"rights enunciated in the present Covenant".[169] However neither of these factors establish whether or not the rather looser form of subordination adopted by the European Court will be operative in the case of article 2(2).

Despite references to articles 2(2) and 3 as independent rights,[170] there is little evidence to suggest that the Committee views article 2(2) as fully autonomous in the sense of article 26 ICCPR.[171] Indeed any reference to violations of civil and political rights has been justified by their impact on economic, social and cultural rights.[172] Given the more extensive supervisory mechanisms of the Human Rights Committee it would be unnecessary and duplicitous for the Committee on Economic, Social and Cultural Rights to enter into a review of discrimination in the field of civil and political rights.

On the other hand, several considerations suggest that the Committee is not ready to assign a strictly subordinate role to article 2(2). First, in dealing with questions of discrimination the Committee has not confined itself to rights explicitly laid down in the Covenant.[173] Secondly, it has clearly interpreted the notion of non-discrimination as one which calls for equality of access and opportunity.[174] It is this notion

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[169] In its General Comment No.18 (37) b/, c/, the Human Rights Committee implies that article 2(1) ICCPR is indeed subordinate. In referring to article 26 it states that it "does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right." As a result "the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant". *Supra*, note 57, at 175, para.12.

[170] This might be the inferred from the grouping of such provisions together with the substantive rights in General Comment No.3, ESCOR, Supp.3, Annex III, at 84, para.5, UN Doc.E/C.12/1990/8, (1991).

[171] *See above*, note 160.

[172] *See e.g.*, Simma, E/C.12/1990/SR.42, at 12, para.57.

[173] For example, the Committee has considered questions such as: the authority of women to start a business or open a bank account, Jimenez Butragueno, E/C.12/1989/SR.9, at 6, para.24; differential retirement ages, Sviridov, E/C.12/1987/SR.6, at 5, para.18, Simma, E/C.12/1988/SR.3, at 3, para.8; the right of men to paid leave to look after children, Jimenez Butragueno, E/C.12/1987/SR.12, at 4, para.14, Texier, E/C.12/1987/SR.19, at 10, para.47; persecution of the Bahai's, Alvarez Vita, E/C.12/1990/SR.42, at 11, para.56.

[174] In the Committee's guidelines adopted at its fifth session, reference is made to equality of opportunity in relation to article 6, and equality of access with regard to articles 11 and 13. *Supra*, note 59.

Meron comments that the Committee on the Elimination of Racial Discrimination has dealt with distinctions on the grounds of race in a similar manner. He concludes that "the 'common law' of the Convention is based on the notion of equality, rather than on its definition of racial discrimination". Meron, *supra*, note 10, at 291.

of equality, as noted above,[175] that has coloured the Committee's general approach to the implementation of the rights. To see non-discrimination as an objective as opposed to a procedural principle is to confer upon it an individual status.

The approach of the Committee would seem to be close to that of the European Court. Whilst it will not concern itself with matters that do not fall within the general scope of economic, social and cultural rights, it will not confine itself to combatting discrimination only in those areas where a violation of the substantive rights occurs. It is submitted that this is a suitable and balanced approach. To extend the scope of the provision beyond of economic, social and cultural rights would not only lead to possible conflicts with other human rights organs, but would impose too great a burden of work upon the Committee. On the other hand, to restrict the provision to a subordinate status would deprive it of any substantive value.

## V) STATE OBLIGATIONS

### A) IMMEDIATE OR PROGRESSIVE IMPLEMENTATION?

Whereas the obligation under article 2(1) ICESCR is progressive in nature, this does not seem to be the case as regards article 2(2). The fact of its physical separation from article 2(1) and the inclusion of the word "guarantee" draw one to the conclusion that States are under an obligation to eliminate discrimination immediately.[176] This was the interpretation advocated during the drafting of the Covenant,[177] and has been endorsed in the Limburg principles,[178] and in the practice of the Committee. The Committee expressly stated that it considered articles

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[175] *See above*, text accompanying notes 29-32.

[176] Klerk argues this point from the fact that the progressive implementation provision of article 2(1), only applies to the substantive articles in Part III. Article 2(2) is not subordinate to the other provisions in part II. Klerk, *supra,* note 9, at 261.

[177] The Lebanese proposal to include the word "guarantee" was preferred to that of the representative of France, which provided for progressive implementation. 8 UN ESCOR (274th mtg), at 13, UN Doc.E/CN.4/SR.274, (1952).

A proposal to amalgamate the first two paragraphs of article 2 [UN Doc.A/C.3/L.1054 and Add.1, (1962)] was considered unacceptable in the Third Committee. 17 UN GAOR, C.3, (1206th mtg), paras. 10-13, 11 UN Doc.A/C.3/SR.1206, (1962).

[178] Paragraph 35 reads:

"Article 2(2) calls for immediate application and involves an explicit guarantee on behalf of the States parties. It should, therefore, be made subject to judicial review and other recourse procedures".

*Supra*, note 54, at 127.

2(2) and 3 as being "capable of immediate application by judicial and other organs in many national legal systems."[179]

It would seem quite apparent that States are capable of eliminating most *de jure* discrimination immediately. There is certainly little justification for introducing new legislation or administrative practices that are discriminatory.[180] The most important factor appears to be the contention that the elimination of *de jure* discrimination does not involve significant economic expenditure. Thus in the case of Zaire, which was criticised for having a law that required women to ask permission from their husbands to work outside the home, it was felt that the question of economic development was irrelevant.[181] Klerk argues, that even in times of economic crisis "the introduction or the continuation of discriminatory practices can never be 'compatible with the nature of these rights'".[182] Accordingly, the promotion of the general welfare can not be achieved at the expense of one section of society. "Non-discrimination is not a favour that can be granted only in a time of a growing economy".[183]

However, it would be wrong to suggest that the elimination of discrimination will always be capable of being achieved immediately. First, it is undoubtedly true that certain forms of corrective action will inevitably involve considerable financial expenditure. For example, the elimination of discrimination as regards retirement ages or remuneration in employment[184] may involve employees being paid more for longer periods of time. Secondly, a distinction between *de jure* and *de facto* discrimination should be established.[185] Whereas the former may be eliminated by the creation and enforcement of relevant legislation, the existence of *de facto* discrimination, as evidenced through material inequalities and individual prejudice, is a matter that cannot be overcome overnight. Longer-term social and educational programmes are needed to eliminate *de facto* discrimination in a progressive manner. It is

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[179] General Comment No.3, *supra*, note , at 4, para.5.

[180] Klerk, *supra*, note 9, at 262; This was also the conclusion of the Third Committee, 17 UN GAOR, Annex, (Ag. Item 43), para.64, UN Doc. A/5365, (1962).

[181] *See*, Texier, E/C.12/1988/SR.17, at 6, para.36.

[182] Klerk, *supra*, note 9, at 263.

[183] *Ibid*, at 264.

[184] *See below*, Chapter 6.

[185] Cohen has drawn a similar distinction. He sees action to eliminate elements of discrimination in policies, programmes, procedure and criteria as "corrective action"; whereas action to give disadvantaged groups equal standing with the majority he calls "compensatory action". Cohen C., "Affirmative Action and the Rights of the Majority", in Fried L., Minorities: Community and Identity, 353, at 355 (1983).

relevant to note here that the specialised instruments on discrimination all imply that States are entitled to eliminate discrimination gradually.[186] This conclusion is more evident in so far as States are required to combat discrimination by third parties, and to achieve equality of opportunity.

B) THE TYPE OF ACTION REQUIRED

As regards *de facto* discrimination,[187] legislative action must be considered a necessary first step in any policy. Members of the Committee have looked towards legislative measures as evidence of a State's commitment to eliminating discrimination.[188] Thus one member commented that:

> "The Covenant did not automatically imply that legislation was an indispensable component of a policy designed to eliminate discrimination in employment, for example. However, it was evident that, if that were the interpretation adopted by Governments, the burden of proof would lie with those Governments, which would therefore be expected to show that the non-legislative measures that they had taken effectively ensured the elimination of discrimination and that it was not essential to take legislative measures."[189]

It is evident that any legislative measures taken, to be effective, should be accompanied by judicial remedies.[190] The provision of such remedies seems to be particularly appropriate given the duty to "guarantee" the exercise of the rights without discrimination.

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[186] ILO Convention, art. 2; UNESCO Convention arts 3 and 4; and ICEDAW, art 2. ICERD article 2(1) also appears to allow for progressive implementation, but in article 5 requires States parties to "guarantee" equality before the law. *Cf.* Yilmaz-Dogan v.Netherlands, CERD Report, 43 UN GAOR, Supp.(No.18), at 59 (1988).

[187] Action to combat *de jure* discrimination merely involves repealing the offending legislation or administrative directive. *See e.g.*, Jimenez Butragueno, E/C.12/1990/SR.42, at 16, para.86.

