undeniable coexistence of both parties' rights.

176. Convention concerning Indigenous and Tribal Peoples in Independent Countries (n° 169) (adopted 27 June 1989, entered into force 5 September 1991) 72 ILO Official Bulletin 59.

177. Ley n° 19.253 de 1993 establece normas sobre protección, fomento y desarrollo de los indígenas, y crea la corporación nacional de desarrollo indígena.

178. Constitución Política de la República de Chile 1980 (as amended).

179. Código de Aguas 1981 (as amended).

The Court added that *'the judgment appealed has been limited to regularizing pre-existing rights,'* that one *'is judicially recognizing a use of the water resources from time immemorial,'* and that *'the procedure used has, as its purpose, that once the customary use is recognized, it be considered a right, which, once regularized, can be entered in the corresponding national state registry, which will make it possible for the Indigenous Community to survive on its ancestral land (...).'* The Court observed that the respondent did not attempt to contradict the appellant's water rights, but rather obtain the regularisation of its 'pre-existing and ancestral rights over water resources' recognised in article 64 of the Indigenous Law.

The Court referred that a correct application of article 64 of the Indigenous Law must take into account the ILO Indigenous and Tribal Peoples Convention, whose article 15, n° 1 stipulates: *'The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded,'* which must be read in conjunction with article 13, n°2 stating: *'The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use'.* In light of the exposed the Court established that *'notwithstanding that it is a fact not controverted by the litigants that the source of water that supplies the community bringing the motion, called Socavón or Vertiente Chusmiza, is situated on a property entered in the name of the company opposing the motion, Agua Mineral Chusmiza, which moreover appears in the respective registration of title (...); that circumstance does not stand in the way of applying the special protection contained in Article 64 of the Indigenous Law, which moreover appears in the respective registration of ownership. (...) That circumstance does not prevent one from applying the special protection contained in Article 64 of the Indigenous Law, which enshrines a presumption of ownership and use of the waters by the Aymara and Atacama indigenous communities (...).'*

Decision The Supreme Court dismissed the appeal and confirmed the Appeals Court decision recognising that the indigenous community had ancestral property rights over the waters that emanate from the Socavón Chusmiza. Subsequently, the indigenous community, alleging the State's failure to enforce the Supreme Court's decision, brought the case before the Inter-American Commission on Human Rights, which declared the petition admissible.¹⁸⁰

180. Inter-American Commission on Human Rights, Report N° 29/13, Petition 1288-06, March 20, 2013.

CHILE

Comunidad Atacameña de Toconce c/Essan SA

Corte Suprema

22 March 2004¹⁸¹

Keywords [Availability– Water – Ancestral water rights (recognition/violation) – Indigenous people – Customary water rights – Obligation to Protect]

Abstract Customary or ancestral water rights can be recognised in favour of indigenous communities even if other water rights over the same water source have been registered by a third party.

Facts The Atacameña indigenous community of the village of Toconce applied to regularise and register its ancestral rights to water from the Toconce River in accordance with the Chilean Indigenous Law, since it has been supplying the community from time immemorial with water for human consumption, animals and irrigation. However, the water company Essan SA had already registered water rights for the use of water from the same river and objected to this registration. A report by the Water Regional Director, who conducted an inspection visit to the area, notes that both parties' rights can coexist, since there is sufficient availability of water.

Procedure The Atacameña Community applied to the Second Court of Letters of El Loa Calama, seeking the regularisation and registration of their water rights. The Court granted the application and recognised the Community's 'rights to use surface waters and streams of the Toconce River, consumptive in nature, and of permanent and continuing use, for a total amount of thirty litres per second'. It further ordered that the Community's water rights be registered in the Water Property Registry. Both the Community and the water company Essan SA appealed the judgment. The Court of Appeals of Antofagasta confirmed the decision in first instance, in relation to the Community's water rights but increased the amount of water they were entitled to one hundred litres per second. Essan SA further appealed this decision to the Supreme Court with a motion for cassation [Primerero].

181. *Comunidad Atacameña de Toconce c/ Essan SA* [2004] Corte Suprema 986/2003 <<http://www.eclac.cl/drni/proyectos/walir/27.pdf>>

Claims The appellant alleged that the recognition of water rights to the Atacameña Community amounted to a violation of Transitory article 2, in connection with article 20, 21 and 121 of the Water Code since this registration interfered with its own water rights to a provision of 470 litres per second, registered since 1986 [Primerº].

Applicable Law and Reference to Regional or International Instruments

- Law on the Protection, Promotion and Development of Indigenous Communities (Indigenous Law N° 19,253 of 1993) – Transitory Arts. 3 and 64¹⁸²
- Decree-Law on Water Rights, Art. 2, 7¹⁸³
- Political Constitution of the Republic of Chile, art 19 (n°24, last paragraph)¹⁸⁴
- Water Code – Transitory Art. 2, 20, 21, 121¹⁸⁵

Court rationale The Supreme Court held that it was ‘impossible to qualify as illegal the use of water without authorisation, i.e. without a legal title, if that use derives from customary practices’ [Tercero]. It further maintained that as noted by the lower courts, in this case, transitory article 2 of the Water Code does not intend to create water rights, but solely to regularise and register them. For this reason, the lower courts determined that the Community was an ancestral owner of the water rights challenged, i.e., owner, in accordance with the express text of the law, as stipulated in transitory article 3 of the Indigenous Law. [Cuarto]. The Court added that before the current legal framework was in force, the legislator, with a view to strengthen water rights, expressly recognised its customary use as a Right, as stipulated in article 7 of Decree-Law n° 2603 of 1979, and then gave them constitutional protection under article 19 (n° 24, last paragraph) of the Political Constitution [Sexto]. As a consequence, the Court concluded, transitory article 2 of the Water Code enables the regularisation but not the creation of rights, since the rights object of regularisation existed previously and their property cannot be challenged because it emanates from the law. It added that, in order to obtain the formalisation of the ancestral property right, recognised by the Indigenous Law, it is important to know and establish the essential content and characteristics of those rights. This is what the lower courts did when they regularised the Community’s water rights to use surface waters and streams of the Toconce River, consumptive in nature, and of permanent and

182. Ley n° 19.253 de 1993 establece normas sobre protección, fomento y desarrollo de los indígenas, y crea la corporación nacional de desarrollo indígena.

183. Decreto Ley n° 2.603 de 1979 establece normas sobre derechos de aprovechamiento de aguas.

184. Constitución Política de la República de Chile 1981 (as amended).

185. Código de Aguas 1981 (as amended).

continuing use, for a total amount of a hundred litres per second [Octavo]. The Court did not see any reason to rule differently [Décimo].

Decision The Supreme Court dismissed the appeal and confirmed the lower Court's decision [Undécimo].

Dagoberto Bohórquez Forero c/ EAAB Empresa de Acueducto y Alcantarillado de Bogotá y Otros

Tribunal Administrativo (Cundinamarca)

3 May 2012¹⁸⁶

Keywords [Availability – Water – Sanitation – informal settlements – Right to access to public services (violation) – Right to access services infrastructure to guarantee public hygiene (violation) – Collective Rights – Public service – Obligation to fulfil]

Abstract Public authorities and public water companies have the obligation to, in settlements that have already been legalised, provide water and sanitation services efficiently and in a timely manner.

Facts According to a judicial inspection carried out on 15 October 2009, the water and sanitation service is deficient in several informal settlements in Ciudad Bolívar and Soacha, on the outskirts of Bogotá, which has led the inhabitants to install hosepipes' networks and connect them to tanks for their water provision. The sanitation system is precarious and in bad condition, it is not connected, nor piped as it was built by the community. The provision of public services in these barrios is inadequate, as there is no sanitation infrastructure and their inhabitants have built it themselves, with their own means. For the provision of drinking water the users have two options: either to make a connection through hosepipes to the tanks, although one is damaged and the other one is not sufficient to provide the service effectively and continuously to the whole community; or through tanker trucks. Some of these settlements had been legalised, while others remained illegal. (p.43)

Procedure A group of residents (the claimants) living in informal settlements in Ciudad Bolívar and Soacha, on the outskirts of Bogotá brought a popular action (*acción popular*) before the Third Administrative Court of the Circuit of Bogotá against the public water and sanitation service provider (*Empresa de Acueducto y Alcantarillado de Bogotá ESP*), the Mayor of Bogotá, the

186. *Dagoberto Bohórquez Forero c/ EAAB Empresa de Acueducto y Alcantarillado de Bogotá y Otros* [2012] Tribunal Administrativo (Cundinamarca) 11001-33-31-003-2007-00186-01. No hyperlink available.

Department of Cundinamarca and other public authorities (the respondents). The Court dismissed their claims. The claimants then appealed to the Administrative Court of Cundinamarca.

Claims The claimants sought, through a popular action (*acción popular*), the protection of collective rights and interests related to the enjoyment of a healthy environment, access to water and sanitation services' infrastructure that guarantee public health and access to public services provided efficiently and adequately.

Applicable law and reference to regional or international instruments

- Political Constitution of Colombia – Arts. 88, 365 – 370¹⁸⁷

Court Rationale The Court in first instance dismissed the claims . Regarding non-legalised settlements, it held that the respondents had no obligation to expand public services to these areas. Regarding legalised settlements, the Court concluded that their recognition by the district did not imply a guarantee of satisfactory provision of residential public services and that the respondents had devised plans and technical studies for future water service provision and therefore, had not neglected the rights of residents.

On appeal, the Administrative Court of Cundinamarca, based its ruling on Article 365 of the Constitution, whereby public services are an inherent social purpose of the State and the State is obliged to ensure the efficient delivery of public services to every inhabitant. In this respect the Court referred that the provision of public services is conditioned by the assumptions of efficiency and opportunity, which were not complied with by the public company. The Court found that *'irrespective of the action taken to study the area and develop technical designs, the fact remains that the water services do not meet the needs of the community and sanitation services are non-existent; therefore, the collective rights invoked by the community are currently being violated'*. The Court concluded that, based on consistent adjudication, the municipalities are constitutionally obliged to guarantee and secure the delivery of public services, as part of the social purposes of the State. (pp. 44-46)

Regarding the settlements that had already been legalised (mostly by the Capital District), the Court found that the Capital District has the responsibility to mitigate the violation of the collective rights of the inhabitants and therefore must, in collaboration with the public service provider and

187. The Political Constitution of Colombia, 1991. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=5431>.

the inhabitants, take the necessary steps to deliver services efficiently and in a timely manner. The Court ruled that the Department of Cundinamarca (CAR) in turn was obliged to issue the necessary permits and licenses, based on environmental legislation concerned with the use of natural resources. (pp. 47-48)

Regarding the non-legalised settlements, the Court found that while citizens had rights to public services, these services must be provided on the basis of legality, including principles of planning, programming and budgeting that are indispensable to ensure that the State can deliver its functions. The Court reasoned that the administration has discretion to arrive at those planning decisions. On the basis of a popular action, the judiciary could not intervene in such executive decisions unless there was evidence of arbitrariness, unreasonableness, disproportionality or neglect of principles that guide public expenditure. The Court found no evidence to that effect. The Court therefore ruled that the non-legalised settlements could not invoke collective rights to public services. (pp. 48-49)

Decision The Administrative Court of Cundinamarca overruled the judgement of the Court in first instance in relation to the legalised settlements, protecting, as a consequence, the rights to a healthy environment, to access services' infrastructure that guarantees public health, to access public services and to an efficient and timely provision in the legalised settlements.

The Court ordered the Municipality of Bogotá and the public water company to, within one year, and in coordination and collaboration with the Department of Cundinamarca and CAR, execute the works already planned for the water and sanitation service provision in the settlements; and to advance the relevant studies and technical designs to complement those projects. It gave authorities a further year to then execute those complementary works. (pp. 59-60)

COLOMBIA

Hernán Galeano Díaz c/ Empresas Públicas de Medellín ESP, y Marco Gómez Otero y Otros c/ Hidropacífico SA ESP y Otros
Corte Constitucional, Ninth Chamber of Revision
5 August 2010¹⁸⁸

Keywords [Availability – Access to information – Accountability – Right to water (violation) – Right to a dignified life (threat) – Right to health (threat) – Not connected to water supply – Public service – core obligation – Obligation to fulfil – Obligation to protect]

Abstract Failing to connect a property to the water and sanitation networks, and failing to supply a daily, minimum essential amount of water to a user, constitute violations of the right to water under the Colombian Constitution and international human rights law.

Facts Mr Hernan Galeano Díaz and his family were living in a house where the public company 'Empresas Públicas de Medellín ESP' (EPM) refused to supply water and sanitation services [page 5, para. 1]. As a result, his house was not connected to the public water and sanitation networks. A judicial inspection revealed that the small pipes feeding the wash basin, the toilet and the shower were directly connected to the neighbor's water network, who supplies water to Mr. Díaz's house for two hours a day for \$40.000 per month. The judicial inspection also revealed that there were buckets to collect water from the rain. The neighbor referred during the inspection that she had written a letter authorising the water pipeline of the applicant to be extended through her house. EPM would not connect the public water service to Mr. Díaz residence because the local water and sanitation networks operated by EPM was not installed in front of his house.

Mr Otero and live in the Nueva Granada neighborhood in Buenaventura. The water service provided by the private company Hidropacífico SA ESP was highly deficient as it did not provide the minimum essential amount of water to the neighborhood. Water was only supplied between 6pm and 12am,

188. *Hernán Galeano Díaz c/ Empresas Públicas de Medellín ESP, y Marco Gómez Otero y Otros c/ Hidropacífico SA ESP y Otros* [2010] Corte Constitucional T-616/10 <<http://www.corteconstitucional.gov.co/relatoria/2010/T-616-10.htm>>.

and water pressure was not sufficient to supply households higher up in the neighborhood, who were left with no provision of water at all although water bills were paid [ref]. Families sometimes had to resort to collection of rain water. The private water company recognised that the water service in Nueva Granada was critical due to illegal connections to the water network by people living in the informal settlement El Milagroso [page 9, para. 1-2.3].

Procedure Mr Díaz applied for a ‘tutela’ action (injunction) to the Municipal Criminal Court (23) against EPM seeking the connection of his property to the water and sanitation networks [page 5, para. 1-1.4]. His application was dismissed on the grounds that he had not complied with the minimum duties of users, including applying for a connection to the water and sanitation services and carrying out the works suggested by EPM [page 6, para. 1-3]. Mr. Díaz appealed to the Constitutional Court.

Mr Otero and others, the second applicants, applied for a ‘tutela’ action to the Seventh Municipal Civil Court of Buenaventura against Hidropacífico SA ESP and others, seeking the adoption of the necessary measures to ensure an adequate water service to their houses [page 9, para. 1-1-4.]. His application was also dismissed on the grounds that the protection of the rights invoked could be carried out through an *actio popularis* (collective action) and that there was no eminent, irremediable damage present [page 11, para. 1-5]. Mr. Otero and others appealed to the Constitutional Court.

The Constitutional Court decided to consider the applications jointly.

Claims In both cases, the applicants alleged that their rights to water, health and a dignified life, had been violated since measures had not been adopted by those responsible ‘to ensure access to a minimum daily supply of drinking water. In the case of Mr Díaz, this was due to the absence of a connection to the local water and sanitation networks, and in the case of Mr. Otero and others it was due to recurring deficiencies in the water service provision [page 13].

Applicable Law and Reference to Regional or International Instruments

- CESCR General Comment N° 15 – Paragraphs 2, 12, 37¹⁸⁹
- ICESCR – Arts. 11 and 12¹⁹⁰

189. UN CESCR ‘General Comment 15’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9.

190. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976 993 UNTS 3 (ICESCR).

- Political Constitution of Colombia – Arts. 79, 356 and 366¹⁹¹

Court Rationale The Constitutional Court held that in the two situations, object of appeal, the right to water acquires an undeniable fundamental character. The water requested by the applicants is for domestic uses in their own houses and what they request is to have sufficient water for human consumption, personal and household hygiene, and food preparation. Anytime the lack of water for these personal and domestic uses puts at risk the enjoyment of dignity, life and health, its protection becomes urgent.

The Court first referred to the status of the right to water under national and international law. It referred that according to the Political Constitution of Colombia the right to water is protected under the right to a healthy environment (article 79) and water service provision is a duty of the State (article 366). It added that under international human rights law, the right to water is an economic and social right derived from articles 11 and 12 of the ICESCR [page 13, para. 11-1.2], and also an essential element of the right of women to adequate living conditions and part of the right of children to health. But, in addition to that, the Constitutional Court has previously sustained that ‘water for human consumption constitutes a true fundamental right’ [page 14, para. 11-1.2] as it is indispensable to guarantee physical life and human dignity. As a fundamental right, the Constitutional Court, through its case-law, has been protecting, different aspects of the right to water notably in relation to ‘the minimum standards of (i) availability, (ii) quality, (iii) access and (iv) non-discrimination regarding distribution, in conformity with the obligation to use the maximum available resources to achieve the realization of the right to water for all inhabitants’. The Court further specified that it protected ‘the right to a continuous and sufficient water supply for personal uses’, and ‘the right to water of acceptable physical and chemical conditions’. It also re-stated that ‘not guaranteeing a person or a community’s access to the necessary and appropriate infrastructure for the provision of water service’ is a violation of the right to water, and recalled that it had extended ‘the protection of the right to non-discrimination to the distribution of water’ [para. 11-2.3].

The Constitutional Court referred that the interpretation of the content and scope of the right to water must be complemented with General Comment N° 15 on the right to water, which states that ‘the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’ [para. 11-2.5]. The Court

191. Constitución Política de Colombia 1991 (as amended).

noted that compliance with these standards guarantees the full enjoyment of the right to water for human consumption and creates immediate and progressive obligations for States, subject to budget availability and internal regulation. An analysis of the Constitutional Court's jurisprudence made in light of General Comment N° 15, establishes that 'the fundamental right to water guarantees access to public water services that supply water for human consumption, in terms of availability, quality, accessibility and non-discrimination' [para. II-2.7]. The Court concluded that the right to water enjoys constitutional protection at two levels: at the minimum content level, where the constitutional judge must take the necessary measures to stop the violation immediately; and at the level that exceeds the minimum content, where the constitutional judge must verify if the violation of the right is due to a total or partial lack of investment or to public negligence, in which case it must order the adoption of the necessary measures. In the cases at issue, the Court found that the refusal of the first respondent (EPM) to connect the first applicant's (Mr. Díaz) premises to the water and sanitation networks was a violation of his right to water, and threatened his and his family's human dignity, [para. III-3.7] since the way in which he was forced to obtain water was unjustified and did not guarantee the minimum essential levels of availability that the State is obliged to provide. It further held that the second respondents, (Hidropacífico and others) violated the second applicants' (Mr. Otero and others) right to water, and threatened their rights to life and human dignity due to the failure to supply a daily, minimum essential amount of water to the applicants or to foresee other alternative forms of water distribution namely tanker-trucks or water storage systems (obligations of Hidropacífico), in conformity with their constitutional, legal and contractual obligations [para. III-3.10]. In relation to the illegal connections to the water network carried out by the inhabitants of the neighbouring informal settlements, the Court held that the local authorities were responsible as they did not adopt the necessary measures to avoid the loss of water.

Decision In both cases the Constitutional Court quashed the judgments of the Courts in first instance and protected the rights to water, to a dignified life and to health.

In relation to Mr. Díaz, the Constitutional Court ordered the respondent to, within a month, connect his house to the public water service. It warned the respondent that Mr. Díaz would only bear the cost relative to the installation of the pipeline from the nearest point of the public network until the interior of his house. In any case before starting any works, the respondent must

indicate how much will be on charge of the user in order to reach a payment agreement foreseeing, if necessary, a financing system.

In relation to Mr. Otero and others, the Constitutional Court ordered the respondent to: 1. Take all the budgetary and technical measures required to guarantee at least, within one month, a daily supply of water to the houses of the applicants. . The respondent may use any technological systems available to supply water to the community daily, including tanker trucks or building individual or collective water storage systems. 2. Re-establish, within 48 hours, the provision of drinking water to the houses of the applicants located higher up in the neighbourhood of Nueva Granada. 3. Create , within one month, an information and monitoring system to assess the impact of measures taken to tackle the issue of fraudulent interventions (illegal connections) in the Nueva Granada water supply system.

The Constitutional Court also ordered the Mayor's Office of Buenaventura and the Water and Sanitation Society (local authorities) to:

1. Design and implement, within one month, a contingency plan to stop fraudulent interventions by third parties.
2. Design, within 6 months, a plan foreseeing all the measures to be taken in order to solve definitively the fraudulent appropriation of water by the neighbourhoods of El Milagroso and El 12 de Octubre (informal settlements), including specific measures with a view to guarantee, in the short-term, a minimum amount of water available for the inhabitants of these informal settlements. This plan must be executed before the 31 of December 2011.

Carolina Murcia Otálora c/ Empresas Públicas de Neiva ESP

Corte Constitucional

6 August 2009¹⁹²

Keywords [Affordability – Fundamental rights to water, life and health (violation) – Disconnection of water supply – Non-payment for economic reasons – special protection groups]

Abstract The disconnection of the water supply, affecting groups specially protected by the Constitution, due to non-payment of water bills for lack of means violates the fundamental rights to drinking water, life and health.

Facts The applicant, Mrs. Murcia Otálora, lived together with her husband and two children in a house she rented in the neighbourhood Dario Echandía in the city of Neiva. The applicant did not have a salary and her husband did not have a regular income. In the second half of 2008, the applicant and the respondent, the water provider *Empresas Públicas de Neiva*, agreed on a settlement, in September 2008, whereby Mrs. Murcia paid a first share of \$50.000 of the total debt (\$453.330) and agreed to pay the outstanding water bills in monthly instalments over 3 years. Following the agreement, the petitioner paid some receipts referring to the re-financing of the debt, but regularly received very high water bills. She therefore could not afford to pay the bills and the water supply was disconnected as a result (in December 2008). The respondent argued that the amounts billed were due to the high amount of water consumed. The parties entered into a second settlement, in December 2008, whereby the applicant made a payment of \$42.867. However, in addition to the costs regarding the second re-financing of the debt (\$14.088.79) and the re-connection of water services (\$10.463), water bills continued to be very high and the applicant did not have the means to pay them. As a result, the respondent disconnected the water supply to the family for the second time (in January 2009). Over the course of the proceedings, the Court found out that the presumed high consumption of water was due to a leak in the sanitation system. It also found out that the family had resorted to an unauthorised connection to be able to access water.

192. *Carolina Murcia Otálora c/ Empresas Públicas de Neiva ESP* [2009] Corte Constitucional T-546/09 <<http://www.corteconstitucional.gov.co/relatoria/2009/t-546-09.htm>>.

Procedure Mrs. Murcia Otálora filed a *‘tutela’* action at the Seventh Municipal Civil Court of Neiva, but was not granted the *‘tutela’*. She appealed to the Third Civil Court of the Circuit of Neiva, which confirmed the decision in first instance. The applicant, subsequently, brought the case before the Second Review Chamber of the Constitutional Court.

Claims The applicant claimed that the disconnection of the water supply constituted a violation of her (and her family’s) fundamental rights to life, equality and due process .

Applicable law and reference to regional or international instruments

- Political Constitution of Colombia – Arts 366, 367¹⁹³
- CESCR General Comment n° 15, para 6¹⁹⁴
- Convention on the Rights of the Child – Art. 24, para. 2¹⁹⁵
- Convention on the Elimination of all Forms of Discrimination Against Women – Art. 14¹⁹⁶
- International Covenant on Economic Social and Cultural Rights – Art. 11, para. 1¹⁹⁷
- Act 142 of 1994 – Art. 128, 130¹⁹⁸.

Court Rationale The Seventh Municipal Civil Court of Neiva decided that the disconnection did not constitute a violation of fundamental rights of the family. It held that it was the responsibility of the family to control their water use; *‘when one is poor one should observe proper water use’* and *‘poverty does not exempt a person from the social duty to contribute to the financing of government spending’* (para. 1.4). The applicant appealed to the Third Civil Court of the Circuit of Neiva. This Court confirmed the judgement in first instance (*para. 1.4*) on the basis that although the State foresees subsidies for the poorest, that does not entitle them to waste the service or to be exempt from billing. The applicant then appealed to the Constitutional Court.

193. The Political Constitution of Colombia, 1991. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=5431>.

194. Available at: [http://www.unhchr.ch/tbs/doc.nsf/o/a5458d1d1bbd713fc1256cc400389e94/\\$-FILE/Go34o229.pdf](http://www.unhchr.ch/tbs/doc.nsf/o/a5458d1d1bbd713fc1256cc400389e94/$-FILE/Go34o229.pdf)

195. Available at: http://www.ohchr.org/en/professionalinterest/page_s/crc.aspx

196. Available at: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

197. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

198. Act 142 of 1994, which establishes the System of Public Utilities and other Provisions. Available at: <http://www.superservicios.gov.co/home/web/guest/218>.

The Constitutional Court applied the Constitution of Colombia, 1991¹⁹⁹, the CRC and referred to the ICESCR, CESCR General Comment n° 15, the CEDAW, and Act 142 of 1994²⁰⁰. The Court held that *'satisfying the basic need of drinking water is a fundamental objective of public activity, because the survival of mankind is inextricably linked to the ability to enjoy it. Water for human consumption is a fundamental right and it can be protected through a 'tutela' action, as without water the rights to life, health and human dignity are seriously threatened'* (para. 3.1). The Court further explained that payment for public services is a constitutional duty as from it depends the normal functioning of solidarity mechanisms, which sustain the system and facilitate the provision of an efficient and continuous service not just for the applicant, but for everyone. Therefore, there was a general need for sanctions to discourage non-payment, which may include suspension of water supply (para. 4.4). However, the Court held that even if, as a general rule, water and sanitation services may be disconnected for non-payment of bills, it is prohibited by the Constitution to formulate this possibility as categorical or definitive as, when analysing the legitimacy of a disconnection, one must take into account the reasons for non-payment, the fundamental rights that, as a result, might be undermined or the living conditions of those affected (para. 4.5). The Court added that while the applicant did fail to honour her contractual obligations, she was never reluctant to pay her debts (she paid \$50.000 initially and at a later stage \$42.867). Rather, she was often unable to pay because of economic circumstances (para. 5.1).

The Court held that economic circumstances did not in principle exempt the applicant from paying outstanding bills. However, it also held that the public company could not have suspended the water supply completely as in this case, both the children and the family facing economic difficulties enjoy special protection under the Constitution and international human rights treaties. It added: *'Children's rights, as foreseen in Art. 24, para. 2 of the CRC, must be guaranteed with greater diligence by public authorities, when neither the family, nor society provide them with access to minimum basic quantities of drinking water.'* According to the Court, *'not all cases of non-payment legitimise the disconnection of water and sanitation services. If the non-payment is involuntary or due to insurmountable reasons; if it is related to groups entitled to constitutional special protection; if the service is indispensable to guarantee other constitutionally protected fundamental*

199. The Political Constitution of Colombia, 1991. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=5431>.

200. Act 142 of 1994, which establishes the System of Public Utilities and other Provisions. Available at: <http://www.superservicios.gov.co/home/web/guest/218>.

rights such as the rights to life, equality, dignity and health; and if, finally, the legal conditions for disconnection are met, what must be changed is the way in which the public service is provided. Rather than disconnecting the water supply, basic and indispensable, minimum quantities of water must be provided to the final user.'

Notwithstanding these considerations, the Court upheld the judgements of the Courts in first and second instance, albeit for different reasons. Unlike the Courts in first and second instance, the Constitutional Court concluded that the disconnection of the water supply did in this case constitute a violation of the fundamental rights to drinking water, life and health most notably of the children. However, as the applicant resorted to an illicit re-connection, the Court concluded that this effectively excluded her from seeking protection through licit means.

Decision

The Constitutional Court upheld the judgements of the Courts in first and second instance, because the applicant had resorted to an unauthorised connection.

Flor Enid Jiménez de Correa c/ Empresas Públicas de Medellín

Corte Constitucional

17 April 2007²⁰¹

Keywords [Affordability – Availability – Rights to health life (violation) – Dignity – Vulnerable group – Disconnection of water supply – Special protection – Non-payment – Public Service – Obligation to protect]

Abstract Disconnecting the water (and electricity) supply to the property of a vulnerable person suffering from chronic kidney failure for lack of means to pay, amounts to a violation of the right to life in dignity conditions, which requires the satisfaction of vital, minimum conditions such as access to water (and electricity) services, and is contrary to the Colombian Constitution and the ICESCR .

Facts Mrs Jiménez de Correa, a 56-year-old woman, suffers from a chronic kidney failure which affects her normal, daily life. Due to her condition, she needs four daily sessions of dialysis at home. Each dialysis session lasts for 30 minutes and has to be performed every six hours, during the day, every-day of the week. According to health professionals, the treatment requires not only an exhaustive personal hygiene, especially hand washing, a daily bath, and the cleaning of the catheter but also good lighting conditions. The treatment has to be performed at home and access to water is indispensable not only prior to the treatment but also during the day in order to maintain the required hygiene conditions. Mrs Jiménez de Correa does not have an income as she cannot work due to her health condition. The son who supported her economically passed away 5 years ago and she hasn't yet received a survivor's pension. As she could not pay her water and electricity bills, the public service provider, 'Empresas Públicas de Medellín' (EPM), disconnected the water and electricity supply to her premises. EPM offered Mrs Jiménez a form of debt financing (installment agreement), which she could not accept because she had no conditions to honour it [para. 1-1.1 to 1-1.4].

201. *Flor Enid Jiménez de Correa c/ Empresas Públicas de Medellín* [2007] Corte Constitucional T-270/07
<<http://www.corteconstitucional.gov.co/relatoria/2007/T-270-07.htm>>.

Procedure Mrs Jiménez de Correa filed a *tutela* action at the Tenth Municipal Civil Court of Medellín against the public water company EPM. The Court protected her right to water and ordered the reconnection of her property to the public water network considering that it was necessary for her medical treatment, and that denying it would put her life at risk [para. 1-3.1]. The Fifteenth Civil Court of the Circuit of Medellín confirmed this decision. EPM further appealed to the Constitutional Court arguing that water services could not be provided for free, and that the company had reconnected her premises to the water supply network despite Mrs Jiménez de Correa's refusal to accept a payment agreement they offered her [para. 1-3.2].

Claims The applicant sought obtain the protection of her fundamental rights to health, life, physical integrity and environmental sanitation, and to that purpose, requested the reconnection of her property to the water and electricity public supply systems [para. 2].

Applicable Law and Reference to Regional or International Instruments

- CESCR General Comment N°15, Paragraphs 1, 2, 6, 11, 12, 15, 27, 57, 58²⁰²
- ICESCR – Arts. 11 and 12²⁰³
- Political Constitution of Colombia – Arts. 11, 13, 93, 365 and 366²⁰⁴

Court Rationale The Constitutional Court referred to articles 11 and 12 of the ICESCR and to General Comment N° 15 as the legal bases for the right to water. It stressed that according to General Comment N°15 *'the human right to water is indispensable for leading a life in human dignity and is a prerequisite for the realisation of other human rights'*.²⁰⁵ The Court referred that three factors are determinant for the enjoyment of the right to water: availability, quality and accessibility and added that these standards are implied in articles 365 and 366 of the Constitution, which consecrate the efficient provision of public services to all inhabitants of the country. The Court also stressed that in light of article 93 of the Constitution, interpreted in conformity with General Comment N° 15, water is an autonomous, social right and that States parties to the Covenant *'have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited*

202. UN CESCR 'General Comment 15' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9

203. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976 993 UNTS 3 (ICESCR)).

204. Constitución Política de Colombia 1991 (as amended).

205. UN CESCR 'General Comment 15' (n 1) [1].

*grounds in the provision of water and water services.*²⁰⁶ It further held that 'to ensure that water is affordable, States parties must adopt the necessary measures that may include (...) appropriate pricing policies such as free or low-cost water' [para. II-4].

Regarding the right to life, the Constitutional Court noted that articles 11 and 13 of the Constitution require the State to strengthen the protection of this right in relation to people who are in a clear vulnerable situation due to their economic, physical or mental condition. The Court stated that the right to life must be interpreted broadly, i.e. as living in dignified conditions, so as to include a series of minimum conditions that allow an individual to live in dignity, by taking into consideration specific aspects such as the satisfaction of basic needs, health, age, disabilities, or any other situation that requires special protection from the State [para. II-5]. The Court held that the health condition of the applicant entitles her to this special protection from the State given her vulnerability and the lack of economic means to pay her water and electricity bills [para. II-6.1].

The Court concluded that the non-provision of water (and electricity) services to Mrs Jiménez de Correa, ostensibly affected her life in the most basic dignity conditions and seriously put at risk her livelihood. The Court found that a systematic and direct application of the Constitution to this case does not permit the disconnection of public services for economic reasons and requires the protection of the rights to health and to life in dignity.

Decision The Court upheld the decision of the Fifteenth Civil Court of the Circuit of Medellín [para. III] and ordered the reconnection of the electricity supply to Mrs Jiménez de Correa. The public water supply had been reconnected by EPM after the first instance decision. The Court further ordered the local authorities (Personería Municipal) and the Regional Ombudsman of Antioquia to give Mrs Jiménez de Correa all the necessary assistance in relation to her survivor's pension, and referred that when Mrs Jiménez de Correa receives her income, a payment plan should be agreed between her and EPM in accordance with her situation and safeguarding her vital minimum.

206. UN CESCR 'General Comment 15' (n 1) [15].

COLOMBIA

Jorge Hernán Gómez Ángel c/ Alcalde Municipal de Versalles – Valle del Cauca y el Gerente de la Empresa de Servicios Públicos de Versalles

Corte Constitucional, Fourth review Chamber

22 May 2003²⁰⁷

Keywords [Quality – Contaminated water – Rights to life, human dignity, health and healthy environment (threat and violation) – Lack of water treatment – Public service – Obligation to protect]

Abstract The right to water is a fundamental constitutional right when it is used for human consumption. Supplying water that is unfit for human consumption amounts to a violation of the fundamental rights to life, human dignity, health and a healthy environment under the Colombian Constitution.

Facts Mr Jorge Ángel, a municipal councilor, acting as a citizen of Versalles and on behalf of the rest of the community, complained that the mayor of the municipality of Versalles and the manager of the Public Services Company were supplying water unfit for human consumption to the population.

Procedure Mr Jorge Ángel applied for a *'tutela'* action to the Municipal Court of First Instance of Versalles, Mr Jorge Ángel appealed to the Constitutional Court.

Claims The applicant alleged that the respondents had violated his and the other inhabitants' of Versalles rights to life, health, human dignity and a healthy environment by allegedly supplying contaminated water to the population [Cons].

Applicable Law and Reference to Regional or International Instruments

- Political Constitution of Colombia – Arts. 11, 13, 49, 365, 366, 367 and 370²⁰⁸

207. *Jorge Hernán Gómez Ángel c/ Alcalde Municipal de Versalles – Valle del Cauca y el Gerente de la Empresa de Servicios Públicos de Versalles* [2003] Corte Constitucional T-410/03 <<http://www.corteconstitucional.gov.co/relatoria/2003/T-410-03.htm>>.

208. Constitución Política de Colombia 1991 (as amended).

Court Rationale The Constitutional Court held that the supply of water constitutes a public service that is essential for life and enjoys Constitutional protection. It referred to articles 365-367 and 370 of the Constitution which provide that the State has the duty to ensure the efficient delivery of public services to all its inhabitants (article 365), and that it is a fundamental objective of the State to satisfy the needs of the inhabitants regarding drinking water, health, education and sanitation (article 366).

The Court emphasised that without water there is no life. Thereby, the public water service satisfies people's vital needs, which requires, naturally, the supply of water fit for human consumption, as the service is not provided by simply delivering the water, without any type of treatment, when it does not meet the minimum physical, chemical and bacteriological conditions for its use, putting at risk the health, and life of its users. The Court concluded that drinking water is a fundamental constitutional right when it is used for human consumption, as it is indispensable for life. The Court also recalled the normative concept of 'respect for human dignity', which has the character of fundamental right and stressed the relationship between human dignity and the guarantee of adequate living conditions. It added that the legal notion of human dignity incorporates the real and effective possibility of enjoying certain goods and services allowing every human being to live in society according to their special conditions and qualities under the logic of inclusion and the real possibility of playing an active role in society.

The Constitutional Court concluded that, in conformity with its case law/jurisprudence, the proven supply of contaminated and unfit water for human consumption by the respondents, constitutes a risk factor and is a 'violation of the fundamental rights to life, human dignity, health and a healthy environment' of Mr. Gómez Ángel and the inhabitants of the Versalles municipality.

Decision The Constitutional Court quashed the judgment of the Court of First Instance and protected the rights to life, human dignity, health and a healthy environment. The Court ordered the local Mayor and the public water company to adopt, within 30 days, the necessary administrative, financial and budgetary measures to ensure, within a period of six months, the effective provision of the water public service with the required levels of quality, regularity, immediacy and continuity, established by the Constitution and the law [Res.Seg.].

COLOMBIA

María de Jesús Medina Pérez y otros v. Alvaro Vásquez

Sala Séptima de Revisión de la Corte Constitucional

22 November 1994²⁰⁹

Keywords [Quality – water contamination – right to health (violation) – community participation]

Abstract This case considered that the contamination of water for human consumption at its source by a pig farm violates the right to health of those who consume the water and puts the ecological balance at risk for present and future generations.

Facts The inhabitants of Llanos de Cuivá (the plaintiffs) had been using and managing a community aqueduct for over 20 years. The aqueduct's water was considered safe until Mr. Alvaro Vásquez (the defendant) built a pig farm near the main water basin for the aqueduct. The pigs' manure was collected and used as fertilizer on the farm grounds. Runoff carried it to the water sources for the aqueduct. Numerous community members, particularly children, began suffering from gastrointestinal infections and skin infections as a result of using the polluted water (*p.* 25). Analysis of the water revealed it was contaminated with faecal matter. The defendant did not have the necessary environmental and health permits (*licencia sanitaria*) for the farm and, following a visit by the Health Service Section of Antioquia, it was recommended not to grant him a permit to dump animal excrements (*licencia de vertimiento*).