[188] Questions have been asked as to legal prohibition against discrimination against women, Jimenez Butragueno, E/C.12/1987/SR.7, at 6, para.23; and legislative measures taken to prevent dismissal of pregnant women, Mrachkov, E/C.12/1988/SR.10, at 6, para.25.

[189] Alston, E/C.12/1987/SR.6, at 3, para.8.

[190] Members of the Committee have thus asked *inter alia*: what penalties are provided for violations of non-discrimination laws in employment, Simma, E/C.12/1989/SR.15, at 2, para.3; how many decisions have been made regarding discrimination in housing, Rattray, E/C.12/1990/SR.2, at 11, para.63; What effective remedies exist in the courts for women, Jimenez Butragueno, E/C.12/1988/SR.19, at 4, para.12.

Although legislation is certainly important, it will not necessarily be completely effective. As suggested above, those aspects of discrimination which relate to social attitudes can not be eliminated immediately merely through the enforcement of relevant legislation. Here, other measures, particularly educational and social, are more appropriate.[191] It has been suggested in the Committee that States are expected to undertake programmes to combat the discriminatory attitudes and prejudices of the population.[192] In particular, action should be directed towards the elimination of stereotypes whether racial, religious, sexual or other.[193]

The need to take measures beyond legislative action is particularly evident in the pursuit of equality of opportunity. Inequality of opportunity is often the result of inequality in the economic condition of various groups in society, of social and cultural expectations that affect potential development, or of differences that result from the education and training recieved. Thus action in favour of real equality of opportunity calls for extensive measures in the whole field of economic, social and cultural rights, particularly as regards education, vocational training, and social promotion and protection.[194] As one member of the Committee recognised:

> "There was... a need to transcend the formal approach to equality in order to gain insight into the obstacles to equality in daily life, and the arrangements made through education, for instance, to make sure that equality really was achieved".[195]

On the one hand, this requires the removal of any impediments that might stand in the way of equality of opportunity.[196] On the other hand, it also necessitates that certain positive steps are taken to promote the position of vulnerable and disadvantaged groups in society. The degree to which such affirmative action measures are necessary will be discussed

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[191] A memorandum of the Secretary General recognized that:
"It is clear that forms of discrimination which deny legal rights may and should be fought by legal measures, while those which comprise merely social treatment must chiefly be fought by education and by other social measures".
UN Doc.E/CN.4/Sub.2/8, at 2 (1947).

[192] *See e.g.*, Alvarez Vita, E/C.12/1988/SR.14, at 6, para.32.

[193] *See e.g.*, Jimenez Butragueno, E/C.12/1990/SR.16, at 8, para.37. *See also*, Valticos N., International Labour Law, 111 (1979).

[194] *Ibid.*

[195] Rattray, E/C.12/1987/SR.16, at 9, para.40.

[196] *See e.g.*, Jimenez Butragueno , E/C.12/1991/SR.4, at 13, para.67.

below. It is clear nevertheless that legislative measures alone will not be sufficient in such cases.[197]

## C) AFFIRMATIVE AND PROTECTIVE ACTION

A distinction has occasionally been drawn between affirmative and protective measures. Affirmative measures are those taken to enable disadvantaged sectors of the population to assert their right to equality of opportunity.[198] Protective measures, on the other hand, are meant to protect inherently vulnerable groups such as children and those with physical or mental disabilities, whose vulnerability is not temporary in nature.[199] There is some evidence for such a distinction being made in the Covenant itself. Article 10 provides for special measures of protection for the family,[200] mothers before and after childbirth,[201] and children.[202] The legitimacy of affirmative action and of protective action outside the specified contexts however, has to be read into the provisions of article 2(2).

### 1) The Obligation to take Affirmative Action.

As noted above, the concept of discrimination itself suggests that only those who are situated equally must be treated equally.[203] It is implicit that differential treatment is on occasions legitimate. The principle of equality, however, goes further in requiring differential treatment to combat *de facto* discrimination.[204] Despite no reference to

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[197] *See e.g.* Texier, E/C.12/1989/SR.10, at 8, para.43.

[198] This is sometimes known as "positive" or "reverse discrimination". Such terminology is most often used by opponents of affirmative action. It will not be used here as it is somewhat contradictory given the definition of discrimination described above.

[199] Dinstein, *supra*, note , at 15. However other commentators do not make such a distinction, *see*, Mckean who notes that article 10 ICESCR provides for protective action for children and mothers. He argues that it recognizes that such measures of protection "in order not to be discriminatory must be temporary". McKean, *supra*, note 21, at 152.

[200] Article 10(1).

[201] Article 10(2).

[202] Article 10(3).

[203] *See above*, text accompanying notes 3-4.

[204] Capotorti emphasizes that while the quesitons of non-discrimination and minority protection are distinct in that the the former requires uniform treatment and the latter special treatment, they are in fact "two aspects of the same problem: that of fully ensuring the equal rights to all persons". *Supra*, note 15, at 14. *See also*, McKean, *supra*, note 21, at 142.

affirmative action in the text of the Covenant, it is clear from the travaux préparatoires that such measures were not intended to be considered discriminatory.

In the drafting of the Covenant an Indian proposal suggested the inclusion of an explanatory paragraph reading:

> "Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as 'distinction' under this article"[205]

The Indian member argued that the principle of non-discrimination:

> "raised certain problems in the case of the particularly backward groups still to be found in many under-developed countries. In his country, the constitution and the laws provided for special measures for the social and cultural betterment of such groups; measures of that kind were essential for the achievement of true social equality in highly heterogeneous societies. He felt certain that the authors of the draft Covenant had not intended to prohibit such measures, which were in fact protective measures... He therefore thought it essential to make it clear that such protective measures would not be construed as discriminatory within the meaning of the paragraph."[206]

The proposal was finally withdrawn, it having been made clear that the

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Goldstein argues that "even in the unusual cases in which equality requires differential treatment, it is still limited to that: ie., differential, not preferential, treatment is required." Goldstein S., "Reverse Discrimination- Reflections of a Jurist", 15 Isr.Y.H.R., 28, at 30 (1985). It is unclear exactly what he means by such a distinction as it might be argued that any difference in treatment involves some form of preference. A more valid distinction could be drawn between differences in treatment that are intended to promote a vulnerable group in a general sense and those that aspire to achieving some numerical representation. The latter aspires to a form of absolute equality, whereas the former may be so constructed to allow for the intercession of individual choice, presenting less of a restriction upon the rights of members of the majority.

[205] UN Doc.A/C.3/SR.1182, para.17 (1962). As an alternative he sought the insertion of an explanatory statement in the report.

Similarly, a Belgian proposal (UN Doc.A/C.3/L.1030, (1962)) to add a clause to article 2(2) explaining that the prohibition did not extend to protective measures taken on the basis of age and sex, was withdrawn on the basis that this was understood in the terms of the Three-Power Amendment. UN Doc.A/C.3/SR.1204, para.29 (1962).

[206] UN Doc.A/C.3/SR.1183, paras.12, 29 (1962). It was clear however in speaking of "protective measures" the Indian representative, in commenting that such measures were essentially temporary, meant affirmative action. UN Doc. A/C.3/SR.1257, para.18 (1963).

Three-Power Amendment implicitly included this understanding.[207] As a matter of comparison, article 1(4) CERD and article 4(1) CEDAW do contain explicit statements to the effect that affirmative action measures may be taken.[208]

Even if the travaux preparatoires do recognise the legitimacy of affirmative action, there is little indication outside the scope of article 3,[209] that such positive measures are in fact required. Facing a similar situation as regards the ICCPR the Human Rights Committee has made a positive statement in this regard. In its General Comment 4/13 it stated in relation to articles 3, 2(1) and 26 of the ICCPR that the prevention of discrimination "requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws".[210] On this basis, commentators have argued that States are indeed obliged to take affirmative action for the benefit of disadvantaged groups.[211]

The Committee has directed a number of questions towards the issue to affirmative action especially as regards people with physical disabilities[212] and ethnic or racial minorities.[213] In doing so it seems to accept the legitimacy of such action even if there is a residual concern

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[207] This is the import of the discussion over the use of the term "discrimination" as opposed to "distinction". *See above*, text accompanying notes 42-46.

During the drafting of Article 27 ICCPR, relating to the rights of minorities, it was recognized that differential treatment might be granted to them to ensure real equality of status with the other elements of the population. UN Doc. A/2929, *supra*, note , at 181.

[208] The Committee on the Elimination of Discrimination Against Women recommended that "States Parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment". General Recommendation 5, (7th Sess. 1988), at 109, UN Doc.A/43/38, (1988).

[209] *See,* UN Doc. A/C.3/SR.1182, para.11 (1962).

[210] General Comment 4/13, 36 UN GAOR, Supp.(No.40), at 109, UN Doc. A/36/40, (1981). *See also*, ILO Convention, article 2; UNESCO Convention, article 4; CERD, article 2(2); CEDAW, article 3.

[211] *See e.g.*, Ramcharan, *supra,* note 1, at 261.

[212] *See e.g.*, Jimenez Butragueno, E/C.12/1989/SR.15, at 4, para.15; Fofana, E/C.12/1990/SR.11, at 4, para.19; *ibid*, E/C.12/1991/SR.4, at 12, para.64.

[213] Questions have been asked as to: measures taken to ensure ethnic balance in schools, Badawi El Sheikh, E/C.12/1989/SR.10, at 10, para.59; special treatment given to racial minorities in employment, Wimer Zambrano, E/C.12/1987/SR.20, at 10, para.45; special measures taken to ensure respect for cultural life of the gipsy community, Texier, E/C.12/1988/SR.14, at 7, para.41; Alvarez Vita, E/C.12/1991/SR.11, at 13, para.75.

over the effect such action may have on the economy.[214] Nevertheless, it has not explicitly recognised the obligatory nature of affirmative action. It could be argued that the Committee implicitly recognises such an obligation through its requirement that States concentrate upon the situation of vulnerable and disadvantaged groups in society.[215] This is a matter that ideally should be made clear in a future General Comment.

2) <u>The Form of Affirmative Action.</u>

It is clear that affirmative action in the field of economic, social and cultural rights can take a number of forms. At one extreme it might involve merely the provision of special benefits to disadvantaged groups such as advice, training, housing or food. At the other extreme affirmative action might take the form of quota systems in public employment, education, or employment training.

As regards the first form of affirmative action, there seems to be little reason to reject policies that involve selective distribution of resources[216] or special facilities for the promotion of disadvantaged groups.[217] However, much criticism has been directed at affirmative action which envisages the distribution of benefits on the basis of "suspect classifications", particularly through the imposition of "quota systems". It is reasoned that it involves a process of discrimination against those who are deprived of employment, for example, as the result of a requirement of numerical representation,[218] for which reason they may engender hostility and resentment.[219] It is also possible that a person from one disadvantaged group may be deprived opportunity as a result of such a system.[220] Perhaps most conclusively, quota systems advocate a form of absolute equality that takes little account of the notion of individual choice.

Members of the Committee have given little indication of what forms of positive measures they consider to be legitimate. Cognisance

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[214] *See e.g.*, Neneman, E/C.12/1988/SR.18, at 2, para.5.

[215] As noted above, this conclusion depends upon whether the action is seen to be directed towards the realisation of the rights themselves or at achieving equality of opportunity. *See above*, text accompanying notes 25-28.

[216] Goldstein accedes to this which he considers as an integral part of the political process, *supra*, note 204, at 31.

[217] This is not always viewed as affirmative action in its true sense, as the action may be justified on the basis of present disadvantagement rather than past discrimination.

[218] Cohen, *supra*, note 185, at 356; Schachter, *supra*, note 15, at 295.

[219] Schachter, *supra*, note 15, at 305.

[220] Goldstein, *supra*, note 204, at 39.

has been made of a wide range of training and fiscal measures[221] but no objection has as yet been made regarding the imposition of quotas.[222]

It is submitted that the Committee should at least assess the nature and extent of any affirmative action measures by reference to the purpose for which they were instituted. Not only should such action conform to the necessity of promoting equality of opportunity, its extent should also be proportionate to the measure of existing disadvantagement. Consideration should thus be given to other possible courses of action that do not involve the apportionment of benefits on the basis of "suspect classifications". The imposition of quotas might be justified as an extreme measure to remedy a particularly urgent situation of disadvantagement that is closely associated with *de facto* discrimination against one social group. It should be remembered nevertheless, that such affirmative measures are to be instituted as a temporary expedient, and should not form part of a permanent strategy.

3) A Case of Protective and Affirmative Action: Minority Groups.

The question of protective and affirmative action is particularly problematic with regard to ethnic and racial minorities. On the one hand the social marginalisation of such groups might justify affirmative action with a view to integrating them within the State-development process. On the other hand, the need to maintain their cultural independence and self-determination argues in favour of protective measures being taken to ensure development outside that of the majority.[223]

Arguably, the Covenant itself does recognise the different needs of ethnic minorities particularly as regards their cultural identity. Although article 15 merely states that everyone has the right to "take part in cultural life", a recognition of legitimate differences in belief and tradition is to be found in articles 13(3) and (4). Under those articles, parents have the right to establish and choose schools other than those established by the public authorities. Similarly, the reference to self-determination in article 1 of the Covenant might be interpreted as implying that minorities have a right to pursue their own "economic,

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[221] Questions have been asked *inter alia* as to: subsidies to allow poor access to cultural life, Neneman, E/C.12/1988/SR.3, at 9, para.43; training and support for women's cooperatives, Simma, E/C.12/1989/SR.6, at 10, para.45.

[222] Quotas referred to have included: measures to ensure ethnic balance in schools, Badawi El Sheikh, E/C.12/1989/SR.10, at 10, para.59; a law reserving two percent of jobs for the disabled, Jimenez Butragueno, E/C.12/1989/SR.15, at 4, para.15.

[223] *See generally*, Thornberry P., "Self-Determination, Minorities, Human Rights: A Review of International Instruments", 38 I.C.L.Q., 867 (1989); Sohn L., "The Rights of Minorities", in Henkin L.(ed), The International Bill of Rights, 270 (1981).

social and cultural development" without excessive interference from the authorities.[224] Although these provisions would appear to stress freedom from State interference in the maintenance of an independent identity, the question remains as to the extent to which the Covenant places positive obligations upon States to promote the cultural rights of minorities.

The Committee quite clearly supports the adoption of positive measures in favour of minorities in so far as they are disadvantaged. In addition however, despite the obvious pitfalls in defining "ethnic minorities" for the purpose of taking protective measures,[225] Committee members have endorsed the idea that ethnic minorities are entitled to some form of independence and consequently protective measures.[226] It is considered that ethnic groups and indigenous populations should accordingly have the right to express themselves in their own language, enjoy their own culture,[227] and establish their own educational institutions if they choose to do so.[228] In addition, members have

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[224] As the Human Rights Committee stated with respect to article 27 ICCPR:
"...the rights protected by article 27 include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong."
UN Doc.A/45/40, Vol.II, App.A, para.32.2 (1990).

[225] *See*, Sigler and Caportati, *supra*, note 34.
It may be noted here that the institution of protective measures in favour of ethnic minorities can be assimilated only as a group right. This is not the case for other actions under article 2(2). A difference can be made between rights that fall upon the individual as a result of his or her membership of a group, and rights that belong to the individual who is to be identified by means of a group membership. Thus one member of the Committee commented with regard to a reply of the representative of Iran:
"The delegation's statement about the definition of minorities raised an interesting legal point but failed to address the real issue. Whether or not minority rights were treated as group rights was irrelevant to the existence of the rights of individual members of those groups."
Alston E/C.12/1990/SR.43, at 8, para.42.

[226] *E.g.* Taya, E/C.12/1987/SR.16, at 4, para.14. A similar conclusion can be found in analysis of the work of the Human Rights Committee with respect to article 27. Cholewinski R., "State Duty to Ethnic Minorities: Positive or Negative?", 10 Hum.Rts.Q., 344 (1988).

[227] *See e.g.*, Texier, E/C.12/1988/SR.13, at 9, para.39

[228] *See e.g.*, Rattray, E/C.12/1990/SR.16, at 10, para.54. Judge Tanaka commented in respect of minorities that the notion of equality before the law
"prohibits a State to exclude members of a minority group form participating in rights, interests and opportunities which a majority population group can enjoy. On the other hand, a minority group shall be guaranteed the exercise of their own religious and education activities. This guarantee is conferred on members of a minority group, for the purpose of protection of

generally been critical of attempts to assimilate such groups into the mainstream,[229] one member going so far as to make note of their right to self-determination.[230] The Committee however, has not made any clear statement as to the obligation of States to take positive action to ensure that that separate cultural identity was maintained.[231]

D) THIRD PERSONS

In contrast to article 2(1)(d) ICERD and articles 2(b), (e) and (f) of CEDAW which require the State to bring an end to racial discrimination by any persons, group, or organization, the Covenant makes no reference to discrimination between private individuals. Similarly, the travaux préparatoires make little specific mention of an obligation on the part of States to ensure non-discrimination between private individuals.[232] It is only possible to infer such an obligation from references to *de facto* equality.[233]

That States undertake to "guarantee" the exercise of the rights without discrimination, however, suggests that the obligation does extend beyond merely the control of public bodies. Indeed, to the extent that States are required to control private activity in relation to the substantive articles (for example to ensure safe and healthy working conditions), article 2(2) should also apply. One commentator concludes

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their interests and not from the motive of discrimination itself. By reason of protection of the minority this protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not."

*Supra*, note 7.