Procedure The plaintiffs applied for a '*tutela*' action before the Municipal Civil Court of Yarumal. The Court granted the '*tutela*' as a provisional measure. The owner of the pig farm challenged the decision before the Circuit Civil Court of Yarumal, which confirmed the decision in first instance. The defendant brought the case before the Review Chamber of the Constitutional Court.

Claims The plaintiffs sought the protection of their right to health which was, allegedly, being affected by the contamination of their drinking water source by a nearby pig farm.

209. Spanish original version available at: <http://www.corteconstitucional.gov.co/relatoria/1994/T-523-94.htm>. Translation of court quotations by the authors.

Applicable law and reference to regional or international instruments

- Political Constitution of Colombia – Arts. 79, 80, 86, 365-367, 369²¹⁰
- General Environmental Law of Colombia (Law 99 of 1993) – Arts. 5, 49²¹¹
- Declaration of the United Nations Conference on the Human Environment²¹²
- Rio Declaration on Environment and Development²¹³

Court Rationale The Municipal Civil Court granted the ‘tutela’, provisionally, to protect the right to life and ordered the defendant to abstain from fertilising his farm with the pig’s excrements and to dump the waste of his farm in a different area, far away from the groundwater source. The Circuit Civil Court, confirmed the ‘tutela’ granted by the Court in first instance.

The Court held that the right to a healthy environment is linked to the ability of consuming clean water and that the protection of ‘*the purity of water in its source*’ is part of the national policy on renewable natural resources, which ensures its sustainable use also for future generations. It added that, according to the Constitution, the State’s social goal to achieve a better standard of living for its population implies the State’s duty to solve the problem of non-potable water (Section II, 2, B, 1.1 at p. 17).

A community is entitled to potable water and the fact that the water service is managed by that community does not exclude its protection from a private person who is affecting the efficient provision of the service. The Constitution guarantees the ‘*right of communities to participate in the decisions that affect them*’, including through their participation in the committees for the development and social control of water and sanitation services (Section II, 2, C, 3.2 at p. 24). The Court stated: ‘*Public participation is the best warranty for efficiency in providing public services, but it does not exclude the use of coercive measures by the authorities when water for human consumption is contaminated, which amounts to a criminal offence*’ (Ibid.). The Court concluded that water sources cannot be contaminated and, in this case, the contamination is not accidental, it happened because the defendant has put his profit before the right to potable water. For this reason, the community

210. Political Constitution of the Republic of Colombia of 1991. Available at: <http://pdba.georgetown.edu/constitutions/colombia/col91.html>.

211. General Environmental Law of Colombia, Ley 99 de 1993, 22 Dec. 1993. Available at: http://www.oas.org/dsd/fida/laws/legislation/colombia/colombia_99-93.pdf.

212. Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972. Available at: <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

213. Rio Declaration on Environment and Development, Rio de Janeiro, June 1992. Available at: <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

is drinking contaminated water and their children are suffering from skin and gastrointestinal infections; It is clear that more than complying with a regulation, what is at stake in this case, is to protect the right to health which has been violated by a private person who has the obligation to respect a natural water source.

Decision The Constitutional Court upheld the decisions of the Courts in first and second instance and ordered the defendant to:

1. Stop, within 12 hours, all operations in the pig farm that were causing the water contamination, until mechanisms to stop runoff were adopted and the necessary environmental and health permits were obtained.
2. Pay for the medical services of the affected children.

The Court also ordered that the Ministry of the Environment be informed about the Court decision in order to enable it to make the necessary arrangements to inform the community of their constitutional right to participate in processes that affect them, through the 'committees for the development and social control of water and sanitation services' and through participation in public hearings that precede the processing of environmental permits (p. 28).

Carlos Alfonso Rojas Rodríguez c/ ACUAVENORTE y Otros

Corte Constitucional, Fourth Chamber of Revision

3 November 1992²¹⁴**Keywords** [Availability – accountability – fundamental right to water]**Abstract** In this case the Constitutional Court considered that the connection of a house or a workplace to a water and sewage network is a fundamental constitutional right.**Facts** A construction company (the plaintiff) was in the process of building houses on 78 plots of land. The plaintiff entered into an agreement with the Association of Users of the Rural Aqueduct of Veredas del Norte de Fusagasugá (ACUAVENORTE) and the Sanitation Division of the Aqueduct and Sewer Fund of the Colombian Department (territorial entity) of Cundinamarca (the respondents). In the agreement, the respondents agreed to install and connect the aqueduct service to the plots of land. . The plaintiff paid the appropriate fee to the respondents, but the connection was delayed and the respondents ultimately refused to connect the plots to the water and sewage network.**Procedure** The plaintiff sought to secure, through a *'tutela'* action (injunction), the connection of the plots under construction to the water and sewage network. In first instance, the First Municipal Criminal Court of Fusagasugá denied the *'tutela'* action. The plaintiff challenged this decision before the Second Criminal Court of the Circuit of Fusagasugá, which granted the *'tutela'*. The respondents challenged this decision before the Fourth Review Chamber of the Constitutional Court (paras.1 – 2.2).**Claims** The plaintiff claimed that his fundamental right to get a connection of his plots of land to the water and sewage network was being violated by the respondents.

214. *Carlos Alfonso Rojas Rodríguez c/ ACUAVENORTE y Otros* [1992] Corte Constitucional T-578/92 <<http://www.corteconstitucional.gov.co/relatoria/1992/T-578-92.htm>>.

Applicable law and reference to regional or international instruments

- Political Constitution of Colombia – Title II, Chapter 2 and Art. 365 – 367²¹⁵
- American Convention on Human Rights²¹⁶
- Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights²¹⁷

Court Rationale The Review Chamber of the Constitutional Court stated that the connection to the water and sewage network was a fundamental constitutional right, as it affects the enjoyment of other fundamental rights such as the rights to life and health. It applied the Political Constitution of Colombia²¹⁸, and referred to the ACHR, and the Additional Protocol to the ACHR²¹⁹. The Court emphasised that under the Constitution (Art. 365), *'it is the duty of the State to ensure efficient delivery of public services to all inhabitants of the country'* (para. 4, legal grounds). Furthermore, public services may be provided by the State, directly or indirectly, or by organised groups or private entities. *'In any case, the State will maintain the regulation, control and monitoring of these services'* (para. 4, legal grounds). The Court continued stating that the provision of basic needs such as health, education, sanitation and drinking water fall under the basic duties of the State (Art. 366) and that in principle, a *'tutela'* action can be sought when there is a violation of these fundamental rights: *'in principle, water is the source of life and a lack of water services, therefore, directly affects people's fundamental right to life. This means that the residential water and sewage service while affecting people's lives, public safety and health, is a constitutional right, and can generally be protected by a "tutela" action'* (para. 6, legal grounds).

Decision The Review Chamber of the Constitutional Court held that the plaintiff as a legal person (construction company) could not seek a *'tutela'* action, as legal persons cannot, *per se*, claim a violation of fundamental constitutional rights. It added that a claim for fundamental constitutional rights

215. Constitución Política de la República de Colombia de 1991, available at: <http://pdba.georgetown.edu/constitutions/colombia/col91.html>.

216. Available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

217. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador', adopted at the 18th regular session of the General Assembly in San Salvador, El Salvador on November 17, 1988, available at: <http://www.oas.org/en/iachr/mandate/Basics/sansalvador.asp>.

218. Constitución Política de la República de Colombia de 1991, available at: <http://pdba.georgetown.edu/constitutions/colombia/col91.html>.

219. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador', adopted at the 18th regular session of the General Assembly in San Salvador, El Salvador on November 17, 1988, available at: <http://www.oas.org/en/iachr/mandate/Basics/sansalvador.asp>.

by a legal person was only possible if the legal person claimed those rights on behalf of natural persons. Since the plots were still under construction, the Court held that the connection to the water and sewage network did not constitute an 'immediate need' for a public service, as the need for the connection would benefit a legal person and not individuals.

Gad Amit Kaufman y Otros c/ Municipalidad de Carrillo y Otros

Corte Suprema de Justicia, Constitutional Chamber

14 January 2009²²⁰**Keywords**

[Availability– Sustainability – Participation (violation) – Access to information – Groundwater – Right to a healthy and ecologically balanced environment (violation) – Sustainable environmental management – Precautionary principle (violation) – Obligations to respect and protect]

Abstract Authorising a project diverting water for commercial and tourism purposes without previously informing and allowing the affected population to participate in the formulation of the project, and without the technical certainty about its impact on the availability of water for the satisfaction of the population's consumption needs, amounts to a violation of the precautionary principle as guaranteed by the right to a healthy and balanced environment under the Costa Rican Constitution.

Facts Since 2006 the Costa Rican Water and Sanitation Institute (ICAA) has tried to pursue the '*Project for the expansion of the El Coco-Ocotol aqueduct*' motivated by the interest of local private developers – especially tourism and urban entrepreneurs – to obtain access to water for their ventures. In order to achieve this, ICAA proposed the possibility of exploiting water resources from the Sardinal aquifer, based on its own technical studies favoring the aquifer's exploitation, so that the available water resources fed the aqueduct, for which the construction of an interconnected infrastructure would be necessary to divert and distribute the water. To this extent, ICAA signed a Letter of Understanding (LOU) with a private company – Coco Water S.A. – in March 2006. However, residents from the area where the Sardinal aquifer is located, opposed the project, on the grounds of different inconsistencies, and non-compliance with environmental obligations, such as the lack of technical studies proving the possibility of exploitation of the aquifer, the carrying out of works without environmental viability and the lack of information provided to the community.

220. *Gad Amit Kaufman y Otros c/ Municipalidad de Carrillo y Otros* [2009] Corte Suprema de Justicia 2009-000262 (Sardinal case). No hyperlink available.

Procedure Mr. Kaufman and other residents of Sardinal applied for an injunction order (*recurso de amparo*) to the Constitutional Chamber of the Supreme Court of Justice against the Municipality of Carrillo and other public authorities in order to obtain the protection of their fundamental rights [para. 1].

Claims The applicants alleged that pursuing the ‘*Project for the improvement of the El Coco-Ocotol aqueduct*’ would amount to a violation of their fundamental rights to water and to a healthy and ecologically balanced environment [para. III].

Applicable Law and Reference to Regional or International Instruments

- Political Constitution of the Republic of Costa Rica Arts. 9, 21, 33 and 50²²¹
- European Water Charter²²²
- Protocol of San Salvador – Art. 11²²³
- Rio Declaration on Environment and Development – Principles 10, 15²²⁴
- Organic Environmental Law – Art. 6, 17²²⁵

Court Rationale The Court first stated that the Constitutional Chamber’s case law clearly recognises the right to water as a fundamental right. It added that public institutions have the obligation to make a responsible and prudent use of available water resources, which implies the need to be certain about the amount of water available to be exploited – availability – in order to ensure present provision and the future sustainability of the service, and to avoid that current water use causes an environmental threat compromising the existence and the future of water provision.[para. IV]

The Court recalled its judgement in the previous case of *Comité Pro-No Construcción de la Urbanización Linda Vista, San Juan Sur de Poás c/ Ministerio de Ambiente y Energía y Otros* and reiterated that groundwater is a theme intimately connected to certain fundamental rights recognised by the Polit-

221. Constitución Política de la República de Costa Rica 1949 (as amended).

222. European Water Charter (1974) UN Year Book of the International Law Commission 342. The text of the European Water Charter was adopted by the Consultative Assembly (now Parliamentary Assembly) of the Council of Europe on 28 April 1967 in Recommendation 493 (1967), and by the Committee of Ministers on 26 May 1967 in Resolution (67) 10.

223. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series n° 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992).

224. ‘Report of the United Nations Conference on Environment and Development’ (Rio de Janeiro 3-14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (Vol. I) Annex I.

225. Ley Orgánica del Ambiente 1995 (n° 7554).

ical Constitution and by international human rights instruments. The Court held that article 50 of the Constitution on the right to a healthy and balanced environment translates into Costa Rican law the precautionary principle as recognised under Principle 15 of the Rio Declaration on Environment and Development [para. IV]. It mentioned that access to drinking water is essential to ensure the rights to life – as stated in the 1968 European Water Charter of the Council of Europe – , and health (article 21 of the Constitution) and is associated with the development and socio-economic growth of the population, ensuring to each individual a dignified standard of living (article 33 of the Constitution and article 11 of the Protocol of San Salvador). The Court referred that the protection of the right to a healthy and ecologically balanced environment, requires the State to adopt preventive measures in order to avoid affecting it; and that amongst these measures, Environmental Impact Assessments (EIA), foreseen in article 17 of the Organic Environmental Law, are essential. It added that SETANA has been entrusted with this task. The Court declared that in the framework of EIAs it is particularly relevant to publicly inform the population that might be positively or negatively affected by works with an environmental impact, going beyond the mere transmission of information and establishing a dialogue that brings inputs prior to the granting of environmental viability.

The Court also referred that the Rio Declaration on Environment and Development binds the State of Costa Rica to the principle of participation (Principle 10) regarding environmental issues, which has been recognised in article 6 of the Costa Rican Organic Environmental Law. It highlighted that the ‘need to provide for the adequate participation of the population, potentially affected by the completion of this type of projects, is specially justified when it comes to the use of water resources, as taking into account the recognition of the right to water as a fundamental right, the Court has previously recognised as unconstitutional any measure that, for economic reasons or reasons of another nature, prevent a community’s access to water’ [para. VI].

The Court concluded that it is clear that the right to a healthy and ecologically balanced environment provides a special protection to groundwater, which in the framework of the precautionary principle on environmental issues, can only be exploited when there is scientific certainty that its use does not involve a risk or threat to the environment. For this reason, the administration must always carry out the necessary environmental assessment, which must be shared publicly with the affected population. [para. VII]

Therefore, the Court found that there was a violation of the right to a healthy and balanced environment for the breach of the precautionary principle on environmental issues as ICAA proposed the development of an infrastructure and water resources' exploitation project without any certainty about the availability of water and the possibility of exploiting the Sardinal aquifer, causing, as a result, an unnecessary environmental risk [para. XXIV].

Decision The Court granted the application and held that the approval and implementation of the project for the expansion of the El Coco-Ocotol aqueduct, along with the lack of technical certainty about the exploitation capacity of the Sardinal aquifer's water resources and, as a result, the uncertainty about the consideration given to the priority of water availability for the satisfaction of the community's interests above any other type of economic, commercial or touristic interest, amounted to a violation of article 50 of the Constitution on the right to a healthy and balanced environment; the Court also found that the lack of citizen's due participation in the project formulation amounted to a violation of article 9 of the Constitution. Consequently, it ordered the respondents to adjust their actions in relation to the project of expansion of the El Coco-Ocotol aqueduct [Por tanto].

COSTA RICA

**Comité Pro-No Construcción de la Urbanización Linda Vista,
San Juan Sur de Poás c/ Ministerio de Ambiente
y Energía y Otros**

Corte Suprema de Justicia, Constitutional Chamber
25 February 2004²²⁶

Keywords [Quality – Sustainability – Groundwater – Right to life, health and a healthy and ecologically balanced environment (violation) – Sustainable environmental management – Precautionary principle – Pollution – Obligation to protect]

Abstract Failing to apply the precautionary principle (*in dubio pro natura*) when authorising construction projects that might have a potential pollution impact on groundwater sources, amounts to a violation of the rights to life, health and a healthy and ecologically balanced environment under the Costa Rican Constitution and legislation.

Facts Ninety per cent of the Poás Canton (area) is characterised as of high vulnerability (susceptibility of aquifers to be contaminated). Important aquifers that supply drinking water to the communities in the area are located in the Cantón of Poás. The recharge area of the Poás aquifer has a very high vulnerability to contamination (e.g. coliforms and nitrates) especially if building housing developments (*urbanizaciones*) with septic tanks per house in the area. The building company Vega & Vega S.A. wanted to develop a housing project (*Urbanización Linda Vista*), in the Poás' aquifer recharge-discharge area. The Municipality of Poás authorised earthworks in relation to the housing project without previously obtaining environmental viability from the Ministry of Environment and Energy. A hydrogeological study carried out in February 2002 by the Hydro Consultants' company Aragonés & Cía. concluded that there was no danger of contamination of the existing aquifer. This conclusion was later confirmed in a technical report by engineer Castellón (October 2002). In June 2002 the National Environmental Office, (*Secretaría Técnica Nacional Ambiental* – SETENA)

226. *Comité Pro-No Construcción de la Urbanización Linda Vista, San Juan Sur de Poás c/ Ministerio de Ambiente y Energía y Otros* [2004] Corte Suprema de Justicia 2004-01923 <<http://www.ernestojinesta.com/ernesto%20jinesta/Sentencias%20E.%20Jinesta/04-01923.HTM>>.

granted environmental viability to the housing project. In October 2002 the Water Department from the National Meteorological Institute indicated to the Legal Department of the Ministry of the Environment and Energy that the Linda Vista Housing Project represented a high risk to the vulnerability of the Poás aquifer. In November 2002, a technical report by a different Engineer (Eng. Schosinsky), concluded that there were serious inconsistencies between the technical reports submitted by Engineer Castellón and the Hydro Consultants' company Aragones & Cía.

Procedure The Committee appealed the administrative decision (*oficio*) of the National Environmental Office (SETENA), an agency of the Ministry of the Environment and Energy, granting 'environmental viability' to the housing project and allowing its construction. The appeal was rejected by a resolution (*resolución*) of the Minister of the Environment and Energy. The Committee filed an '*amparo*' application against the Minister's resolution to the Constitutional Chamber of the Supreme Court of Justice.

Claims The applicant alleged that the administrative decision authorising the construction of the housing project (*urbanización*) violated several provisions of the Political Constitution, including article 50 protecting the right to a healthy and ecologically balanced environment [Res.1].

Applicable Law and Reference to Regional or International Instruments

- Biodiversity Law – Art. 11²²⁷
- Political Constitution of the Republic of Costa Rica – Arts 21, 33 and 50²²⁸
- General Law on Safe Drinking Water – Arts. 3 and 16²²⁹
- General Health Law – Arts. 275, 276, 285, 291 and 309²³⁰
- Mining Code – Art. 4²³¹
- Organic Environmental Law – Art. 51²³²
- Additional Protocol to the American Convention on Human Rights in the area of ESCR (Protocol of San Salvador) – Art. 11²³³
- Rio Declaration on Environment and Development – Principle 15²³⁴

227. Ley de Biodiversidad 1988 (n° 7788).

228. Constitución Política de la República de Costa Rica 1949 (as amended).

229. Ley General de Agua Potable 1953 (n° 1634).

230. Ley General de Salud 1973 (n° 5395).

231. Código de Minería 1982 (n° 6797) (as amended).

232. Ley Orgánica del Ambiente 1995 (n° 7554).

233. Available at: <http://www.oas.org/juridico/english/treaties/a-52.html>

234. 'Report of the United Nations Conference on Environment and Development' (Rio de Janeiro 3-14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (Vol. I) Annex I.

- Stockholm Declaration on the Human Environment – Principle 2²³⁵
- Water Law – Art. 31, 32²³⁶

Court Rationale The Supreme Court of Justice held that groundwater is a theme intimately connected to certain fundamental rights recognised by the Political Constitution and by international human rights instruments. It referred that article 50 of the Constitution provides for the right to a healthy and ecologically balanced environment, which is achieved, inter alia, through the protection and preservation of the quality and quantity of water for human use and consumption.

The Court further asserted that ‘access to drinking water ensures the rights to life’ and health (article 21 of the Constitution), and is associated with the development and socio-economic growth of the population, ensuring to each individual a dignified standard of living (article 33 of the Constitution and article 11 of the Protocol of San Salvador). The Court considered that ‘the protection and exploitation of groundwater reservoirs is a strategic obligation to preserve the life and health of human beings and, to achieve the adequate development of any population’. It further mentioned the recognition of the duty to respect sustainable development as stated under Principle 2 of the Stockholm Declaration [Cons.VI].

The Court explained that the regulation of groundwater in Costa Rica is scarce and the competences for the management of groundwater resources are scattered and fragmented. Nevertheless, it referred that in conformity with the Mining Code and the Organic Environmental Law groundwater is public in nature. The Court therefore held that, given the features of the contamination of aquifers used for public supply and their difficult regeneration, the measures to avoid the contamination must be preventive and protective, through the prohibition of certain human activities in certain areas or by ordering safety measures in relation to potentially contaminating activities.

In relation to the legal protection of groundwater in Costa Rica, the Court noted that article 31 of the Water Law implies the State’s obligation to, through its competent bodies and agencies, set and determine the perimeter protection areas of wells or catchment areas (of 200 meters) and also of aquifers’ recharge areas, which might count or should count with a forest coverage for its protection. Furthermore, it added that article 32 of the

235. ‘Report of the United Nations Conference on the Human Environment’ (Stockholm 5-16 June 1972) (16 June 1972) UN Doc A/CONF.48/14.

236. Ley de Aguas 1942 (n° 276).

Water Law provides that in an area, larger than the previously mentioned, under the risk of contamination, the executive, through the Drinking Water Department (currently ICAA), must take the necessary measures to prevent contamination of groundwater. This imposes an unavoidable obligation of cooperation between the Executive and the ICAA in order to take all the appropriate administrative measures to remove the danger of contamination in an area larger than the protection perimeters of aquifers' recharge areas. Moreover, the General Law on Safe Drinking Water qualifies as public all the lands considered as indispensable to build or locate water supply systems, as well as to ensure the health and physical protection and necessary flow of a drinking water supply (article 2), which necessarily includes aquifers' recharge areas, whereas, the Organic Environmental Law (article 51) embodies criteria that should be applied for the conservation and sustainable use of water, especially groundwater. The protection and conservation of groundwater is also safeguarded by the General Health Law, which requires everyone to adequately eliminate sewage and wastewater in order to prevent ground pollution and the pollution of natural water sources for human use and consumption (articles 285 and 291) [Cons.XIII].

Then, the Court clarified that although the competences for the integrated management of groundwater in Costa Rica, are scattered and fragmented, Costa Rica's public administration, at central and decentralised levels, has a series of inalienable, nontransferable, imprescriptible competences in relation to the conservation and protection of groundwater that cannot be declined and must be exercised effectively for the sake of Costa Rican people's right to a healthy and ecologically balanced environment. The Court recalled the importance of the precautionary principle, enshrined in Principle 15 of the Rio Declaration²³⁷ and reaffirmed in article 11 of the Costa Rican Biodiversity Law [Cons.XV].

Given the Court's state of doubt in relation to the effects the housing project could have on the quality and quantity of the water of the Poás aquifer – which supplies drinking water to several communities in the area – it found imperative to apply the precautionary principle (*in dubio, pro natura*) in order to prevent or suspend any activity that could negatively affect the sustainable management of water resources in the area and, as a result affect the fundamental right to a healthy and ecologically balanced environment

237. Principle 15 of the Rio Declaration: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

[Cons. XVII]. The Court concluded that the series of administrative acts and omissions (at central and decentralised levels), allowing the construction of the project violated the rights to life, health and a healthy and ecologically balanced environment of the applicants [Cons.XIX].

Decision The Court quashed all the administrative decisions that led to the authorisation of the housing project (urbanización) and condemned the Ministry of Environment and Energy, the Costa Rican Water and Sanitation Institute (ICAA), the Groundwater, Irrigation and Drainage National Service (SENARA), the Housing and Urban Planning National Institute (INVU) and the Municipality of Poás to take a series of measures with a view to protect the recharge-discharge areas of the aquifers of the Poás Canton. These included ordering the Ministry of Environment and Energy to define, clearly and precisely, in the cartographic sheets the protection perimeters of the recharge-discharge areas of the existing aquifers in the Poás Canton and to initiate immediately their public domain revindication processes; and to develop a strategic plan for the efficient and sustainable environmental management of groundwater in the Poás Canton. Measures to be taken by the Municipality of Poás included the elaboration and approval of, within 24 months, as part of a future regulatory plan, a zonification bylaw of the protected and reserved areas, which includes the Poás Canton's springs and aquifers cartographic locations, hydrogeological maps and vulnerability and protection alignments as well as their recharge areas; to abstain from authorising the construction of housing developments or any other urban settlements and industries in such protected and reserved areas. The Court warned that disregard of its orders would constitute a crime of disobedience and would be punishable by imprisonment of three months to two years or twenty to sixty days fine [Por tanto].

Ileana Vives Luque c/ Empresa de Servicios Públicos de Heredia

Corte Suprema de Justicia, Constitutional Chamber

27 May 2003²³⁸

Keywords [Availability – Water – Right to water (violation) – Connection to water supply – Basic public services – Obligation to protect]

Abstract Denying the connection of a property to the public water supply system amounts to a violation of the right to safe drinking water as derived from the rights to health, life, a healthy environment, food and adequate housing under the Costa Rican Constitution.

Facts Heredia's Public Services Company (PSC), the only water company in the Province of Heredia, denied Mrs Luque's request for the connection of her property to the public water supply system. Heredia's PSC based this decision on the following technical reasons: the scarcity of water in the area during the Summer months, the vicinity of Mrs Luque's property to the chlorination station and the fact that, although technically possible, it was inconvenient to make a connection to the leading/main pipe line (tubería de conducción).

Procedure Mrs Luque filed, first, an administrative complaint next to Heredia's PSC seeking the connection of her property to the public water supply network. As her request was denied she applied for an injunction order (recurso de amparo) to the Constitutional Chamber of the Supreme Court of Justice, seeking the protection of her fundamental rights.

Claims Mrs Luque alleged that the unjustified denial by Heredia's PSC to connect her property to the public water supply system amounted to a violation of her fundamental rights to adequate housing, equality, and a healthy and balanced environment [Cons.I].

238. *Ileana Vives Luque c/ Empresa de Servicios Públicos de Heredia* [2003] Corte Suprema de Justicia 2003-04654 <http://gestor.pradpi.org/download.php?id_doc=2393>.

Applicable Law and Reference to Regional or International Instruments

- CESCR General Comment N° 15²³⁹ – Paragraph 1
- Protocol of San Salvador – Art. 11(1)²⁴⁰
- Convention on the Elimination of all Forms of Discrimination against Women – Art. 14
- Convention on the Rights of the Child – Art. 24
- International Conference on Population and Development, Cairo – Principle 2

Court Rationale The Court held that the technical reasons referred by the respondent as justification for the non-connection of Mrs Luque's property to the water supply, highlight a serious problem that violates the fundamental rights of the applicant and of other inhabitants of the area – the defective water service. The Court recognised as part of Costa Rica's Constitutional law 'the fundamental right to drinking water, which is derived, amongst others, from the fundamental rights to health, life, a healthy environment, food and adequate housing, along the same lines as it has also been recognised in international human rights instruments applicable in Costa Rica' (e.g. Convention on the Elimination of all Forms of Discrimination against Women; Convention on the Rights of the Child). The Court added that in conformity with the Inter-American System of Human Rights, Costa Rica is, in this matter, obliged by what is stipulated in article 11(1) of the Protocol of San Salvador on the right to a healthy environment which includes access to basic public services. In addition to that, the Court emphasized that the Committee on Economic, Social and Cultural Rights had recently reiterated in its General Comment N° 15 that 'access to water is a human right, not only indispensable for a healthy life, but also a prerequisite for the realisation of all other human rights' [Cons.V]. The Court referred that the obligation of the State to provide basic public services implies, on the one hand, that it cannot deny these services to anyone on illegitimate grounds and on the other hand, that it must adopt measures to achieve the full realisation of this right as provided under article 1 of the Protocol of San Salvador. The Court held that this doesn't mean the fundamental right to public services is not immediately enforceable; on the contrary, when the State is reasonably required to provide these services, right holders can claim [them] and pub-

239. UNHRC 'General Comment 15' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9.

240. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series n° 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992).

lic administrations or, where appropriate, private entities to whom service provision has been delegated, cannot allege a lack of resources to justify the non-compliance with their obligations. [Cons.VI]

Decision The Court granted the application to Mrs Luque and ordered the respondent (Heredia's PSC) to provide her with the public water supply service within 6 months. Non-compliance with the order will result in imprisonment for three months to two years or a twenty to sixty-day fine [Por tanto].

ECUADOR

Caso n° 0006-10-EE

Corte Constitucional para el período de transición
8 April 2010²⁴¹

Keywords [Availability – Sustainability – Water scarcity– Right to water (protection – Drought – State of emergency – Obligation to fulfil]

Abstract Declaring a State of Emergency due to water scarcity caused by drought, with a view to ensure the protection of the right of access to water for human consumption and agricultural and livestock activities, is compatible with the provisions of the Ecuadorian Constitution and the Organic Law on Jurisdictional Guarantees and Constitutional Control.

Facts A State of Emergency was declared in the Carchi Province by the Presidential Executive Decree N° 254, on 20 February 2010. The facts that motivated the declaration of State of Emergency, are based on the need to adopt measures required to address the water scarcity (drought) with a view to 'guarantee the catchment, provision, production, storage and distribution of water for human consumption and agricultural and livestock use, because if no preventive measures were taken, there was the danger of a serious internal commotion due to the lack of water in the Province of Carchi.

Procedure The Constitutional President of the Republic of Ecuador submitted to the President of the Constitutional Court, for constitutional review, Executive Decree N° 254 containing the Declaration of State of Emergency due to water scarcity (drought) in the whole territory of the Carchi Province [page 2].

Claims The State of Emergency was declared in order to, allegedly, guarantee the right to access to water, as well as, the catchment, provision, production, storage and distribution of water, for human consumption and agricultural and livestock uses.

241. *Caso n° 0006-10-EE* [2010] Corte Constitucional 0010-10-SEE-CC <<http://186.42.101.3/alfresco/d/d/workspace/SpacesStore/ocb9f699-8d68-4935-8780-039c4ce77af3/0006-10-EE-res.pdf>>. No paragraph numbers being available for this case, pinpoints refer here to page numbers.

Applicable Law and Reference to Regional or International Instruments

- CESCR General Comment N° 15²⁴²
- Constitution of the Republic of Ecuador – Arts. 12, 164, 166, and 318²⁴³
- Organic Law on Jurisdictional Guarantees and Constitutional Control – Arts. 119-125

Court Rationale The Constitutional Court held that from the revision of the Executive Decree it becomes evident that the State of Emergency seeks the protection of the right to access to water, protected by the Constitution in article 318.

The Court stated that ‘the core of the State of Emergency is directly related with the necessity principle’. Accordingly, a State of Emergency can be declared in the case of a natural disaster, such as the drought crisis in Carchi, which could seriously endanger the human, agricultural and livestock activities of the province and which could lead to the lack of water supply for human consumption, and for agriculture and livestock which are an important part of the local economy [page s.8-9].

The Court declared that in accordance with articles 12 and 318 of the Constitution, ‘the human right to water is fundamental and indispensable, it constitutes a national strategic asset for public use, it’s imprescriptible, indefeasible, inalienable and essential for life’. It considered that it was clear that the State and the Government as part of the State, were competent to adopt measures for the protection of the human right to water. The Court further referred to General Comment N° 15 and stated that the human right to water ‘is the right everyone has to access a limited natural resource and a public good fundamental for life and health’; it is ‘indispensable for leading a life in human dignity, [and] it is a prerequisite for the realisation of other human rights’. It noted that States parties must take effective measures to realise the right to water.

The Court added that the Ecuadorian Constitution, in accordance with the highest standards of human rights protection, has recognised this development in articles 12 and 318 of the Constitution. The human right to water, grounds its foundation in the identification of this resource as strategic and highly protectable, so that everyone may enjoy water in a way that is

242. UN CESCR ‘General Comment 15’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9.

243. Constitución de la República del Ecuador 2008 (as amended).

sufficient, safe, accessible and affordable for human use, ensuring food sovereignty, the ecological flow and productive activities. [page 11]

The Court observed that the State assumed, in this case, a leading role in the respect for the right to water as it has established effective mechanisms regarding the management, delivery, catchment, provision, production, storage and distribution of water [page 12]. It found that the ordinary constitutional regime was not sufficient to tackle the gravity of the situation and that the drought affected seriously the access to water, which could be irreversible if the State did not intervene urgently [page 13]. The Court declared that in this particular case, there were no other ordinary means as suitable and adequate to protect the right of access to water, which justifies the ‘immediate and direct intervention of the State’.

The Constitutional Court concluded that Executive Decree N° 254 determined the causes and formal and material reasons for its issuance, and that it considered as pertinent and necessary the Declaration of State of Emergency, as it prevents a serious internal commotion regarding the right of access to water, safeguarding thereby the general and individual wellbeing.

Decision The Court declared the formal and material approval of Executive Decree N° 254, issuing the State of Emergency for water scarcity (drought) in the Province of Carchi and found that the Declaration of State of Emergency was in conformity with the Constitution [page 15].

Habeas Corpus Colectivo presentado por Víctor Atencio c/ el Ministerio de Gobierno y Justicia, Director General del Sistema Penitenciario

Corte Suprema de Justicia, Plenary chamber
29 December 2011²⁴⁴

Keywords [Availability – Quality – Water – Adequate sanitation – Physical, mental and moral integrity of detainees (violation) – Conditions of detention – Obligation to fulfil]

Abstract Detaining prisoners without respect for minimum detention conditions, including adequate sanitation and access to drinking water, violates Panamanian legislation and international human rights law.

Facts In October 2009, three civil society organizations,²⁴⁵ (the plaintiffs), visited the Nueva Esperanza Rehabilitation Centre, (*Centro de Rehabilitación Nueva Esperanza*), the Women’s Rehabilitation Centre (*Centro Femenino de Rehabilitación*) and the Public Jail, all in the Province of Colón. They found that the detention conditions, including the sanitation facilities and the drinking water supply systems in the three prisons were woefully inadequate for both male and female prisoners.

Prisoners faced sewage leaks in their cells and had to defecate in plastic bags. Leaks in the water and sewage system as well as accumulated garbage in the cells constituted health hazards and provided breeding sites for mosquitoes. Some cells were flooded with water and wastewater, which was particularly grave for prisoners who had to sleep on the floor. Due to these deplorable detention conditions, the prisons’ facilities were infested with large numbers of cockroaches and rodents. In the Nueva Esperanza Rehabilitation Centre, a problem affecting the pumps which supplied drinking water to the prison had been detected 3 months before the visit and it had not been solved yet. In the Women’s Rehabilitation Centre, the water in the family visiting area

244. *Habeas Corpus Colectivo presentado por Víctor Atencio c/ el Ministerio de Gobierno y Justicia, Director General del Sistema Penitenciario* [2011] Corte Suprema de Justicia 928-09 <[http://bd.organojudicial.gob.pa/rjhtml/pleno/rj201112-0000-0-5-20-10-928-09/\\$-8-229-2214\\$-20111229-M.htm](http://bd.organojudicial.gob.pa/rjhtml/pleno/rj201112-0000-0-5-20-10-928-09/$-8-229-2214$-20111229-M.htm)>.

245. Centro de Iniciativas Democráticas (CIDEM), Comisión de Justicia y Paz, Red de Derechos Humanos de Panamá (RDH-Panamá).

of the prison has to be filtered. The Minister of State and Justice and the General Director of the Penitentiary System, (the defendants), recognised that the situation in the prisons needed to be improved and stated that this was their priority. The defendants also pointed out that the problems, and the current lack of solutions, were due to insufficient resources.

Procedure The plaintiffs applied for a collective *habeas corpus* at the Supreme Court of Justice (*Corte Suprema de Justicia*) against the Minister of State and Justice (Ministro de Gobierno y Justicia) and the General Director of the Penitentiary System.

Claims The plaintiffs claimed that the State has the obligation to protect the life and safety of the prisoners, and that detention conditions should not constitute an additional form of punishment for inmates. They claimed that a judicial intervention, through a collective *habeas corpus*, was necessary to put an end to these deplorable situations, which violate rights enshrined in the Constitution and in international human rights instruments ratified by Panama. They furthermore sought to determine a firm deadline for the Government to solve the outlined problems (paras. 1, 2, the Plaintiffs).

Applicable law and reference to regional or international instruments

- Political Constitution of the Republic of Panama – Arts. 21, 23, 28²⁴⁶
- American Convention on Human Rights²⁴⁷
- UN Standard Minimum Rules for the Treatment of Prisoners²⁴⁸
- Law 55 of 2003 on the Reorganisation of the Penitentiary system – Art. 5, 44, 47, 63, 68²⁴⁹
- Executive Decree n° 393 of 2005 regulating the Panamanian Penitentiary system – Art. 5²⁵⁰

Court Rationale The Supreme Court of Justice explained that a collective *habeas corpus* claim for the protection of the rights of the prisoners is possible under article 23 of the Constitution, *‘when the form or conditions of detention or the place where the person is detained, puts at risk their physical,*

246. The Constitution of Panama. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=3404>.

247. Available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

248. UN Standard Minimum Rules for the Treatment of Prisoners, Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>.

249. Law n° 55 of 2003 available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NOR-MAS/2000/2003/2003_529_2243.PDF.

250. Executive Decree n° 393 of 2005 Regulating the Panamanian prison system. Available at: http://www.oas.org/dsp/english/cpo_observatorio_marconac_pan.asp.

mental or moral integrity or violates their rights of defence' (para. 1, considerations of the Court).

The Court held that persons deprived of their liberty retain their fundamental and inalienable human rights as enshrined in the Constitution and in other international instruments ratified by Panama, including the rights to health, education, privacy, information and communication, equal treatment and non-discrimination, which must be respected by prison authorities in conformity with article 5 of Law 55 and article 5 of Executive Decree n° 393. Moreover, the Court added that the Constitution prohibits the use of measures that violate the physical, mental or moral integrity of detainees (para. 8, considerations of the Court).