[229] *See*, Alston, E/C.12/1988/SR.13, at 13, para.71; Alvarez Vita, E/C.12/1990/SR.16, at 7, para.29. Recognition of certain problems have been identified however. Thus Mr Wimer Zambrano commented:

"Recognition of indigenous languages, which reflected a concern to respect the traditions and the cultural identity of different indigenous populations, nevertheless ran counter to another objective of equal importance in countries of Latin America, the desire to achieve assimilation"

E/C.12/1990/SR.18, at 14, para.89.

[230] *See*, Konate, E/C.12/1989/SR.8, at 10, para.52.

[231] *Cf.* Article 27 ICCPR, which has been interpreted by the Human Rights Committee as obliging States to take positive steps to ensure the enjoyment of the cultural rights of minorities. *See*, McGoldrick D., "Canadian Indians, Cultural Rights and the Human Rights Committee", 40 I.C.L.Q., 658 (1991).

[232] Klerk, *supra*, note 9, at 266.

[233] *See above*, text accompanying notes 12-16.

that "under Article 2(2) and 3 states are equally obliged to prohibit others to practice discrimination in public life".[234]

The Committee has expressed some interest in the need to protect the rights of individuals against possible violations by other individuals,[235] and has in particular looked towards control of the private sector. No distinction is made as regards article 2(2). Although there is certainly greater concern as regards the activity of public bodies,[236] members of the Committee have thus looked towards the operation of non-discriminatory norms between private groups and individuals such as in private sector employment[237] and health care.[238]

Even if it is accepted that the obligation in article 2(2) is not restricted to public bodies, some consideration needs to be given to the extent to which States are under a duty to regulate the actions of private individuals. There is clearly a tension here between individual freedom or privacy and the demands of combatting discrimination.[239] As Henkin notes:

> "That racial discrimination is often private discrimination means that efforts to eliminate it meet resistance from competing values of individual right which also have attractive claims in human dignity".[240]

During the drafting of article 26 ICCPR it was made clear that individual preferences or the exercise of individual choice, were not to be subject to legal regulation.[241] However matters of everyday life, such as housing, transport, restaurants, and employment were deemed to be capable of

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[234] Klerk, *supra*, note 9, at 267.

[235] For the operation of the concept of "drittwirkung", *see above*, Chapter 2, text accompanying notes 28-42.

[236] For example many questions are directed exclusively at public employment, *see e.g.*, Jimenez Butragueno, E/C.12/1991/SR.3, at 11, para.51.

[237] Questions have been directed towards: differences of retirement ages in the private sector, Jimenez Butragueno, E/C.12/1988/SR.10, at 8, para.39; equal access of women to employment in the private sector. Simma, E/C.12/1989/SR.8, at 8, para.46; and maternity leave for women in private sector, Mrachkov, E/C.12/1987/SR.8, at 7, para.30.

[238] *See e.g.*, Rattray, E/C.12/1990/SR.2, at 10, para.61.

[239] Meron interpretes the right of association as restricting the scope of the principle of non-discrimination "so as to protect strictly personal relations from its reach". Meron, *supra*, note 10, at 294.

[240] Henkin L., "National and International Perspectives on Racial Discrimination", 4 H.R.J., 263, at 265 (1971).

[241] Saudi Arabia, UN Doc.A/C.3/SR.1099, para.18 (1961); Pakistan, UN Doc.A/C.3/SR.1102, para.4 (1961).

control by the State.[242] Ramcharan concludes rather generally that "certain types of discrimination by individuals, other than in personal and social relationships, would violate the guarantees of the Covenant and that a state party is under an obligation to take measures against such forms of discrimination".[243] The task is clearly one of defining the threshold between the exercise of individual choice and the control of discriminatory behaviour in public life.

Within the scope of the Covenant there are a number of areas in which the State might be obliged to ensure non-discrimination. For example, access to private employment or training, the rental of private accomodation, admission to trades unions or private educational establishments, access to privately owned cultural facilities (such as theatres or cinemas). Whilst it might be said that there is a *prima facie* case for regulating the activities of all such institutions and individuals, it has to be recognised that there is also a need to protect the intimate and personal activities of individuals in their association with others. For example, it would not be appropriate for the State to intervene in a landlord's choice as to who to have as a lodger in the same house. Meron's conclusion is particularly evident here:

> "While certain private and interpersonal, associational relations would be insulated from the reach of the Convention, the activities of large private entities and of basically unselective organisations would be regarded as publicly available goods and services".[244]

According to this view, the degree of intervention should reflect the size and selectivity of the organisation concerned.

The Committee has not, at this stage, made any attempt to rationalise the competing demands in this area. For example, in one case the Austrian representative noted that there was a problem of discrimination in the private sector as "wages were freely agreed between employer and employee and because of the high value attached to the independence of the social partners".[245] Although apparently negating any State responsibility for discrimination in the sphere of private sector employment, this statement was rather superficially accepted by the Committee without comment.

It is submitted that the Committee needs to address these complex problems with more precision with a view to establishing some principle to describe State obligations as regards discrimination between private

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[242] USSR, UN Doc.A/C.3/SR.1098, para.6 (1961).

[243] Ramcharan, *supra,* note 1, at 262-263.

[244] Meron, *supra*, note 10, at 295.

[245] Berchold (Austria), E/C.12/1988/SR.4, at 3, para.11.

individuals and bodies. As a minimum, the Committee needs to ensure that States themselves are aware of the competing principles and have laws and regulations that reflect a balanced approach.

## VI) CONCLUSION

Although the concepts of non-discrimination and equality are arguably central to the implementation of the Covenant, they have been given remarkably little attention either in the drafting of the Covenant or in the practice of the Committee. Given the complexity and controversial nature of the issues involved, there is manifestly a need for the Committee to make some clear statement as to its position. In particular, attention needs to be paid to the notion of equality of opportunity in so far as it is seen as being a relevant objective of the Covenant. This is so not merely by virtue of the fact that it gives rise to claims for affirmative and protective action, but also to the extent that it poses problems of measurement.

In relation to the principle of non-discrimination, the Committee appears to have adopted a position analogous to that of other human rights bodies. It has interpreted article 2(2) in a relatively broad manner both as to its scope *ratio materiae* and *ratio personae*. Although the article is not deemed to be entirely autonomous in the sense of article 26 ICCPR, it covers both direct and indirect discrimination by public authorities and private individuals. Similarly, the article is not limited to those "suspect" classifications specifically enumerated, but may also cover other unreasonable differentiations.

Even here however, there is room for greater specificity. Although it is clearly necessary for article 2(2) to apply beyond the restricted classification of grounds upon which discrimination is prohibited, the Committee needs to establish what additional grounds it considers to be "suspect" and the level of scrutiny with which it will evaluate differentiations. As regards regulation of the activities of private individuals a balance has to be struck between the demands of individual choice and freedom and the necessity of combatting discrimination in the longer-term. As suggested, the Committee should look initially to ensure that States reflect such a balance in their laws and administrative practices.

# CHAPTER FIVE: THE RIGHT TO WORK

*Article 6*

*1. The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take the appropriate steps to safeguard this right.*

*2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

## I) INTRODUCTION

Despite the statistical existence of unemployment in every country in the world, work continues to be "an essential part of the human condition".[1] For many, it represents the primary source of income upon which their physical survival depends. Not only is it crucial to the enjoyment of "existence rights" such as food, clothing or housing,[2] it affects the level of satisfaction of many other human rights such as education, culture and health. Article 6, however, is not so much concerned with what is provided by work (in terms of remuneration), or the conditions of work, but rather in the value of employment itself. It thus gives recognition to the idea that work is an important element in maintaining the dignity and self-respect of the individual.

## II) THE TRAVAUX PREPARATOIRES

The initial idea of including an article on the right to work was discussed in the General Assembly's Third Committee in 1950.[3] The Socialist States argued for the inclusion of such an article on the basis that it formed one of the "cornerstones of modern society"[4] and gave

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[1] Sieghart P., The Lawful Rights of Mankind, 123 (1986).

[2] *See*, Tomes I., "The Right to Work and Social Security", 8-9 Bull.Czech.L 192, at 196 (1967-8); Van der Ven J., "The Right to Work as a Human Right", 11 Howard L.J., 397, at 405-406 (1965).

[3] UN Docs, A/C.3/SR.289-91, 297-99, 5 GAOR, C.3, 289th-91st and 297th-99th mtgs, (1950).

[4] Hoffmeister (Czechoslovakia), A/C.3/SR.299, para.33 (1950).

other rights "a foundation in reality".[5] In particular it was felt that the right to work was essential in the context of the right to life as providing the "means towards living".[6]

In the following year, a number of proposals were made concerning an article on the right to work in a Working Group of the Commission on Human Rights.[7] These, together with a number of other proposals, were considered by the Commission on Human Rights at its seventh session in 1951.[8] The Commission draft was then reviewed by the General Assembly's Third Committee in 1956 which produced the final version of the article.[9]

## A) A GUARANTEE OF THE RIGHT TO WORK

The initial proposals fell into three main groups. First, the Socialist States made proposals in which the State would "guarantee" or "ensure" the right to work.[10] Secondly, some Western States proposed that States should "promote conditions" under which the right to work might be realised.[11] Finally, certain other States proposed a compromise formula in which it was merely stated that everyone should have the right to work[12] (a decision on whether or not the obligation should be progressive being deferred until the adoption of a general clause). It became apparent that many States would not accept an obligation to "guarantee" the right to work in the sense of ensuring full employment or eliminating unemployment. In particular, it seems to have been felt that such a guarantee would bind States to a centralised system of government in which labour was under the direct control of the State.[13]

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[5] Panyushkin (USSR), A/C.3/SR.297, para.54 (1950).

[6] Afnan (Iraq), A/C.3/SR.298, para.64, (1950).

[7] E/CN.4/AC.14/2, at 3 (1951).

[8] E/CN.4/SR.205-7 and 216-218, (1951).

[9] UN Doc.A/C.3/SR.709-713 (1956).

[10] *See e.g.*, USSR proposal, E/CN.4/AC.14/2, at 3, (1951).

[11] *Ibid*, proposals of USA, Denmark and Egypt.

[12] *Ibid*, proposal of Yugoslavia. *See also*, proposal of ILO, E/CN.4/AC.14/2/Add.1, (1951).

[13] Roosevelt (USA), E/CN.4/SR.269, at 6, (1952); Later she commented:
"...it was difficult to see how democratic States could guarantee absolutely and by their own action the right to work to all persons without becoming totalitarian States."
E/CN.4/SR.275, at 11, (1952).

It was made clear that in many countries, the achievement of the right to work was dependent upon the economic climate in which it operated. External constraints relating to the international trade situation or a lack of raw materials[14] made the achievement of the right to work contingent upon international action as well as a particular national economic or social policy.[15] In that light it was generally considered that the right to work could only be achieved in a progressive manner.[16] More extremely, some felt that a guarantee of the right to work was in fact impossible at any stage.[17]

In using the stock formula in which the States Parties "recognise" the right to work the drafters clearly placed article 6 within the compass of article 2(1) which provides for the progressive realisation of the right.[18] However, whilst rejecting the term "guarantee", the delegates seemed to be concerned primarily with the obligation to achieve full employment. It is unclear from the drafting whether it was intended that all aspects of the article, such as the obligation to refrain from imposing forced labour, were intended to be progressively implemented.

B) <u>OPPORTUNITY TO GAIN HIS LIVING</u>

The majority of proposals that gained broad support utilised the term "opportunity to gain his living by work" in some form.[19] This specific wording was proposed in order to underline the fact that the individual must be able to earn a living wage.[20] It was criticised, however, because it was seen to limit the concept of work to that which

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[14] *See*, Rossel (Sweden), E/CN.4/SR.216, at 6, (1951).

[15] *See*, Cassin (France), E/CN.4/SR.275, at 12, (1952).

[16] *See e.g.*, Bowie (UK), E/CN.4/SR.206, at 10, (1951); Sorensen (Denmark), E/CN.4/SR.207, at 10, (1951); Roosevelt (USA), E/CN.4/SR.276, at 6, (1952).

[17] *See e.g.*, Cassin (France), E/CN.4/SR.269, at 4, (1952); Hoare (UK), E/CN.4/SR.278, at 8, (1952).

[18] That article 6 was to be governed by the general implementation clause was the reason for the rejection of additional articles on the implementation of the right to work. *See e.g.* UN Doc.E/2256, at 16-17, 14 ESCOR, Supp.4, (1952).

[19] *See e.g.*, Proposal of France, E/CN.4/576; proposal of ILO, E/CN.4/AC.14/2/Add.1.

[20] *See*, Cassin (France), E/CN.4/SR.216, at 27, (1951).

generated income,[21] and because the question of remuneration fell more clearly within the scope of article 7.[22]

Although inclusion of the phrase did have considerable support, the main controversy lay over the precise relationship between the right to work and the opportunity to gain one's living by work. The original proposal accepted at the Commission's seventh session linked the right to work with the opportunity to gain one's living by the phrase "that is to say".[23] Although it was argued that the concepts in fact described two separate rights,[24] the majority felt that the opportunity to gain one's living was, in part at least, a definition of the right to work.[25] A Greek amendment to alter the phrase to read "the fundamental right to work, which includes the right of everyone to the opportunity to gain his living by work"[26] was ultimately adopted,[27] it being felt that the right to work "did not mean simply the right to remuneration but the right of every human being to do a job freely chosen by himself, one which gave meaning to his life."[28] Although the other elements within the right to work were unfortunately not spelled out,[29] the discussion implies that it includes, at least, the right not to be arbitrarily deprived of work of any kind, whether remunerative or otherwise.

There was some underlying confusion as to the exact nature of State obligations that were implicit in the right to gain a living through work. Some States seem to have considered that the opportunity to work

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[21] *See,* Yu (China), E/CN.4/SR.216, at 25, (1951).

[22] *See,* Azmi Bey (Egypt), E/CN.4/SR.216, at 29, (1951).

[23] Article 20 of the draft covenant read:
" Work being the basis of all human endeavour, the States Parties to the Covenant recognize the right to work, that is to say, the fundamental right of everyone to the opportunity, if he so desires, to gain his living by work which he freely accepts."
UN Doc.E/1992, Annex 1, at 23, ECOSOC OR, 13th Sess., Supp.9, (1951).

[24] *See,* Pazhwak (Afghanistan), A/C.3/SR.709, at 137, para.28 (1956).

[25] *See e.g.*, Diaz Casanueva (Chile), A/C.3/SR.709, at 137, para.34 (1956); Ponce (Ecuador), A/C.3/SR.711, at 148, para.12 (1956).

[26] UN Doc.A/C.3/L.536. A similar amendment was to use the word "as" in place of "that is to say". *See* Mufti (Syria), A/C.3/SR.709, at 137, para.31 (1956).

[27] 42 votes to ten with 13 abstentions. The word "fundamental" was deleted from the final version. UN Doc.A/3525, at 4, para.28, 11 UN GAOR, Annexes, C.3, Ag.Item 31, (1956).

[28] Thierry (France), A/C.3/SR.709, at 138, para.37 (1956); *See also*, Mufti (Syria), A/C.3/SR.710, at 144, para.42 (1956).

[29] *Cf.* Marriott (Australia), A/C.3/SR.711, at 150, para.36, (1956).

obliged the State to provide work for all who wished to do so.[30] Other States, however, considered that the opportunity to work merely implied that the State should restrain itself from preventing persons from working.[31] A general reading of the debate would suggest that a position of compromise was reached that enabled the word "opportunity" to be included by consensus.[32] Whereas market or mixed economy States would not accept an obligation to provide employment, as suggested above, they could accept a position where they were responsible for developing employment opportunities.[33] Presumably the development of employment opportunities could be achieved either directly through State employment or indirectly by developing the economic conditions for increasing private sector employment.

C) FREE CHOICE IN EMPLOYMENT

A certain tension between a guarantee of the right to work and free choice in employment was identified in the early stages of drafting.[34] It was considered inconceivable that everyone should be provided with work of their own choosing by the State. If the State was obliged to provide employment, it could not be required to cater entirely for individual choice but would obviously limit job opportunities according to the requirements of the country's economic development.[35] Some States accordingly suggested that free choice of employment should be qualified for the purpose of maintaining full employment.[36] The majority, however, looked to the primacy of free choice over the achievement of full employment through the provision of labour by the State.[37]

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[30] *See e.g.*, Azkoul (Lebanon), E/CN.4/SR.268, para.8, (1952); Jevremovic (Yugoslavia), E/CN.4/SR.277, para.11, (1952).

[31] *See e.g.*, Nisot (Belgium), E/CN.4/SR.268, para.8, (1952); Pazhwak (Afghanistan), A/C.3/SR.710, at 141, para.7, (1956).

[32] E/CN.4/SR.218, para.7, (1952).

[33] *See*, Diaz Casanueva (Chile), A/C.3/SR.710, at 144, paras 37-38, (1956).

[34] *See e.g.*, Jevremovic (Yugoslavia), E/CN.4/SR.205, at 11, (1951); Bowie (UK), E/CN.4/SR.206, at 10, (1951); Rossel (Sweden), E/CN.4/SR.216, at 6, (1951).

[35] *See*, Santa Cruz (Chile), E/CN.4/AC.14/SR.3, at 15-16, (1951).

[36] *See e.g.*, Valenzuela (Chile), E/CN.4/SR.206, at 23, (1951); Ahmed (Pakistan) A/C.3/SR.709, at 138, para.39, (1956).

[37] The USSR representative objected, for example, that free choice could be used to justify unemployment and the lack of measures to combat it. Morosov (USSR), E/CN.4/SR.218, at 7, (1951).