The Court emphasized that, in conformity with article 130 of Law 55, the Panamanian national legal framework relies on the international legal instruments ratified by Panama, on the protection of the human rights of detainees, such as the American Convention on Human Rights and the UN Standard Minimum Rules for the Treatment of Prisoners. The national and international legal texts mentioned, have the common denominator of consecrating the responsibility to the Panamanian State to, through the Penitentiary System, guarantee the rights of detainees, as well as their detention conditions.

In relation to the UN Standard Minimum Rules for the Treatment of Prisoners, the Court added that the Panamanian authorities must 'seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.' The Court concluded that it is the duty of the penitentiary authorities to safeguard certain detention conditions, including to ensure hygiene conditions, as well as adequate sanitary installations, clean and decent, adequate bathing and shower installations and the provision of drinking water, in conformity with Law 55 of 2003 (para. 13, considerations of the Court). The Court concluded that *'the State has the obligation to respect, monitor and guarantee the implementation of human rights'* (last para., considerations of the Court).

Decision

The Court found that the detention conditions in the three prisons visited violated the rights of the prisoners. It asserted that this situation resulted from the lack of compliance by the public authorities with article 131 of Law 55 of 2003, which required the *Ministerio de Gobierno* (and the Ministry of Finance) to provide a plan conducive to guarantee the approval of available

budget allocations for the implementation of Law 55 on the Reorganisation of the Penitentiary System. The Court ordered the *Ministerio de Gobierno*, the penitentiary authorities and other relevant public authorities to take a series of measures to remedy the situation, including: to fix the problem of wastewater seepage, within one month, and to provide new mattresses for inmates; to solve the garbage problem, within one month, and to undertake periodic garbage collection and pest control measures; to secure, within one year, the necessary budget allocations in order to ensure that dignified detention conditions will be available in the three prisons visited; and to ensure that all authorities involved in the planning, allocation, management and execution of these budgets follow the principles laid out in this judgement (paras.1-9).

This decision shows in particular how the judiciary can pass judgements that have budgetary implications while respecting the separation of powers between the judicial, executive and legislative branches of government. The judgement gives clear orders with regard to how conditions in prisons should be improved and orders also that the necessary budget for these improvements be created. It however respects the space of the executive branch to determine how it will implement the duties that the law requires it to fulfil.

Red de Vigilancia y Exigibilidad de los Derechos Económicos, Sociales y Culturales Región Junín c/ Municipalidad Provincial de Huancayo

Corte Superior de Justicia (Junín)

2 September 2005²⁵¹

Keywords [Access to information – Quality – Water – Right to health, life and environment (violation) – Pollution – Obligation to protect]

Abstract Municipal authorities must comply with their obligation to protect the life, health and the environment of a population exposed to contaminated water provided by a public water company, under Peruvian law. Accordingly, the population must be informed of the risk to life and health caused by the delivery of such contaminated water.

Facts Since 1999 a series of reports and statements have been issued regarding the quality of the water supplied by the public water company, SEDAM Huancayo, to the city of Huancayo and neighboring districts. A laboratorial analysis carried out, in 1999, by the Microbiology Laboratory of the National University of Peru revealed that the water exceeded the limits established by international standards. The Health Ministry (DIGESA) assessed the service infrastructure of the water company and concluded that it required expansion and rehabilitation. A report by the WHO concludes that the water distributed in the districts of Huancayo is contaminated with total and fecal coliforms. A monitoring report by the National Department for Sanitation Services (*Superintendencia Nacional de Servicios de Saneamiento – SUNASS*), determines that the water normally delivered in Huancayo does not comply with the quality requisites for drinking water. Despite several requests addressed to the Municipality by the Network for the Monitoring and Enforcement of Economic, Social and Cultural Rights, from the Junín Region (*Red de Vigilancia y Exigibilidad de los Derechos Económicos, Sociales y Culturales*), to inform the population about the danger of consuming the water from the public network without previously boiling it, the Municipality did not respond.

251. *Red de Vigilancia y Exigibilidad de los Derechos Económicos, Sociales y Culturales Región Junín c/ Municipalidad Provincial de Huancayo* [2005] Corte Superior de Justicia (Junín) 1230-2005. No hyperlink available. No paragraph numbers being available for this case, pinpoints refer here to page numbers

Procedure The Network for the Monitoring and Enforcement of Economic, Social and Cultural Rights, from the Junín Region filed a judicial constitutional procedure (*acción de cumplimiento*) to the Second Civil Court of the Huancayo Province against the Provincial Municipality of Huancayo. The Court in first instance granted the Network's application. The Provincial Municipality of Huancayo appealed the decision to the High Court of Justice (*Corte Superior de Justicia*).

Claims The applicant (the Network) sought the compliance by the Huancayo Provincial Municipality of its obligation to protect the life, health and environment of the population that lives in the districts supplied by the water and sanitation services of SEDAM Huancayo, given the reports warning about the eminent and serious risk to the health and life of all the service users [page 3].

Applicable Law and Reference to Regional or International Instruments

- General Law on Sanitation Services – Arts. 3 and 5²⁵²
- General Health Law Arts. I, II, III and IV²⁵³ Procedural Constitutional Code – Arts. 66, 69

Court Rationale The Court in first instance clarified that the purpose of this application (*acción de cumplimiento*), was to ensure that an official or public authority comply with a legal provision or execute an administrative act (...), in conformity with article 66 of the Procedural Constitutional Code. The Court considered as proved that the city of Huancayo and neighboring districts were consuming contaminated water and held that being water a vital element for people's lives, it should be delivered in conformity with the technical rules defined by the regulatory organisms, within levels established under the Regulation for the quality of drinking water for human consumption issued by SUNASS.

The Court, while referring that the representative of the Provincial Municipality (when contesting the application) stated that SEDAM Huancayo was making efforts to improve the quality of the water, and that the infrastructure of the Vilcacoto Plant was being rehabilitated and expanded, considered all the more appropriate that the population of the districts affected was informed of the situation.

252. Ley General de Servicios de Saneamiento n° 26338 de 1994.

253. Ley General de Salud n° 26842 de 1997

Decision The Court in first instance granted the Network's application (*acción de cumplimiento*), and ordered the Provincial Municipality of Huancayo to, in conformity with articles 3 and 5 of the General Law on Sanitation Services, and articles I to IV of the General Health Law:

- a. Inform the population, through the mass media, in the districts supplied by the water service of SEDAM Huancayo, of the current danger to their life and health resulting from the consumption of the water provided without previously boiling it.
- b. Take the necessary measures to regularise the quality of the water delivered by the public company SEDAM Huancayo.

On appeal, the High Court of Justice (*Corte Superior de Justicia*), upheld the judgment in first instance and ordered the Provincial Municipality of Huancayo to comply with articles 3 and 5 of the General Law on Sanitation Services, and articles I to IV of the General Health Law 'in order to fulfil its obligation to protect the life, health and environment of the population living in the areas supplied by the public water company, SEDAM Huancayo.

UNITED STATES OF AMERICA

Kennedy v City of Zanesville

District Court (Southern District of Ohio, Eastern Division)

10 July 2008²⁵⁴

Keywords [Non-discrimination – Availability – Water and sanitation – Right to housing – Racial discrimination]

Abstract Denying the connection of an African-American neighbourhood to the water supply system for 50 years, while ensuring the connection of all surrounding white neighbourhoods, amounts to a violation by public authorities of the fair housing laws as it constitutes racial discrimination prohibited under United States Federal law.

Facts Coal Run is the only predominantly African-American neighbourhood located in Muskingum County, next to the City of Zanesville (Ohio). Coal Run lies on abandoned mines, the operation of which contaminated all groundwater. There was no water suitable for human consumption, sanitation or hygiene purposes, and water had to be harvested from roofs and melted snow. While Coal Run residents had been left without water, white neighbouring areas were all connected to the water supply system in the meantime [page 1]. Public authorities, including the City of Zanesville, continuously declined Coal Run residents' requests for connection since 1950s [page 3]. They implemented difficult and costly water projects in white areas [page 6], while declining a project qualifying for federal funding at Coal Run [page 7]. In spring 2002, residents sent letters to the public authorities in order to require that water be supplied to Coal Run, but they were left unanswered [page 54]. Only after discrimination complaints were filed was a water project for Coal Run initiated, which finally led to the supply of water to the community in early 2004 [page 56].

Procedure Mr Jerry R Kennedy and others residents of Coal Run filed a discrimination case with the Ohio Civil Rights Commission in July 2002 [page s. 54-55]. Less than two weeks after, the Muskingum County started to take steps to supply water to Coal Run [page 55]. The City of Zanesville,

254. *Kennedy v City of Zanesville* [2008] District Court (Southern District of Ohio, Eastern Division) 2:03-cv-1047 <<http://www.relmanlaw.com/docs/zanesville-opposition.pdf>>. No paragraph numbers being available for this case, pinpoints refer here to page numbers.

Muskingum County and Washington Township filed motions for summary judgment before the District Court (Southern District of Ohio, Eastern Division) so that no judgment be granted to Mr Kennedy and other residents of Coal Run [page s. 56-57].

Claims The respondents notably alleged that evidence was not sufficient to support the applicants' claim for discrimination [page 57].

Applicable Law and Reference to Regional or International Instruments

- Fair Housing Act, 42 USC 3601²⁵⁵
- Civil Rights Act, Title VI, 42 USC 2000d²⁵⁶
- Ohio Revised Code, s 4112.02(H)²⁵⁷

Court Rationale The Court inferred from the facts that '[t]here is only one explanation for the fifty years of conduct [of the public authorities]: racial discrimination. That discrimination deprived Plaintiffs of a basic human need – access to uncontaminated water' [page 4]. It highlighted that 'decades of being denied a basic service, like water, simply because residents live in an African-American neighborhood unquestionably constitutes sufficient injury under the fair housing laws' [page 6]. The Court further observed that '[e]ach [resident] had a moving story to tell about how they made from one day to the next without one of the most basic of human necessities – water' [page 7]. It added that '[f]or nearly fifty years, Plaintiffs suffered profound emotional, financial, and physical harm at the hands of the Defendants. The harm was caused by an ongoing discriminatory practice purposefully directed at the Coal Run neighborhood because of the race of the residents.' Then the Court summarised the case as follows:

The story of Coal Run is the story of relentless and enduring hardship and needless suffering from the denial of water. This was not merely the denial of the convenience of public water. The only water available to Coal Run residents was contaminated and unusable. When Defendants denied Coal Run water service, they denied the residents their only access to usable water. [page 8]

The Court declared that 'the discriminatory, regular, and continuous decisions to pass over Coal Run and bring water to predominantly white areas despite being on notice of the Coal Run neighbourhood's need for water'

255. Fair Housing Act 1968.

256. Civil Rights Act 1964.

257. Ohio Revised Code 1953 (as amended).

amounted to a continuing violation of the fair housing laws [page 70]. It found that ‘the clear pattern of a virtually all African-American community being deprived of water service for fifty years while being surrounded by waterlines serving nearly all-white areas is simply unexplainable on grounds other than race, and permits, if not demands, an inference of racial discrimination’ [page 102].

Decision Finding that sufficient evidence to support plaintiff’s allegations of racial discrimination, the Court dismissed the motions for summary judgment in their entirety [page 141]. Upon proceeding to trial, a jury ultimately returned a verdict awarding the US\$10.8 million to the residents of Coal Run.

Dowdell v. City of Apopka Florida

Court of Appeal (Florida, Eleventh Appellate District)

28 February 1983²⁵⁸

Keywords [Non-discrimination – Equality – Racial discrimination – Obligation to prioritize marginalized communities]

Abstract Municipal authorities failed to provide access to water infrastructure for predominately African-American neighbourhoods. The Court required the authorities to prioritize access by a marginalized group in order to remedy systemic discrimination. Specifically, the Court found prohibited racial discrimination in the provision of water and ordered provision of water to be expedited and implemented before provision to any predominantly white neighbourhoods was undertaken.

Facts Applicants are residents of a poor, African-American neighbourhood which is part of but geographically separated from the small city of Apopka, Florida [para. 1]. Their neighbourhood was not provided access to the municipal water service.

Procedure A class action suit was brought on behalf of the applicants. The court of first instance, found intentional discrimination the provision of street paving, the water distribution system, and storm drainage facilities in violations of the 14th Amendment of the Constitution of the United States [para. 3]. The court of first instance issued an order enjoining Apopka from initiating or constructing any new municipal services or improvements in the white community until such time as the disparities in the black community facilities were eliminated [para. 3]. The court of first instance also impounded federal funds to be used to remedy the situation. The City of Apopka appealed, claiming the discrimination was not intentional.

Claims The applicants alleged that the respondent intentionally discriminated against them in the provision of water and other public infrastructure on account of race [para. 1].

258. *Dowdell and Others v. City of Apopka, Florida*, 698 F. 2d 1181, United States Court of Appeals, Eleventh Circuit, 28 February 1983.

Applicable Law and Reference to Regional or International Instruments

- Constitution of the United States, Fourteenth Amendment

Court Rationale The key issue is whether the City of Apopka engaged in intentional discrimination.²⁵⁹ The Court looked at the ‘totality of the relevant facts’ and found that they supported a finding that the City of Apopka engaged in a systematic pattern of cognitive acts and omissions, selecting and reaffirming a particular course of municipal services expenditures that inescapably evidenced discriminatory intent [para. 9].

The Court then looked at the remedy provided by the court of first instance, specifically the impoundment of federal funds. The Court found the remedy appropriate given the Constitutional violations, finding that the court of first instance ‘exercised its inherent equitable power to fashion a remedy appropriate to the wrongs committed’ [para. 10].

Decision The Court affirmed that the municipality could not initiate or implement any water infrastructure in white majority areas until the African American majority areas were on par with the white majority areas of the city as well as the impoundment of federal funds to be used for that purpose.

259. Under the U.S. Constitution, only intentional discrimination is prohibited, unlike international law which also prohibits policies and practices that have a discriminatory effect.

Condominio del Conjunto Residencial Parque Choroní II c/ Compañía Anónima Hidrológica del Centro (Hidrocentro)

Corte Primera de lo Contencioso Administrativo

22 June 2005²⁶⁰

Keywords [Affordability – Availability – Water – Right to health (threat) – Right to life (threat) – Disconnection of water supply – non-payment – Public service – Obligation to protect]

Abstract The disconnection of the water supply to a group of users for non-payment of excessive water bills due to malfunctioning meters installed by the public service provider, is not in conformity with the principle of proportionality and puts at risk the rights to life and health protected by the Venezuelan Constitution.

Facts The *Condominio del Conjunto Residencial Choroní II* (hereinafter the Condominium), representing 234 families living in this residential area, was notified by the public water company Hidrocentro of the eminent disconnection of their water supply if the accumulated debt for water bills was not paid. The excessive monthly amounts to be paid since March 2004 were due to the malfunctioning meters installed by Hidrocentro. The Condominium complained to Hidrocentro about the excessive water bills and asked for an adjustment of the debt, which was not accepted.

Procedure The Condominium applied to the Civil and Administrative High Court of the Central Region (*Juzgado Superior en lo Civil y Contencioso Administrativo*), seeking the annulment of acts practised by the water company Hidrocentro and requesting a precautionary amparo (*amparo cautelar*) against the company. The Court declined its jurisdiction [para. 1.1]. Consequently, the matter was brought to the First Court for Administrative Litigation (*Corte Primera de lo Contencioso Administrativo*).

Claims The applicants alleged that their rights to health and to quality services protected by the Constitution in articles 83 and 117, respectively, had

260. *Condominio del Conjunto Residencial Parque Choroní II c/ Compañía Anónima Hidrológica del Centro (Hidrocentro)* [2005] Tribunal Supremo de Justicia AP42-N-000628 <<http://lara.tsj.gov.ve/decisiones/2005/junio/1477-22-AP42-N-2005-000628-2005-509.html>>.

been violated and requested the annulment of the following acts: the account status, the consumption history (while providing an adjustment of the amounts due), and the notification for the disconnection of the water supply. They also requested, through a *precautionary amparo*, the provisional suspension of the disconnection and the reinstatement of the water supply in order to avoid damage to the health of the population of the Condominium [para. 1.2].

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Bolivarian Republic of Venezuela, arts 83, 117 and 156(29)²⁶¹
- Organic Law for the Provision of Drinking Water and Sanitation Services, art 46, 78²⁶²

Court rationale The Court stated that ‘the water supply service is an activity, which unquestionably provides for the satisfaction of a need of the population, and is directly related to public health’. This activity is qualified as public in nature by article 156(29) of the Constitution. The Court further noted that ‘the management of the residential water public service can be carried out by the State directly or indirectly as stipulated in Article 46 of the Organic Law for the Provision of Drinking Water and Sanitation’, for as long as the service’s quality, generality and cost-efficiency are guaranteed.

The Court referred that the normal functioning of the water service is a first need service for the population and is deeply linked to the realisation of other constitutional rights, such as the rights to health and to life, which are also protected by the State.

The Court found in this particular case that the disconnection of the water supply by the respondent was not in conformity with the principle of proportionality, since it would cause a greater damage to the community, as opposed to the interests of the respondent, since the people living in the Condominium will be prevented from using this vital resource, which is closely linked to health.

The Court held that the disconnection of the water supply by the respondent as a result of non-paid accumulated debts, whose excessive amounts were due to the malfunctioning meters installed by Hidrocentro, is an excessive sanction, especially in light of the fact that users demonstrated their will-

261. Constitución de la República Bolivariana de Venezuela 1999 (as amended).

262. Ley Orgánica para la Prestación de los Servicios de Agua Potable y de Saneamiento 2001.

ingness to pay the correctly billed part of the debt (covering the period from April 2004 until the 13th of April 2005) [para. II.3].

Decision The Court granted the application and ordered the respondent:

- a. to abstain from disconnecting the drinking water supply to the applicants, who must pay the water bills from April 2005 onwards, excluding those amounts that could be considered excessive due to the malfunction of the meters, which should be subject of a formal complaint to Hidrocentro.
- b. to provide, within ten days, a report about the current situation of the meters installed at the Conjunto Residencial Parque Choroní II [para. III].

The Court also ordered the Condominium, in case of complaints in relation to excessive amounts charged by Hidrocentro, as a result of malfunctioning meters, from the 13th of April 2005 onwards, to make a record of such complaints with the corresponding evidence.

BANGLADESH

Rabia Bhuiyan v Ministry of LGRD

26 August 2005²⁶³

Keywords [Quality – contamination – accountability – health – right to life – positive obligations]

Abstract The Government must, on the basis of national and international laws, fulfil its legal obligations to provide safe water and must therefore take immediate measures, in particular stop human consumption from arsenic contaminated water, raise awareness of the dangers of arsenic contaminated water, and ensure provision of a safe water supply.

Facts Over the past three decades, campaigns and technical support from international agencies to the water and sanitation sector in Bangladesh resulted in a country wide shift from surface water to groundwater consumption. In order to reduce the disease burden due to the use of contaminated surface water, tube wells were being installed to provide access to groundwater. The demand for drinking groundwater further increased after organisations and the Government promoted groundwater over surface water. However, the groundwater was not tested for arsenic contamination.²⁶⁴ The population generally assumed that groundwater was safe to drink [para. 7]. The contamination of groundwater sources with arsenic constitutes a major threat to the health of consumers.

Procedure The applicant, a former member of the parliament, filed a public interest petition against the Government and other public authorities (the respondents). The High Court Division in first instance²⁶⁵ rejected the petition. The applicant then appealed.

Claims The applicant argued that the respondents had failed to ensure that groundwater sources used for human consumption were free from arse-

263. *Rabia Bhuiyan v. Ministry of LGRD and others*, Appellate Division (Civil Appeal n° 118 of 1999), 27 August 2005. Available at: <http://www.globalhealthrights.org/wp-content/uploads/2013/02/SC-2007-Rabia-Bhuiyan-v.-LGRD.pdf>.

264. Arsenic occurs naturally in groundwater in Bangladesh, as the water filters through arsenic rocks, see 'Arsenic drinking water', WHO, http://www.who.int/water_sanitation_health/dwq/arsenic/en/.

265. Judgement passed by the High Court Division on 3-8-1999, Writ Petition n° 2879 of 1999.

nic. The applicant sought a Court order to oblige the Government to seal tube-wells that were contaminated with arsenic, to test water quality and to guarantee that the presence of arsenic in groundwater would not exceed a certain threshold (para. 2).

Applicable law and reference to regional or international instruments

- Constitution of Bangladesh²⁶⁶
- Environmental Conservation Act 1995²⁶⁷
- Environmental Conservation Rules 1997²⁶⁸
- International Covenant on Economic, Social and Cultural Rights²⁶⁹
- CESCR General Comment n° 14²⁷⁰

Court Rationale The High Court Division in first instance²⁷¹ recognised the severe situation of arsenic contamination of groundwater, but rejected the petition, holding that the petitioner had failed to show that there existed ‘any rule to allow for sealing’ and ‘*further noting that the Government is very much aware of the arsenic hazard in the country and already taking steps in the matter*’ [para. 4].

The Court of Appeal found that the High Court Division erred by not considering existing law and policy, including international human rights law. It explained that the responsibilities of the Government for the supply of clean and safe water to communities are clearly set out in a number of laws, including the Environmental Conservation Act 1995²⁷² and the Environmental Conservation Rules 1997²⁷³. The Court referred to the ICESCR, stating that the Covenant includes ‘*the obligation to protect the right to health which includes to ensure access to safe and potable water*’ [para. 17]. The Court also explained

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266. Constitution of the People’s Republic of Bangladesh, 1972. Available at: <http://www1.umn.edu/humanrts/research/bangladesh-constitution.pdf>.
267. The Bangladesh Environment Conservation Act, 1995, available at: http://www.doe-bd.org/2nd_part/153-166.pdf.
268. The Environment Conservation Rules, 1997, available at: http://www.moef.gov.bd/html/laws/env_law/178-189.pdf.
269. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>
270. UN CESCR General Comment n° 14: *The right to the highest attainable standard of health*, 11 August 2000, E/C.12/2000/4, available at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En).
271. Judgement passed by the High Court Division on 3-8-1999, Writ Petition n° 2879 of 1999.
272. The Bangladesh Environment Conservation Act, 1995, available at: http://www.doe-bd.org/2nd_part/153-166.pdf.
273. The Environment Conservation Rules, 1997, available at: http://www.moef.gov.bd/html/laws/env_law/178-189.pdf.

that CESCR General Comment n° 14²⁷⁴ on the right to health includes the right to drinking water and sets forth the content categories of the right to health in terms of availability, accessibility and quality [para. 18]. The Court furthermore argued that the State had a legal obligation to ‘*respect, protect and fulfil their duties to ensure rights and that these include administrative, judicial and other promotional measures for realisation of rights*’ [para. 20]. The Court also reiterated that the core obligations of the State, imposed by the Covenant, include to ‘*ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water*’ [para. 20]. The Court therefore concluded that the High Court should not have rejected the petition without considering the respondents’ responsibilities under these laws [para. 22].

The Court furthermore held that the non-compliance with the statutory duties of the respondents to ensure access to safe and drinkable water constitutes a violation of the right to life as guaranteed in Articles 31, 32, 15 and 18 of the Constitution²⁷⁵.

Decision

The Court decided that due to ‘*the circumstances and given the extreme gravity of the situation and the serious effect of continuing arsenic contamination through drinking ground water on public health, the Court directs the respondents to fulfil their legal obligations to provide safe water to millions of persons across Bangladesh, in particular to stop human consumption from arsenic contaminated water, by adopting the following measures (...)*’ [para. 29]. The Court also retained jurisdiction of the case and required periodic reporting by the Government as to its implementation of the Court’s order. Specifically, the measures ordered by the Court included:

1. To take the necessary and effective steps to implement existing plans and policies against arsenic contamination;
2. To comply with relevant provisions of the Paurashava Ordinance and the Local Government Ordinance and other laws with respect to providing safe water supply;
3. To comply with the Environmental Conservation Act and Rules;
4. To frame rules for groundwater management;
5. To raise mass awareness of the dangers of drinking water from arsenic contaminated tube wells and of alternative sources of safe drinking water;

274. UN CESCR General Comment n° 14: *The right to the highest attainable standard of health*, 11 August 2000, E/C.12/2000/4, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En).

275. Constitution of the People’s Republic of Bangladesh, 1972. Available at: <http://www1.umn.edu/humanrts/research/bangladesh-constitution.pdf>.

6. Expediting the testing of tube wells across the country for arsenic;
7. To undertake a phase-by-phase programme for sealing tube wells identified as being arsenic contaminated and for continuing to screen tube wells;
8. Ensuring that no further damage to human health is caused through the use of arsenic contaminated tube wells; and
9. To provide a yearly report to this Court regarding steps taken to implement the arsenic policies and plans.

***Environment & Consumer Protection Foundation
v Delhi Administration and Others***

Supreme Court

3 October 2012²⁷⁶

Keywords [Availability – Acceptability – Water and sanitation – Right to education (violation) – Schools – Children – Obligation to fulfill – Positive obligations]

Abstract Public authorities have an immediate obligation to ensure the provision of toilet facilities for boys and girls as well as drinking water facilities in schools pursuant to the right to education as guaranteed by the Constitution of India and the Right of Children to Free and Compulsory Education Act.

Facts Article 21A of the Constitution of India recognises the State's duty to provide free and compulsory education [para. 1]. Several schools did not provide proper toilet facilities for boys and girls or drinking water facilities [para. 4].

Procedure The Supreme Court issued several interim orders giving directions to the States and the Union Territories to provide, *inter alia*, basic infrastructure facilities including toilets and drinking water 'so that children can study in a clean and healthy environment' [para. 2]. However, several States and Territories did not fully comply accordingly [para. 7]. The petitioner in this case, the Environment & Consumer Protection Foundation – a registered non profit organisation- sought to improve the conditions, including those related to water and sanitation, at all schools in India. The writ petition was originally based on the right to free and compulsory education for children, as guaranteed in the Constitution of India²⁷⁷ [para. 1]. Proceedings began in 2004. While the case was pending, the Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009²⁷⁸ ('the RTE Act'). The Act specifies that the right to education applies to all children between

276. *Environment & Consumer Protection Foundation v Delhi Administration and Others* [2012] Supreme Court WP (Civil) n° 631 <<http://indiankanoon.org/doc/192582350/>>.

277. The Constitution of India, available at:<http://indiacode.nic.in/coiweb/welcome.html>.

278. Right of Children to Free and Compulsory Education Act of 2009. Available at: <http://www.indg.in/primary-education/policiesandschemes/free%2oand%2ocompulsory.pdf>.

6 and 14. It further specifies minimum standards for elementary schools, which include that schools must have separate toilets for boys and girls and a safe and adequate drinking water facility.

Claims The applicant sought to obtain an order from the Court instructing the relevant authorities to improve school conditions in accordance with article 21A of the Constitution, specifically by providing drinking water and sanitation facilities [paras.1-2].

Applicable Law and Reference to Regional or International Instruments

- Constitution of India, art 21A²⁷⁹
- Right of Children to Free and Compulsory Education Act, s 31²⁸⁰

Court Rationale Prior to this particular case, the Supreme Court had already and repeatedly ordered all States and Union Territories to provide basic infrastructure, including toilet facilities and drinking water, in schools to ensure that children could study in a clean and healthy environment [para. 2]. While some States and Union Territories did not comply with these orders, some States submitted details of infrastructure facilities in schools. The information submitted showed that a number of schools did not provide for adequate toilet facilities for boys and girls and some schools did not provide drinking water either.

As a result, the Court passed interim orders on several occasions throughout 2011 and 2012. An example of one of the orders passed by the Court reads as follows: ‘[...] *It is imperative that all the schools must provide toilet facilities. Empirical researches have indicated that wherever toilet facilities are not provided in the schools, parents do not send their children (particularly girls) to schools. It clearly violates the right to free and compulsory education of children guaranteed under Article 21-A of the Constitution*’ and ‘*We direct all the States and the Union Territories to ensure that toilet facilities are made available in all the schools on or before 30th November, 2011. In case it is not possible to have permanent construction of toilets, at least temporary toilets be provided in the schools on or before 30th November, 2011 and permanent toilets be made available by 31st December, 2011*’ (para. 4).

Since there were already standing orders at previous dates on the same case, the Court did not find it necessary to repeat the former process to come to a similar decision. In this case, the Court therefore reiterated the

279. Constitution of India 1949 (as amended).

280. Right of Children to Free and Compulsory Education Act 2009 (n° 35).

previous orders and held: *‘We notice that some of the States have not fully implemented the directions issued by this Court in Society for Unaided Private Schools of Rajasthan (supra) as well as the provisions contained in the RTE Act. Considering the facts that this Court has already issued various directions for proper implementation of the RTE Act and to frame rules, there is no reason to keep this Writ Petition pending’* (para. 7). The Court disposed of the writ petition and directed all States to give effect to its previous orders to provide toilet and water facilities in schools within the following six months. The Court further clarified that its directions applied equally to all schools, regardless if they were State or privately owned, aided or unaided, minority or non-minority (para. 9). Finally, the Court invited claims for appropriate orders if no implementation measures were taken: *‘We make it clear that if the directions are not fully implemented, it is open to the aggrieved parties to move this Court for appropriate orders’* (para. 10).

Decision The Court dismissed the writ petition considering its previous issuance of several orders, but it directed all States to give effect to its directions within six months, these notably including the provision of ‘toilet facilities for boys and girls’ and ‘drinking water facilities’. It emphasised that its directions are applicable to all schools, both public and private, aided or not, minority or not [para. 9].

Perumatty Grama Panchayat v State of Kerala

High Court (Kerala)

16 December 2003²⁸¹

Keywords [Availability – Sustainability – Water – Obligation to protect – Right to life (violation) – Drinking water scarcity – Excessive extraction of groundwater – Industry]

Abstract A company cannot be entitled to unfettered extraction of groundwater that would lead to ecological imbalance as this would be contrary to the Public Trust Doctrine and the right to life as guaranteed under the Constitution of India.

Facts The excessive exploitation of groundwater resources by a factory run by Hindustan Coca-Cola Beverages Pvt Ltd, a soft drink and bottled water company, caused water shortage in the region, which resulted in an acute drinking water scarcity. The Perumatty Grama Panchayat – the village council – decided to cancel the company's licence to operate the factory on public interest grounds and ordered the company to stop production. The latter submitted that the factory was in compliance with statutory requirements and denied the allegations that it had depleted groundwater or that it had caused environmental damages. [paras.2-3].

Procedure Hindustan Coca-Cola Beverages Pvt Ltd applied to the High Court (Kerala) against the order of the Perumatty Grama Panchayat. The Court directed the company to invoke the statutory remedy available and apply to the appropriate authority [para. 3]. The company then applied to the Government, which ordered the Perumatty Grama Panchayat to rule on the matter following the completion of a detailed investigation of the company and its products. Until then the factory could continue production. The Perumatty Grama Panchayat subsequently applied against this decision to the High Court (Kerala) [paras.3-4].

Claims The applicant alleged that it was permitted to cancel the licence of the factory that manufactured non-alcoholic beverages, on the grounds

281. *Perumatty Grama Panchayat v State of Kerala* [2003] High Court (Kerala, Ernakulam) Writ Petition n° 34292 of 2003, (2004) (1) KLT 731 <<http://www.elaw.org/node/1410>>.

that it was causing water shortages through the excessive exploitation of groundwater [para. 1].

Applicable Law and Reference to Regional or International Instruments

- Constitution of India, art 21²⁸²
- Stockholm Declaration on the Human Environment, Principle 2²⁸³

Court Rationale The Court specified that the issues at stake were pertaining to the legality of the applicant's decision to cancel the licence of the respondent and the admissibility of the Government's interference [para. 10]. It first stated that the order of the applicant to close the factory was unauthorised as it was not narrowly tailored to address the concern at issue. For instance, the applicant could have declared that extraction of groundwater would no longer be permitted and directed the respondent to find alternative sources of water provision. Therefore, the Government's order interfering with the decision of the applicant to require the closure of the factory was upheld [para. 12].

Turning to the legality of the applicant's decision, the respondent observed that no particular law was regulating the use of control of groundwater, the respondent argued that it was therefore entitled to an 'unfettered right ... to extract ground water'. The Court, however, declared that: 'Groundwater is a national wealth and it belongs to the entire society. It is a nectar, sustaining life on earth. Without water, the earth would be a desert.' Regarding sustainability, the Court declared that 'every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nations in the best possible way' [para. 13]. The Court referred to Principle 2 of the Stockholm Declaration on the Human Environment which states that 'natural resources of the earth, including ... water, ... must be safeguarded for the benefit of present and future generations through careful planning and management', and to the matter in *MC Mehta v Kamal Nath*²⁸⁴ where the Apex Court relied on the Public Trust Doctrine, according to which 'the State is the trustee of all natural resources which are by nature meant for public use and enjoyment'. Accordingly, the Court found that:

... it can safely be concluded that the underground water belongs to the public. The State and its instrumentalities should act as trustees of this

282. Constitution of India 1949 (as amended).

283. 'Report of the United Nations Conference on the Human Environment (Stockholm 5-16 June 1972) (16 June 1972) UN Doc A/CONF.48/14.

284. *MC Mehta v Kamal Nath* [1996] Supreme Court WP (Civil) n° 182 of 1996, (1997) 1 SCC 388.

great wealth. The State has got a duty to protect ground water against excessive exploitation and the inaction of the State in this regard will tantamount to infringement of the right to life of the people guaranteed under Art.21 of the Constitution of India.

The Court emphasised that the Supreme Court ‘repeatedly held that the right to clean air and unpolluted water forms part of the right to life’ guaranteed by article 21 of the Constitution. Although every land owner has a customary right to ‘draw a reasonable amount of water, which is necessary for his domestic use and also to meet agricultural requirements’, the Court found that the extraction of 510 kilolitres of water per day was ‘breaking the natural water cycle’ considering that ‘[i]f there is artificial interference with the ground water collection by excessive extraction, it is sure to create ecological imbalance.’ It specified that ‘if the ... respondent is permitted to drain away this much of water, every land owner in the area can also do that and if all of them start extracting huge quantities of ground water in no time, the entire Panchayat will turn [into] a desert’. Consequently, the Court declared that the extraction of groundwater by the respondent was illegal [para. 13].

Decision The Court ordered the respondent to completely stop drawing groundwater within a month’s time [Findings para. 1], during which the respondent is entitled to find alternative sources of water [Findings para. 2]. It further ordered the applicant to renew the respondent’s licence except for groundwater extraction purposes, and to determine the amount of water that a landowner of 34 acres of land could extract for agricultural and domestic purposes [Findings para. 4], in order to assess the quantity of water the respondent could draw for its activities [Findings para. 5].²⁸⁵

285. In 2005, the High Court of Kerala found that the company could extract up to 500,000 litres per day.

Attakoya Thangal v Union of India
(Availability – Water resources management)

High Court (Kerala)

1 January 1990²⁸⁶

Keywords [Availability – Quality – Sustainability – Participation – Right to life (violation) – Right to water (violation) – Water resources management]

Abstract This case concerned the management of groundwater resources on the islands of Lakshadweep. The islands struggle with the need to balance increased demand for fresh water with the need to protect the limited amount of groundwater sources from overexploitation.

Facts In order to meet the increased demand for water on the islands, Government authorities on the islands of Lakshadweep had planned for the construction of electric or mechanical pumps as replacement for hand pumps. A petition was filed by a number of people in response to this initiative. According to the petitioners, and later supported by expert testimony, large scale withdrawals with electric or mechanical pumps would deplete the water sources, causing seepage or intrusion of saline water. Petitioners argued that only traditional ways of pumping, by means of hand withdrawal from water wells, would sustain the existing water resources. The additional mechanized wells as planned by the authorities would disturb the water equilibrium [para. 3].

Procedure A petition was filed at the High Court of Kerala.

Claims The respondents argued that with the growing need for more water, the sources currently used were not sufficient. They explained that the prevalence of water borne diseases made the introduction of new water supply systems unavoidable [para. 4]. They further submitted that water extraction would be monitored to prevent excessive withdrawals.

286. *Attakoya Thangal v Union of India* [1990] High Court (Kerala) <<http://www.indiankanoon.org/doc/1980528/>>.

Applicable law and reference to regional or international instruments

- Constitution of India²⁸⁷

Court Rationale The Court ordered the Central Ground Water Board to investigate the various aspects raised in the petition, and to submit a report [para. 5]. All researchers agreed that existing groundwater resources are limited and that excessive withdrawals would upset the fresh water equilibrium, leading to salinity and diminution of water quality. They also came to the conclusion that the availability of fresh water on the islands should be increased by other means, such as rain water harvesting, desalination or reverse osmosis [para. 7].

The Court based its decision on Article 21 of the Constitution of India²⁸⁸, which protects the right to life. The Court reasoned that water was fundamental for sustaining life and that the right to life entailed the need to protect water resources and to manage them sustainably. The Court pointed out that *'Perhaps water management will be one of the biggest challenges in the opening decades of the next century. Water resources have therefore to be conserved'* [para. 10].

Decision The Court prohibited the implementation of the planned scheme and ordered a review of the plans by the Ministry of Science and Technology and the Ministry of Environment with the aim to ensure that any future plans would ensure sustainability of quality water supply.

287. Constitution of India. Available at: <http://lawmin.nic.in/olwing/coi/coi-english/coi-index-english.htm>.

288. Constitution of India. Available at: <http://lawmin.nic.in/olwing/coi/coi-english/coi-index-english.htm>.

Municipal Council, Ratlam v. Shri Vardhichand & Others

Supreme Court of India,
29 July 1980²⁸⁹

Keywords [Accountability – quality – health – sanitation – obligation to protect – obligation to fulfil – positive obligations]

Abstract The case concerned the obligations of municipal authorities to protect and to fulfil rights related to public health, including whether a court can ‘by affirmative action compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great costs and on a time-bound basis’ (p.2).

Facts Residents of informal settlements sought to hold the Municipality of Ratlam accountable to its obligation to protect by ending a public health nuisance caused by pollution discharged by a nearby alcohol plant and to its obligation to fulfil by providing sanitation facilities aimed in part at reducing public health risks associated with waste collecting in water near the residents homes.

Procedure Residents (the respondents) of a neighbourhood in the Municipality of Ratlam (the petitioner) filed a complaint at the Sub Divisional Magistrate. The Magistrate found the facts proven and ordered the Municipality to provide for sanitation services, a drainage construction and closure of pits with mud to stop mosquito breeding, within two months. A failure to comply with this order would lead to criminal prosecution for failure to abate a public nuisance [pp.1-2-7]. The Municipal Council contested the petition on the ground that the owners of houses had chosen to live in that area, fully aware of the insanitary conditions, thereby precluding their right to complain. The Municipal Council also pleaded financial difficulties in the construction of drains and provision of services [p.1].

The order of the Magistrate was dismissed by the Sessions Court, but was subsequently upheld by the High Court. The Municipality then appealed the High Court’s decision to the Supreme Court.

289. (1981) SCR (1) 97. Available at: <http://www.judis.nic.in/supremecourt/qrydisp.aspx?file-name=4495>.

Claims Respondents alleged that the Municipality had failed to meet its obligations to provide for public health including by failing to abate pollution and other hazardous waste from impacting their homes. Specifically, the Respondents sought a halt to pollution runoff from a nearby alcohol plant, mitigation of open waste that collected in open cess pools and poorly drained areas, mitigation of malaria resulting from standing water, and the creation of sanitary facilities to prevent the flow of human waste into their neighbourhood.

Applicable law and reference to regional or international instruments

- Code of Criminal Procedure s. 133²⁹⁰
- Constitution of India²⁹¹
- Directive Principles of State Policy, Part IV of the Constitution of India

Court Rationale In upholding the lower court's decision in favour of the residents, the Supreme Court considered the case in the context of collective rights and the public interest. It also took into consideration substantive equality between wealthier and poorer residents of the municipality and the obligation of municipal authorities to abate public nuisances.

In its reasoning the Supreme Court explained the situation: *'The rich have bungalows and toilets, the poor live on pavements and litter the street with human excreta because they use roadsides as latrines in the absence of public facilities. And the city fathers being too busy with other issues to bother about the human condition, cesspools and stinks, dirtied the place beyond endurance which made well-to-do citizens protest, but the crying demand for basic sanitation and public drains fell on deaf ears'*[p.4]. The Court expressed its appreciation for the Magistrate's decision to order the Municipality to undertake action [p.5]. The Court held that the power of the Magistrate under the Code of Criminal Procedure s. 133, forms *'a public duty to the members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional facts are present as here'* [p. 9]. The Municipality could therefore not extricate itself from its responsibility. The Court furthermore held that the Municipality's alleged financial inability does not take away its liability. *'The Criminal Procedure Code operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State regardless of their budgetary provision'* [p.10]. °

290. Available at: <http://indiakanon.org/doc/983382/>

291. Available at: <http://indiacode.nic.in/coiweb/welcome.html>

The Court furthermore held that a *'responsible Municipal Council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies.'* Therefore, *'providing drainage systems – not pompous and attractive, but in working condition and sufficient to meet the needs of the people – cannot be evaded if the Municipality is to justify its existence'* [pp.11-12].

Decision The Supreme Court upheld the High Court's view affirming the Magistrate's order. The Supreme Court ordered the Municipal Council to immediately abide by its obligation to protect by halting pollution from the alcohol plant flowing into the community. It also ordered the Council to immediately begin to take steps to meet its obligation to fulfil by providing a sufficient number of public latrines for use by men and women separately, to provide water supply and scavenging service morning and evening to ensure sanitation, and required the Municipal authorities to meet this obligation within six months of the Court's order. The Court added that if its order was not implemented municipal authorities could face criminal sanctions as well as hold them in contempt of court. The Court also ordered the State Government to give special instructions to the responsible body for malaria eradication to stop the mosquito breeding in this area within a reasonable time. Further; *'The Municipality will not merely construct the drains but also fill up cesspools and other pits of filth and use its sanitary staff to keep the place free from accumulations of filth.'* The Court also held that the Municipality if resources were limited, it needed to prioritize mitigation of such public health nuisances over low priority items and elitist projects, request loans and grants from State Government, and use the savings in the area of public health expenditures that will be realized by implementing the Court's order. [p.14].

Judicial Review of the Law of the Republic of Indonesia n° 7 Year 2004 regarding Water Resources

Constitutional Court

19 July 2005²⁹²

Keywords [Accountability – Sustainability – Water – Right to water (non-violation) – Water resources – Obligation to protect – Privatisation – Regulation]

Abstract The right to water is part of the right to live a physically and mentally prosperous life under the Indonesian Constitution.

Facts Several individuals and NGOs challenged the constitutionality of the Law n° 7 of 2004 regarding Water Resources.

Procedure Several individuals and NGOs applied to the Constitutional Court for constitutional review.

Claims The applicants alleged that their constitutional rights had been impaired by the Law on Water Resources [page 10]. They notably alleged that the Law encouraged privatisation [page 35], and that it has caused the commercialisation of water use [page 40], contrary to the provision of article 33(3) of the Constitution.

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Republic of Indonesia, arts 28H and 33(3)²⁹³
- Law on Water Resources²⁹⁴

Court rationale The Court first stated that ‘the water is indeed absolutely necessary for human life and can be said to be as absolutely necessary as important as the need of living beings for oxygen (air)’. It observed that ‘access to clean water supply’ had been recognised as a human right in several international instruments, in particular through the right to health

292. *Judicial Review of the Law of the Republic of Indonesia n° 7 Year 2004 regarding Water Resources* [2005] Constitutional Court 058-, 059-, 060- and 063/PUU-II/2004, and 008/PUU-III/2005 <[http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_Putusan%20058-059-063%20PUU-II-2004.%20008-PUU-III-2005%20\(UU%20SDA\).pdf](http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_Putusan%20058-059-063%20PUU-II-2004.%20008-PUU-III-2005%20(UU%20SDA).pdf)>.

293. Constitution of the Republic of Indonesia 1945 (as amended).

294. Law n° 7/2004 on Water Resources.

[page 22]. The Court then declared that this recognition underlined two aspects: 'the fact that water is such an important need for human life' and that 'every person's access to water needs to be protected'. It specified that '[f]or the sake of the aforementioned protection, the right to water shall be affirmed as the highest right in law, namely the human rights' [page 24]. Considering that water is not always available and not available everywhere, the Court therefore declared that 'it is certain that the state must therefore be involved in its management in order to respect, protect, and fulfil the aforementioned human rights' [page 25], as enshrined in articles 28H and 33(3) of the Constitution. It stated that:

... the constitutional foundation of water management is Article 33 Paragraph 3 of the 1945 Constitution²⁹⁵ and Article 28H of the 1945 Constitution which lays the foundation for the recognition of the right to water as part of the right to live a physically and mentally prosperous life which means that they become the substance of the human rights; [page 26]

The Court further asserted that since the protection of the human right to water 'is inseparable from the fulfillment of the right', the State is 'obligated to guarantee that every individual's need for water can be fulfilled' [page s. 26-27]. Regarding sustainability, the Court stated that use of water does not only concern the present need, but also the 'guarantee of continuation in the future, as it is directly related to the human existence'. Therefore the state must be actively involved in the planning of water resources management [page 27].

The Court then assessed whether in the Water Resources Law the State's obligations to respect, protect and fulfil the right to water had been regulated. Under article 5 of the Law on Water Resource, the State has to guarantee that every person received water for basic needs in order to ensure a healthy, hygienic and productive life. The Court declared that this legal formulation was sufficient to describe the right to water as guaranteed by the Constitution [page 28]. It found that:

With the existence of Article 5 of the Water Resources Law, the state is obligated to guarantee the right of every individual to obtain water for the purpose of fulfilling the minimal daily basic needs, including the need of community depending on distribution channels. [page 30]

295. Article 33 provides that 'Land and water and natural resources contained therein shall be controlled and shall be used for the greatest prosperity for the people'.

The Court reviewed several provisions of the Water Resources Law and then held that the Law ‘sufficiently obligated the Government to respect, protect, and fulfill the right to water’ [page 34].

On the issue of privatisation, it considered that except for rights to use and obtain water, ‘every exploitation of water must be subject to state’s right to control’ [page 35]. The Court stated that ‘due to the particular nature of characteristic of water compared to the other resources such as oil or other mined goods, and due to the implementation of two legal provisions on water [namely article 28H and article 33(3) of the Constitution], the management of water has a special feature’ [page s. 35-36]. Although the Water Resources Law recognises the right of commercial use of water, the State shall control the exploitation of water resources through a system of permits, which is not contradictory to the said articles of the Constitution [pages. 36-40]. The Court also rejected the argument that the Law had caused the commercialisation of water as it found that the user-pays principle was not commercial in nature [page 41].

Decision Finding that the Water Resources Law maintained sufficient State oversight, the Court dismissed the application and declared the Water Resources Law to be constitutional.

ISRAEL

Abadallah Abu Massad and others v Water Commissioner and Israel Lands Administration

Supreme Court, sitting as the Court for Civil Appeals
5 June 2011²⁹⁶

Keywords [Availability – Equality – Water – Right to water (violation) – Discrimination – Principle of proportionality – Community]

Abstract This case deals with discriminatory denial of access to water supply for Bedouins living in so called Unrecognised Villages in the Negev desert, located in the southern region of Israel.

Facts Unrecognised Villages, longstanding villages inhabited by Bedouins in the Negev desert, are considered illegal under Israeli law [para. 1]. The Israeli Water Authority (IWA) only provides household water connections to houses that have building permits under Israeli law. The IWA used this policy to coerce the Bedouins living in the Unrecognized Villages to move to townships planned by the State [para. 45]. Bedouins in Unrecognised Villages, Israeli citizens of Palestinian ethnicity, reject moving to townships, as they want to remain on their ancestral land and continue with their traditional means of livelihood. Without access to household connections, Bedouins living in Unrecognised Villages can currently only obtain their water in one or two ways: They may purchase water from a ‘water centre’ located near a legal village and independently transport it back to their village homes, or they may obtain permission from the IWA’s Water Committee to establish a ‘private’ water access point to the water pipes in the region. Such a permit will only be granted if the applicant can substantiate ‘special humanitarian considerations’ [para. 1]. Both options are at a far higher cost than that paid for direct water connections guaranteed to other Israelis.

296. *Abadallah Abu Massad and others v Water Commissioner and Israel Lands Administration* [2011] Supreme Court Civil Appeal 9535/06
<<http://www.adalah.org/upfiles/2012/Supreme%20Court%20Ruling,%20Civil%20Appeal%20No.%209535.06%20-%20Abu%20Masad,%20Right%20to%20Water%20-%20English.pdf>>. >. Case summary based on the journal article by: Sharmila L. Murthy, Mark Williams and Elisha Baskin, ‘The Human Right to Water in Israel: A Case Study of the Unrecognized Bedouin Villages in the Negev’ (2013) 46(1) *Israel Law Review* 25.

Procedure Six Bedouin villagers (the applicants) applied for relief before the Supreme Court.

Claims The applicants sought the Supreme Court's review of the IWA's denial of their requests to have 'private' water connections established at a point near their homes [paras.15-17].

Applicable law and reference to regional or international instruments

- Israeli Basic Law; Human Dignity and Liberty²⁹⁷ (Israeli Basic Law provides the Constitutional framework of Israel)
- Israeli Water Law²⁹⁸
- Committee on Economic Social and Cultural Rights General Comment n° 15²⁹⁹

Court Rationale In its decision, the Court applied Israeli Basic Law; Human Dignity and Liberty³⁰⁰, Israeli Water Law³⁰¹ and CESCR General Comment n° 15. The Court assessed the reasonability and proportionality of the State's policy. It concluded that generally *'the implementation of the state planning policy on the level of accessibility of residents of the unrecognized Bedouin villages to water sources involves a violation of their right to water, which is afforded them as a human right'* [para. 44]. However, the court balanced the right to water against the State's interest in orderly planning. In doing so, the Court upheld the IWA's decision not to provide access to Unrecognized Villages on account of their unlawful status under Israeli planning law. The Court explained that *'proportionality is obtained, therefore, as long as a person's basic right to accessibility to water sources is maintained, even if this involves inconvenience and the bearing of certain monetary costs. To be noted that, in light of the phenomenon of illegal settlements, this is not an optimal system for water consumption, but a minimal arrangement, which intends to uphold the basic right to water, even though its realization involves effort and cost. The realization of the full right to water requires the legal arrangement*

297. Israeli Basic Law: Human Dignity and Liberty. Available at: http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

298. Section 3 of the Israeli Water Law states that 'every person is entitled to receive water and to use it, subject to the provisions of this law.' Available at: <http://faolex.fao.org/docs/html/isr1321E.htm>.

299. Available at: [http://www.unhchr.ch/tbs/doc.nsf/o/a5458d1d1bbd713fc1256cc400389e94/\\$FILE/Go34o229.pdf](http://www.unhchr.ch/tbs/doc.nsf/o/a5458d1d1bbd713fc1256cc400389e94/$FILE/Go34o229.pdf)

300. Israeli Basic Law: Human Dignity and Liberty. Available at: http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

301. Section 3 of the Israeli Water Law states that 'every person is entitled to receive water and to use it, subject to the provisions of this law.' Available at: <http://faolex.fao.org/docs/html/isr1321E.htm>.

of settlements, and this is contingent on the residents' choice, and open to their decision' [para. 45].

Decision The Court reaffirmed the decision of the IWA's Water Committee but did require provision of 'minimum access to water.' In the context of the case, it would found that three of the applicants had reasonable access to water, and that in case of the third, the Committee had already approved the connection to the water main. As for the three other plaintiffs, the Court indicated that the record was unclear as to whether they had minimal access to water [paras.48-49]. The Court therefore ordered the Water Committee to revisit those cases [para. 50].

Upon revisiting the cases, the Water Committee again denied the requests and the cases were subsequently brought before the Water Court. As a result, despite the broad legal holding and invocation of the right to water, the actual application of the Court's ruling to the facts of the case is very narrow as the 'unlawful' nature of the settlements was deemed a legitimate reason to deny direct access to the water network.

For a more detailed analysis of the case and the human right to water for Bedouins living in unrecognised villages in the Negev, please refer to 'The Human Right to Water in Israel: A Case Study of the Unrecognized Bedouin Villages in the Negev', *Israel Law Review* Volume 46, Issue 1.³⁰²

302. Available at: http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/carr/programs/RightToWater/HumanRight2WaterIsrael_SMurthy_MWilliams_EBaskin.pdf.

Rajah Ramachandran v Perbadanan Bekalan Air Pulau Pinang Sdn Bhd

High Court (Malaya)

2 March 2004³⁰³

Keywords [Affordability – Water – Obligation to respect – Obligation not to act arbitrarily or capriciously or unjustly (violation) – Disconnection of water supply – Defaulting payment – Public service]

Abstract A public service provider cannot arbitrarily or unjustly disconnect premises from the water supply system in order to force debt recovery, as it must act in such a way as to impose the least possible inconvenience on consumers when enforcing its rights.

Facts As a customer of the water company Perbadanan Bekalan Air Pulau Pinang Sdn Bhd (PBAPP), Mr Rajah Ramachandran paid bi-monthly water bills which never exceeded 25 Ringgit (RM) for every two months. In September 2002, he complained to PBAPP as his water bill suddenly amounted to RM 3,047.02 [para. 3]. PBAPP agreed to conduct an examination of the water pipe, but found no defects and insisted that Mr Ramachandran must pay the bill. As he refused to oblige, PBAPP disconnected his premises from the water supply system. Mr Ramachandran subsequently lodged a complaint with the Consumers Association of Penang which arranged a meeting between the two parties. PBAPP suggested that Mr Ramachandran should first pay an amount of RM 500 before the company reconnected his property to the water supply system. Mr Ramachandran rejected that proposal [para. 6].

PBAPP uses two types of meters with different ‘counting systems’. From July 1999 to September 2002, the company read the meter wrongly, so it effectively had billed too little. During the proceedings, the company was not able to explain to the satisfaction of the court why the meter was read wrongly for such a long time. The plaintiff declared himself willing to pay subsequent higher bills, but not the first high bill. During the disconnection, the plaintiff and his wife had to rely on neighbours to have water available.

303. *Rajah Ramachandran v Perbadanan Bekalan Air Pulau Pinang Sdn Bhd* [2004] High Court (Malaya) 22-716-2003 <http://hba.org.my/laws/CourtCases/2004/rajah.htm>.

The disconnection was done shortly before Diwali, a festival which includes ritual bathing.

Procedure Mr Ramachandran applied to the High Court (Malaya).

Claims The applicant sought to obtain an interim injunction with a view to preventing the respondent from disconnecting the water supply to his premises, and that the reconnection costs be borne by the respondent [para. 2].

Applicable Law and Reference to Regional or International Instruments

- Water Supply Enactment, s 49(1)³⁰⁴

Court rationale The respondent stated that the exorbitant amount of the water bill was due to mistakes in reading the water meter [para. 8]. Section 49(1) of the Water Supply Enactment provides that in case of default, the water supplier can disconnect the water supply 'by severing the service pipe or by taking such other means as he thinks fit and proper' [para. 11]. The Court interpreted the reference to 'such other means as it thinks fit and proper' as an invitation to the supplier to act in a reasonable manner (para. 14). The Court observed that no satisfactory argument was given by the respondent regarding the repetition of the wrong reading during 39 months [para. 9]. It subsequently found that disconnection was not narrowly tailored to deal with the issue of non-payment while minimizing harm and declared that 'the attempt by the [respondent] to cut-off water supply was an oppressive act done with the intention of pressurising the consumer into submission and to make the payment' [para. 10]. Emphasising that 'the consumer is entitled to an explanation as to how the wrong reading had occurred' [para. 12], the Court subsequently found that:

The draconian act of cutting off supply was too harsh in the circumstances of this case. If the [respondent] is entitled to only cut off water supply for non-payment the Act would not have provided for the lesser alternative cause of action the [respondent] could have resorted to. It must be understood that a public body endowed with a statutory discretion in enforcing its rights must exercise such discretion as would impose the least inconvenience to the public. It ought not to act arbitrary or capriciously or unjustly. Nevertheless it must not hesitate to act appropriately where drastic action is warranted like when a consumer without any rhyme or reason refuses to settle his bill [para. 13].

304. Water Supply Enactment 1998.

Decision The Court granted the application in the terms requested by the applicant [para. 14].

NEPAL

***Advocate Prakash Mani Sharma and Others
v Nepal Water Supply Corporation and Others***

Supreme Court, Joint Bench

10 July 2001³⁰⁵

Keywords [Quality – Accountability – Water – Obligation to provide regular access to pure drinking water]

Abstract The national water supply company shall be accountable for its actions or inactions and cannot diminish its legal obligation to provide pure drinking water on a regular basis on the grounds that it does not have the capacity to do so.

Facts The applicants alleged that the Nepal Water Supply Corporation supplied contaminated water and collected fees from locations where it did not supply water, while there was no means to hold officials of the Corporation accountable. The Nepal Water Supply Corporation denied these allegations.

Procedure A petition was brought before the Supreme Court by attorney Mr Prakash Mani Sharma.

Claims In denying the facts as alleged by the applicants, the Nepal Water Supply Corporation claimed that it only supplied drinkable water since biological testing was carried out beforehand; that it was taking steps to improve the drainage system; and that it implemented different measures in order to prevent leakage. It further argued that water supplied was 'tested pure water as per the WHO standard'. Eventually, since the Corporation had been supplying water with the support of World Bank loans, it considered it had no means to undertake action beyond its existing capacity. While the Court was unable to resolve the factual dispute as to whether or not the water supplied was of adequate quality, it proceeded to clarify the applicable law regarding the provision of quality water.

305. *Advocate Prakash Mani Sharma and Others v Nepal Water Supply Corporation and Others* [2001] Supreme Court WP2237/1990 <<http://www.elaw.org/node/1383>>. Translation by Raju Prasad Chapagai (amended). No paragraph or page numbers are available.

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Kingdom of Nepal, art 25³⁰⁶
- Nepal Water Supply Corporation Act, preamble and s 5³⁰⁷
- WHO Guidelines for Drinking-Water Quality³⁰⁸

Court rationale The Court first stated that:

There is no question that the Nepal Water Supply Corporation has an obligation to supply pure and uncontaminated water. In regard to pure water and its significance, modern science establishes the fact that ‘water is life and life is water’. Pure water is indispensable for lives of all living creatures of nature; it is an established, eternal truth and sensitive subject as well. Water free from any kind of bacteria, chemical, smell, colour and acid, which has a quality to satisfy thirst, is actually pure and drinkable water.

Further noting that ‘[p]olluted and contaminated drinking water results in epidemic diseases and other physical and mental health-related problems’, the Court underlined that ‘70% diseases are caused by contaminated water’ and that the World Health Organization (WHO) adopted guidelines on drinking water setting specific limits notably as regards chlorination and coliforms.

Considering the obligations of the respondent under the Nepal Water Supply Corporation Act, the Court declared that ‘the Corporation has an explicit legal obligation to provide regular access to pure drinking water’. However, it could not decide whether the water supplied was meeting WHO requirements since the Court cannot gather or evaluate evidence under its writ or extraordinary jurisdiction. Nonetheless, it asserted that regarding supply of pure water, ‘the gravity of the subject and negative impact upon society due to the distribution of impure water cannot be ignored’. Since article 25(1) of the Constitution states that ‘[i]t shall be the chief objective of the State to promote conditions of welfare on the basis of the principles of an open society ... while at the same time protecting the lives, property and liberty of the people’, the Court declared that ‘[t]o guarantee necessities to people and its fair supply is also a major obligation of the welfare State’. While the preamble of the Nepal Water Supply Corporation Act provides that the Corporation operates ‘so as to maintain the health and convenience of the gen-

306. Constitution of the Kingdom of Nepal 1990.

307. Nepal Water Supply Corporation Act 1989.

308. WHO Guidelines for Drinking Water Quality. Volume 1: Recommendations (2nd edn WHO, Geneva 1993).

eral public, make proper arrangements to make available pure drinking water on a regular basis and the system of sewerages’, and section 5 describes the functions, duties and powers of the Corporation, the Court found that the latter ‘seem[ed] reluctant to perform its duties to protect public health’ while ‘it cannot be immune from its immense obligation towards public health.’

Decision The Court dismissed the petition as it could not establish the facts in the particular case. However, it decided that the Ministry of Housing and Physical Development should provide necessary directions to the Nepal Water Supply Corporation so as to make it accountable and responsible, and ensure appropriate arrangements are made so that the Corporation provides pure drinking water in accordance with its obligation under the Nepal Water Supply Corporation Act.

Nestle Milkpak Limited v Sindh Institute of Urology and Transplantation and Others

High Court (Sindh, Karachi)

1 September 2006³⁰⁹

Keywords [Availability – Sustainability – Water – Obligation to preserve and protect the water resource (violation) – Excessive extraction of groundwater – Bottled water industry]

Abstract Authorising a water bottling company to tap water from an aquifer in an area where water resources are insufficient is not in the interest of local populations and the environment.

Facts The Sindh Institute of Urology and Transplantation and other universities or foundations purchased land in Deh Chuhar area, which was to be exclusively reserved for health and educational purposes [para. 3]. Other uses were not permitted [para. 4]. However, Nestle Milkpak Ltd acquired 20 acres of land in the same area. It planned to construct a water bottling plant in Karachi City which would use water from the sub-soil aquifer underneath Del Chuhar. The water bottling plant would tap water from the aquifer, which would be harmful and hazardous in terms of water availability for landholders and residents of the area. Nestlé did not obtain official permission from the authorities to undertake such financial activity under the Canal and Drainage Act [para. 5].

The parties in this case were engaged in a complex dispute about land and corresponding rights to Abstract groundwater. The Sindh Institute of Urology and Transplantation and other universities and foundations (the respondents) asserted exclusive rights to the land in order to establish 'Education City', an area where only educational and health institutions were to be established. They further claimed that the planned construction of a bottling plant by Nestlé Milkpak Ltd. (the appellant) and the corresponding Abstract ion of large quantities of groundwater would be damaging to the 'Education City' project, to the inhabitants of the area and the environment. However,

309. *Nestle Milkpak Limited v Sindh Institution of Urology and Transplantation and Others* [2006] High Court (Sindh, Karachi) HCA 271 (2004) <<http://ceej.pk/cms/docs/shc/2005CLC424.pdf>>. <http://www.pljlawsite.com/html/PLJ2007K33.htm>

Nestlé claimed that within the area earmarked for ‘Education City’, it had been granted land for the construction of a bottling plant. Nestlé further argued that owners of land had the right to Abstract unlimited amounts of groundwater, that the bottling plant would bring much needed potable water to the citizens of Karachi and that the planned Abstract ion would not lead to environmental problems.

Procedure The Sindh Institute of Urology and Transplantation and the other institutions applied for interim measures, seeking an injunction to prevent Nestle Milkpak Ltd from building the water bottling plant and tapping into the aquifer below Del Chuhar, on the grounds that it would amount to a violation of section 12 of the Pakistan Environmental Protection Act. Interim measures were granted by the court of first instance which prevented Nestlé from constructing the bottling plant pending the completion of the case [para. 12]. Nestle Milkpak Lt appealed to the High Court (Sindh, Karachi). The Court of Appeal did not adjudicate the facts of the case in order to arrive at its decision. It decided instead on the basis of prima facie evidence and referred back to the Court of first instance for the detailed investigation and adjudication of questions of facts and law [para. 19, 25].

Claims The appellant alleged that the lower court erred in provided injunctive relief since it properly had possession and ownership of the land in question through registered deed and that drawing of underground brackish water would not affect the aquifer or the environment [para. 13].

Applicable Law and Reference to Regional or International Instruments

- Environment Protection Act, s 12³¹⁰
- Canal and Drainage Act³¹¹

Court rationale The Court first stated that the interim measures were justified [para. 20]. It declared that it was hard to believe that extraction of groundwater from the aquifer by the appellant ‘in such huge quantities’ (about 148 gallons per minute, that is 306 million litres per year) ‘will not disturb the aquifer and environment of the area’. The Court further stated that:

It is also hard to swallow that party having only 20 acres of land in the area would be within their legal rights to extract such huge quantities of water on the plea of being ‘brackish’ (which plea is yet to be proved) without causing harm/prejudice to the interests of other residents in

310. Pakistan Environmental Protection Act 1997.

311. The Canal and Drainage Act 1873.

the area, particularly when the area in question is situated in a country where natural source of water for aquifer, i.e. raining, is negligible and highly insufficient. [para. 21]

Consequently, the Court found ‘no legal infirmity to disturb the impugned order’ [para. 25].

Decision The Court dismissed the appeal and upheld the interim measures. It referred the matter to the first instance judge to expedite further proceedings [para. 25].

***General Secretary, West Pakistan Salt Miners Labour Union
v The Director, Industries and Mineral Development***

Supreme Court
12 July 1994³¹²

Keywords [Quality – Availability – Pollution – Obligation to Protect]

Abstract This case considered industrial pollution negatively impacting water resources used for human consumption.

Facts The Punjab Coal Company (PCC) was licensed to carry out mining activities in the catchment area of a water reservoir which supplied 60-70% of the drinking water for a nearby town [p. 5]. Petitioners claimed that the license should never have been granted as the catchment area was classified as a reserve. The mining activities had severely reduced the water catchment area. Furthermore, poisonous water from the mines contaminated the water reservoir constituting a health hazard [p. 4].

Procedure Petitioners challenged a license at the Supreme Court of Pakistan.

Claims Petitioners claimed that mining activities contaminated the water supply of some 35,000 residents and mine workers of Khewra. They challenged a 30-year license that had been granted to PCC in 1950 and that was subsequently renewed for another 20 years.

Applicable law and reference to regional or international instruments:

- Constitution of the Islamic Republic of Pakistan³¹³

Court Rationale The Court primarily based its decision on Article 9 of the Constitution of the Islamic Republic of Pakistan³¹⁴. It held that *‘Article 9 of the Constitution provides that “no person shall be deprived of life or liberty*

312. *General Secretary, West Pakistan Salt Miners Labour Union v The Director, Industries and Mineral Development* [1994] Supreme Court Human Rights Case 120 of 1993 <<http://ceej.pk/cms/docs/sc/1994SCMR2061.pdf>>.

313. The Constitution of the Islamic Republic of Pakistan. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=7246>.

314. The Constitution of the Islamic Republic of Pakistan. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=7246>.

save in accordance with law". The word "life" has to be given an extended meaning and cannot be restricted to vegetative life or mere animal existence. In hilly areas where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean that persons residing in other parts of the country where water is available in abundance do not have such right. The right to have unpolluted water is the right of every person wherever he lives' [p. 9].

The Court referred to its own precedents as well as to judgements from the Supreme Court of India, which are treated as persuasive precedents by higher courts in Pakistan. In these judgements, the word 'life' was interpreted to have a wide meaning and to also guarantee dignity. Water is included in that concept, among other necessities such as food, clothing, shelter, education, health care, a clean atmosphere and unpolluted environment.³¹⁵

Decision The Court ordered several measures to ensure the protection of water sources from contamination [pp. 12, 13]:

- The Court ordered the mine operator PCC, within four months of the Court's order, to shift the location of the mouth of the mine to a safe distance from the stream and reservoir to ensure that no further pollution would occur;
- It authorised a Commission to inspect, record evidence and hear witnesses on the feasibility of shifting the mouth of the mine and to oversee whether this stopped pollution;
- It decided that the Court would again consider the case, including the necessity to close the mine, if the Commission concluded that shifting was not possible or would not stop pollution;
- The Pakistan Mineral Development Corporation (PMDC), which had installed a water pipeline to service the residents, was ordered to install a second pipeline and to enlarge a freshwater reservoir;
- PCC and all other mine operators were ordered to take measures to prevent any future pollution;
- All authorities with the power to grant or renew licenses were ordered not to grant new licenses and not to renew or extend existing licensed for mining.

315. The Court referred to:

Supreme Court of Pakistan, *Shehla Zia v WAPDA* (PLD 1994 SC 693 at 714; H.R. Case no 15-K/1992), Supreme Court of India, *M.C. Mehta v. Union of India*, (AIR 1988 SC 115) and *M.C. Mehta v. Union of India* (AIR 1988 SC 1037). In these cases, the Supreme Court of India ordered the closure of tanneries because their industrial effluents were polluting the Ganges.

BELGIUM

Juge de Paix Fontaine-l'Évêque

15 October 2009³¹⁶

Keywords [Affordability – Water – Right to water (violation) – Human dignity (violation) – Disconnection of water supply – Defaulting payment – Public service – Minimum supply]

Abstract Completely disconnecting a user's property from the public water supply without guaranteeing the user a minimum supply is contrary to the right to human dignity and the right to water as defined under the Belgian Constitution and the ICESR.

Facts The public water service provider *Société wallonne des eaux* (SWE) [page 309] requested judicial authorisation to disconnect a user's property from the water supply system [page 307].³¹⁷

Procedure The service provider applied to the *Justice de Paix*³¹⁸ of the municipality of Fontaine-l'Évêque seeking approval of the proposed disconnection of service [page 307].

Claims The applicant sought to disconnect the respondent's property from the water supply system at the address where the dispute arose, and/or at her current address where necessary [page 307].

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Kingdom of Belgium, art 23(1)³¹⁹
- Decree relating to the Volume II of the Environmental Code containing the Water Code (Walloon Region), art 202³²⁰

316. *Juge de Paix Fontaine-l'Évêque* [2009], JJP [2012] 306. No paragraph numbers being available for this case, pinpoints are therefore referring to page numbers.

317. Regarding the identification of the applicant as a service provider, see: JJP [2012] 310.

318. A *Juge de Paix* in Belgium is a small claims court at the canton level within the Belgium justice system that hears certain types of cases including those dealing with small amounts of alleged damages and those dealing with certain housing related disputes.

319. Constitution belge 1994.

320. Décret relatif au Livre II du Code de l'Environnement constituant le Code de l'Eau, 27 mai 2004 (Région wallonne).

- ICESCR, art 12³²¹
- Water Code, art D.1(3)³²²

Court Rationale The *Justice de Paix* first recalled the conditions allowing a disconnection of users' premises from the public water supply under article 202 of the Decree relating to the Volume II of the Environmental Code containing the Water Code. This provision notably specifies that such disconnection can occur by judicial authorisation only [page 307]. The *Justice de Paix* then referred to Henri Smets' definition of the right to water, which is 'the right for every person, regardless of his economic situation, to be provided with a minimum quantity of quality water which is sufficient for life and health'.³²³ It further highlighted that:

The right to water is inextricably related to the right to health since 80% of diseases are of hydric origin; it is an integral part of recognised human rights at international level and 'from a more general point of view one can associate the right to water with the right to life and with the principle to safeguard human dignity'³²⁴ (H. Smets ..., who cites article 12 of the International Covenant on Economic, Social and Cultural Rights).

The *Justice de Paix* subsequently referred to the national protection of the right to water under article D.1(3) of the Water Code, and declared that the right was of constitutional character since human dignity as guaranteed under article 23(1) of the Constitution 'cannot be understood without access to water (potable AND not potable)' [page 308].

However, the *Justice de Paix* clarified that '[t]he implementation by States of the 'right to water' does not mean that they are bound to provide each person with water for free'. He noted that the legislation prevented unilateral disconnection of water supply as it required prior judicial authorisation. He emphasised that '[t]his restriction is resulting from the nature itself of SWE's public service mission and from its role in providing this common and vital resource that water is (potable or not), to which every human being is

321. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

322. Livre II du Code de l'Environnement constituant le Code de Eau, 3 mai 2005.

323. French original: '[L]e droit pour toute personne, quel que soit son niveau économique, de disposer d'une quantité minimale d'eau de bonne qualité qui soit suffisante pour la vie et la santé' in Henri Smets, 'Reconnaissance et mise en œuvre du droit à l'eau' *Revue trimestrielle des droits de l'homme* [2012] 837, 837.

324. French original: 'De manière plus générale, on peut associer le droit à l'eau au droit à la vie et au principe de la sauvegarde de la dignité humaine' in *ibid* 839.

entitled.’ Observing that no criteria were set in the Decree to assist judges in their decision-making process, the Justice held that:

... to recognise the vindication of a request to undertake a complete disconnection (notably) on the pretext that the user has accumulated an important debt, that he was already previously condemned or that he does not comply with a debt clearance plan, would be equivalent to give the judge the power to impose a measure that, in any case and per se, would violate the principle established under article 23 of the Constitution but also by all aforementioned supranational provisions... .

The *Justice de Paix* consequently found that ‘[e]ven a chronic failure of the user to his obligation to pay could not deprive him from his basic right to respect of his dignity’. Consequently, the *Justice de Paix* held that the proper remedy for the supplier was a reduction of water supply which maintained a minimum supply, as that remedy is likely to preserve the user’s human dignity. This is a ‘higher principle which imposes on all actors of the economic sector’, which applies when they are performing a ‘public service mission which affects fundamental rights of any human being’ [page 309].

Decision The *Justice de Paix* dismissed the applicant’s request for disconnection [page 310].

***Section française de l'Observatoire International des Prisons
c/ Ministère de la Justice***

Conseil d'Etat, Interim order

22 December 2012³²⁵

Keywords [Availability – Water – Inhuman or degrading treatment (violation)
– Conditions of detention]

Abstract Rights guaranteed by the European Convention on Human Rights are included within the fundamental freedoms protected by the Code of Administrative Justice. Prison directors are responsible for taking appropriate measures to protect detainees' lives and ensuring that they are provided with effective access to running water. Failure to do so would amount to inhuman or degrading treatment under the European Convention on Human Rights.

Facts After visiting the prison *Les Baumettes* in Marseilles, the General Inspector of prisons issued alarming recommendations on 12 November 2012 on the dilapidated state of the building. Notably, he reported that toilets were not fixed to the floor while the flushing system was almost non-existent, sinks were leaking, showers were not enclosed and hot water was not provided [para. 2].

Procedure The French Section of the International Observatory of Prisons applied to the Administrative Tribunal (Marseilles) for injunctive relief (urgent motion) under article L.521-2 of the Code of Administrative Justice so that appropriate measures could be ordered within 48 hours to end serious and unlawful breaches of fundamental freedoms of detainees at Les Baumettes. The Administrative Tribunal ordered interim measures to be taken to ensure that artificial lighting and a functioning window be provided in cells and waste removed. The International Observatory of Prisons appealed to the Council of State as several requested measures were not granted, including the provision of adequate water and sanitation facilities.

325. *Section française de l'Observatoire International des Prisons c/ Ministère de la Justice* [2012] Conseil d'Etat (référés) 364584
<<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CE-TATEXT000026830000&fastReqId=775466674&fastPos=1>>. No proper paragraph or page numbers are available for this case.

Claims The applicant alleged that the shortcomings identified in the recommendations of the General Inspector of prisons showed a violation of articles 2 and 3 of the European Convention on Human Rights and requested appropriate measures to be taken without delay. The applicant requested that all cells be inspected to secure electrical equipment, remove any dangerous objects and ensure effective access to running water.