There was considerable concern that the right to work should contain some indication that forced labour or slavery should be illegal.[38] It was pointed out that the prohibition of forced labour was implicit in the concept of a "right to work" which could be invoked or not, as a matter of choice,[39] and that it was already covered by article 5 of the Covenant.[40] Nevertheless proposals were made to include the phrase "of his own choice"[41] or "who so desires"[42] to indicate this concern. The latter term was the one chosen initially, together with the stipulation that work be freely accepted.[43] The term "choice" was rejected on the basis that it might have implied that governments undertook to find the employment of everyone's choosing.[44] The inclusion of both the terms "desires" and "freely accepts" seemed to stress that people should not only be free from coercion in their choice of occupation but also be at liberty not to work at all.

However at a later stage the position was reversed. The term "desires" was deleted in favour of the phrase "work which he freely chooses or accepts".[45] One justification for the deletion of the term "desires" was that it might be seen as a legitimisation of "social parasitism".[46] For those States that instigated the change, work was not

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[38] *See e.g.*, Simarsian (USA), E/CN.4/SR.216, at 18, (1951); Sender (ICFTU), E/CN.4/SR.216, at 19, (1951).

[39] *See*, Jevremovic (Yugoslavia), E/CN.4/SR.216, at 20, (1951); Cassin (France), E/CN.4/SR.216, at 27, (1951). Cassin later commented:

> "Article 20 [later article 6] contained both the positive and negative aspects, like the word 'droit' itself. Inherent in that word was the notion that it could be exercised voluntarily; otherwise it would be an obligation. Equally inherent was the notion of the ability to exercise the right."

He went on to argue that there was therefore no need to include the words "opportunity" or "desires" within the text. E/CN.4/SR.268, at 9, (1952).

[40] *See e.g.*, Malik (Lebanon), E/CN.4/SR.217, at 11, (1951).

[41] *See e.g.*, Mehta (India), E/CN.4/SR.216, at 24, (1951).

[42] *See e.g.*, Sorensen (Denmark), E/CN.4/SR.216, at 9, (1951).

[43] UN Doc. E/1992, Annex 1, at 23, *supra*, note 23. It would seem that the inclusion of the term "freely accepts" was similarly intended to prohibit forced labour. *See*, Simarsian, E/CN.4/SR.217, at 10, (1951).

[44] *See*, Myrddin-Evans (ILO), E/CN.4/SR.216, at 29, (1951).

[45] UN Doc.A/3525, at 3-4, paras 25 and 28, *supra*, note 27.

[46] *See*, Aznar (Spain), A/C.3/SR.709, at 137, para.30, (1956); Jaramillo Arrubla (Colombia), *ibid*, at 138, para.44; Nestor (Rumania), A/C.3/SR.712, at 153, para.7, (1956). One member of the Third Committee felt he could not support the term "desires" as it was at variance with his States' vagrancy laws. Rivas (Venezuela), A/C.3/SR.710, at 143, para.21, (1956).

merely a right but also a duty.[47] Fortunately, however, the possibility that the individual might be obliged in law to take up some form of employment, as seems to be implied here, was not subject to full agreement. First, a number of States emphasised that the concept of a right to work did not allow for the possibility of a co-existent duty to work. Secondly, if work must be freely accepted as article 6 requires, it is difficult to see how a duty to work could ever be enforced. It was thus the presence of the phrase "freely accepts" which was generally considered to prohibit forced labour, that led to the deletion of the word "desires" as being essentially redundant.[48]

The term "chooses", far from carrying the implications assigned to it in the Commission's debate, was merely intended to strengthen the existing meaning of the article. In the final analysis it seems that the term "chooses" covered the right to choose a trade or profession whilst the term "accepts" covered the right to accept or refuse an offer of employment.[49] As such the alterations did not substantially change the meaning assigned to the original Commission version of the article.[50] Despite opposition,[51] the article seems to have been adopted on the strength of this analysis.

D) <u>FULL EMPLOYMENT</u>

Despite the rejection of proposals for a guarantee of the right to work, there remained considerable support for the inclusion of a reference to full employment.[52] This led a contemporary commentary to conclude that the presence of paragraph 2 seemed to include the right to be provided with work, in addition to the right not to be prevented

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[47] *See e.g.*, Aznar (Spain), A/C.3/SR.709, at 137, para.30, (1956). That there might be some conflict between the free choice of work and the duty to work was dispelled by one member:

> "...the obligation to work and freedom to work were in no way incompatible. Men ought to work, but they should be free to choose their trade or profession."

Jaramillo Arrubla (Columbia), A/C.3/SR.709, at 138, para.44, (1956). How an obligation to work and a freedom not to accept work can be reconciled is unclear. This somewhat dubious reasoning was not followed in that delegates' later statements. *Cf.*A/C.3/SR.712, at 154, para.14, (1956).

[48] *See e.g.*, Aznar (Spain), A/C.3/SR.710, at 141, para.4 (1956); De Almeida (Brazil), A/C.3/SR.710, at 142, para.11 (1956)

[49] *See*, Jaramillo Arrubla (Colombia), A/C.3/SR.712, at 154, para.14, (1956).

[50] *Cf.* Cheng (China), A/C.3/SR.710, at 144, para.35, (1952).

[51] *See e.g.*, Elliot (UK), A/C.3/SR.712, at 154, para.8, (1956).

[52] *See e.g.*, Fischer (WFTU), E/CN.4/SR.217, at 4, (1951); Whitlam (Australia), E/CN.4/SR.277, at 10, (1952); *see generally*, UN Doc. E/2256, para.110, ECOSOC OR, 14th Sess., Supp.4, (1952).

from working.[53] However, the debate on paragraph 1 does not seem to bear this out. Any such right to employment was to be viewed in relation to the State obligation to secure full employment in a progressive manner, which in itself was conditional upon the economic development of the country concerned.

In recognising "full employment" as merely being a method of implementation,[54] a proposal to include it in a second paragraph to article 6 extended into a debate on the more general question of whether specific implementation clauses should be included within the substantive portion of the Covenant. Even following the adoption by the Commission of a second paragraph relating to full employment, certain members advocated its deletion.[55] It was argued that it was better to state the principle of the right to work in general terms leaving the specifics of implementation to the ILO. Additionally, not only was it illogical to insert specific implementation clauses in some articles and not others,[56] but also the proposals were limited and indeed self-evident.[57] However it was felt that in order for the Covenant to go beyond the UDHR[58] it was necessary for the specifics of implementation, beyond those found in article 2,[59] to be spelt out where possible.[60] As far as article 6 was concerned, more detailed standards

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[53] UN Doc. A/2929, *ibid*, at 103, para.2.

[54] It was noted that full employment could either be seen as a means for ensuring the right to work or as a separate goal. *See*, Azkoul (Lebanon), E/CN.4/SR.276, at 13, (1952).

[55] UK Amendment, A/C.3/L.534.

[56] *See*, Elliot (UK), A/C.3/SR.710, at 143, para.26, (1956).

[57] *See*, Elliot (UK), A/C.3/SR.709, at 137, para.29, (1956); Shipley (Canada), *ibid*, para.32; Thierry (France), *ibid*, at 138, para.38.

[58] It was felt that without paragraph 2, article 6 would not differ substantially from the UDHR. Abdel-Ghani (Egypt), A/C.3/SR.710, at 143, para.20, (1956). In particular some States seemed to be driven by the rather erroneous idea that without paragraph 2 States would not be bound *inter se* with respect to article 6. *See e.g.*, Ponce (Ecuador), A/C.3/SR.711, at 148, para.13; Pudlak (Czechoslovakia), *ibid*, at 149, para.19.

[59] *See*, Eustathiades (Greece), A/C.3/SR.710, at 143, para.29, (1956).

[60] *See*, Diaz Casanueva (Chile), A/C.3/SR.710, at 144, para.38, (1956); Massoud-Ansari (Iran), A/C.3/SR.711, at 149, para.31.

had been established in ILO instruments,[61] and had already gained general acceptability on the international plane.[62]

So for the majority, the question was not the inclusion of a second paragraph relating to full employment, but what elements should be referred to therein. It was made clear that the obligation to achieve full employment was only one method of securing the right to work,[63] even if considered the most important.[64] This point was made apparent in the final version of article 6 which stipulates that the steps to ensure the right to work "shall include" the obligation to achieve full employment. Paragraph 2 thus is not an all inclusive paragraph.

1) Economic Development

There was general agreement that the achievement of full employment was dependent upon the structure and economic development of each country.[65] On the other hand, proposals to make reference to the technical means for ensuring full employment,[66] in particular the need for "economic expansion" or "development",[67] were subject to opposition. It was argued that a reference to development might leave the way open for States to avoid their obligations[68] and that it would duplicate and even limit article 2.[69] In response it was submitted that a reference to economic expansion or development was indeed necessary,[70] being justified by the text of articles 55 and 56 of

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[61] *See*, Vlahov (Yugoslavia), A/C.3/SR.710, at 142, para.9, (1956).

[62] *See*, Morosov (USSR), A/C.3/SR.710, at 142, para.15, (1956).