Applicable Law and Reference to Regional or International Instruments

- Code of Administrative Justice, art L.521-2³²⁶
- European Convention on Human Rights, arts 2 and 3³²⁷
- Penitentiary Law, art 22³²⁸

Court Rationale The Council first assessed whether the conditions to bring an urgent motion as provided under article L.521-2 of the Code of Administrative Justice were met. These imply an emergency situation and a violation of a fundamental freedom. It held that the rights guaranteed under articles 2 and 3 of the European Convention on Human Rights are fundamental freedoms as understood under article L.521-2 of the Code of Administrative Justice, and that the public authority's failure to act created an imminent and blatant danger for detainees' lives or exposed them to inhuman or degrading treatment. Consequently, the administrative judge has the authority to take appropriate measures to remedy the situation at *Les Baumettes* and require that remedies begin to be implemented within 48 hours.

Regarding access to running water, the Council noted that an inspection of all cells had been undertaken following the issuance of the General Inspector's recommendations. The Director of the prison had also decided to undertake renovation work so as to improve the situation as identified in the recommendations. Therefore, the Council found that:

... commitments made by the penitentiary institution in order to restore, as soon as possible, ... the normal functioning of the running water supply in the building render unnecessary the prescription, within the short time frame set under article L.521-2 of the Code of Administrative Justice ... of additional measures.

326. Code de justice administrative 2000 (as amended).

327. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights).

328. Loi n° 2009-1436 du 24 novembre 2009 pénitentiaire.

Decision While finding that violations of the Code of Administrative Justice had occurred, including related to availability of adequate water and sanitation facilities, the Council ultimately dismissed the urgent motion for injunctive relief on the grounds that the prison administration had already taken measures to end the violations, including the serious and unlawful breaches of fundamental freedoms of detainees at Les Baumettes.

FRANCE

Madame X c/ Commune de Saint-Hilaire-de-Lavit

Cour de cassation, 1st Civil Chamber

28 November 2012³²⁹

Keywords [Quality – Water – Obligation to provide water suitable for human consumption (violation) – Public service – Obligation of result]

Abstract A municipality providing water for human consumption has a contractual ‘obligation of result’ to supply water suitable for such use. It can only be fully exempted from its liability in case of force majeure, or partially exempted in case of negligence on the part of the person suffering the damage.

Facts It was observed that the public service provider of the municipality of Saint-Hilaire-de-Lavit supplied drinking water of poor quality.

Procedure As a resident of the municipality of Saint-Hilaire-de-Lavit, Mrs X applied for damages to the *Justice de Paix*³³⁰ (Mende), who dismissed her application. She appealed to the Court of Cassation.

Claims The applicant alleged that article L.1321-1 of the Public Health Code – which states that any person providing water for human consumption shall ensure that it is suitable for such purposes – establishes an ‘obligation of result’ for the supplier, which means that the supplier has to ensure that water provided to the public is of the required quality. She sought damages under article 1147 of the Civil Code, which provides that the person who does not comply with his contractual obligation shall be liable for damages, except in case of force majeure or negligence on the part of the person suffering the damage.

329. *Madame X c/ Commune de Saint-Hilaire-de-Lavit* [2012] Cour de cassation (Civ 1) 11-26814 <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX-TO00026709101&fastReqId=2047838846&fastPos=1>>. No paragraph or page numbers are available for this case.

330. A *Juge de Paix* in Belgium is a small claims court at the canton level within the Belgium justice system that hears certain types of cases including those dealing with small amounts of alleged damages and those dealing with certain housing related disputes.

Applicable Law and Reference to Regional or International Instruments

- Civil Code, art 1147³³¹
- Public Health Code, art L.1321-1³³²

Court Rationale While the *Justice de Paix* found that the municipality had only an ‘obligation of means’ as regards water quality to which it complied by undertaking work to remedy the poor quality of water, the Court overturned this decision since it found that ‘the municipality had an obligation to provide water suitable for human consumption and that it could only be fully exempted from this contractual obligation of result by proving that there was a case of *force majeure*, or partially [exempted] by proving the negligence of the victim’.

Decision The Court quashed the decision of the *Justice de Paix* and found a violation of article L.1321-1 of the Public Health Code and article 1147 of the Civil Code. It referred the matter to be reheard by the Justice of the Peace (Alès) and ordered the municipality of Saint-Hilaire-de-Lavit to pay costs.

331. Code civil 1804 (as amended).

332. Code de la santé publique 1953 (as amended).

Fédération Départementale des Syndicats d'Exploitants Agricoles du Finistère

Conseil constitutionnel, Priority preliminary ruling on the issue of constitutionality

27 July 2012³³³

Keywords [Participation – Water Abstract ion – Right to participate in public decision-making having an impact on the environment (violation) – Water resources]

Abstract Environmental legislation failing to ensure public participation in the delimitation of feeding areas for Abstract ion of drinking water and in the definition of the related action program, violates Article 7 of the French Charter for the Environment.

Facts The Prefect of Finistère³³⁴ issued two decrees, in conformity with article L.211-3(5)(II) of the Environmental Code, delimitating the feeding areas for the Abstract ion of drinking water (from Kermorvan to Tétrabu), and defining the voluntary program of action and the program of obligatory measures to be implemented, in order to reduce the nitrate levels found in these water catchment areas. The Farmers' Federation of Trade Unions from Finistère challenged the constitutionality of article L.211-3(II)(5) of the Environmental Code, on the basis that it did not safeguard the principle of public participation in matters affecting the environment.

Procedure The Farmers' Federation applied to the Administrative Court of Rennes seeking the annulment of the two decrees issued by the Prefect of Finistère. Before ruling on the merits, the Administrative Court referred the question regarding the constitutionality of article L.211-3(II)(5) of the Environmental Code to the Council of State (*Conseil d'État*).³³⁵ The Council

333. *Fédération Départementale des Syndicats d'Exploitants Agricoles du Finistère* [2012] Conseil constitutionnel 2012-270 QPC <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/decisions-of-the-constitutional-council-qpc/2012/decision-no-2012-270-qpc-of-27-july-2012.115505.html>>.

334. A prefect in France is the State's representative in a department or region.

335. *Fédération Départementale des Syndicats d'Exploitants Agricoles du Finistère c/ Préfet du Finistère* [2012] Conseil d'Etat 357695.

of State brought the matter before the Constitutional Council for constitutional review.

Claims The applicant alleged that article L.211-3(II)(5) of the Environmental Code violated the principle of public participation as guaranteed under article 7 of the Charter for the Environment,³³⁶ since it did not define the conditions for exercising the right to public participation when: a) delimitating the protection zones of the feeding areas for Abstract ion of drinking water and b) establishing the related actions' program [para. 2].

Applicable Law and Reference to Regional or International Instruments

- Charter for the Environment – Art. 7³³⁷
- Environmental Code – Art. L. 211-3(II)(5)³³⁸

Court Rationale The Constitutional Council referred to article 7 of the Charter for the Environment which provides that:

Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment.

'Every person has the right, within conditions and limits as defined by law, to access information pertaining to the environment held by public authorities and to participate in the development of public decisions having an impact on the environment.'

In light of this provision, the Council held that the administrative decisions delimitating the protection zones of feeding areas for the Abstract ion of drinking water and establishing an actions' program, were public decisions having an impact on the environment, however, 'neither the challenged provision, (article L.211-3(II)(5) of the Environmental Code) nor any other legislative provision ensure the implementation of the principle of public participation in public decision-making '. Therefore, by adopting the challenged provision without safeguarding the principle of public participation, the legislator disregarded the extent of its competence. As a result article

336. The Environmental Charter is part of the Constitution of the French Republic 1958 (as amended).

337. Charte de l'environnement 2004.

338. Code de l'environnement (as amended).

L.211-3(II) (5) of the Environmental Code must be declared as contrary to the Constitution.

Decision The Constitutional Council decided that article L.211-35(II) (5) of the Environmental Code was unconstitutional [Findings Article 1], taking effect from 1 January 2013 [Findings Article 2].

Madame Sandra A c/ Commune de Gouvernes

Conseil d'Etat

15 December 2010³³⁹

Keywords [Availability– Water – Right to respect for private and family life (violation) – Connection to drinking water supply – Obligation to fulfil]

Abstract Denying a connection to the water supply system to a property owner who decided to live in two caravans in her property, amounts to a violation of the latter's right to respect for private and family life under the European Convention on Human Rights.

Facts Mrs Sandra A, the owner of a plot of land in the municipality of Gouvernes, installed two caravans in her property and was living there with her partner and their five children. On 20 September 2004, she requested her property to be connected to the drinking water supply network, but the mayor of Gouvernes tacitly dismissed her application on the basis that the plot of land was located in the perimeter of a protected area, and within the protection perimeter of an historic monument where the installation of caravans was prohibited under article R.449-9 (now article L.111-6) of the Urban Planning Code.

Procedure Mrs A first applied to the Administrative Court of Melun against the tacit administrative decision of the Gouvernes' mayor, denying the connection of her property to the water supply network. The Administrative Court dismissed her application on 15 February 2007. She appealed to the Administrative Court of Appeal of Paris, which also dismissed her application on 16 October 2008. She further appealed to the Council of State (*Conseil d'État*).

Claims The applicant alleged that the respondent's tacit refusal to connect her property to the drinking water supply network constituted a violation of her right to respect for private and family life as guaranteed under article 8 of the European Convention on Human Rights.

339. *Madame Sandra A c/ Commune de Gouvernes* [2010] Conseil d'Etat 323250 <<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETA-TEXT000023248093&fastReqId=322404839&fastPos=1>>. No paragraph numbers or page numbers are available for this case.

Applicable Law and Reference to Regional or International Instruments

- European Convention on Human Rights – Art. 8³⁴⁰
- Urban Planning Code – Art. L.111-6³⁴¹

Court Rationale The Council of State held that the Mayor’s tacit administrative decision denying the connection of an ‘irregularly established building for residential purposes’ to the drinking water supply network constituted an interference, by a public authority, on the right to respect for private and family life of the applicant, as guaranteed under article 8 of the Convention. While such interference could be justified by the legitimate aim of respecting urban planning and safety rules as well as protecting the environment, it is, in each case, for the administration to ensure and for the judge to verify, that the interference resulting from the refusal to connect a property to the water supply network is proportional to the legitimate aim pursued.

The Council concluded that the Administrative Court of Appeal had committed a legal error and violated the provisions of article 8 of the Convention by ruling that the Mayor’s tacit refusal to connect Mrs. A’s property to the water supply network did not constitute an interference on her right to respect for private and family life.

Decision The Court granted the application and quashed the judgment of the Administrative Court of Appeal [Findings Article.1]. It referred the matter to the Administrative Court of Appeal of Paris [Findings Article.2], and ordered the respondent to pay the applicant EUR 3,000 [Findings Article.3].

340. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

341. Code de l’urbanisme 1954 (as amended).

Laurent X

Cour de cassation, Criminal Chamber
16 February 2010³⁴²

Keywords [Availability – Quality – Water and sanitation – Human dignity (violation) – Safety of workers (violation) – Seasonal workers – Vulnerable people – Housing conditions – Obligation to protect]

Abstract Amongst other deplorable conditions, failing to accommodate seasonal workers with water suitable for human consumption and sufficient sanitation facilities is contrary to the, constitutionally protected right to adequate housing, and incompatible with human dignity and the safety of workers under French law.

Facts Mr Laurent X was the director of two companies that farmed two agricultural lands. He recruited several dozens of seasonal workers from Morocco and Tunisia who were accommodated on site. The housing conditions were deplorable, no mattresses were available on beds, electricity was faulty and water, which sometimes was not suitable for human consumption, had to be taken from a well about 50 metres away. Additionally, only six sanitation facilities were provided for the use of 100 people, several of which were in bad condition.

Procedure In first instance, Mr Laurent X was found guilty of subjecting a group of vulnerable people to housing conditions incompatible with human dignity and of infringing workers' safety regulations. This decision was upheld by the Court of Appeal of Aix-en-Provence. He then decided to appeal to the Court of cassation.

Claims In first instance and in Court of Cassation, the applicant claimed that Mr. Laurent X had subjected a group of vulnerable people to housing conditions incompatible with human dignity.

342. *Laurent X* [2010] Cour de cassation (Crim) 09-84012
<<http://www.legifrance.gouv.fr/affichJurijudi.do?oldAction=rechJurijudi&idTexte=JURITEX-TO00022004596&fastReqId=894994607&fastPos=1>>. No paragraph or page numbers are available for this case.

On appeal, Mr. Laurent X alleged that the judgment of the Court of Appeal of Aix-en-Provence should be quashed for procedural reasons (contrary to articles 6 and 7 of the European Convention on Human Rights and article 225-14 of the Penal Code).

Applicable Law and Reference to Regional or International Instruments

- European Convention on Human Rights – Arts. 6 and 7³⁴³
- Penal Code – Art. 225-14³⁴⁴
- Rural Code – Arts. R. 716-20, 21, 24

Court Rationale The Court of Cassation held that Mr. Laurent X had seriously violated several provisions of the Rural Code. These included: article R. 716-21, which states that in collective accommodation, the minimum surface required for sleeping is 6 square meters per occupant and the number of seasonal workers must not be more than three; and article R. 716-20, which stipulates that if a farm is not served by a flowing water supply network, the employer must make available, everyday, at least 100 litres of drinking water to each worker.

The Court added that the housing conditions as described were deprived of a minimum, basic comfort and were contrary to the right to adequate housing as protected by the Constitution and that Mr. Laurent X should have ensured the upkeep of the housing conditions, and that the workers' dependency was known to him since he had the power to decide on the renewal of their seasonal contract. The Court concluded that the assessment of the housing conditions by the Court of Appeal of Aix-en-Provence was justified under article 225-14 of the Penal Code, which provides that: 'Subjecting a person, whose vulnerability or dependence is obvious or known to the offender, to working or living conditions incompatible with human dignity is punishable by five years imprisonment and a fine of EUR 150,000.' It further found that this provision is not incompatible with article 7 of the European Convention on Human Rights on the principle of no punishment without law.

Decision The Court of Cassation expressly confirmed the appealed decision with the exception of the provisions related to the sentencing (for procedural penal reasons).

343. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

344. Code pénal 1994 (as amended).

Commune de Saint-Jean d'Aulps c/ Syndicat des copropriétaires de l'immeuble Relais de la Terche et autre

Conseil d'Etat

14 October 2009³⁴⁵**Keywords** [Non-discrimination – Affordability – Water – Principle of equality (non-violation) – Block tariffs]**Abstract**

Applying decreasing or progressive water block tariffs to all subscribers, without distinction, can be lawfully implemented under French law, since they do not create different categories of users who should then be subjected to different tariffs.

Facts By deliberation of 14th June 1994, the municipal council of Saint-Jean d'Aulps adopted a regulation on the water supply service establishing in its article 15, on the one hand a subscription fee of 300 Francs³⁴⁶ per residential unit for the water supply service, and, on the other hand block tariffs depending on actual water consumption (FF 4 per m³ up to 30 m³; FF 1 per m³ from 30 to 500 m³; FF 4 per m³ beyond 500 m³). The association of two property co-owners³⁴⁷ (hereinafter 'the Syndicat') considered that this provision (article 15) created an inequality of treatment between collective and individual housing, as users in collective housing – whose consumption included several housing units – had to pay a higher water price than other users.

Procedure The Syndicat requested the Mayor of Saint-Jean d'Aulps to revoke article 15 of the municipality's regulation for the drinking water service. The Mayor tacitly denied the request. The Syndicat applied to the Administra-

345. *Commune de Saint-Jean d'Aulps c/ Syndicat des copropriétaires de l'immeuble Relais de la Terche et autre* [2009] Conseil d'Etat 300608 <<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETA-TEXT000021164447&fastReqId=1891469650&fastPos=1>>. No paragraph or page numbers are available for this case.

346. Former French currency: EUR 1 = FF 6.55957.

347. In France, the *syndicat de copropriété* is an agency or agent that manages a co-owned building, instructed by the co-owners of a building. [Just a suggestion, and I think 'to take in charge' does not work in English] who takes in charge the general collective management of a co-property such as a building with various co-owners.

tive Court of Grenoble, which quashed the tacit decision of the Mayor and ordered him to revoke article 15. The municipality appealed against this judgment, which was upheld by the Administrative Court of Appeal of Lyon. The municipality appealed to the Council of State (*Conseil d'État*).

Claims On appeal, the municipality alleged that article 15 did not create different categories of users and therefore did not introduce an illegal differentiation between them.

Applicable Law and Reference to Regional or International Instruments

- Law on Urban Solidarity and Renewal – Art. 93³⁴⁸
- Water Law – Art. 13(II)³⁴⁹

Court Rationale The Council of State clarified that Article 13(II) of the Water Law from 1992 provides that water bills will include an amount calculated on the basis of the actual volume of water consumed by subscribers and it could also include an amount calculated independently of the volume, given the fixed service charges and the characteristics of the water connection.

The Council considered that these provisions do not require municipalities or public institutions in charge of the water supply service, to create a uniform tariff per cubic meter – they can legally establish decreasing or progressive block tariffs according to consumption levels. The Council added that, as long as, the establishment of such differentiated tariffs applies without distinction to all subscribers, it does not, in itself, create categories of users defined by the different volume of water consumed'. The Council therefore concluded that article 15 did not create an illegal differentiation merely by establishing different block tariffs depending on the amount of water consumed.

The Council referred that although, article 93 of the Law on Urban Solidarity and Renewal provides that, upon request of a property owner, any public water supply service must carry out the individualisation of water supply contracts within collective residential buildings, a certain number of subscribers could have found themselves in a particular situation before the entry into force of this Law (13 December 2000), since their water consumption could regroup that of several housing units (due to the lack of legislation in this respect).

348. Loi n° 2000-1208 du 13 décembre 2000 relative à la solidarité et au renouvellement urbains.

349. Loi n° 92-3 du 3 janvier 1992 sur l'eau.

The Council declared, however, that ‘the principle of equality does not imply that subscribers of a public service who find themselves in a different situation should be subjected to different tariffs’.

Decision The Council granted the appeal of the Municipality and quashed both judgments of the Administrative Court of Appeal of Lyon and of the Administrative Court of Grenoble.

FRANCE

Préfet du Doubs c/ Commune d'Audincourt

Cour Administrative d'Appel (Nancy)

11 June 2009³⁵⁰

Keywords [Affordability – Water – Access to housing (non-violation) – Disadvantaged families – Municipal prohibition of disconnection of water supply]

Abstract A municipality does not have the competence nor the legal bases (including the Universal Declaration of Human Rights) to prohibit, through a Mayor's decree, the disconnection of the water, gas and electricity supply services to disadvantaged families, under French law.

Facts By decree of 26 October 2007, the Mayor of Audincourt prohibited the disconnection of the water, gas and electricity supply services to disadvantaged families living in the municipality. The Sub-Prefect of Montbéliard addressed a letter to the Mayor of Audincourt on the 15 November 2007 requesting him to withdraw the decree.

Procedure The Prefect of Doubs applied to the Administrative Court of Besançon requesting the annulment of the Mayor's decree, which was dismissed. He appealed to the Administrative Court of Appeal of Nancy.

Claims The Prefect alleged that the Mayor had no competence to issue the decree, which was void of legal basis.

Applicable Law and Reference to Regional or International Instruments

- General Code on Local Authorities – Art. L.2212-1³⁵¹
- Public Health Code – Art. L.1311-1³⁵²
- Social Action and Family Code – Arts. L.115-2 and L.115-3³⁵³
- Universal Declaration of Human Rights³⁵⁴

350. *Préfet du Doubs c/ Commune d'Audincourt* [2009] Cour Administrative d'Appel (Nancy) o8NC00599
<<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CE-TATEXT000020867668&fastReqId=1567820798&fastPos=1>>.

351. Code général des collectivités territoriales 1996-2000 (as amended).

352. Code de la santé publique 1953 (as amended).

353. Code de l'action sociale et des familles 1956 (as amended).

354. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

Court Rationale The Administrative Court of Appeal of Nancy recalled that under article L.2212-1 and 2 of the General Code on Local Authorities, the Mayor is responsible for the municipal police, which is in charge of ensuring order, safety, security and public salubrity.

The Court considered that, firstly, the risk from the use of alternative means of heating and lighting, to the security of people and goods, was not one that would justify the Mayor's decree prohibiting the disconnections. Secondly, neither articles L.115-2 and L.115-3 of the Social Action and Family Code, which make the fight against exclusion a national priority and order local authorities to prevent and eradicate exclusion, nor article L.1311-1 of the Public Health Code, which foresees the adoption of decrees establishing general rules of hygiene and any other measures to preserve human health, 'have the purpose or the effect of allowing the Mayor to prohibit the disconnection of the water, gas and electricity [supply services]'. Thirdly, the Court found that:... while the municipality sustains that it is the Mayor's responsibility to ensure the strict compliance with fundamental rights, as access to housing, it does not refer to any legislative or regulatory provision authorising the local executive (which cannot usefully invoke the Universal Declaration of Human Rights), to adopt a decree prohibiting the disconnection of the water, gas and electricity [supply services] to disadvantaged families .

Decision The Court granted the appeal and quashed both the Mayor's decree and the judgment of the Administrative Court of Besançon.

Note that under international human rights law, the disconnection of water supply constitutes a retrogressive measure and as such is presumed to be a violation of the right to water unless there are no alternatives and all human rights of those affected have been carefully considered. Strong procedural safeguards are indispensable to ensure that violations of the right to water cannot occur. A decree to prohibit any disconnection of disadvantaged families, as was subject in the case above, provides such a strong procedural safeguard. In the case presented here, the Court decided that neither legislation for the protection of security of persons, the eradication of exclusion or the protection of public health nor fundamental or human rights give the Mayor the authority to pass a decree prohibiting disconnections of disadvantaged families. Unfortunately, the Court did not discuss which safeguards against disconnections exist or would be desirable under French law.

FRANCE

Monsieur X c/ Syndicat d'Adduction d'Eau du Trégor

Cour de cassation, 1st Civil Chamber

30 May 2006³⁵⁵

Keywords [Quality – Water pollution – Obligation to provide water suitable for human consumption (violation) – Agricultural runoff – Public service – Obligation to protect]

Abstract A public water company has the ‘obligation of result’ to supply water fit for human consumption and it cannot be exempted from this obligation on the basis that the water pollution resulted from agricultural runoff, unrelated to its activities.

Facts The public water service provider, *Syndicat d'Adduction d'Eau du Trégor* (hereinafter, SAET) supplied water to its users that was not suitable for human consumption due to an abnormal concentration of pesticides and nitrates. Mr. X, a water user, who had been supplied with the water unfit for human consumption during a period of 2091 days, sought legal action.

Procedure Mr X sought to obtain damages before the Court of Appeal of Rennes, which granted his application. The public water company SAET appealed to the Court of Cassation.

Claims On appeal, the public water company SAET alleged that it should not be held responsible for a pollution caused by intensive agriculture, which was not related to its own activities. It further claimed that this pollution was impossible to overcome given the significant cost and magnitude of the works to be undertaken to avoid its effects.

Applicable Law and Reference to Regional or International Instruments

- Public Health Code³⁵⁶

355. *Monsieur X c/ Syndicat d'Adduction d'Eau du Trégor* [2006] Cour de cassation (Civ 1) 03-16335 <<http://legifrance.com/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEX-TOOOO07050009&fastReqId=806360675&fastPos=1>>. No paragraph or page numbers are available for this case.

356. Code de la santé publique 1953 (as amended).

Court Rationale The Court of Cassation held that SAET was obliged, under the provisions of the Public Health Code, to ensure that the water it provided to the public was fit for human consumption and in conformity with the quality standards required by the legal and regulatory provisions to which it was bound .

The Court referred that since the appellant recognised that it should have undertaken certain steps to render the water safe for human consumption, the water pollution resulting from agricultural runoff did not constitute an unpredictable and irresistible event amounting to *force majeure*, likely to exempt it from its responsibility, since the public water company was bound by an obligation of result.

Decision The Court dismissed the appeal and confirmed the decision of the Court of Appeal of Rennes in its entirety. The Court applied the polluter pays principle, and ordered the appellant to pay costs.

FRANCE

Madame X c/ Commune d'Amiens

Court of Cassation, 3rd Civil Chamber

15 December 2004³⁵⁷

Keywords [Availability – Water – Right to adequate housing (violation) – Connection to water supply – Obligation to fulfil]

Abstract A lessor/landlord's obligation to provide a tenant with adequate housing, includes the obligation to connect the residential property to the water supply service, as guaranteed by French law.

Facts Following the signature of a lease contract on 6 May 1983, Mrs X became the tenant of a residential property managed by the Public Office for Planning and Construction of Amiens (hereinafter, OPAC), and owned by the municipality of Amiens. She requested the connection of the property to the water supply service but was informed by OPAC that the property could not be connected to the water supply as the rent she paid, ranked Category IV, had been determined taking that into consideration. Mrs. X was offered an alternative housing solution by OPAC, which she declined.

Procedure Mrs. X applied to the Court of Appeal of Amiens, which found that OPAC was not required to connect the residential property to the water supply service. Mrs X appealed to the Court of Cassation.

Claims The applicant alleged that OPAC had the obligation to undertake the necessary works in order to connect the residential property to the water supply service. On appeal, Mrs. X claimed that the judgment of the Court of Appeal of Amiens was contrary to article 1719-1 of the Civil Code.

Applicable Law and Reference to Regional or International Instruments

- Civil Code, art 1719-1³⁵⁸

357. *Madame X c/ Commune d'Amiens* [2004] Cour de Cassation (Civ 3) 02-20614 <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007050420&fastReqId=1119761931&fastPos=1>>. Neither paragraph nor page numbers are available for this case.

358. Code civil 1804 (as amended).

Court rationale The Court of Cassation held that the landlord's obligation to provide a tenant with adequate housing includes the obligation to connect the residential property to the water supply service, as foreseen in article 1719-1 of the Civil Code.

Decision The Court quashed the judgment of the Court of Appeal of Amiens and ordered OPAC and the municipality of Amiens to pay the costs.

IRELAND

Kinsella v Governor of Mountjoy Prison

High Court

12 June 2011³⁵⁹

Keywords [Quality– Sanitation – Duty to protect the person of every citizen (violation) – Conditions of detention]

Abstract Detaining an individual in a padded cell for a continuous period of 11 days with merely a mattress and a cardboard box as a sanitation facility constitutes a violation of the State's constitutional duty to protect the person of every citizen under the Irish Constitution.

Facts Mr Wayne Kinsella was convicted of theft and sentenced to five month's imprisonment. He was also a remand prisoner awaiting trial for murder that was scheduled in May 2012 at the Central Criminal Court [para. 1]. He was detained at Cloverhill Prison which is primarily a remand prison with conditions that are generally considered 'humane and civilised'. Prisoners have access to their own clothes, recreation facilities, and a library. Mr Kinsella's conviction took effect on 1 June 2011 following his decision to withdraw an appeal in Circuit Court against that of the District Court [para. 2]. He was subsequently conveyed to Mountjoy Prison [para. 3], where he was brought to the basement section and placed in an observation cell, which was entirely padded and approximately three metres by three metres with a small window providing some natural light. The sanitation facilities in the cell consisted only of a cardboard box [para. 4]. Mr Kinsella was detained there for 11 continuous days [para. 5] in order to protect him from potential harm from other inmates and because of a shortage of single cells within the prison system [para. 6]. He spent virtually all 11 days in the observation cell and that according to the applicant, he was not allowed recreational time or a shower during that time [para. 5].

The cell was meant for prisoners who need to be protected from self-harm, however the applicant was placed in the cell because there were not enough single cells to accommodate all prisoners that needed protection from other

359. *Kinsella v Governor of Mountjoy Prison* [2011] High Court 2011 1125 SS, [2011] IEHC 235 <<http://courts.ie/judgments.nsf/09859e7a3f34669680256ef3004a27de/03ead-4b8ab76869a802578b8005b420a?OpenDocument>>.

inmates. The prison unsuccessfully sought alternatives, including in other prisons [paras. 5-6].

Procedure Mr Kinsella applied to the High Court for release [para. 1].

Claims The applicant alleged that his conditions of detention, which notably included the lack of adequate sanitation facilities, constituted an infringement on his constitutional rights, and applied for release under article 40(4) (2) of the Constitution [para. 1].

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Republic of Ireland, arts 40(3) (2) and 40(4) (2)³⁶⁰
- European Convention on Human Rights, art 3³⁶¹

Court Rationale The Court considered that while prison detention inevitably involves the deprivation of certain rights, other rights which are not necessarily diminished must continue to be protected [para. 8]. It stated that the protection of the person under art 40(3) (2) of the Constitution encompasses the protection of the integrity of the human body, the mind, and personality [para. 9]. The Court considered the fact that the applicant had been a protected prisoner posed a real constraint to the prison authorities, as they had to take effective security precautions at all times to protect the applicant when he was permitted to leave his cell [para. 3]. The Court subsequently declared that the applicant's conditions of detention in isolation and in a padded cell involved 'a form of sensory deprivation' but not in the sense as to constitute inhumane and degrading treatment as 'condemned by the European Court of Human Rights in *Ireland v. United Kingdom* (1978) 2 EHRR 25' and hence the detention did not rise to a violation of article 3 of the European Convention on Human Rights [para. 8]. However, the Court found that these conditions for a continuous 11-day period amounted to a breach of the State's obligations to protect the person of the applicant under article 40(3) (2) of the Constitution:

...it is nonetheless impossible to avoid the conclusion that a situation where a prisoner has been detained continuously in a padded cell with merely a mattress and a cardboard box for eleven days compromises the essence and substance of this constitutional guarantee, irrespec-

360. Constitution of Ireland (*Bunreacht na hÉireann*) 1937 (as amended).

361. Convention for the Protection of Human Rights and Fundamental Freedoms (*European Convention on Human Rights*, as amended).

tive of the crimes he has committed or the offences with which he is charged. [para. 10]

However, the function of the Court in an application under article 40(4) (2) of the Constitution is to determine whether the breach of the applicant's constitutional right is such as would entitle him to immediate and unconditional release [para. 11]. The Court found that the applicant's continued detention had not been rendered entirely unlawful by the breach of his constitutional right because there had been substantial difficulties in finding him suitable accommodation, there was a real and genuine concern for his safety, and because there was no intentional violation nor manifest negligence on the part of the authorities. In this regard, the authorities had not completely failed in their duties and obligations towards him [para. 14].

Decision The Court held that the applicant's detention at Montjoy Prison during 11 days amounted to a violation of the State's obligation under art 40(3) (2) of the Constitution to protect the person of the applicant [para. 16(A)], although under the present circumstances this breach was not so serious as to immediately render his detention unlawful [para. 16(B)]. The Court dismissed the application for release but with a caveat that the applicant would justifiably be entitled to make a fresh application for release under art 40(4) (2) or to take such further legal steps as he might be advised should his current conditions of detention continue [para. 16(C)].

In a postscript to the judgment, it was stated that the day after the delivery of the judgement, a place had become available in Cloverhill Prison where the applicant was immediately transferred [para. 17].

Case n° HD 200.018.358

Gerechtshof ('s-Hertogenbosch) (Court of Appeal)

2 March 2010³⁶²

Keywords [Affordability – Water – Right to water (non-violation) – Principle of equity – Disconnection of water supply – Defaulting payment – Proportionality – Reasonableness]

Abstract The right of a water company to withhold performance, and in particular to disconnect the water supply in case of non-payment, does not constitute per se a violation of the right to water as derived from articles 11 and 12 ICESCR since no absolute right to water entailing a cost-free supply of water can be claimed.

Facts Under the Water Supply Law, the public utility company 'NV Waterleiding Maatschappij Limburg' (WML) is exclusively responsible for the supply of drinking water in the Dutch province of Limburg [para. 4.2.1]. WML concluded a contract with the respondent (anonymous) to supply drinking water at his property, to which the general terms for drinking water³⁶³ apply, allowing the disconnection of water supply in case of non-compliance [para. 4.2.3]. From 14 June 2000 to 14 May 2008, the respondent's water bills amounted to EUR 2,196.77. However, he failed to meet his contractual obligations and only paid an amount of EUR 150.81 [para. 4.2.4]. WML had warned the respondent in early April 2008 that it would consider disconnecting the respondent's water supply and/or begin judicial proceedings if no payment was made by mid-April 2008 [para. 4.2.5].

Procedure WML lodged a case in first instance with the District Court of Heerlen. WCL sought payment of outstanding fees plus statutory interest and access to the respondent's property to interrupt the water supply if and as long as the respondent failed to pay the bills and interest [para. 4.3]. The Court of First Instance ordered payment but dismissed the second claim on the grounds that it would be contrary to the respondent's right to water under articles 11 and 12 ICESCR. [para. 4.5]. WML appealed this latter part of the

362. *HD 200.018.358* [2010] Gerechtshof ('s-Hertogenbosch) LJN BL6583, PRG (2010) 70 <<http://zoeken.rechtspraak.nl/detailpage.aspx?ljin=bl6583>>.

363. Available at: http://www.wml.nl/nl-nl/158/5805/veelgestelde-vragen.aspx#faq_869

decision to the Court of Appeal (Den Bosch). The respondent did not appeal the part of the judgment ordering payment of outstanding fees and interest.

Claims The applicant alleged that according to its right to withhold performance under articles 6(52) and 6(262) of the Civil Code, access should be granted to the respondent's premises to disconnect the water supply [para. 4.7].

Applicable Law and Reference to Regional or International Instruments

- CESCR General Comment 15³⁶⁴
- Civil Code, arts 6(52) and 6(262)³⁶⁵
- ICESCR, arts 11 and 12³⁶⁶
- Water Supply Law, art 3(p)³⁶⁷

Court Rationale The District Court sentenced the respondent to pay the debts, but rejected the claim for access to the respondent's property.³⁶⁸ This Court found that the disconnection of a client who had not paid bills would breach the right to water: *'the right of the defendant to water is frustrated by this measure. The defendant in this case has no other choice than to rely on WML, the regional monopolist, to ensure his right to water. This right has long been codified and recognised by the Netherlands, notably the right to an adequate standard of living and the right to health (Articles 11 and 12 ICESCR). Recognition of the right to water and sanitation is therefore an explicit expression of an element of these existing rights. The Netherlands recognised the human right to water and sanitation at the seventh session of the Human Rights Council (3 to 28 March 2008) in Geneva. The foregoing leads to the rejection of the claim on this ground'* [para. 4.5].

WML appealed the decision regarding the rejection of the disconnection to the Den Bosch Court of Appeal [para. 4.6]. The Court of Appeal first recalled that the right to suspend services as laid down in the Civil Code has to be executed following the principles of reasonableness and fairness. It

364. UN CESCR 'General Comment 15' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9.

365. Burgerlijk Wetboek 1992.

366. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

367. Waterleidingwet 1957, STB 1975/150; replaced by the Drinking Water Law (Drinkwater wet 2009, STB 2009/370) as of 1 July 2011.

368. *Waterworks Company Limburg v Anonymous*, lower District Court of Heerlen of the District Court of Maastricht, First instance judgment, 294701 CV EXPL 08-4236, 25 June 2008 [not published].

stated that this ‘does not imply that the appellant ... should never exercise its right to suspend services, but that it should do so with severe caution and constraint’ [para. 4.8]. Referring to previous case law, the Court declared that according to the principle of reasonableness and fairness, a water company should only be entitled to disconnect the water supply if it undertook reasonable efforts to persuade the consumer to pay and if it notified the consumer that – should defaulting payment endure – the water supply would be disconnected [para. 4.8].

Before examining the applicability of international instruments pursuant to art. 93 of the Constitution, the Court analyzed whether or not suspension of water supply in for non-payment was in contravention of the ICESCR or other treaties or sources of international law. The Court examined arts. 11 and 12 of the ICESCR in particular as well as the applicant’s reference to General Comment 15 which derived a right of access to water from these treaty provisions, and which notably provides that: ‘The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and *affordable* water for personal and domestic uses.’³⁶⁹ The Court noted that General Comment 15 further provides that ‘[w]ater, and water facilities and services must be affordable for all. Direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten Covenant rights’³⁷⁰ [para. 4.10]. In light of these elements, the Court found that ‘the right to access to water does not entail that a cost-free supply of water can be claimed’ [para. 4.10]. Given that the Court found that WML showed due diligence in order to induce the respondent to pay and the respondent was warned of possible suspension for non-payment, the Court applied the reasonableness and fairness standard and held that ‘*the right of WML to suspend [the water supply] does not self-evidently mean a breach of the right to water (as in articles 11 and 12 ICESCR)*’ [para. 4.11]. Further reference was made to article 3(p) of the Water Supply Law and the Drinking Water Law which was not yet in force at the time of the decision, and from which it cannot be deduced that there is an obligation to supply drinking water without payment [para. 4.11].

Decision *The Court stated: ‘Since WML’s claim is not unlawful or invalid on the basis of both national and international law, the Court decides to assign the claim’* (para. 4.12). The Court thus concluded that WML is allowed to disconnect the water supply from the respondent’s property if and as long as he has not fulfilled his payment (para. 5).

369. *ibid* [2].

370. *ibid* [12(c)(ii)].

A x EPAL – Empresa Pública das Águas de Lisboa

Tribunal Constitucional, Second Section

30 November 2004³⁷¹

Keywords [Affordability – Water – Right to health (violation) – Right to quality of life (violation) – Right to quality of the environment (violation) – Disconnection of water supply – Non-payment]

Abstract Allowing a public water company to disconnect the water supply at other premises than those where non-payment occurred, as a coercive mean of debt recovery, is contrary to the right to life, health, quality of life and quality of the environment as guaranteed under the Portuguese Constitution, since the values associated with access to water for human consumption prevail over the economic importance of coercive contractual compliance.

Facts The water supply was disconnected from Mr A's property by the public water company *Empresa Pública das Águas de Lisboa* (EPAL) [para. 1] due to non-payment of 6,322 euros for the supply of water. EPAL did not disconnect, however, the premises associated with the water debt but another property of Mr A, for which there was no water debt, in order to accelerate debt recovery [para. 2].

Procedure Mr A applied to a first instance Court to obtain an order against the public water company EPAL to reconnect his property to the water supply service. His application was dismissed in first instance and Mr. A appealed to the Court of Appeal of Lisbon, which upheld the decision of the Court in first instance. Mr A appealed then to the Constitutional Court for constitutional review of article 69 of the Regulation for the Provision of Water Services [para. 1].

Claims The applicant, Mr. A, alleged that article 69 of the Regulation for the Provision of Water Services was illegal and unconstitutional as it allowed the water company to disconnect a user's water supply in case of non-payment, not only at the property whose water bills had not been paid, but also at any other property belonging to the user, even if there was no water debt in

371. *A x EPAL – Empresa Pública das Águas de Lisboa* [2004] Tribunal Constitucional 685/2004 <<http://www.tribunalconstitucional.pt/tc/acordaos/20040685.html>>.

relation to that property. Mr. A claimed that the application of such norm was contrary to the principle of equality (article 13 of the Constitution) and affected the rights to health and quality of life protected by articles, 64 and 66 of the Constitution, as well as European rules on competition law under article 81 and 82 of the Treaty establishing the European Community and the Regulation implementing these rules [para. 3].

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Portuguese Republic – Arts. 13, 18, 64, 65 and 66³⁷²
- Council Regulation (EC) n° 1/2003³⁷³
- Regulation for the Provision of Water Services – Arts. 65(d) and 69³⁷⁴

Court Rationale The Constitutional Court held that ‘the (monopolistic) supply of such an essential good to life as water cannot be legitimately affected solely because of the repercussion of a contractual relationship over another one, in coercive and sanctioning terms’. It stated that ‘[t]he Constitution guarantees a set of rights aimed at the protection of a standard of living, with the necessary human conditions, of health and environmental quality (Articles 64, 65 and 66 [of the Constitution]), for the realization of which access to water is essential.’ Consequently, the Court found that: ‘It is not possible, therefore, that access to water for human consumption, and the environmental and quality of life conditions that such access provides, be subject to a pure logic of business protection’, guided by coercive means against users which go beyond the strict enforceability of their contracts.

As a result, the Court found that ‘the values associated with the access to water for human consumption prevail over the economic importance of coercive means against non-paying users, in such a way, that they expose the disproportionality of the use of such means in the framework of contracts regularly complied with by the same users. [para. 6].

Decision The Constitutional Court granted the application and decided that articles 65(d) and 69 of the Regulation for the Provision of Water Services were unconstitutional, as contrary to articles 64, 65, 68 and 18 of the Constitution [para. 7]

372. Constituição da República Portuguesa 1976 (as amended).

373. Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

374. Regulamento para o Serviço de Abastecimento de Água, Portaria n° 10.716 de 24/07/1944.

Ruling n° Up-156/98

Ustavno Sodišče (Constitutional Court)

11 February 1999³⁷⁵

Keywords [Affordability – Water – Right to private property (violation) – Proportionality – Human dignity Defaulting payment – Disconnection of water supply]

Abstract A house which is disconnected from the water supply system does not comply with the necessary conditions to ensure human dignity. Furthermore, the disconnection of an entire building by the public water provider from the water supply due to the defaulting payment of one-fourth of its residential users is not a proportionate restriction to the constitutional right to private property.

Facts The applicants were tenants living in a building where 82 other residents lived [para. 1]. Water was provided to the whole building and all properties by two connections to the water network [para. 6]. Since the building was initially built as a single unit, no individual water metering system was set up. 19 residents did not pay their water bills to Rižanski vodovod Koper (the public water service provider) which amounted to the non-payment of 8.4 million Slovenian Tolars.³⁷⁶ As a consequence, Rižanski vodovod Koper decided to disconnect all inhabitants of the building from the water supply system [para. 1].

Procedure The Superior Court of Koper held that the applicants are obliged to tolerate the disconnection of water supply for non-payment of other users living in the same building due to the absence of individual metering.³⁷⁷ The applicants then appealed before the Constitutional Court [para. 2].

Claims The applicants sought the annulment of the Superior Court's decision on the grounds that the decision denied them the protection of pos-

375. *Ruling No Up-156/98* [1999] *Constitutional Court Official Gazette RS*, n° 17/99; OdlUS VIII, 118 <<http://odlocitve.us-rs.si/usrs/us-odl.nsf/0/23FOC293D2395279C1257172002A2A8D>>.

376. Former Slovenian currency: EUR 1 = SIT 239.64. Therefore, SIT 8.4 million Slovenian Tolars would be equivalent to EUR 35,052.58.

377. *Ruling No Cp 1104/97* Superior Court (Koper) 6 May 1998.

session of residential premises used as habitation in violation of article 33 of the Constitution. They also alleged a violation of the principle of equality before the law, equal protection and the right to a healthy environment under articles 14, 22 and 72 of the Constitution [para. 2].

Applicable Law and Reference to Regional or International Instruments

- Constitution of the Republic of Slovenia, arts 15(3) and 33³⁷⁸

Court Rationale Examining whether the decision of the Superior Court was in line with human rights provisions as guaranteed under the Slovenian Constitution, the Court first underlined that under art. 33 ‘the right to private property is a fundamental human right, which is closely connected with the protection of personal freedom’. The constitutional protection of private property goes beyond that of civil law [para. 8]. Therefore, the constitutional right to property applies not only to landlords but also to a tenant occupying the premises permanently for residential purposes, since for such person, housing is the basis of existence and a means to fill basic living needs [para. 9]. The Court subsequently declared that:

The disconnection of a premise from the water supply – as a whole, the space in which the person lives – significantly changes the situation in which the person lives. Living in a premises, which remains without water, is not only difficult, but impossible. Considering the loss of this important part of its function, sooner or later it does not provide what is necessary for human dignity [para. 11]

After recalling that restrictions to constitutional rights are legitimate should they be complying with the principle of proportionality as stated under article 15(3) of the Constitution [para. 12], the Court stated that disconnections of water supply are constitutionally permissible in situations of non-payment [para. 13]. However, the Court held that disconnection in the present case did not comply with the principal of proportionality [para. 14]. Specifically residents were deprived from water unless they paid a very high amount of arrears which were not attributable to themselves. The Court stated that, ‘[t]he fact that the water provider may avoid judicial proceedings for debt recovery does not outweigh the serious interference with the applicants’ constitutional right to private property’ constituted by the disconnection of water supply [para. 15]. Therefore, the Court found that:

378. Ustava Republike Slovenije, Stran 1373, Ur.l. RS, št. 33/1991.

Unless direct users of individual dwelling units have reasonable possibilities for the arrangement of individualised metering, the disconnection of water supply on the grounds that it would be easier for the supplier to recover the arrears, is an excessive measure and is therefore contrary to the right to private property (Article 33 of the Constitution) [para. 16]

Decision The Court reversed the decision of the Superior Court and remanded the case to that court with instructions to apply its holding to the present case [para. 17]. It further required the respondent ‘to enable the water connection and ensure the smooth supply of water’ to the applicants within four hours after notification of the decision [para. 19].

State v Senijeli Boila and Pita Nanoka

High Court (Suva), Criminal Jurisdiction

25 October 2004³⁷⁹

Keywords [Quality – Sanitation – Right to freedom from inhumane and degrading treatment (violation) – Conditions of detention]

Abstract Detaining untried prisoners without respect for minimum conditions of detention, including adequate sanitation, might be considered inhuman or degrading treatment, which is prohibited under article 25 of the Constitution.

Facts Messrs Senijeli Boila and Pita Nanoka were imprisoned awaiting trial for criminal offences. Both had previously escaped from lawful custody and were considered a flight risk.

The first applicant was in a cell with two other inmates. There was a bucket to relieve themselves and a water can. Inmates changed the bucket when they were told and they emptied the bucket twice a day. They had dinner in the cell, not in the mess with other prisoners. The cell smelled filthy. The inmates were locked up for 24 hours and only allowed out for 5 minutes per day to bathe [p. 4]. The second applicant was alone in a cell. There was a bucket to relieve himself. As a remand prisoner, he had access to two toilet rooms with half doors outside the cell block building [p. 5].

Shortly after a visit to the prison visit by the judge all remand prisoners were moved to a different building that has an ablution block for toilet and bath needs. There were no more bucket latrines, the building was well ventilated and had separate eating facilities. (p. 5-6) There was some uncertainty whether this move was permanent, as applicants seemed to have been moved back for some time. (p. 17-18)

379. *State v Senijeli Boila and Pita Nanoka* [2004] High Court (Suva) HAC032D.04S <<http://lawfiji.com/judgements/wp-content/uploads/2012/02/State-v-Senijeli-Boila-and-Pita-Nainoka-HAC032D.04S.pdf>>.

Procedure Messrs Boila and Nanoka applied for bail to the High Court on the grounds that their conditions of custody amounted to inhumane and degrading treatment [page s. 2-3].

Claims The applicants alleged that the conditions of their custody amounted to inhumane and degrading treatment contrary to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture and the UN Standard Minimum Rules for the Treatment of Prisoners [page 3].

Applicable Law and Reference to Regional or International Instruments

- Constitution of Fiji, s 25³⁸⁰
- The Bail Act, s 19 (2) (b)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ³⁸¹
- European Convention on Human Rights, art. 3³⁸²
- ICCPR³⁸³
- UN Standard Minimum Rules for the Treatment of Prisoners³⁸⁴
- Universal Declaration of Human Rights³⁸⁵

Court Rationale The Court noted that section 19(2)(b) of the Bail Act provides that conditions of custody are relevant to the question of whether or not bail should be granted, and that those conditions include any breaches of the U.N. Standard Minimum Rules [page 7]. The Court also referred to the UN Standard Minimum Rules for the Treatment of Prisoners in order to assess the violation of the right to freedom from inhumane and degrading treatment under section 25 of the Constitution [page s. 11-12]. The Court declared that '[t]he Rules require that one prisoner should be kept in one cell, that there should be adequate sanitary facilities, and access daily to fresh air and exercise. It also states that a breach of the Standard Minimum Rules does not inescapably mean that the conditions are inhuman and degrading – conditions much be very serious before they are considered inhumane or

380. Constitution of Fiji 1997 (as amended).

381. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

382. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953).

383. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

384. Standard Minimum Rules for the Treatment of Prisoners, UN ECOSOC Res 663 C (XXIV) (31 July 1957) amended by Res 2076 (LXII) (13 May 1977).

385. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

degrading. The greater the departure from the Rules, the greater the likelihood of a finding of a breach of section 25 of the Constitution.' [page 14]. Considering in particular the 'sharing of the cell with two other inmates, the foul smell from the damp bedding and the bucket latrine' ... and the fact that the applicants, ate, slept, relieved themselves and lived in that atmosphere day after day without relief.' the Court found that 'the conditions of their custody dehumanise the Applicants and degrade them as human beings'. It further found the 'level of severity of such degradation to be such that the Prison Department are in breach of section 25 of the Constitution' [page 15].

In assessing grounds for bail, the Court specified that inhumane and degrading treatment can never be justified [page 8]. The Court stated that limited resources or the poor background of the people of Fiji (neither of which were used as an argument by state counsel) can never be used as justification for such treatment [page 15]. The Court also stated that it would have granted bail immediately if the applicants had remained in the old cells and thus established inhumane and degrading treatment as an absolute ground for bail.

Decision While the Court found for the applicants' since it held that the conditions of their detention amounted to a violation of the right to freedom from inhumane and degrading treatment under both the U.N. Standard Minimum Rules and consequently section 25 of the Constitution, it did not grant bail considering that the applicants were now held in better conditions of custody. The Court declared, however, that it would not hesitate to grant it should the applicants be moved back to their previous cells [page 19].

Naba v The State

High Court (Lautoka)

4 July 2001³⁸⁶

Keywords [Availability – Sanitation – Inhumane and degrading treatment (violation) – Conditions of detention]

Abstract Detainees may have a right to bail when the conditions of their imprisonment are inhumane and degrading and notably do not provide for adequate sanitary measures, combined with a delay in trial which cannot be attributed to the prisoners.

Facts Five applicants who were held on remand for charge of murder at the Natabua Prison Remand block, applied for bail. In this remand block, detainees were confined in a badly ventilated cell and only had a bucket for their sanitary needs.

Procedure The applicants had applied for bail in October 2000. This application was denied, with the proviso that if the trial did not proceed expeditiously, the Court would have to reconsider the issue. As the trial did not proceed expeditiously, the applicants re-applied for bail to the High Court.

Claims The applicants claimed that they suffered inhumane conditions while being held in remand, including lack of adequate sanitation facilities.

Applicable Law and Reference to Regional or International Instruments

- Constitution of Fiji, s 28(1)³⁸⁷
- Universal Declaration of Human Rights, art 5³⁸⁸
- International Covenant on Civil and Political Rights, art 9(3)³⁸⁹

386. *Naba v The State* [2001] FJHC 338, [2001] 2 FLR 187<<http://www.pacii.org/fj/cases/FJHC/2001/127.html>>. Neither paragraph nor page number are available for this case.

387. Constitution of Fiji 1997 (as amended).

388. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

389. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁹⁰
- United Nations Standard Minimum Rules for the Treatment of Prisoners, rule 12³⁹¹

Court Rationale The Court interpreted the bail provisions in light of fundamental human rights principles including those guaranteed by the Fiji Constitution. The Court took note of the constitutional requirement that Courts heed ‘developments in the understanding of the content of particular human rights ... and developments in the promotion of particular human rights’ [page 5]. To undertake this analysis, the Court relied on international and comparative law to inform the substantive content of Constitutional rights [page s 10-11]. The Court also observed that the United Nations Standard Minimum Rules for the Treatment of Prisoners requires adequate sanitary facilities (rule 12) and cited jurisprudence from the Human Rights Committee which relied on the UN Standard Minimum Rules and holding that ‘certain minimum standards regarding the conditions of detention must be observed regardless of a State Party’s level of development [page 11]. Consequently, the Court found that the conditions violated the minimum standards as well as the detainees’ constitutional rights under section 28(1) of the Constitution, stating in particular:

That a bucket system is still used for the needs of nature is offensive in this day and age. That such persons are confined in a building built in the 1920s with ventilation and structures not conducive to human habitation does not accord with the sense of social justice and fairness our community expects [page 14].

Decision The Court granted bail to the applicants given the inhuman and degrading conditions and taking into account the delay of their trial. The Court also held that the applicants’ and other detained persons’ conditions of detention amounted to inhumane and degrading treatment and recommended the closure of the Natabua Remand block [page 16].

390. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

391. Standard Minimum Rules for the Treatment of Prisoners, UN ECOSOC Res 663 C (XXIV) (31 July 1957) amended by Res 2076 (LXII) (13 May 1977).

REGIONAL JURISDICTIONS

PART II

- 1. AFRICAN COMMISSION ON HUMAN
AND PEOPLE'S RIGHTS**
- 2. EUROPEAN COURT
OF HUMAN RIGHTS**
- 3. INTER-AMERICAN COURT
OF HUMAN RIGHTS**
- 4. SPECIAL MECHANISM: TRIBUNAL
LATINOAMERICANO DEL AGUA**

Institute for Human Rights and Development in Africa v Angola

African Commission on Human and Peoples' Rights

22 May 2008³⁹²

Keywords [Availability – Sanitation – Right to human dignity (violation) – Conditions of detention]

Abstract Failing to provide detainees with adequate access to sanitation, and failing to take steps in order to amend this situation amounts to a violation of the right to human dignity under the African Charter of Human and Peoples' Rights.

Facts Mr Esmaila Connetah and 13 other Gambian nationals were legally living and working in Angola(?). During an alleged illegal (?) deportation campaign of the Angolan Government (Operação Brilhante), foreign nationals working in the diamond-mining regions of Angola were systematically deported. They were 'arbitrarily arrested, detained and later deported from Angola without any legal protection' [para. 3]. Those expelled were kept in detention centres under inhuman conditions and in particular poor sanitation. In one centre only two buckets of water were provided to the detainees for bathroom facilities, and no separation between the bathroom and the sleeping and eating areas was arranged [para. 5].

The above all stems from the allegations made by the applicant, not the merits, so we can't use these to present it as fact. I propose to focus the facts as much as possible on the conditions in detention. See the following text, with quotations from the merits of the judgement:

Mr Esmaila Connetah and 13 other Gambian nationals, on whose behalf the complaint was filed, were among a large number of foreign nationals who were expelled from Angola en masse in 2004 during an illegal deportation campaign that affected tens of thousands of other non-nationals [para. 67]. They were arbitrarily arrested [para. 55], detained and deported [62]. They were held in detention across Angola [para 60] prior to their deportation.

392. *Institute for Human Rights and Development in Africa v Angola* [2008] African Commission on Human and Peoples' Rights 292/04
<http://www.achpr.org/files/sessions/43rd/communications/292.04/achpr43_292_04_eng.pdf>.

At one of the centres, the Cafunfu detention centre, ‘bathroom facilities consisted solely of two buckets [of water] for over 500 detainees, and these were located in the same one room where all detainees were compelled to eat and sleep’ [para. 51]

Procedure The Institute for Human Rights and Development in Africa filed a complaint on behalf of Mr Esmaila Connetah and 13 other Gambian nationals with the Secretariat of the African Commission on Human and Peoples’ Rights in 2004 [para. 10]. The Government of Angola offered no response to the allegations in the Communication [para. 33].

Claims The complainant alleged that the respondent State had violated several human rights enshrined in the African Charter on Human and Peoples’ Rights, including articles 1 and 5.

Applicable Law and Reference to Regional or International Instruments

- African Charter on Human and Peoples’ Rights, arts 1 and 5³⁹³

Court Rationale Article 5 of the African Charter provides that ‘Every individual shall have the right to the respect of the dignity inherent in a human being’. The Commission found that the degrading and inhuman conditions at the detention centres, and notably at the Cafunfu detention centre where over 500 detainees shared two water buckets as bathroom facilities with no separate space to eat or sleep, amounted to a violation of the right to dignity within the meaning of article 5 of the Charter [para. 51].

Furthermore, ‘since instead of adopting measures to promote and protect human rights, the Respondent State pursued a course of action which failed to take into account the various safeguards envisioned by the African Charter’, the Commission found that this conduct amounted to a violation of article 1 of the African Charter, which provides that every State party to the Charter ‘shall recognize the rights, duties and freedoms enshrined in [Chapter 1 on Human and Peoples’ Rights] and shall undertake to adopt legislative or other measures to give effect to them’ [para. 83].

Decision The Commission granted the application and held that the respondent State violated, among others, articles 1 and 5 of the African Charter. Since it was not the first time the respondent State was charged with similar human rights violations, the Commission recommended several measures.

393. African Charter on Human and People’s Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

With respect to conditions in detention, it recommended, among others, regular supervision or monitoring of places of detention; the establishment of effective complaint procedures regarding the treatment of detainees and guaranteeing effective access to competent authorities such as administrative tribunals and courts [para. 87]

***Sudan Human Rights Organisation and Centre
on Housing Rights and Evictions v Sudan***

African Commission on Human and Peoples' Rights
27 May 2009³⁹⁴

Keywords [Quality – Availability – Accountability – Water – Right to health (violation) – Obligation to Respect – Obligation to Protect – Massive violation of human rights – Water sources pollution]

Abstract In this case, the Commission found a violation of the rights to be heard, life, dignity, property, health, liberty and security of the person, freedom of movement and residence, protection of the family, and the right to economic, social and cultural development.

Facts The Darfur region had been in a state of emergency from the time the Government of General Omar Al-Bashir assumed power [para. 4]. From 2003, following the emergence of armed conflict in the region, the Government engaged in and continued to *'forcibly evict thousands of black indigenous tribes, inhabitants of the Darfur from their homes, communities and villages'* [para. 110].

The Centre on Housing Rights and Evictions (COHRE) (the complainants) alleged that forced evictions, destruction of public facilities and properties, looting and destruction of foodstuffs, crops and livestock, poisoning of wells and denial of access to water were committed in a discriminatory manner against people of Black African origin in the Darfur region [para. 63]. The situation was compounded by the unavailability of local remedies. It was impossible to bring issues of human rights violations before independent and impartial courts since the state was under a military regime resulting in intimidation, threats and harassments if cases were brought forward [para. 64]. Moreover, it was argued that the Sudan Government took little or no steps to remedy the violations. Displacements into remote regions also made it impossible for people to access remedies [para. 67].

394. *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan* [2009] African Commission on Human and Peoples' Rights 279/03 and 296/05 <http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45_279.03_296.05_eng.pdf>. Case summary based on the journal article by: Lilian Chenwi, 'African Commission Reaffirms Protection of Socio-Economic Rights in the African Charter' (2010) 11(2) ESR Review 10.

Procedure Communications were submitted to the African Commission on Human and Peoples' Rights by the Sudan Human Rights Organisation (SHRO) and the Centre on Housing Rights and Evictions (COHRE) against the Government of Sudan and the two cases were joined by the Commission. SHRO eventually withdrew and the COHRE case, which dealt with social rights violations including the right to water, ultimately was considered and decided on the merits.

Claims The COHRE Communication concerned allegations of 'gross, massive and systematic' violations of human rights in the Darfur region of the Sudan, including forced evictions, destruction of public facilities and properties, looting and destruction of foodstuffs, crops and livestock, *poisoning of wells and denial of access to water* [paras.1-14, 207].

The Government disputed the allegations, and challenged the complaints on admissibility grounds under article 56(5) of the African Charter [paras. 69-80].

Applicable law and reference to regional or international instruments

- African Charter on Human and Peoples' Rights ³⁹⁵
- Universal Declaration of Human Rights ³⁹⁶
- International Covenant on Economic Social and Cultural Rights³⁹⁷
- UN CESCR General Comments 4, 7, 12, 14 15³⁹⁸
- UN CESCR General Comment n° 19³⁹⁹.

Court Rationale The Commission found that the case was admissible, since local remedies were not available: *'the scale and nature of the alleged abuses, [and] the number of persons involved ipso facto make local remedies unavailable, ineffective and insufficient'* [para. 100]. The Commission found violations of the rights to be heard, life, dignity, property, health, liberty and security of the person, freedom of movement and residence, protection of the family, and the right to economic, social and cultural development as guaranteed in the African Charter on Human and Peoples' Rights. The Commission found a violation of Article 1 of the African Charter as it places a general

395. African Charter on Human and Peoples' Rights. Available at: <http://www1.umn.edu/humanrts/instree/z1afchar.htm>.

396. Universal Declaration of Human Rights. Available at: <http://www.un.org/en/documents/udhr/>

397. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

398. UN CESCR General Comments. Available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

399. UN CESCR General Comment 19. Available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

obligation on states to recognise the rights contained in it and to adopt measures to give effect to the rights [paras. 227, 228]. In finding a violation of the right to health, the Commission noted developments in international law relating to the normative content of the right to health, which includes health care and health conditions [para. 208]. Specifically, the Commission considered CESCR General Comment 14 and the duties on states contained therein. These include the obligations to ensure that third parties do not infringe on the enjoyment of the right, to refrain from unlawfully polluting water and soil during armed conflicts, to ensure third parties do not limit people's access to health-related information and services, and to enact or enforce laws to prevent the pollution of water [paras. 209, 210]. The Commission also recalled its decision in *Free Legal Assistance Group and Others v Zaire*.⁴⁰⁰ In that case, the Commission found the failure of a state to provide basic services such as safe drinking water and electricity and the shortage of medicine as constituting a violation of the right to health [para. 211]. Accordingly, the Commission found a violation by the Government of Sudan as the destruction of homes, livestock and farms, and the poisoning of water sources exposed the victims to serious health risks.

Decision

The African Commission recommended that the Government of Sudan should, among other things, rehabilitate economic and social infrastructure, such as education, health, *water*, and agricultural services in the Darfur provinces in order to facilitate the return of the displaced; and establish a National Reconciliation Forum to resolve, inter alia, issues of land, grazing and *water rights*, including destocking of livestock. The decision is viewed as another landmark decision, as it speaks to the indivisibility of human rights and advances socio-economic rights, such as the rights to housing, food, water and health, as well as the need for effective domestic remedies. Importantly, the decision reaffirms and elaborates upon an implicit right to water in the African Charter, including as a component of the right to health. Regarding the obligations to respect and to protect, the Commission held that 'violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States' and that 'States should ... refrain from unlawfully polluting air, water and soil' and 'should also ensure that third parties do not limit people's access to health-related ... services' and that 'failure to enact or enforce laws to prevent the pollution of water [violated the right to health].' [para. 210].

400. Communications 25/89, 47/90, 56/91 & 100/93, (2000) AHRLR 74.

Tadevosyan v Armenia

European Court of Human Rights, Third Section

2 December 2008⁴⁰¹

Keywords [Availability – Water and sanitation – Degrading treatment (violation) – Conditions of detention]

Abstract Restricting access of a detainee to the toilet and drinking water to only twice a day constitutes degrading treatment in violation of art 3 of the European Convention on Human Rights.

Facts Mr Myasnik Tadevosyan, an Armenian national, was the local leader of an opposition movement in the Armavir region and former chief of police [para. 5]. On 5 April 2004, he was sentenced to 10 days of administrative detention for disobeying orders and using inappropriate language with a police officer [para. 9]. He served his sentence at the Temporary Detention Facility at the Ejmiatsin Police Department, where he previously worked as the chief of police [para. 10]. On 20 May 2004, he was arrested anew for similar reasons and condemned to the same sentence in the same facility [para. 13-24]. He shared a ten-square-metre cell with nine other inmates. The small window was rarely open and the cell did not have enough fresh air. The detainees had to sleep on the floor, had access only twice a day to the toilets and drinking water and only received one meal a day [para. 25].

Procedure The applicant challenged his incarceration and the case against him by seeking the intervention of the regional Prosecutor (Armavir) but his application was dismissed [paras. 22-23]. He applied to the European Court of Human Rights on 5 November 2004 [para. 1].

Claims The applicant alleged that the conditions of his detention amounted to a violation of article 3 of the Convention which prohibits torture and inhuman or degrading treatment [para. 36].

401. *Tadevosyan v Armenia* (App n° 41698/04) ECHR 2 December 2008 <<http://hudoc.echr.coe.int/sites/eng/page/s/search.aspx?i=001-89969>>. For further analysis, see: Vivien Deloge, 'Road to 2015: The European Union and the Realisation of the Human Right to Water' (2012) 16 *New Zealand Journal of Environmental Law* 1, 16-19.

Applicable Law and Reference to Regional or International Instruments

- Law on Conditions for Holding Arrested and Detained Persons
- CPT Report on the visit to Armenia from 6 to 17 October 2002⁴⁰²
- European Convention on Human Rights, art 3⁴⁰³

Court Rationale The Court referred to the 2004 Report on Armenia of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and to the criteria applied when assessing police detention facilities, which included the following:

Persons in custody should be able to satisfy the needs of nature when necessary, in clean and decent conditions, and be offered adequate washing facilities. They should have ready access to drinking water and be given food at appropriate times, including at least one full meal (that is, something more substantial than a sandwich) every day. [para. 30]

In light of this report, the Court found that several submissions of the applicant corresponded to the findings of the CPT and therefore it did not see any reason for doubting the allegations made by the applicant [para. 54]. Explicitly referring to its rationale enunciated in the matter of *Riad and Idiab v Belgium*⁴⁰⁴ and *Shchebet v Russia*,⁴⁰⁵ it declared:

The Court finally notes that at no time during his stay in the detention facility was the applicant allowed unrestricted access to the toilet or drinking water, his visits to the toilet or drinking water facilities being limited to only twice a day. Only one meal per day was provided. The Court reiterates that it is unacceptable for a person to be detained in conditions in which no provision has been made for meeting his or her basic needs. [para. 53]

The Court subsequently declared that ‘the hardship the applicant endured appears to have exceeded the unavoidable level inherent in detention and finds that the resulting suffering and feelings of humiliation and inferiority went beyond the threshold of severity under Article 3 of the Convention’. [para. 57]. Therefore, It found that the applicant’s conditions of detention

402. Council of Europe, ‘Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 17 October 2002’ CPT/Inf (2004) 25.

403. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

404. *Riad and Idiab v Belgium* (Apps n° 29787/03 and 29810/03) ECHR 24 January 2008 [106].

405. *Shchebet v Russia* (App n° 16074/07) ECHR 12 June 2008 [96].

amounted to degrading treatment contrary to article 3 of the Convention [para. 58-59].

Decision The Court held that the applicant's conditions of detention violated article 3 of the Convention [Findings para. 2]. It ordered the respondent State to pay the applicant EUR 4,500 within three months in respect of non-pecuniary damage together with EUR 3,000 in respect of costs and expenses [Findings para. 6]

ECHR/ BELGIUM

Riad and Idiab v Belgium

European Court of Human Rights, First Section

24 January 2008⁴⁰⁶

Keywords [Availability – Water (drink) – Inhuman and degrading treatment (violation) – Asylum seekers – Conditions of detention]

Abstract Detaining asylum seekers for over ten days and failing to provide them with food, drink and facilities to take a shower or wash their clothes constitutes inhuman and degrading treatment in violation of the European Convention on Human Rights.⁴⁰⁷

Facts Mr Mohamad Riad, holder of a Lebanese travel document showing his status as a Palestinian refugee, and Mr Abdelhadi Idiab were denied entry on Belgian territory on the grounds that they did not have the necessary visa [paras. 7 and 13]. They declared that they feared for their lives in Lebanon and applied to the Belgian authorities for asylum status [paras. 8 and 14]. The Belgian authorities, however, dismissed their applications [paras. 10 and 16]. Meanwhile, they had been placed in the Brussels National Airport transit area [paras. 9 and 15], where they spent three days with no food or drink, receiving no help or guidance from the public authorities [para. 29]. They occasionally received food from staff members of the airport cleaning company, the airport managing company, and Muslim and non-religious advisors. They had no facilities to take a shower or wash their clothes. On 15 February 2003 an order requiring their removal from Belgium as well as an order requiring their detention for that purpose were granted and served upon the applicants [para. 44]. On that date, Messrs Riad and Idiab were detained in the Merksplas Closed Centre for Illegal Immigrants [para. 45-46] and subsequently repatriated to Beirut on 8 March 2003 [paras. 49-50] and 5 March 2003 [para. 52]. The applicants were in the end confined for 15 and 11 days, respectively, in the transit zone [para. 68].

406. *Riad and Idiab v Belgium* (App nos 29787/03 and 29810/03) ECHR 24 January 2008 <http://hudoc.echr.coe.int/sites/eng/page_5/search.aspx?i=001-108395>. Case summary based on the journal article by: Vivien Deloge, 'Road to 2015: The European Union and the Realisation of the Human Right to Water' (2012) 16 *New Zealand Journal of Environmental Law* 1, 16-19.

407. See also *MSS v Belgium and Greece* (App n° 30696/09) ECHR 21 January 2011.

Procedure In addition to the applications for asylum status, notice was given to the Belgian Minister for the Interior on 3 February 2003 that Messrs Riad and Idiab ‘had suffered degrading treatment by having to spend three days in the transit zone without food or drink’ and had to return to the transit zone after having spent only a few hours in the INADS Centre, where bed and board could be provided [para. 43]. Then they were left without assistance to get food, drink, and a return ticket [para. 29]. After several intermediate proceedings, the President of the Brussels Court of First Instance ordered on 14 February 2003 the Belgian State to release the applicants and allow them to ‘leave the transit zone freely and without restriction’ with a penalty of EUR 1,000 per hour in the event of a failure to comply [para. 37]. As they were nonetheless further detained in the wake of the judgment, they complained again to the Minister for the Interior on 19 February 2003 [para. 47]. They subsequently applied to the European Court of Human Rights on 6 August 2003 [para. 1].

Claims The applicants alleged, *inter alia*, that their living conditions in the transit zone of Brussels National Airport amounted to a violation of article 3 of the Convention [para. 2], which prohibits torture and inhuman or degrading treatment [para. 81]. In particular, they submitted that they were left in the transit zone ‘without any means of subsistence (food or drink), and without accommodation, toilets or anywhere to sleep’; that they could only wash their clothes in the airport lavatory facilities; and that they were left without hygiene articles, having ‘nowhere to enjoy a private life’ [para. 88]. They also alleged that these conditions were meant to coerce them to leave Belgium voluntarily [para. 42].

Applicable Law and Reference to Regional or International Instruments

- European Convention on Human Rights, art 3⁴⁰⁸

Court Rationale The Court did not examine whether the conditions under which the applicants were detained were intended to coerce them to repatriate to Lebanon. The Court noted that while States are have a right to control entry into their respective territory, this right must be exercised in accordance with the provisions of the European Convention and that article 3 prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim’s circumstances or conduct [para. 100]. Ultimately, the Court declared that it ‘considers it unacceptable that anyone might be detained in conditions in which there is a complete failure

408. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

to take care of his or her essential needs.’ It further added that ‘[t]he fact that certain persons working in the transit zone provided for some of the applicants’ needs does not in any way alter the wholly unacceptable situation which they had to endure.’ [para. 106]. The Court stated that these conditions ‘caused them considerable mental suffering, undermined their dignity and made them feel humiliated and debased’ [para. 107]. Therefore, it found that ‘the fact that the applicants were detained for more than ten days in the location in issue amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention’ [para. 110].

Decision The Court notably held that the applicants’ right to liberty and security under article 5 of the Convention had been violated [Findings para. 2], and that their conditions of detention in the transit zone amounted to a violation of the provision of article 3 of the Convention [Findings para. 3]. It ordered the respondent State to pay both applicants EUR 15,000 within three months in respect of non-pecuniary damage and EUR 13,376.60 in respect of costs and expenses [Findings para. 5]

Eugen Gabriel Radu v Romania

European Court of Human Rights, Third Section

13 October 2009⁴⁰⁹

Keywords [Availability – Quality – Adequate sanitation – Inhuman or degrading treatment (violation) – Conditions of detention – Obligation to fulfil]

Abstract Detaining prisoners without respect for material conditions of detention, including adequate sanitation, constitutes inhuman or degrading treatment under the European Convention on Human Rights.⁴¹⁰

Facts Mr Eugen Gabriel Radu, a Romanian national, was sentenced successively in 2001 and in 2006 to ten years' and four and a half years' imprisonment, respectively, for aggravated theft [para. 4]. While currently held at Baia-Mare prison, he previously suffered a partial paralysis of his left hand due to the persistent glacial cold in the cells of the Bucharest-Jilava prison where he was detained. Despite medical care, the paralysis persisted because of the harshness of the conditions of detention [para. 6]. The prison was infested with parasites, mice and rats, particularly on the ground floor where the applicant was detained. Sanitation facilities were not functional, they were blocked and without running water, forcing the prisoners to use water from 50 to 100 litres barrels. It happened that toilets on the ground floor flooded due to broken or blocked pipes. Mr Radu could only take a hot shower once a week, in a room with rusty equipment and leaky, old pipes [para. 7].

Procedure Mr Radu applied to the European Court of Human Rights on 22 December 2003 [para. 1].

Claims The applicant alleged that his conditions of detention at the Bucarest-Jilava prison, which have caused a partial, permanent paralysis of his left hand, amounted to a violation of article 3 of the European Convention

409. *Eugen Gabriel Radu v Romania* (App n° 3036/04) ECHR 13 October 2009 <http://hudoc.echr.coe.int/sites/eng/page_s/search.aspx?i=001-94902>. Case available in French only at the time of the publication.

410. The Court did not specify whether the fact amounted to inhuman, degrading, or inhuman and degrading treatment within the meaning of article 3 of the Convention.

on Human Rights, which prohibits torture and inhuman or degrading treatment [para. 18].

Applicable Law and Reference to Regional or International Instruments

- CPT Report on the visit to Romania from 8 to 19 June 2006⁴¹¹ – published on 11 December 2008
- European Convention on Human Rights – Art. 3⁴¹²
- Commissioner on Human Rights follow-up report on the visit to Romania from 13 to 17 of September 2004 – published on 29 March 2006

Court Rationale The Court first referred to the 2006 report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which described conditions of detention at the Bucarest-Jilava prison as ‘appalling’ and highlighted that toilets located in cells were only partially enclosed [para. 15]. It noted that, at the time of the CPT’s visit in 2006, the Committee found that the conditions of detention at the Bucarest-Jilava prison, especially in the section for dangerous detainees, remained globally the same in terms of overpopulation and hygiene, as they had been found by the CPT during its previous visit in 1999. Then it recalled that:

... under [article 3 of the Convention] the State must ensure that a person is detained in conditions which are compatible with the respect for his human dignity, that the manner and method of the execution of the measure do not subject him to a distress or hardship of an intensity exceeding the unavoidable level of suffering inherent to detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured [para. 28]⁴¹³

The Court noted that Mr. Radu complained of the material conditions of detention and especially of the hygiene conditions of his detention at the prison of Bucarest-Jilava during several years (from November 2003 to May 2005 and from September 2006 to June 2008). It observed that Mr. Radu was detained in section IV of the prison, which was reserved for dangerous detainees and that both reports, from the CPT and the Commissioner for Human Rights qualified the detention conditions, including the sanita-

411. Conseil de l’Europe, ‘Rapport au Gouvernement de la Roumanie relative à la visite effectuée en Roumanie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT)’ CPT/Inf (2008) 41.

412. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

413. English quotation from *Kudła v Poland* (App n° 30210/96) ECHR26 October 2000 [94].

tion and hygiene conditions, in this section, as ‘deplorable’, ‘alarming’ or ‘appalling.’

Noting that overpopulation in cells aggravated the conditions of detention of the applicant, the Court found that ‘the material conditions of the detention and its duration had exceeded in the applicant’s case the unavoidable level of suffering inherent to detention and therefore amounted to a treatment contrary to article 3 of the Convention’ [para. 33].

Decision The Court declared Mr. Radu’s application admissible and held that the applicant’s conditions of detention violated article 3 of the European Convention on Human Rights [Findings para. 2]. It ordered the respondent State to pay the applicant EUR 5,000 for non-pecuniary/moral damages [Findings para. 3].