[63] *See*, Hoare (UK), E/CN.4/SR.278, at 8, (1952).

[64] *See*, Santa Cruz (Chile), E/CN.4/SR.216, at 11, (1951).

[65] *See e.g.*, it was commented that the aims of article 6 would only be achieved "only in so far as the States provided every opportunity for employment and ensured a stable economy in which only temporary unemployment would be possible". Sender (ICFTU), E/CN.4/SR.276, at 9, (1952). *See also*, Roosevelt (US), E/CN.4/SR.276, at 6, (1952); Santa Cruz (Chile), *ibid*, at 8.

[66] *See*, Juvigny (France), E/CN.4/SR.276, at 11, (1952); Cassin (France), E/CN.4/SR.278, at 4, (1952).

[67] In the end the preference was for the word "development". *Cf.* E/CN.4/SR.278, at 13, (1952).

[68] *See*, Azkoul (Lebanon), E/CN.4/SR.276, at 12, (1952); Kovalenko (USSR), E/CN.4/SR.278, at 3, (1952).

[69] *See e.g.*, Rossel (Sweden), E/CN.4/SR.277, at 3, (1952).

[70] *See*, Waheed (Pakistan), E/CN.4/SR.277, at 6, (1952).

the UN Charter.[71] That mention should be made of economic development was finally accepted by the Commission. In the Third Committee however, despite certain reservations,[72] it was decided that development should not be limited to the economic field, and that social and cultural development should also be mentioned to give the article fuller expression.[73]

It would seem that the inclusion of the reference to economic, social and cultural development, not only highlights the perceived interdependence of article 6 and the other articles within the Covenant, but also re-emphasises that article six is intended, in part at least, to be progressively implemented.

2) National and International Programmes

In the light of the external considerations that bear upon a particular country's economic development, it was also proposed that article 6 should refer explicitly to "national and international programmes to achieve economic development.[74] Although members were in accordance with the intentions of the proposal,[75] concern was expressed as to the precise obligations that ensued[76] and the limitative effect they might have on article 2.[77] Delegates seem to have been satisfied finally by an assurance that on the basis of article 2, national and international action was implicit in the proposal and therefore did not have to be explicitly mentioned.[78]

3) Legislative Measures

Similarly a suggestion that article 6(2) should refer to legislative measures was rejected on the basis that it was not entirely clear how full

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[71] *See*, Santa Cruz (Chile), E/CN.4/SR.277, at 3, (1952).

[72] *See e.g.*, Marriott (Australia), A/C.3/SR.711, at 150, para.34, (1956); Cheng (China), A/C.3/SR.712, at 154, para.10, (1956).

[73] *See*, Pazhwak (Afghanistan), A/C.3/SR.709, at 137, para.28, (1956); Mufti (Syria), *ibid*, para.31; Ponce (Ecuador), A/C.3/SR.711, at 148, para.12, (1956).

[74] *See*, Santa Cruz, E/CN.4/SR.276, at 8, (1952).

[75] *See e.g.*, Rossel (Sweden), E/CN.4/SR.277, at 3, (1952).

[76] *See*, Hoare (UK), E/CN.4/SR.276, at 10, (1952); Azkoul (Lebanon), E/CN.4/SR.276, at 12, (1951).

[77] *See*, Roosevelt (USA), E/CN.4/SR.277, at 7, (1952).

[78] *See*, Roosevelt (USA), E/CN.4/SR.277, at 8, (1952). Nevertheless the provision was rejected by only a very small minority of six votes to five with seven abstentions.

employment could be ensured in that manner.[79] This does not discount the possibility that legislation might be necessary on occasions. Moreover, the context of the debate would appear to restrict this conclusion to the achievement of full employment, and not for example, the prohibition of discrimination in employment.

4) Productive Employment

At a number of stages during the drafting of article 6 it was often submitted that work should be productive.[80] Although little discussion took place over the inclusion of this word in the final stages, it seems to have been intended to prohibit the adoption of social projects of little significance merely to draw in the unemployed for the purpose of maintaining full employment.

5) Fundamental Political and Economic Freedoms

The US proposal to achieve full employment "under conditions ensuring fundamental political and economic freedoms to the individual" had a certain amount of support.[81] This proposal reflected the concern of Western States that full employment was not an objective to be imposed through totalitarian means at the expense of democracy and freedom.

It was argued that the term "freedoms" should not be limited to fundamental ones, but should be expanded to include all political and economic freedoms.[82] However it was countered that the purpose was to safeguard only those freedoms which were fundamental in relation to

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[79] Chile proposed that States should adopt legislation at a suitable time guaranteeing full employment. Santa Cruz (Chile), E/CN.4/SR.275, at 11, (1952). The Chilean amendment was criticised for emphasising legislative measures as a means for securing full employment. Azkoul (Lebanon), E/CN.4/SR.276, at 12, (1952); Mehta (India), E/CN.4/SR.277, at 7, (1952).

[80] *See*, Santa Cruz (Chile), E/CN.4/SR.216, at 24, (1951); Fischer (WFTU), E/CN.4/SR.217, at 4, (1951). This must be distinguished from the proposal that the right to work should be limited to "socially useful" work, which was suggested as a recognition that society requires its members to undertake work that contributes to the general well-being. *See*, Whitlam (Australia), E/CN.4/SR.217, at 12, (1951); Ciasullo (Uruguay), *ibid*, at 10; Yu (China), *ibid*, at 12.. There was a certain amount of opposition to the term "socially useful" as it was thought it might be open to abuse by States. Myrddin-Evans (ILO), E/CN.4/SR.217, at 16, (1951).

[81] *See*, Azkoul (Lebanon), E/CN.4/SR.276, at 12, (1952); Rossel (Sweden), E/CN.4/SR.277, at 3, (1952). One participant suggested thus that States should seek to prevent further unemployment and achieve full employment under conditions satisfying material needs and with "respect for freedom and the safeguarding of moral and spiritual value." Sender (ICFTU), E/CN.4/SR.276, at 10, (1952).

[82] *See*, Pazhwak (Afghanistan), A/C.3/SR.709, at 137, para.28.

the right to work and not just any freedom,[83] and that to include all freedoms was too vague and might sanction abuse.[84] It is submitted that this was a meaningless debate. Nowhere was it defined what freedoms were considered to be "fundamental", or which ones were considered to relate to the right to work. Perhaps all that could be concluded from the discussion is that the phrase was intended to prohibit "trade-offs" between the right to work and other civil and political rights.

6) Steps to be Taken

As suggested above there were questions over the extent to which the various proposals modified article 2(1) itself. It was made clear that the purpose of article 6(2) was not to limit article 2 but rather to outline certain conditions which were required for the full attainment of the right to work.[85] The inclusion of the words "steps to be taken" confirmed the intention that article 6(2) should merely be an elaboration of the general implementation provision in article 2(1).[86]

However, it should be made clear that not all the steps were conceived of as existing on the same theoretical level. For example, the reference to development was included only in so far as it related to the achievement of full employment. On the other hand, although full employment must be seen as method of implementing the right to work, it was also be presented as a goal in its own right.[87]

E) ABILITY

A number of proposals were made to the effect that the right of access to work should be made subject to the limitations of aptitude, ability and qualifications. Although there were no real objections to such a proposal, it did not gain any significant support. The proposal to include a reference to ability is particularly interesting to the extent that it might be seen to draw upon the notion of equality of opportunity. Whilst non-discrimination in employment could fall within the terms of article 6 read in conjunction with article 2(2), the stipulation of certain limitations within article 6 would have suggested that a positive rather

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[83] *See*, Eustathiades (Greece), A/C.3/SR.709, at 138, para.35.

[84] *See e.g.*, Rivas (Venezuela), A/C.3/SR.710, at 143, para.22, (1956); Diaz Casanueva (Chile), *ibid*, at 144, para.38.

[85] *See*, Roosevelt (USA), E/CN.4/SR.277, at 8, (1952).

[86] The US proposal was accordingly amended by the Lebanese proposal to become the new joint amendment E/CN.4/L.95.

[87] For a discussion on the interrelationship between the substance of the rights and their means of implementation *see above*, Chapter 2, text accompanying notes 61-64.

than a negative approach should be taken. In other words instead of outlining the cases in which discrimination is illegitimate, it would reverse the situation and provide only for the cases in which discrimination is legitimate.

## III) THE APPROACH OF THE COMMITTEE

### A) A GUARANTEE OF THE RIGHT TO WORK

The specific wording of article 6 (which utilises the term "recognise"[88]), supported by the travaux preparatoires[89] and a number of commentators,[90] clearly dismiss the idea that the right to work should necessarily be "guaranteed". Nevertheless, a number of the Committee members have looked towards a legal guarantee of the right to work.[91] One member has even argued that such a guarantee should be formally enshrined in the Constitution.[92] However, it is difficult to envisage how such a guarantee should operate.