ECHR/ ROMANIA

Marian Stoicescu v Romania

European Court of Human Rights, Third Section

16 July 2009⁴¹⁴

Keywords [Quality – Water unfit for human consumption – Inhuman or degrading treatment (violation) – Conditions of detention – Obligation to fulfil]

Abstract Detaining prisoners without respect for material conditions of detention, including access to water fit for human consumption constitutes inhuman or degrading treatment under the European Convention on Human Rights.⁴¹⁵

Facts Mr Marian Stoicescu, a Romanian national, was serving a sentence of eight years' imprisonment for aggravated attempted murder [para. 5] in four different prisons including the prison of Bucarest-Jilava (from September 2002 to April 2003) [para. 6]. The Bucharest-Jilava prison was infested with parasites, while prisoners had to share their beds because of the overpopulation in cells, and the hygiene was questionable if not absent. To wash his clothes with hot water or make tea, Mr Stoicescu had to improvise by making a kettle with metallic lids, which exposed him to a considerably high risk of electrocution. The quality of water was deplorable, containing impurities and emitting a putrid smell. Prisoners were often confronted by a special intervention group composed of masked guards to scare them from asserting their rights [para. 8].

Procedure Mr Stoicescu applied to the European Court of Human Rights on 8 March 2002 [para. 1].

Claims The applicant alleged that his conditions of detention 'in particular, the prison overpopulation, the poor quality of the water and the appalling hygiene [conditions]' amounted to a violation of article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment [para. 15].

414. *Marian Stoicescu v Romania* (App n° 12934/02) ECHR 16 July 2009 <http://hudoc.echr.coe.int/sites/eng/page_s/search.aspx?i=001-93542>. Case available in French only at the date of the publication.

415. The Court did not specify whether the facts amounted to inhuman, degrading, or inhuman and degrading treatment within the meaning of article 3 of the Convention.

Applicable Law and Reference to Regional or International Instruments

- European Convention on Human Rights – Art. 3⁴¹⁶

Court rationale The Court observed that the respondent State not only, did not contradict the applicant's allegations on the quality of the water, which was unfit for human consumption, but it also recognised that no water analysis had been undertaken at the time of the facts [para. 9 and 24].

Then it recalled that:

... under [article 3 of the Convention] the State must ensure that a person is detained in conditions which are compatible with the respect for his human dignity, that the manner and method of the execution of the measure do not subject him to a distress or hardship of an intensity exceeding the unavoidable level of suffering inherent to detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured [para. 28]⁴¹⁷

The Court found that the conditions of detention the applicant had to endure for a significant time 'had exceeded the unavoidable level of suffering inherent to detention' [para. 25]. Therefore, these amounted to a breach of article 3 of the European Convention on Human Rights [para. 26].

Decision The Court declared Mr. Stoicescu's application admissible and held that the applicant's conditions of detention violated article 3 of the European Convention on Human Rights [Findings para. 2].

416. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

417. English quotation from *Kudła v Poland* (App n° 30210/96) ECHR26 October 2000 [94].

Butan and Dragomir v Romania

European Court of Human Rights, Third Section

14 February 2008⁴¹⁸

Keywords [Accountability – Private water company – Right to a fair trial (violation) – Disconnection of water supply – Public service – Obligation to protect]

Abstract The failure of national authorities to ensure the enforcement of a judicial ruling, ordering a private water company, under a public concession, to connect an apartment to the water supply system, amounts to a violation of the right to an effective access to a tribunal under the European Convention on Human Rights.

Facts Mr Traian Nicolae Butan and Mrs Constan ă Dragomir, two Romanian nationals (mother and son), own an apartment, in an apartment block, where the drinking water supply from the public network was organised by a single contract between the property owners association and the private water company (holder of a public service concession) [para. 5]. The water supply was disconnected from the premises on 20 October 2001, as neighbours living on the lower floors closed the pipes connecting to their apartment [para. 6]. Since they could not come to an agreement with the neighbours, Mr Butan and Mrs Dragomir sought to conclude a contract directly with the private water company [para. 7]. On 11 April 2002, they complained to the municipality, which required the private water company to ascertain the facts [para. 8]. The company refused to conclude a contract with Mr Butan and Mrs Dragomir on 21 August 2003 [para. 9]. From November 2003 to November 2004, Mr Butan had to rent another apartment due to the disconnection of water supply, while Mrs Dragomir continued to live in the apartment at issue [para. 12].

Procedure On 11 September 2003, the First Instance Court of Bucharest ordered the neighbours to reopen the pipe to give Mr Butan and Mrs Dragomir access to drinking water [para. 10]. Mr Butan and Mrs Dragomir also

418. *Butan and Dragomir v Romania* (App n° 40067/2006) ECHR 14 February 2008 <http://hudoc.echr.coe.int/sites/eng/page_s/search.aspx?i=001-85120>. Case available in French only at the time of the publication.

sought to obtain an order compelling the water company to conclude a contract with them [para. 13], but the Regional Court of Bucharest dismissed their application on 26 October 2004 since it found that the company could not be responsible for the neighbour's acts [para. 15]. The Court of Appeal of Bucharest upheld this judgment on 18 May 2005 [para. 16]. The High Court of Cassation and Justice granted the apartment owners' appeal on 22 November 2005, and ordered the Company to conclude a contract for the supply of drinking water to the apartment [para. 17]. As the water company did not comply with this ruling in 2006, Mr. Butan and Mrs Dragomir applied to the Regional Court of Bucarest seeking the application of a penalty payment to the water company for its refusal to execute the judgement of 22 November 2005 [para. 20]. Mr Butan and Mrs Dragomir applied to the European Court of Human Rights on 15 May 2006 [para. 1]. The Regional Court of Bucharest sentenced the company on 14 May 2007 to a daily penalty of 20 Romanian Lei for non-compliance [para. 21]. Enforcement was still not observed at the time of the proceedings before the European Court of Human Rights [para. 23].

Claims The applicants alleged that the non-enforcement of the High Court of Cassation and Justice's decision of 22 November 2005 amounted to a violation of their right to access a tribunal as guaranteed under article 6(1) of the Convention on the right to a fair trial [para. 23] and a violation of their right to the respect of their possessions, protected by article 1 of Protocol N^o1 to the ECHR. They also alleged that the inaction of the public authorities (which they considered discriminatory), denied their right to respect for their home, and that their failure 'to remedy the inhuman conditions they had to endure due to the lack of water in their sanitary facilities' amounted to a violation of articles 3, 8, 13 and 14 of the European Convention on Human Rights [para. 43].

Applicable Law and Reference to Regional or International Instruments

- European Convention on Human Rights – Arts. 3, 6(1), 8, 13 and 14⁴¹⁹
- Protocol N^o1 to the European Convention on Human Rights – Art. 1

Court Rationale The Court held that the High Court of Cassation and Justice's judgment ordering the private water company to conclude a contract with the applicants, for the supply of drinking water to their apartment had still not been enforced [para. 33]. The Court stated that the obligation had

419. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

been imposed on a private entity, ie a private water company. It considers, however, particularly important that the private water company in question was a public service concessionaire, and as such it was linked to the municipality by an administrative law contract, whose execution should have been monitored by the public authorities [para. 34].

The Court noted that the private water company had constantly opposed the enforcement of the ruling while the public authorities never reacted [para. 36]. The Court stated that the conclusion of a contract with the applicants was not made conditional, in the judgment of November 2005, to the previous installation in the apartment of a new connection to the public water supply system, as alleged by the company [para. 38]. In any case, the water company had already opposed to the applicants its refusal to authorise such works.

Therefore, the Court declared that ‘national authorities have not taken all the measures that one could have reasonably expected them to in order to enforce the final ruling in favour of the applicants’ [para. 40]. Consequently, it found that ‘by their inaction, national authorities deprived the applicants of an effective access to a tribunal [para. 41], in violation of article 6(1) of the European Convention on Human Rights [para. 42]. Regarding the violation of articles 3, 8, 13 and 14 of the Convention, and article 1 of Protocol N° 1 to the ECHR, the Court declared that it was not necessary to rule on these separately as they related to the same arguments analysed in light of article 6(1) of the Convention [para. 45].

Decision The Court declared Mr Butan and Mrs Dragomir’s application admissible and held that the applicants’ right to a fair trial (article 6(1) of the Convention) had been violated [Findings para. 2]. Moreover, the Court considered that the applicants suffered material damage due to the non-execution of the Courts’ decisions and moral damage consisting of a profound feeling of injustice given the impossibility to see the Court’s judgement, in their favour, enforced, so as to benefit from an effective protection of their rights. Consequently, it ordered the respondent State to pay the applicant EUR 10,000 in respect of moral damages [Findings para. 4].

Fedotov v Russia

European Court of Human Rights, Fourth Section
25 October 2005⁴²⁰

Keywords [Availability – Water and sanitation – Inhuman treatment (violation) – Conditions of detention]

Abstract Failing to provide access to water and sanitation to a detainee for over 32 hours constitutes inhuman treatment in violation of article 3 of the European Convention on Human Rights.⁴²¹

Facts Mr Igor Leonidovich Fedotov, a Russian national, became the subject of an investigation by the prosecutor's office of the Borovich District on 7 May 1999 as he was suspected to have benefited for personal gain from his position as president of a non-governmental organisation, and in particular to have purchased computer equipment for personal use [para. 9]. Charges against him were dropped, then upheld [paras. 11-13], and ultimately dropped again on 10 April 2000 by a senior investigator from the Investigations Division of the Novgorod Regional Police [para. 14]. In the meantime, Mr Fedotov was wrongly arrested twice by the police on 15 June 2000 [para. 15] and 6 July 2000 [para. 18], because his name was still on the list of wanted persons issued at federal level. During his second detention, which lasted 32 hours, police officers verbally abused him. He was also hit in the chest [para. 19]. Furthermore, he was not provided with food or water and could not access sanitation facilities [para. 20].

Procedure Mr Fedotov sought to obtain compensation for pecuniary and non-pecuniary damage from the Ministry of Finance, the Prosecutor General's Office and the Ministry of the Interior in early 2001 [para. 31]. On 18 September 2001, the District Court (Basmanniy) declared unlawful the criminal proceedings he was subjected to on the grounds that there was no evidence of a criminal offence he would have committed [para. 33]. The District Court,

420. *Fedotov v Russia* (App n° 5140/02) ECHR 25 October 2005 <<http://hudoc.echr.coe.int/sites/eng/page/s/search.aspx?i=001-70756>>. Case summary based on the journal article by: Vivien Deloge, 'Road to 2015: The European Union and the Realisation of the Human Right to Water' (2012) 16 *New Zealand Journal of Environmental Law* 1, 16-19.

421. See also: *Kadiķis v Latvia* (App n° 62393/00) ECHR 4 May 2006; *Shchebet v Russia* (App n° 16074/07) ECHR 12 June 2008.

however, did not find facts consistent with Mr Fedotov's allegations and provided compensation only for the July 2000 detention. Dissatisfied with the District Court's findings of fact and the failure to order compensation for the June 2000 detention, he appealed to the City Court (Moscow). That Court upheld the judgment on 16 January 2002. He then applied to the European Court of Human Rights on 18 December 2001 [para. 1].

Claims The applicant alleged that the conditions of his detention amounted to a violation of article 3 of the Convention which prohibits torture and inhuman or degrading treatment [para. 56].

Applicable Law and Reference to Regional or International Instruments

- 2nd CPT General Report⁴²²
- CPT Report on the visit to the Russian Federation from 2 to 17 December 2001⁴²³
- European Convention on Human Rights, art 3⁴²⁴

Court Rationale The Court first recalled its jurisprudence regarding burden of proof, noting that while the burden of proof lies generally with the party making the allegation, not all cases lend themselves to a rigorous application of that principle. The Court stated that in certain circumstances the respondent Government alone has access to information capable of corroborating or refuting factual allegations [para. 60]. Because there were no records of the applicant's detention although he requested them, the Court declared that '[h]e cannot therefore be criticised for not furnishing substantial evidence of the material conditions of his detention.' [para. 61].

With respect to the issue of inhuman or degrading treatment, the Court recalled its previous case law, it emphasised as follows:

The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and

422. Council of Europe, '2nd General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' CPT/Inf (92) 3.

423. Council of Europe, 'Report to the Russian Government on the visit to the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 17 December 2001' CPT/Inf (2003).

424. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

mental effects and, in some cases, the sex, age and state of health of the victim. [para. 62]

The Court then referred to reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to corroborate the applicant's allegations. According to the 2nd CPT General Report, 'Persons in custody should be allowed to comply with the needs of nature when necessary in clean and decent conditions, and be offered adequate washing facilities.' [para. 54]. Following its country visit to Russia, it found that '[t]he cells seen by the delegation were totally unacceptable for extended periods of custody', and that 'there was no provision for supplying detainees with food and drinking water, and access to a toilet was problematic.' [para. 55]. Consequently, with respect to the July 2000 detention, the Court found as follows:

[T]he applicant was kept overnight in a cell unfit for an overnight stay, without food or drink or unrestricted access to a toilet. The unsatisfactory conditions exacerbated the mental anguish caused by the unlawful nature of his detention. In these circumstances, the Court considers that the applicant was subjected to inhuman treatment, incompatible with Article 3 of the Convention. [para. 68]

Decision The Court held that the applicant's conditions of detention violated article 3 of the Convention [Findings para. 2]. It ordered the respondent State to pay the applicant EUR 7,400 within three months in respect of non-pecuniary damage and EUR 800 in respect of costs and expenses [Findings para. 7].

Zander v Sweden

European Court of Human Rights, Court (Chamber)
25 November 1993⁴²⁵

Keywords [Accountability – Water – Right to a fair trial (violation) – Property rights – Industrial pollution]

Abstract The impossibility for landowners to appeal a decision impacting their ability to use their well for drinking purposes is a violation of the right to a fair trial under article 6(1) of the European Convention on Human Rights.

Facts Mr and Mrs Zander have owned since 1966 a property in the municipality of Västerås next to a dump on which a Swedish company, Västmanlands Avfallsaktiebolag (VAFAB), started to undertake the treatment of household and industrial waste from 1 July 1983 onwards [para. 7]. However, analyses already showed in 1979 that drinking water from a well located in the vicinity of the applicants' property was contaminated by excessive levels of cyanide. As a result, the Health Care Board of Västerås prohibited water use from the well and temporarily supplied the landowner who was relying on this well with municipal drinking water [para. 8]. In October 1983, subsequent analyses highlighted that six other wells were also contaminated by cyanide, including that located on the applicants' property. Their use was also prohibited and the applicants were temporarily supplied with municipal drinking water. In June 1984, the National Food Agency shifted the maximum permitted level of cyanide in water from 0.01 mg to 0.1 mg per litre. Consequently, all affected landowners were no longer supplied with municipal drinking water from February 1985 onwards [para. 8]. On July 1986, VAFAB applied to the Licensing Board for a permit renewal which would also allow an extension of its activities [para. 9].

Procedure The applicants joined by other landowners required the Licensing Board not to grant the VAFAB permit without linking it to an obligation for the latter to provide drinking water free of charge to the applicants as a precautionary measure as stated under section 5 of the Environment Protection Act 1969 considering the pollution risks implied by the activities [para. 9].

425. *Zander v Sweden* (App n° 14282/88) ECHR 25 November 1993
<http://hudoc.echr.coe.int/sites/fra/page_s/search.aspx?i=001-57862>.

The Licensing Board granted the permit and dismissed the applicants' claim on 13 March 1987 as it estimated such general precautionary conditioning would be unreasonable. The granting of the permit was however subject to an obligation to regularly monitor the quality of water from the wells, inform their owners of the results, and take immediate action to supply them with water should VAFAB be found to have caused pollution to occur [para. 10]. The applicants appealed this decision to the Government, which dismissed the appeal on 17 March 1988 as a final instance [para. 11]. The applicants then initiated proceedings before the European Commission on Human Rights on 2 September 1988 [para. 17]. Their application was declared admissible on 14 October 1991 [para. 18].

Claims The applicants alleged a violation of article 6(1) of the European Convention on Human Rights on the right to a fair trial since it was not possible for them to seek judicial review of the Government's decision [paras. 17 and 20]. Article 6(1) provides that '[i]n the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' As respondent, the Government put forward that the applicants could have filed a claim for compensation in the Real Estate Court under the Environmental Damage Act 1986 [para. 23] should they had suffered damage or injury from water pollution as prescribed under section 3 [para. 16]. Besides, the two applicants claimed 250,000 Swedish kronor for non-pecuniary damages since they had to collect drinking water from other places 'in buckets, cans and bottles' as they feared their well was polluted but also that 'the value of their property had fallen considerably', while the denial of judicial review 'had aggravated the distress which they had suffered for over ten years as a result of fear of pollution' [para. 31].

Applicable Law and Reference to Regional or International Instruments

- European Convention on Human Rights, art 6(1)⁴²⁶
- Environment Protection Act 1969, ss 1, 5, 22 and 34⁴²⁷
- Environmental Damage Act 1986, ss 3 and 6⁴²⁸

Court Rationale Considering the provision of section 5 of the Environment Protection Act 1969 which set certain obligations to be respected by a person engaging in an environmentally hazardous activity or intending to do so,

426. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

427. Miljöskyddslagen 1969:387.

428. Miljöskadelagen 1986:225.

and the procedure which led the Licensing Board to dismiss the applicants' request, the Court declared that 'the applicants could arguably maintain that they were entitled under Swedish Law to protection against the water in their well being polluted as a result of VAFAB's activities on the dump' [para. 24]. While the Government maintained that the Environment Protection Act 1969 was chiefly of public-law character, the Court asserted that the right at stake was of civil nature since 'the applicants' claim was directly concerned with their ability to use the water in their well for drinking purposes. This ability was one facet of their right as owners of the land on which it was situated. The right of property is clearly a 'civil right' within the meaning of Article 6 para. 1' [para. 27]. Consequently, the Court found that there had been a violation of article 6(1) of the Convention since it was not possible for the applicants to have the Government's decision upholding that of the Licensing Board regarding VASAB's activities reviewed by a court at the time of their appeal, this being acknowledged by the Government [para. 29]. A subsequent Act on Judicial Review of certain Administrative Decisions entered into force on 1 June 1988, allowing the challenge of a number of Government's decisions before the Supreme Administrative Court but 'it was not possible for the applicants to avail themselves of this remedy in respect of the Government's decision as the Act did not have retroactive effect' [para. 13].

Decision The Court ruled that there had been a violation of article 6(1) of the Convention [Findings para. 1] and ordered the Swedish Government to pay 30,000 Swedish kronor to each of the applicants in respect of non-pecuniary damage, and 145,860 Swedish kronor to the applicants jointly in respect of costs and expenses [Findings para. 2].

Dubetska and Others v Ukraine

European Court of Human Rights, Fifth Section

10 February 2011⁴²⁹

Keywords [Quality – Sustainability – Water – Right to respect for private and family life (violation) – Mining pollution]

Abstract Failing to protect individuals from immediate environmental pollution resulting from industrial activities, which impacts on drinking water quality, amounts to a violation of the right to respect for private and family life under the European Convention on Human Rights.

Facts Ms Ganna Dubetska and ten other Ukrainian nationals, members of two extended families, were residents of Vilshyna, a hamlet in the Lviv region [para. 6]. A State-owned coal mine started operating in 1960 in the vicinity of their houses, and a pile of mine refuse was erected around 100 metres away from the Dubetska family house [para. 10]. In 1979, the State further opened a coal processing factory which subsequently produced a 60-metre refuse heap about 430 metres from the Dubetska family property and 420 metres from the other residents' family house [para. 12]. A number of studies by governmental and non-governmental entities found that the operation of the mine and factory had had adverse environmental effects [para. 13]. In particular, these included flooding [para. 14], polluted ground water [para. 15] and air and soil subsidence [para. 19]. Noting the contamination of the well water with mercury and cadmium, a report concluded in 2005 that people living in the surrounding area were exposed to a higher risk of cancer and respiratory and kidney diseases [para. 23].

Procedure The Dubetska family applied to the Chervonograd Court, which ruled in its favour in December 2005 [para. 50] but the judgment was never enforced [para. 55]. The same Court dismissed an application from the other family in 2004 [para. 60]. Ms Dubetska and 10 other Ukrainian nationals applied to the European Court of Human Rights on 4 September 2003 [para. 1].

429. *Dubetska and Others v Ukraine* (App n° 30499/03) ECHR 10 February 2011 <<http://hudoc.echr.coe.int/sites/eng/page/s/search.aspx?i=001-103273>>.

Claims The applicants alleged a violation of article 8 of the European Convention on Human Rights on the right to respect for private and family life since they contended that the State had failed to protect them from ‘excessive pollution’ produced by the two public industrial facilities [para. 73]. They alleged that their houses had sustained damage as a result of soil subsidence caused by mining activities [para. 24]. They further argued that they were continuing to suffer from a ‘lack of drinkable water’ [para. 25]. Several applicants also maintained that they developed chronic health conditions due to the factory operation [para. 28], and that their frustration with environmental factors affected communication between family members [para. 29].

Applicable Law and Reference to Regional or International Instruments

- European Convention on Human Rights, art 8⁴³⁰

Court Rationale The Court first recalled its relevant article 8 jurisprudence. In particular, it recalled that a claim under article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant’s ability to enjoy his or her home, private or family life and that an assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical and mental effects on the individual’s health or quality of life [para. 105]. The Court also discussed the margin of appreciation given a State with regards to striking a fair balance between the competing interests of the individuals affected and the community as a whole [para. 145].

As an examination of the facts of the present case, the Court made note of the substantial amount of data in evidence that the actual excess of polluting substances had been recorded on a number of occasions [para. 115]. The Court considered that the operation of the mine and factory, and especially their piles of refuse, had contributed to the problems experienced by the applicants, namely a deterioration of their health due to water, air and soil pollution, together with damage to their houses resulting from soil subsidence caused by the deposit of toxic substances in the earth around the two industrial facilities. The Court held that the environmental nuisance complained about attained the level of severity necessary to bring the complaint within the ambit of article 8 of the Convention [para. 119].

The Court further observed that the respondent State failed to remedy the violation, stating that while ‘on numerous occasions the authorities con-

430. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

sidered resettling the applicants as a way of providing an effective solution to their environmental hardship' [para. 146], 'notwithstanding the effort, for more than twelve years the State authorities have not been able to put in place an effective solution for the applicants' personal situation' [para. 147]. The Court highlighted that 'from the Convention's entry into force and up to now little or nothing has been done to help the applicants to move to a safer area' [para. 149]. It declared that:

There also appears to have been, at least until the launch of the aqueduct no later than in 2009, delays in supplying potable water to the hamlet, which resulted in considerable difficulties for the applicants. The applicants cannot therefore be said to have been duly protected from the environmental risks emanating from the factory operation. [para. 152]

Consequently, the Court found that the respondent State failed to protect the applicants from the environmental risks related to the operation of the two industries and to progress their relocation [para. 154]. It also found that the respondent State failed to provide sufficient explanation on the absence of relocation or on its inability to adopt an effective solution in order to ease the burden the applicants endured for more than 12 years [para. 155].

Decision The Court held that the applicants' right to respect for private and family life within the meaning of article 8 of the Convention had been violated [Findings para. 3]. It ordered the respondent State to pay EUR 32,000 to the first applicant and EUR 33,000 to the other applicants in respect of non-pecuniary damage [Findings para. 4].

ECHR/ UKRAINE

Melnik v Ukraine

European Court of Human Rights, Second Section

28 March 2006⁴³¹

Keywords [Quality – Sanitation – Hygiene – Degrading treatment (violation) – Conditions of detention]

Abstract Failing to provide adequate conditions of hygiene and sanitation to a detainee having poor health constitutes degrading treatment in violation of article 3 of the European Convention on Human Rights.

Facts Mr Aleksandr Vasilyevich Melnik, a Ukrainian national, began serving a five-year sentence of imprisonment in September 2000 after being convicted of drug offences [para. 17]. Medical examinations at the time he was taken into custody showed that he was in good health [para. 26]. After being wrongly diagnosed twice with lung cancer [para. 34], he was finally transferred to a tuberculosis hospital for convicts, where, as from June 2001, he was treated for tuberculosis [paras. 36-37]. Since March 2004, he had been diagnosed with clinically cured tuberculosis [para. 39]. During his detention, he was held in overcrowded cells [para. 110]. He also was only allowed a once-weekly access to a shower and his linen and clothes could be washed only once a week [para. 107]. .

Procedure Mr Melnik appealed against his conviction to the Regional Court (Vinnytsia), which upheld his sentence in July 2000 [para. 19]. He further sought to obtain permission to review the case file [para. 21], but the District Court (Vinnytsia) dismissed his application on 2 November 2000 [para. 22]. He subsequently applied to the European Court of Human Rights on 14 November 2000 [para. 1].

Claims The applicant alleged that his conditions of detention, in particular as regards sanitation, amounted to a violation of article 3 of the Convention which prohibits inhuman or degrading treatment [para. 64].

431. *Melnik v Ukraine* (App n° 72286/2001) ECHR 28 March 2006
 <http://hudoc.echr.coe.int/sites/eng/page_s/search.aspx?i=001-72886>.

Applicable Law and Reference to Regional or International Instruments

- European Convention on Human Rights, art 3⁴³²

Court Rationale

The Court stated that:

... the fact that the applicant had only once-weekly access to a shower and that his linen and clothes could be washed only once a week raises concerns as to the conditions of hygiene and sanitation, given the acutely overcrowded accommodation. Such conditions would have had an aggravating effect on his poor health. [para. 107]

While the Court further found that ‘the applicant received adequate nutrition’ [para. 108], it declared that ‘the applicant’s conditions of hygiene and sanitation were unsatisfactory and would have contributed to the deterioration of his poor health’ [para. 109]. Consequently, the Court found that the conditions of detention of the applicant, considering its duration and the ‘overcrowding, inadequate medical care and unsatisfactory conditions of hygiene and sanitation’, amounted to degrading treatment within the meaning of article 3 of the Convention [para. 111].

Decision The Court held that the applicant’s conditions of detention violated article 3 of the Convention [Findings para. 2]. It ordered the respondent State to pay the applicant EUR 10,000 in respect of non-pecuniary damage and EUR 500 in respect of costs and expenses [Findings para. 4].

432. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

IACHR/ GRENADA

Paul Lallion v Grenada

Inter-American Commission on Human Rights

21 October 2002⁴³³

Keywords [Availability– Adequate sanitation – Right to physical, mental and moral integrity (violation) – Death row prisoners – Inhuman conditions of detention – Obligation to fulfil]

Abstract Detaining prisoners without respect for material conditions of detention, including adequate sanitation conditions constitutes a violation of the right to physical, mental and moral integrity under the American Convention on Human Rights.

Facts On 19 December 1994, Mr Paul Lallion was convicted for murder and sentenced to a mandatory death penalty [para. 2]. During his detention, he was provided with a bucket as a toilet which he was able to empty only once a day, having to endure the smell and unhygienic conditions until the bucket was emptied [para. 84].

Procedure Mr Lallion appealed to the Eastern Caribbean Court of Appeal in Grenada against his conviction and sentence. His appeal was dismissed by the Court on September 15, 1995 [para. 2]. By letter dated June 17, 1997, he filed a petition against Grenada with the Inter-American Commission on Human Rights [para. 8]. On September 27, 1999, the Commission found Mr. Lallion's case admissible.

Claims The applicant alleged that his conditions of detention amounted to a violation of the right to physical, mental and moral integrity and the right not to be subjected to cruel, inhuman or degrading punishment or treatment under articles 5(1) and 5(2) of the American Convention on Human Rights [para. 83].

433. *Paul Lallion v Grenada* [2002] Inter-American Commission on Human Rights 11.765 <<http://www.cidh.org/annualrep/2002eng/Grenada.11765.htm>>.

Applicable Law and Reference to Regional or International Instruments

- American Convention on Human Rights – Arts. 5(1) and 5(2)⁴³⁴
- UN Standard Minimum Rules for the Treatment of Prisoners – Rules 12 and 15⁴³⁵

Court Rationale The Commission considered that the applicant's claims 'should be evaluated in light of minimum standards articulated by international authorities for the treatment of prisoners' and referred, accordingly, to the UN Standard Minimum Rules for the Treatment of Prisoners, which provide in their rule 12, that 'the sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner' [para. 86]. The Commission declared that:

... the State has failed to meet these minimum standards of proper treatment for Mr. Lallion. The cumulative impact of such conditions, together with the length of time for which Mr. Lallion has been incarcerated in connection with his criminal proceedings, cannot be considered consistent with the right to humane treatment under Article 5 of the Convention.

It further stated that 'the conditions of detention to which he has been subjected fail to meet several of these minimum standards of treatment of prisoners, in such areas as hygiene, exercise and medical care' [para. 87].⁴³⁶ The Commission therefore stated that the applicant's conditions of detention failed 'to respect his physical, mental and moral integrity as required under article 5(1) of the Convention.' Consequently, the Commission finds that the State is responsible for violating this provision of the Convention in respect of Mr. Lallion in conjunction with the State's obligations under Article 1(1) of the Convention [para. 90].

Decision The Commission held that the applicant's conditions of detention amounted to a violation of article 5(1) of the American Convention, in conjunction with a violation of Article 1(1) of the American Convention, considering the failure of the respondent State 'to respect Mr. Lallion's

434. American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series n° 36 (1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992).

435. Standard Minimum Rules for the Treatment of Prisoners, UN ECOSOC Res 663 C (XXIV) (31 July 1957) amended by Res 2076 (LXII) (13 May 1977).

436. See also: *Benedict Jacob v Grenada* [2002] Inter-American Commission on Human Rights 12.158 [94].

right to physical, mental, and moral integrity by confining him in inhumane conditions of detention' [para. 117].

The Commission recommended that the State of Grenada, adopt such legislative or other measures as may be necessary to ensure that the right to humane treatment under Article 5(1) of the American Convention in respect of Mr. Lallion's conditions of detention is given effect in Grenada.

Vélez Loor v Panama

Inter-American Court of Human Rights

23 November 2010⁴³⁷

Keywords [Availability – Water – Right to humane treatment (violation) – Conditions of detention – positive obligations]

Abstract The absence of minimum conditions to guarantee the supply of drinking water within a prison constitutes a serious failure by the State in its duty to guarantee the rights of those held in its custody and it amounts to the violation of the right to humane treatment safeguarded by Art. 5 of the ACHR.

Facts The petitioner was detained by the Panamanian police because 'he did not have the necessary documentation to justify his presence in Panama' and the National Immigration Office issued an arrest warrant. The petitioner was transferred to the La Palma Public Prison because 'the National Immigration Office d[id] not have special facilities to accommodate undocumented persons [para. 93]. The Director of the National Immigration Office, after confirming that the petitioner had been previously deported from Panama in 1996, for having entered national territory 'illegally,' decided to sentence him 'to serve a two year prison term in one of the country's prisons' for 'ignoring the warnings [...] of the prohibition against his entry to Panama' and therefore for violating immigration laws. The petitioner was never notified of this decision (para. 94). He was subsequently transferred to La Joyita Penitentiary Centre. In June 2003, while Mr. Vélez Loor was held at La Joyita Prison, there was a problem in the water supply that affected the prison population. The evidence provided demonstrates that the shortages of drinking water at La Joyita had been frequent [para. 215]. The State itself acknowledged that the petitioner was held in prisons where the provision of water was problematic (para. 197). In September 2003, the petitioner's sentence was commuted by the National Immigration Office and he was deported back to Ecuador.

437. *Vélez Loor v Panama* Inter-American Court of Human Rights Series C n° 218 (23 November 2010) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_218_ing.pdf>.

Procedure Mr. Vélez Loor submitted a petition to the Inter-American Commission on Human Rights. The Commission, subsequently, requested the Inter-American Court of Human Rights to declare the State of Panama responsible for several human rights violations.

Claims Before the Commission and the Court, the petitioner claimed to have suffered various human rights violations, including the lack of access to water, during his imprisonment. The Commission asked the Court to declare Panama responsible for the alleged violations of fundamental rights, such as the right to personal liberty, right to a fair trial, the right to judicial protection, as well as for the alleged inhumane detention conditions.

Applicable law and reference to regional or international instruments

- American Convention on Human Rights, Arts. 1, 2, 5, 7, 8, 25⁴³⁸
- Inter-American Convention to Prevent and Punish Torture – Arts. 1, 6, 8
- CESCR General Comment n° 15⁴³⁹
- United Nations Standard Minimum Rules for the Treatment of Prisoners

Court Rationale The Court stated that *‘every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoner’* [para. 198]. The Court explained that *‘the lack of drinking water is a particularly important aspect of the prison conditions’*[para. 215].

In relation to the right to drinking water, the Court recalled that the CESCR had called on States Parties to adopt measures to ensure that prisoners and detainees are provided with sufficient and safe water for their daily individual requirements. Furthermore, the Court explained that according to the United Nations Standard Minimum Rules for the Treatment of Prisoners, *‘prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with toilets as are necessary for health and cleanliness’*, and *‘drinking water shall be available to every prisoner whenever needed’*. Consequently, States must take steps to ensure that prisoners have sufficient safe water for daily personal needs, inter alia, the consumption of drinking water whenever they require it, as well as water for personal hygiene.

438. Available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

439. Available at: [http://www.unhcr.ch/tbs/doc.nsf/o/a5458d1d1bbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhcr.ch/tbs/doc.nsf/o/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf)

The Court considered that ‘the absence of minimum conditions that ensure the supply of drinking water within a prison constitutes a serious failure of the State’s duty to guarantee the rights of those held in its custody, given that the circumstances of incarceration , prevent detainees from satisfying their own personal basic needs by themselves, even though these needs, such as access to sufficient safe water, are essential for a dignified life’ [para. 216].

Decision In relation to the conditions of detention, the Court decided that the State was responsible for the violation of the right to humane treatment [personal integrity] and that Panama was obliged to ensure the rights of persons deprived of liberty, in particular, to ensure an adequate supply of water at La Joya-La Joyita Prison and to secure that the conditions of imprisonment there as well as in La Palma Prison conform to international standards [para. 276].

Xákmok Kásek Indigenous Community v Paraguay

Inter-American Court of Human Rights

26 August 2010⁴⁴⁰

Keywords [Availability – Quality – Water – Right to life (violation) – Indigenous people – positive obligations]

Abstract The State must take all appropriate measures to protect and preserve the right to life, which includes the provision of water ‘in sufficient quantity and of adequate quality’.

Facts This case is the third case held against Paraguay in front of the Inter American Commission by an indigenous community expelled from its ancestral property.⁴⁴¹ Since the 19th century, the State has transferred the land to some private owners [paras 57-58]. The indigenous community used to live on the territory of ‘Estancia Salazar’, in the area of Chaco, Paraguay. By the end of the 19th century, the State sold two-thirds of this territory without the knowledge of the inhabitants of the area (paras.57, 58). Since then, the lands of the Paraguayan Chaco have been transferred to private owners and progressively divided up. This, and increased agriculture and industries in the area, forced the indigenous peoples to resort to providing cheap manual labour for the new companies (paras.59-63). In 2008, part of this private property was recognized as private protected nature reserve and legal restrictions were put to use and ownership, including the prohibition to occupy the land, as well as the traditional activities of the members of the Community such as hunting, fishing and gathering [para. 82]. The Xákmok Kásek communities, representing 66 families, and 228 individuals, continued until recently roaming this traditional territory and using its resources, with certain limitations imposed by the private owners. It was when the restrictions on mobility and traditional subsistence activities became too onerous that the members of the Community decided to leave and settle in the place known as ‘25 de Febrero’ [para. 98]. Since 2003, the community had no access to water distribution services. On April 17, 2009, the President

440. *Xákmok Kásek Indigenous Community v Paraguay* Inter-American Court of Human Rights Series C n° 21 (26 August 2010) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf>.

441. See *Sawhoyamaxa Indigenous Community v Paraguay* Inter-American Court of Human Rights Series C n° 146 (26 March 2006) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf>.

of the Republic and the Ministry of Education and Culture, issued Decree n° 1830 declaring a state of emergency in two indigenous communities, one of them the Xákmok Kásek Community [para. 191]. As of April 2009, under the Decree, the State supplied the following amounts of water to the members of the Community settled in '25 de Febrero': 10,000 liters on April 23, 2009, 20,000 liters on July 3, 2009, 14,000 liters on August 14, 2009, and 20,000 liters on August 10, 2009. The State indicated that, on February 5, 2009, it had given five tanks of 6,000 m³ to the Community.

Procedure The Xákmok Kásek Indigenous Community against the State of Paraguay lodged an initial petition before the Inter American Commission, on 25 May 2001. On 20 February 2003, the Commission approved Report n° 11/03, declaring the petition admissible. Subsequently, on 17 July 2008, it approved Report on Merits n° 30/08, which included specific recommendations for the State. On 2 July 2009, after considering that Paraguay had not adopted its recommendations, the Commission decided to submit the case to the Inter-American Court of Human Rights.

Claim

The application of the Commission claims the State's alleged international responsibility for the alleged failure to ensure the right of the Xákmok Kásek Indigenous Community and its members' to their ancestral property, and for keeping this Community 'in a vulnerable situation with regard to food, medicine and sanitation that continuously threatens the Community's integrity and the survival of its members' [para. 3]. Moreover, it claimed that the State of Paraguay was responsible for the violation of the rights consecrated in Articles 3 (Right to Juridical Personality), 4 (Right to Life), 8(1) (Right to a Fair trial), 19 (Rights of the Child), 21 (Right to Property), and 25 (Judicial Protection) of the Convention, in relation to the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the Convention [para. 3]. The Commission asked the Court to order the State to immediately provide the community with adequate supplies and services, including water (...), necessary for their subsistence [para. 300].

Applicable Law and Reference to Regional or International Instruments

- American Convention on Human Rights, arts 4 and 19⁴⁴²
- CESCR General Comment N° 15⁴⁴³

Court Rationale The Court held that under the right to life, States are obliged to ensure the creation of the necessary conditions to prevent violations of this right and to prevent its agents from endangering it. It explained that the observance of Article 4, in relation to Article 1(1) of the Convention, not only presumes that no one be deprived of their life arbitrarily (negative obligation), but also requires the States to take all appropriate measures to protect and preserve the right to life (positive obligation) [paras.186, 187]. In the case, the Court established that the State knew of the existence of a situation of real and immediate risk to the life of the members of the Community [para. 192] and that measures adopted have been insufficient to overcome the conditions of special vulnerability of the Xákmok Kásek Community [para. 214], which affected children in particular [para. 259].

The community had been without water distribution services since 2003. The Court observed that although the State provided water since 2009, these amounts were not sufficient as the water provided by the State between May and August 2009 amounted to no more than 2.17 litres per person, per day. The Court referred to CESCR General Comment n° 15 and stated that most people need a minimum of 7.5 litres per day to meet their basic needs, including food and hygiene. The Court also stated that, according to international standards, ‘the quality of the water must represent a tolerable level of risk’ [para. 195]. It further held that the State had not submitted updated evidence on the provision of water during 2010, and found that the community was without access to safe sources of water in the settlement ‘25 de Febrero’ where they were currently located (paras.194, 195).

Consequently, the Court considered that the measures taken by the State following the issue of Decree n° 1830 have not been sufficient to provide the members of the Community with water in sufficient quantity and of adequate quality, and this has exposed them to risks and disease [para. 196]. The Court held that the situation of extreme vulnerability, notably due to the lack of water, affected the children in particular [para. 259] and found that

442. American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series n° 36 (1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992).

443. UN CESCR ‘General Comment 15’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9.

the State had not adopted the necessary measures of protection for all the children of the Community in violation of the right established in Article 19 of the American Convention, in relation to Article 1(1) thereof. [para. 264]

Decision The Court concluded that the State violated the right to life, established in Article 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of all the members of the Xákmok Kásek Community, and ordered that, until the traditional territory or, if applicable, alternate land is delivered to the members of the Community, the State must take the following measures immediately, periodically, or permanently:

- a. provision of sufficient quantities of drinking water for the community members' consumption and personal hygiene; [...]
- e. the installation of latrines or any other adequate kind of sanitary system in the community settlement' [para. 301].

The Court added that, in order to ensure that the provision of basic supplies and services is adequate and regular, the State must prepare a study within six months of notification of this judgment that establishes the following:

- a) Regarding the provision of potable water:
 - 1) the frequency of the deliveries;
 - 2) the method to be used to deliver the water and ensure its purity, and
 - 3) the amount of water to be delivered per person and/or per family [para. 303];

The Court also considered it appropriate to order that the State create a community development fund (with seven hundred thousand United States dollars) as compensation for the non-pecuniary damage that the community suffered, which will be partly used to provide drinking water and to build sanitation infrastructures for the benefit of the members of the Community [para. 323].

PARAGUAY

Case of the Sawhoyamaxa Indigenous Community v. Paraguay (Merits, Reparations and Costs)

Inter-American Court of Human Rights, Series C n° 146,
29 March 2006⁴⁴⁴

Keywords [Availability – quality – accountability – indigenous population – health – right to life (violation) – positive obligations]

Abstract This case considered, among other issues, whether the Government of Paraguay had taken the necessary positive measures to prevent the violation of the right to life of members of an indigenous community. Although this case mainly revolves around land rights, the Court also took into account the Community's lack of access to drinking water and sanitation as factors which constituted, amongst others, a threat to the right to life of the indigenous community.

Facts The Sawhoyamaxa community, made up of several indigenous villages, historically occupied a large territory in the region of Chaco in Paraguay. In the late 19th century, the lands of the Chaco were divided and transferred to private owners, who established estates. The community continued to live on these estates in extreme poverty and facing repressions from land owners. In 1991, the community formally claimed communal ownership over the lands they had traditionally occupied. Most members of the Sawhoyamaxa Indigenous Community moved to the settlements known as 'Santa Elisa' and 'KM 16,' alongside a national road due to the extremely hard physical and labor conditions they had to endure. The water used by the members of the Community, both for human consumption as well as for their personal hygiene, came from wells (earth dams breakwaters) located in the lands claimed, which was also used by animals. In periods of drought, the lack of clean water in the Community was alarming. During November 2002 and January 2003 the members of the Community who had settled in 'Santa Elisa' received two large water tanks which were fed by the Centro Nacional de Emergencia [National Emergency Center] with water brought from breakwaters, that is, with non-drinking water. Notwithstanding, at present such water tanks are not operating [para. 73 (69)]. In 'Santa Elisa' settlement

444. Original version available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf.

some families have built precarious latrines. In general, the members of the Community use the open field to relieve themselves [para. 73 (68)]. Hygienic conditions were very poor and diseases widespread. Many community members, particularly children and the elderly died from tetanus, pneumonia, measles, serious dehydration, cachexia, enterocolitis or alleged traffic and occupational accidents [para. 73 (74)]. The Government once declared in an executive order that the community was in a state of emergency, but took no action to improve the living conditions of the community [para. 73 (64, 67)].

Procedure The non-governmental organization TierraViva a los Pueblos Indígenas del Chaco submitted a petition to the Commission regarding alleged violation by Paraguay of the Sawhoyamaxa Community's ancestral property rights on the basis that their ownership claim to the land, first filed in 1991, had still not been decided. The Commission decided to refer the case to the Inter-American Court on Human Rights to determine whether Paraguay had violated rights of the community guaranteed under the ACHR, including the right to life.

Claims In its application to the Court, the Commission stated that the failure of the State of Paraguay to decide on the Community's claim for territorial rights had resulted in the denial of their title and possession of their lands, which implied that the community had to live in a state of nutritional, medical and health vulnerability that constantly threatened their survival and integrity [para. 2].

Applicable law and reference to regional or international instruments

- American Convention on Human Rights – Arts. 1, 2, 4, 5, 8, 21 and 25⁴⁴⁵

Court Rationale The Court held that Paraguay had violated Article 4 (1) – the right to life – of the ACHR because it did not adopt the necessary positive measures to prevent or avoid risking the right to life of the members of the Sawhoyamaxa Community while they lived alongside the road [para. 178]. The Court stated that the fundamental role given to the right to life requires states to guarantee *'the creation of the conditions that may be necessary in order to prevent violations of such inalienable right'* [para. 151]. This does not only require that no person shall be deprived of its life arbitrarily, but also imposes the positive obligation on the State to adopt measures to protect and preserve the right to life [para. 152].

445. Available at:
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

The Court explained that there was no dispute between the parties regarding the fact that *'the conditions in which the communities live are inadequate to lead a decent existence, nor regarding the fact that such conditions represent an actual and impending risk for their lives'* [para. 156]. It added that, *'Since April 21, 1997, the State has had full knowledge about the actual risk and vulnerability situation to which the members of the Sawhoyamaxa Community are exposed, especially children, pregnant women and the elderly, and also about their mortality rates'* [para. 159].

The Court emphasized that *'together with the lack of lands, the life of the members of the Sawhoyamaxa Community is characterized by unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes'* [para. 168]. Moreover, the Court considered that the measures adopted by the State in compliance with the Presidential Order N° 3789 declaring the Sawhoyamaxa Community in a state of emergency were not sufficient and adequate [para. 170]. As regards to the right to life of children, the Court explained that *'the State has, in addition to the duties regarding any person, the additional obligation to promote the protective measures referred to in Article 19 of the American Convention. Thus, on the one hand, the State must undertake more carefully and responsibly its special position as guarantor, and must adopt special measures based on the best interest of the child'* [para. 177]. The Court considered that the deaths of 18 children members of the Community were attributable to the State. The Court concluded that the State, by not solving the community's claim to their traditional land, *'had not adopted the measures needed for them to leave the roadside, and thus abandon the inadequate conditions that endangered their right to life'* [para. 166].

Decision

The Court unanimously declared that the State violated, amongst other rights, the right to life enshrined in Article 4(1) of the American Convention on Human Rights, relating to Articles 1(1) (obligation to respect rights) and 19 (rights of the child) thereof, to the detriment of the members of the Sawhoyamaxa Indigenous Community.

The Court thus ordered, in relation to water and sanitation, that, while the members of the Community remain landless, the State *'immediately, regularly and permanently adopt measures to: a) supply sufficient drinking water for consumption and personal hygiene to the members of the community,*

[...], d) set up latrines or other types of sanitation facilities in the settlements of the community, [...]' [paras. 248(9), 230]. It further ordered the State to establish a community development fund in the lands to be made over to the members of the Community, to which the State shall allocate the amount of US\$ 1,000,000.00 (one million United States Dollars), to be used to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of the Community [para. 224].

IACHR/ PARAGUAY

Yakye Axa Indigenous Community v Paraguay

Inter-American Court of Human Rights

17 June 2005⁴⁴⁶

Keywords [Availability– Water – Sanitation – Right to life (violation) – Indigenous people – Customary rights – positive obligations]

Abstract Failure by a State to take measures to provide a landless indigenous community with the necessary conditions to live a decent life, including the supply of sufficient drinking water and sanitation facilities, amounts to a violation of the right to life under the American Convention on Human Rights.

Facts Large parts of the Paraguayan Chaco, lands that are traditionally inhabited by indigenous communities, were sold in the nineteenth century on the London stock exchange. The Anglican Church subsequently built several missions on this territory [para. 50.10], and indigenous people were employed to work on livestock estates in particular at Loma Verde and Ledesma, which were also managed by the Anglican Church [para. 50.11]. In 1979, the Anglican Church began a development program for indigenous communities which included the purchase of land including at Estancia El Estribo to establish new indigenous settlements [para. 50.12]. The members of the Yakye Axa Indigenous Community decided to move to Estancia El Estribo considering their mediocre living conditions at Loma Verde where men hardly received wages and women were sexually abused by Paraguayan workers [para. 50.13]. However, resettlement to this new area did not improve their living conditions as they were suffering from lack of water and food [para. 50.15]. Members of the Yakye Axa Indigenous Community decided to take steps in 1993 to claim their ancestral land back [para. 50.16]. They subsequently left Estancia El Estribo in 1996 in order to return to their lands but they were denied access. Therefore, they resolved to settle along the public road between Pozo Colorado and Concepción [50.92]. The destitute living conditions of the members of the Yakye Axa Community who have settled alongside the public road are extreme. They had no access to clean water and the most reliable source of water was that collected during rainfall. The water they regularly use comes from deposits ('tajamares') located in the

446. *Yakye Axa Indigenous Community v Paraguay* Inter-American Court of Human Rights Series C n° 125 (17 June 2005) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf>.

lands they claim; however, it is used both for human consumption and for personal hygiene and it is not protected from contact with animals [para. 50.95]. At this settlement, the members of the Community have no toilets or sanitary facilities of any sort (latrines or septic tanks), for which reason they use the open fields for their physiological needs, which makes the hygienic conditions of the settlement very deficient [para. 50.96]. As a consequence of these conditions, the members of the Indigenous Community who are in this settlement suffer malnutrition, anemia, and widespread parasitism [para. 50.97] The precarious living conditions of the members of the Yakye Axa Community settled alongside the road from Pozo Colorado to Concepción were acknowledged on June 23, 1999 by the President of the Republic of Paraguay, who issued Decree n° 3789 that declared a state of emergency regarding the Yakye Axa and Sawhoyamaxa indigenous Communities, of the Enxet-Lengua People [para. 50.100].

Procedure The Yakye Axa Indigenous Community applied on March 3, 1997 to the Civil and Commercial Trial Court (amparo procedure) against the company Torocay SA Agropecuaria y Forestal which, having rented the land the Community claimed as their ancestral territory, denied the members of the Community access to it [para. 50.62]. The Court dismissed the application on April 17, 1997 [para. 50.63]. This judgment was upheld by the Civil and Commercial Appellate Court and also by the Constitutional Court of the Supreme Court of Justice of Paraguay on July 1, 1999 [para. 50.64].

On January 10, 2000, the non-governmental organizations 'Tierraviva a los Pueblos Indígenas del Chaco paraguayo' and the Center for Justice and International Law applied to the Inter-American Commission on Human Rights, which on March 17 2003 filed an application against the State of Paraguay with the Inter-American Court of Human Rights [para. 1].

Claims The applicants alleged that the respondent State violated their right to life as guaranteed under article 4(1) of the American Convention on Human Rights, since it did not ensure that conditions required for the full enjoyment and exercise of that right were fulfilled [paras.157-158]. On the other hand, the Commission alleged, with regard to article 4, that 57 families, members of the Yakye Axa Indigenous Community, had been living since 1996 in a place that was clearly inadequate to develop their lives under minimally decent conditions, waiting for the State to effectively guarantee their right to live in their ancestral territory.

Applicable Law and Reference to Regional or International Instruments

- American Convention on Human Rights – Arts. 4(1), 19 and 63⁴⁴⁷
- CESCR General Comment N° 14⁴⁴⁸
- Political Constitution of the Republic of Paraguay – Arts. 62 to 66⁴⁴⁹
- ILO Convention on Indigenous and Tribal Peoples – Art. 14⁴⁵⁰
- Law Enacting the ILO Convention on Indigenous and Tribal Peoples⁴⁵¹
- Protocol of San Salvador – Arts. 10 and 11⁴⁵²

Court Rationale The Court declared that ‘approaches that restrict the right to life are not admissible. Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.’ [para. 161]. The Court further specified that:

One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority [para. 162].

The Court referred that in the settlement the members of the Yakye Axa Community were currently living they did not have access to appropriate housing with the basic minimum services, such as clean water and toilets and that these conditions had a negative impact on the nutrition required by the members of the Community who are at this settlement [para. 164, 165]

447. American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series n° 36 (1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992).

448. UN CESCR ‘General Comment 14’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9.

449. Constitución Política de la República de Paraguay 1992.

450. Convention concerning Indigenous and Tribal Peoples in Independent Countries (n° 169) (adopted 27 June 1989, entered into force 5 September 1991) 72 ILO Official Bulletin 59.

451. Ley n° 234/93 que aprueba el Convenio n° 169 sobre Pueblos Indígenas y Tribales en Países Independientes.

452. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series n° 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992).

Moreover, the Court referred to General Comment N° 14 on the Right to the Highest Attainable Standard of Health [para. 166]. It stated that ‘special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water have a major impact on the right to a decent existence and basic conditions to exercise other human rights’. In the particular case of indigenous peoples, ‘access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to access to obtaining food and access to clean water’ [para. 167]. Emphasising that the respondent State ‘did not guarantee the right of the members of the Yakye Axe Community to communal property’, the Court asserted that ‘this fact has had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water’. The Court further held that ‘the State had not taken the necessary positive measures to ensure that the members of the Yakye Axa Community, during the period in which they have been without territory, have living conditions that are compatible with their dignity’, despite the fact that on June 23, 1999 the President of Paraguay issued Decree n° 3.789 that declared a state of emergency in the Community [para. 168].

The Court also highlighted the special gravity of the situation of the children and the elderly members of the Community, and declared that the respondent State has the obligation to provide, for the children of the community, ‘the basic conditions to ensure that the situation of vulnerability due to lack of territory will not limit their development or destroy their life aspirations’ [para. 172]. Regarding the elderly, the Court emphasised that ‘it is important for the State to take measures to ensure their continuing functionality and autonomy, guaranteeing their right to adequate food, access to clean water and health care’ [para. 175].

Therefore, the Court found that the respondent State violated article 4(1) of the American Convention in conjunction with article 1(1), to the detriment of the members of the Yakye Axa Community, ‘for not taking measures regarding the conditions that affected their possibility of having a decent life’ [para. 176].

Decision The Court unanimously held that the State violated the Right to Life embodied in Article 4(1) of the American Convention on Human Rights, in combination with Article 1(1) of that same Convention, to the detriment of the members of the Yakye Axa Indigenous Community [para. 242(3)].

Consequently it ordered the respondent State to:

- c. as long as the Community remains landless, 'supply, immediately and on a regular basis, sufficient drinking water for consumption and personal hygiene of the members of the Community; and ... to provide latrines or any other type of appropriate toilets for effective and healthy management of the biological waste of the Community' [paras.221 and 242(8)].
- d. pay the applicants US\$ 45,000 in respect of costs and expenses [paras.195 and 242(13)], and to allocate US\$ 950,000 to a community development fund and programme on education, housing, agriculture and health to the benefit of the applicants [paras.205 and 242(9)].
- e. identify the traditional territory of the applicants and return it back to the applicants free of charge, within a maximum period of three years [paras.217 and 242(6)].

NOTA BENE

The Tribunal Latino Americano del Agua is not legally speaking a court with a jurisdiction. It is neither a State court nor a regional court established by treaty between States, but a civil society movement. As such, its conclusions are neither legally binding nor advisory opinions. However, the 'judges' of the 'Tribunal' are experts who base their decisions on a meticulous legal examination of national, regional and international legal sources. The Tribunal Latino Americano del Agua's decisions can therefore be analysed as non-binding sources of legal reasoning related to the right to water.

***Fundación Chadileuvú c/ Estado Nacional Argentino
y Provincia de Mendoza***

Tribunal Latinoamericano del Agua

5 November 2012⁴⁵³

Keywords [Availability – Participation – Sustainability – Water – Right to water (violation) – Right to a healthy environment (violation) – Dam]

Abstract Diversion of an interprovincial river which deprives people of another province of sufficient water for human consumption, irrigation and livestock, amounts to a violation of the human right to water under international law and to a violation of the right to a healthy environment under Argentinean law.

Facts The river Atuel flows through the Argentinean Provinces of Mendoza (where it starts) and La Pampa (where it ends) and constituted an important 300-km long wetland where various vegetal and animal species could develop [para. 1]. The river flow was diverted in 1918 and 1937, which led to the diminution and almost disappearance of the main branch of the river [paras.4-5]. In 1948, an agreement was concluded between the National Government and the province of Mendoza regarding the construction of a dam in order to regulate the flow of the river and produce hydroelectric energy [para. 6]. Neither the law pertaining to the construction of the dam, nor the said agreement stipulated any clause safeguarding the ‘rights of La Pampa’ (a national territory under federal protection) [para. 7]. The population of La Pampa was left with almost no resources as a result of the destruction of the wetland and of the lack of water [para. 8], which has had a detrimental impact at different levels including physical, ecological, economic, social and cultural levels. In 1948, the National Department for Water and Electric Energy adopted Resolution 50/49 stipulating a temporary annual delivery of water to the population of La Pampa, for human consumption, irrigation and livestock, and recommending the realisation of studies in order to determine definitively the river flows for La Pampa [para. 10].

453. *Fundación Chadileuvú c/ Estado Nacional Argentino y Provincia de Mendoza* [2012] Tribunal Latinoamericano del Agua <<http://tragua.com/wp-content/uploads/2012/11/atuel.pdf>>.

Procedure A lower Administrative Court from the Irrigation Department of Mendoza did not acknowledge the Resolution and denied the competence of the National Government (*Nación*) in this respect [para. 11]. In 1987, the Nation's Supreme Court of Justice recognised the river Atuel as interprovincial, which involved ceding river flows to La Pampa, and asked both provinces to cooperate [para. 13]. A series of agreements between the authorities of Mendoza and La Pampa (granting river flows to La Pampa), and endorsed by the National Government (*Nación*) were celebrated subsequently but the authorities of Mendoza did not comply with them [paras.14-17]. The Chadileuvú Foundation filed a complaint with the Latin American Water Tribunal against the National State of Argentina and the Province of Mendoza.

Claims The applicant alleged that environmental rights of La Pampa had been violated and in particular the human right to water, and serious harm had been caused to the water ecosystem of the river Atuel, deemed as, 'essential for the progress of the present and future generations' [para. 23].

Applicable Law and References to Regional or International Instruments

- National Constitution of Argentina – Art. 41⁴⁵⁴
- General Environmental Law – Art. 4⁴⁵⁵
- Framework for the Environmental Management of Water (Law 25.688) – Arts. 3 and 7⁴⁵⁶
- UNGA Resolution 64/292⁴⁵⁷

Court Rationale The Tribunal observed that, based on the information provided, the National Government had failed to take any action to resolve the desertification issue in La Pampa and the situation endured by its inhabitants, while tolerating the unilateral use of the river by the province of Mendoza in breach of the provisions of Resolution 50/49. The Tribunal held that this amounted to a violation of 'the constitutional obligation to ensure equal opportunities for all people', which the 1994 reform completed with the 'right of every citizen to a healthy and balanced environment' [para. 23]. It further declared that the Government had failed to regulate the Framework for the Environmental Management of Water (Law 25.688), which required the creation of basin committees and their approval for the use of water [para. 24].

454. Constitución de la Nación Argentina 1994 (as amended).

455. Ley n° 25.675 de Política Ambiental.

456. Ley n° 25.688 Régimen de Gestión Ambiental de Aguas.

457. UNGA Res 64/292 (28 July 2010) UN Doc A/RES/64/292.

The Tribunal recalled its adherence to the ‘international jurisprudence regarding the universal recognition of the human right to water in adequate quantity and quality, as a fundamental human right, the full enjoyment of which should be protected by States’[Cons.1]. It also recalled that the absence of an integrated water basin management plan prevents the equitable use of resources, including water, by the inhabitants of the basin [Cons.2].

The Tribunal also referred to the UN General Assembly Resolution 64/292 recognising the human right to water and sanitation [Cons.4]; article 41 of the National Constitution on the right to a healthy environment [Cons.5-7]; and to the principles of solidarity and cooperation under article 4 of the General Environmental Law [Cons.8].

Consequently, the Tribunal found that the province of Mendoza and the National Government violated environmental standards and principles in force [Res.1] and did not comply with executive and judicial decisions and agreements regarding the river Atuel. It cautioned ‘on the need not to perpetuate the interprovincial conflict which implies the denial of the human right to water to the populations of La Pampa’ [Res.3].

Decision The Tribunal recommended that the governments of La Pampa and Mendoza ‘urgently establish a permanent minimum river flow to ensure the immediate use of water by the population of La Pampa ’ [Rec.2]. It further recommended the creation of an Interim Water Basin Committee representing both provinces equally and ensuring the participation of citizens, with immediate management purposes [Rec.3].

***Frente Amplio Opositor a Minera San Xavier
c/ Minera San Xavier SA de CV y Otros***

Tribunal Latinoamericano del Agua

11 October 2007⁴⁵⁸

Keywords [Quality – Sustainability – Water – Right to water (violation) – Mining pollution – Environmental and social damages – Obligation to protect]

Abstract Public authorities have an obligation to ensure that mining activities do not affect the population's enjoyment of the rights to water and the environment, especially in areas considered protected under Mexican law.

Facts In 1995, the Canadian company Metallica Resources Inc. (*Minera San Xavier SA de CV – MSX*) started mining exploration works in the municipality of Cerro San Pedro without holding the respective permits to modify the land use, and without having previously consulted the population [para. 3]. The open-pit mining project was carried out over the recharge area of the aquifer 2411 'San Luis Potosí', which supplied 40% of the total population of the state of San Luis Potosí [para. 4]. It is estimated that the current extraction in this aquifer will lead to over-exploitation and increased pollution [para. 5]. The mine continued to be operated despite the annulment of its permit by the Federal Court of Fiscal and Administrative Justice in October 2005, which identified a series of violations [para. 6].

Procedure The Large Opposing Front to the San Xavier Mine (*Frente Amplio Opositor a Minera San Xavier*), filed a complaint against the mining company MSX, the Office for the Environment and Natural Resources (SEMARNAT), the Government of San Luis Potosí and the Municipality of Cerro San Pedro.

Claims The applicant alleged that the amounts of cyanide used and the volumes of soil and water removed for mining operations caused damage to the environment which could be irreversible [para. 8]. It also alleged that the over-extraction of 32 million litres of water for the operation of the mine,

458. *Frente Amplio Opositor a Minera San Xavier c/ Minera San Xavier SA de CV y Otros* [2007] Tribunal Latinoamericano del Agua <<http://tragua.com/wp-content/uploads/2012/04/Caso-Mina-San-Javier.pdf>>.

and the social and environmental hazards resulting from the use of cyanide and sulphurous materials, constituted a threat to the environment and to the population [para. 9].

Applicable Law and Reference to Regional or International Instruments

- Decree on Fauna and Flora Preservation Zones⁴⁵⁹
- Ecological and Urban Code of San Luis Potosí⁴⁶⁰
- General Law on Ecological Balance and Environmental Protection⁴⁶¹
- Presidential Decree on Historical Monuments Zones⁴⁶²

Court Rationale The Tribunal recalled ‘the universal recognition of the human right to water in adequate quantity and quality as a fundamental right, the full enjoyment of which must be protected by States’ [Cons.1]. The Tribunal observed that the complexity of the existing environmental legal framework between the 3 levels of the Mexican Government prevented an effective coordination of responsibilities, which led to the circumvention of institutional obligations[Cons.4].

The Tribunal declared that the mining activities violated the Decree on Fauna and Flora Preservation Zones and the Presidential Decree on Historical Monuments Zones, as 75% of the mining activities were located within these protected areas. It also found that the mining activities violated the General Law on Ecological Balance and Environmental Protection and the Ecological and Urban Code of San Luis Potosí [Cons.6-7].

It noted that ‘the company recognised the pollution of surface and ground-water in its impact zone’ [Cons.8], and emphasised that the ‘strong social mobilisation from the local community did not receive appropriate institutional response’ [Cons.9]. The Tribunal found that the respondents were responsible for the environmental and social damages resulting from the activities of San Xavier’s mine [Res.1].

Decision The Tribunal recommended to the respondents:

- a. to stop the mining activities [Rec.1] and to respect international and national provisions applicable to the protection of the aquifer of San Luis Potosí [Rec.3].

459. Decreto de zona de preservación de flora y fauna 1993.

460. Código Ecológico y Urbano de San Luis Potosí, in Ley de Desarrollo Urbano del Estado de San Luis Potosí 2000.

461. Ley General del Equilibrio Ecológico y la Protección al Ambiente 1988.

462. Decreto presidencial de zona de monumentos históricos 1972.

- b. to undertake an independent and participatory study on the environmental damages caused in the mine's impact zone, and the possible mitigation and reparation measures, to be financed by the mining company.
- c. to establish compensation mechanisms for the impacts caused to the water systems and the environment in general, as well as for the potential damages to the population's health [Rec.4].

TLA/ PERU

Grupo de Formación e Intervención para el Desarrollo (GruFides) y Plataforma Interinstitucional Celendina (PIC) c/ Estado Peruano y Minera Yanacocha SRL

Tribunal Latinoamericano del Agua

7 November 2012⁴⁶³

Keywords [Participation – Availability – Quality – Sustainability – Water – Right to water (violation) – Mining – Irreversible damage – Obligation to protect]

Abstract Authorising a mining project that will irreversibly damage the ecosystem, including surface and groundwater resources, without having involved the local population in the decision-making process amounts to a violation of fundamental human rights, and in particular the human right to water under international human rights law.

Facts Within the framework of the Conga project which aimed at exploiting a gold, silver and copper open-pit mine [para. 4], the Yanacocha Mining Company started exploitation in 2004 while an Environmental Impact Assessment (EIA) was conducted between 2005 and 2007 [para. 6]. Two participatory workshops were organised during the elaboration of the EIA but no workshop was carried out before that, which prevented the inhabitants of the area to incorporate their concerns in the EIA before its content was established. The General Office for Mining Environmental Matters (*Dirección General de Asuntos Ambientales Mineros*) issued a report giving a favourable opinion to the approval of the project's EIA for the exploitation phase. The EIA was approved in October 2010. The EIA and other reports showed that the project would generate irreversible damage to the ecosystem of the affected area, including the loss of natural lakes and impact on more than 600 springs, affecting, as a consequence, the population and their human right to water [para. 24]. Technical reports and reports by Experts referred that the implementation of the project would clearly have consequences on both surface water and groundwater, in terms of water quality and quantity [para. 34].

463. *Grupo de Formación e Intervención para el Desarrollo (GruFides) y Plataforma Interinstitucional Celendina (PIC) c/ Estado Peruano y Minera Yanacocha SRL* [2012] Tribunal Latinoamericano del Agua <<http://tragua.com/wp-content/uploads/2012/11/congaperu.pdf>>.

Procedure After several administrative and legal complaints, which were rejected by the Peruvian authorities, a complaint was brought before the Inter-American Commission on Human Rights against the Peruvian State, requesting precautionary measures, in relation to the Conga project [para. 23].

The Group for Training and Intervention for Sustainable Development (Grufides) and the Inter-institutional Platform of Celendín filed a complaint with the Latin American Water Tribunal, against the Peruvian State and the Yanacocha Minning Company.

Claims The applicants, based on a series of technical expert reports, alleged that the Conga mining project will create irreversible damages to the ecosystem of the affected area and will have a negative impact on the quality and quantity of the water, affecting the population and their human right to water. Moreover, they alleged that the Government repressed the groups opposed to the project, criminalised the protest and did not provide for public participation mechanisms in the development of the project [para. 35].

Applicable Law and Reference to Regional or International Instruments

- Political Constitution of Peru – Art. 2(22)⁴⁶⁴
- UNGA Resolution 64/292⁴⁶⁵

Court Rationale The Tribunal held that one of the consequences of the Conga project would be its impact on the population and their human right to water [para. 24]. It emphasized that according to the EIA, the Conga project will have an impact on the water bodies caught within the limits of the project and that the quality and quantity of the water might be affected. It referred that a report by the Ministry for the Environment recognised that the project contemplates the disappearance of 4 lakes and that an international (alternative) expert report requested by the Government of Peru, refers that most of the project is located in an area considered as a fragile ecosystem by Peruvian laws; that the level of groundwater is, in general, close to the surface, and that the area of the project contains 600 springs, which are used by the population for different uses. The Tribunal recalled its adherence to the ‘international jurisprudence regarding the universal recognition of the human right to water in adequate quantity and quality, as a fundamental human right, the enjoyment of which must be protected by States’ [Cons.1]. The Tribunal subsequently referred to the UN General Assembly Resolution

464. Constitución Política del Perú 1993 (as amended).

465. UNGA Res 64/292 (28 July 2010) UN Doc A/RES/64/292.

64/292 recognising the human right to water [Cons.3], and to the right 'to enjoy a balanced and adequate environment for the development of life', protected by article 2(22) of the Constitution of Peru [Cons.4].

Decision The Tribunal decided to:

- a) urge the respondents to suspend definitively the exploitation of the Conga mining project [Res.1].
- b) denounce the series of irregularities and nullities regarding the mining concession and the privatization process of the water resources.
- c) question the powers of public bodies, such as the Ministry for the Environment, to guarantee effectively everyone's right to a balanced and adequate environment for the development of life.
- d) condemn the persecution and repression of the social movement, and the absence of public participation in the discussion and approval of the project [Res.4].
- e) remind the respondents of their 'obligations under international treaties to ensure the implementation of fundamental human rights, especially the right to water' [Res.5].

Comunidades Indígenas del Cantón de Sisimitepet y Pushtan del Municipio de Nahuizalco c/ Presidencia de la República de El Salvador y Otros

Tribunal Latinoamericano del Agua

12 September 2008⁴⁶⁶

Keywords [Participation – Quality – Availability – Water – Right to water (violation) – Indigenous peoples – Vulnerable people – Agricultural and livestock water pollution – Obligation to respect and protect]

Abstract The contamination of an indigenous peoples' water source by agricultural and livestock exploitations creates a high risk health situation to the members of the community, which could be exacerbated by the construction of a new dam, as such a project would imply a reduction of the water flow affecting the right to water of the indigenous communities, and amounting to a violation of indigenous rights as guaranteed under the Convention on Biological Diversity.

Facts Indigenous peoples of the cantons of Pushtan and Sisimitepet, located in the municipality of Nahuizalco, were directly supplied with water from the Sensunapán river in order to satisfy their basic needs [para. 2]. The economic activities of these indigenous peoples depend from the water resources provided by the river. Untreated water from agricultural and livestock activities flowed into the Sensunapán, Trozos, Cutajat and Papaluat rivers, leading to an alarmingly high level of bacteriological water contamination [para. 4]. The polluted water had high levels of total and fecal coliforms, turbidity, chloride, iron, manganese and ammonium, all of which being above the thresholds of the national drinking water standards [para. 5]. Due to environmental pollution and the absence of water treatment, infectious diseases spread amongst the local population [para. 6]. Additionally, since four dams have been operating along the Sensunapán river, the contamination of several water sources and the reduction of the water flow has been

466. *Comunidades Indígenas del Cantón de Sisimitepet y Pushtan del Municipio de Nahuizalco c/ Presidencia de la República de El Salvador y Otros* [2008] Tribunal Latinoamericano del Agua <http://tragua.com/wp-content/uploads/2012/04/veredicto_rio_sensunapan_guatemala_2008.pdf>.

observed [para. 7]. Nonetheless, construction work for the building of a new stage of the dam, known as Sensunapán II, was initiated [para. 8].

Procedure The indigenous peoples from Sisimitepet and Pushtan filed a complaint with the Latin American Water Tribunal against the President of the Republic of El Salvador, the Ministry for the Environment, the Ministry of Public Health and Social Assistance, and the municipality of Nahuizalco.

Claims The applicants alleged that their source of water (Sensunapán river) had been highly contaminated by the runoff of three agricultural and livestock exploitations and that the construction of a new dam (Sensunapán II) would further endanger their access to water for human consumption, irrigation, fishing and subsistence as a community. They also alleged that in relation to the new dam construction project there had been institutional omissions in terms of the public consultation process.

Applicable Law and Reference to Regional or International Instruments

- Convention on Biological Diversity – Art. 8(j)⁴⁶⁷
- ILO Indigenous and Tribal Peoples Convention⁴⁶⁸
- Rio Declaration on Environment and Development – Principles 10 and 15⁴⁶⁹

Court Rationale The Tribunal recalled ‘the universal recognition of the human right to water in adequate quantity and quality as a fundamental right, the full enjoyment of which must be protected by States’ [Cons.1]. The Tribunal highlighted that the serious bacteriological contamination of the water for human consumption due to the activity of the three agricultural and livestock exploitations created a high risk to the health of the population of Pushtan and Sisimitepet [Cons.6].

The Tribunal observed that the respondent State did not recognise its indigenous peoples, in spite of the recommendations of the United Nations CERD and the CDESCR. It added that water is in indigenous beliefs/cosmogony an essential element, of holistic nature, which transcends material and utilitarian preconceptions and that it should be considered as a fundamental element of indigenous peoples identity. It referred to the Convention on Biological Diversity (CBD) and in particular to article 8(j) CBD, which provides

467. Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

468. Convention concerning Indigenous and Tribal Peoples in Independent Countries (n° 169) (adopted 27 June 1989, entered into force 5 September 1991) 72 ILO Official Bulletin 59.

469. ‘Report of the United Nations Conference on Environment and Development’ (Rio de Janeiro 3-14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (Vol. I) Annex I.

that the benefits arising from the use of traditional knowledge, innovations and practices of indigenous peoples, which are relevant for the conservation of biological diversity and sustainable use of its components, have to be protected and promoted [para. Cons.4-5]. It referred to the potential shortage of water for irrigation, hygiene, fishing and recreation of a population estimated in 17,000 inhabitants, by the potential reduction of the water flow, which would be diverted and reduced by the construction and operation of the Sensunapán II [para. Cons. 7]. The Tribunal subsequently found that the potential construction of Sensunapán II would amount to a violation of article 8(j) CBD [Cons.9].

Decision The Tribunal held the respondent authorities responsible for their negligence in addressing and resolving the severe pollution of the Sensunapán river which affected the Pushtan and Sisimitepet communities [Res.1]. It further held the respondent municipal authorities responsible for not meeting the health and well-being needs of its population [Res.2]. It urged the Salvadoran authorities to eradicate the sources of the pollution originating from the three agricultural and livestock exploitations, and to ‘refrain from granting permits for the construction of Sensunapán II, in accordance with principles 10 and 15 of the Rio Declaration on Environment and Development (1992), of which El Salvador is a signatory’ [Res.3-4].

As a consequence, the Tribunal recommended to El Salvador:

- a. to recognise officially its indigenous peoples [Rec.1]
- b. to ratify the ILO Indigenous and Tribal Peoples Convention [Rec.2]
- c. to create the relevant mechanisms of participatory consultation regarding the exploitation of hydroelectric generation, integrating all stakeholders, ‘especially those identified as most vulnerable’ [Rec.3].
- d. to look for alternative plans of hydroelectric exploitation, which reduce the damages to the territories and social and productive systems of indigenous peoples.

A key aim of this publication is to share information about the legal enforcement of the human rights to water and sanitation. As such, it is a useful tool for judges, lawyers and those advocating for those rights and should prove essential for crafting legal complaints that better ensure accountability for violations of the rights to water and sanitation and achieving effective remedies for those suffering such violations.

The cases examined in this publication provide real world examples that demonstrate how the human rights to water and sanitation can be legally enforced before judicial and quasi-judicial bodies. They cover examples of legal enforcement of the range of human rights obligations, including the obligations to respect, to protect and to fulfill the rights to water and sanitation and to do so without discrimination. Cases involve direct application of rights to water and sanitation at the national level, the use of internationally recognized norms to inform rights at the national level, how to use the principle of indivisibility and interrelatedness of rights to enforce implicit rights to water and sanitation, and how regional and international mechanisms have enforced such rights when domestic remedies are not available or sufficient.

Furthermore, cases illustrate not only how individuals and groups can use the law and legal enforcement mechanisms successfully to achieve accountability and remedies, but also how those representing larger classes of persons or challenging the impacts of laws, policies and practices on the rights to water and sanitation can achieve remedies at the more structural and systemic levels

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