A guarantee of the right to work would seem to imply that the State should provide a job for every person who is available for and willing to work. To correspond to the requirements of human dignity, such a guarantee would have to ensure that the type of work suited the skills and aptitudes of the individual worker concerned, and that the individual be given the right to refuse employment. Inevitably, the institution of such a guarantee would involve considerable control of the labour market and expenditure. It is clear that even in those States that do "guarantee" the right to work, it is generally conditional upon the needs of society, off-set by a duty to work and implemented through the

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[88] The term "recognise" is seen as being an indication that the provision is considered to fall within the confines of article 2(1), *see above*, Chapter 2, text accompanying note 189.

[89] *See above*, text accompanying notes 10-18.

[90] *See e.g.*, Van den Berg G. and Guldenmund R., "The Right to Work in East and West" in Bloed A., and Van Dijk P.(eds) Essays on Human Rights in the Helsinki Process, 103 at 111 (1985). *See also* with respect to the UK, Hepple B., "A Right to Work" 10 Ind.L.J. 65 at 73 (1981). It is also interesting to note that the International Labour Conference decided not to provide for a guarantee of the right to work, *see*, Mayer J., "The Concept of the Right to Work In International Standards and the Legislation of ILO Member States" 124 I.L.R., 225 at 239 (1985).

[91] *See e.g.*, Badawi El Sheikh, E/C.12/1987/SR.5, at 3, para.10; Mratchkov, E/C.12/1989/SR.18, at 4, para.11; Neneman, E/C.12/1990/SR.11, at 5, para.27.

[92] *See*, Kouznetsov, E/C.12/1990/SR.15, at 6, para.27. The form which such an expression should take in the Constitution however was not established.

political framework as opposed to law.[93] The situation is even less favourable in market economies where control of labour is insufficient and in developing countries where lack of resources constrain the institution of such a guarantee. Thus in those States where reference to the right to work may be found in their constitutions, it is expressly of a long-term and promotional nature.[94]

In contrast to the occasional reference to a "guarantee" by individual members, the Committee as a whole seems to have taken a more reserved attitude towards the right to work. As one member noted, "it was clear that the right to work could be implemented only if work was available".[95] Accordingly, the Committee has looked towards the implementation of policies and measures aimed at ensuring that there is "work for all who are available for and seeking work".[96] The clearly progressive nature of the obligation indicates that the Committee views article 6, at least as far as the obligation to secure full employment is concerned, as falling squarely within the terms of article 2(1).

## B) ELEMENTS OF THE RIGHT TO WORK

Despite the fact that a guarantee of the right to work is not realistic, it would be superficial to view article 6 merely as requiring the progressive achievement of full employment. That full employment is merely referred to in article 6(2) as one of the steps to achieve the full realisation of the right to work suggests that other elements are implicit in the right which have yet to be spelt out. A right to work in a broader sense seems to encompass two general areas of concern: a right to enter employment and a right not to be unjustly deprived of employment.[97] As far as the former is concerned, it includes all matters that affect access to work such as levels of unemployment, non-discrimination and equal opportunities, vocational guidance and

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[93] *See*, Hepple B., "Security of Employment", in Blainpain R.(ed), Comparative Labour Law and Industrial Relations at 475 (3rd Ed 1987).

[94] Mayer, *supra*, note 90, at 237-8.

[95] Sparsis, E/C.12/1987/SR.5, at 7, para.31.

[96] Revised guidelines regarding the form and content of reports to be submitted by States parties under article 16 and 17 of the International Covenant on Economic, Social and Cultural Rights. ESCOR, Supp.(No.3), Annex IV, 88 at 90, UN Doc.E/1991/23, (1991).

[97] For example, the Constitution of Luxembourg provides in Article 11 for a right to work. This has been interpreted as providing for free choice of employment, free access to employment and freedom from discrimination. *See*, UN Doc.E/1990/5/Add.1, at 2, para.3.

training, and education. The latter field on the other hand concerns employment security and in particular security against unfair dismissal.

Further elements of the right to work are specifically stipulated in article 6 which provides that the right to work "includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". The reference to the opportunity to gain one's living suggests that a minimum remuneration should be provided that satisfies basic needs. This finds more precise recognition in article 7. The reference to freely chosen work seems to provide for a "right not to work" which implies a prohibition of forced labour, and even perhaps legitimises a right to strike.

In the next section, the three main elements of the right to work namely, access to employment, freedom from forced labour, and security in employment will each be discussed in turn.

1) Access to Employment

a) Full Employment

Although article 6(2) was conceived of as being an "implementation clause" in as far as it outlined state obligations as opposed to individual rights,[98] there is no doubt that it forms an indissoluble element in the achievement of the right to work. This is more apparent if it is considered that the "steps" outlined in the Covenant form partial definitions of the "rights".[99] Whereas full employment might be posited as a precondition to the full realisation of the right to work, it must be conceded that an individual's right to work is not necessarily conditional upon the existence of full employment.

It is apparent that the Committee expects there to be some degree of unemployment in every State with which it deals. Thus, as far as the Committee was concerned, there was considerable scepticism as to Czechoslovakia's assertion that unemployment was non-existent,[100] particularly in view of the existence of a system in Czechoslovakia to assist the unemployed.[101] In the context of economics, however, it is generally conceded that the notion of "full employment" does not mean the total absence of unemployment. Forms of unemployment have traditionally been devided into three categories: frictional unemployment, cyclical (or demand-deficiency) unemployment and

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[98] *See above*, text accompanying notes 54-64.

[99] *See above*, Chapter 2 text accompanying notes 61-64.

[100] *See e.g.*, Konate, E/C.12/1987/SR.13, at 5, para.21.

[101] *See*, Simma, E/C.12/1987/SR.13, at 9, para.41; Texier, E/C.12/1987/SR.13, at 10, para.50.

structural unemployment.[102] Whereas cyclical and structural unemployment are matters of serious public concern,[103] frictional unemployment represents the number of people between jobs and as such is not a reflection of the inadequacy of the labour market, but rather of employment mobility. Given that a measure of unemployment (in a general sense) is inevitable, it is surely appropriate for the Committee to define what it understands by the term "full employment" and the extent to which it considers it to be a realistic objective.[104]

Here the text of the article is instructive. In outlining the steps to be taken to achieve the realisation of the right to work, article 6(2) does not speak merely of full employment, but rather of "policies and techniques to achieve... full and productive employment". The achievement of full employment then is not something that the article actually requires. Rather, what is required is a policy that directs itself towards that end.

It is clear from the Committee's comments upon article 2(1) that an essential precondition to the formulation of precise and effective policies is an accurate evaluation of the present situation.[105] Thus according to the Committee's guidelines, States are required to produce information on the "situation, level and trends of employment, unemployment and underemployment".[106] In practice members of the Committee have also expected States to offer some form of explanation for the current level of unemployment[107] and further information on the nature of the unemployment (for example the amount of long-term unemployment)[108]. In addition information is requested as to the level of unemployment with respect to specific categories of workers, and it

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[102] *See e.g.*, Scott M. and Laslett R., Can We Get Back to Full Employment?, 10-11 (1978). Other definitions also include seasonal unemployment, *see*, Worswick G., "Summary", in Worswick G.(ed), The Concept and Measurement of Involuntary Unemployment, 305 (1976).

[103] "Cyclical unemployment" is generally considered to be a result of deficiency of demand for labour; "structural unemployment" is unemployment that results from imperfections in the labour market (such as a mismatch between training and labour demand).

[104] It was traditionally considered that an unemployment level of abour 3% was consonant with full employment. For a discussion of "target rates" of unemployment *see*, Blackaby F., "The Target Rate of Unemployment", in Worswick G.(ed), The Concept and Measurement of Involuntary Unemployment, 279 (1976).

[105] *See above*, Chapter 2, text accompanying notes 75-77.

[106] Reporting guidelines, *supra*, note 96, at 90.

[107] *See*, Texier, E/C.12/1987/SR.5, at 6, para.23; Sviridov, E/C.12/1987/SR.6, at 5, para.16.

[108] *See*, Texier, E/C.12/1989/SR.6, at 5, para.20.

has offered as examples "women, young persons, older workers and disabled workers". This corresponds to the obligation to identify vulnerable or disadvantaged persons, groups, regions or areas with regard to employment.[109] Such areas of concern will clearly vary from country to country and the State will have considerable discretion in identifying them. Nevertheless members of the Committee have generally looked for information on the employment situation of each of the above groups and occasionally on the situation of particular ethnic groups.[110] Any information provided should be placed in the context of the situation both five and ten years previously.[111]

Accurate and useful measurement of unemployment, however, is subject to serious difficulties. Whereas unemployment may be estimated with relative ease in developed States, in developing States, which have a smaller percentage of the working population in wage employment (many being self-employed) and have less well-developed social security systems, unemployment is considerably more difficult to measure. In addition, in developing States, the figures of unemployment are likely to disguise serious underemployment (in the sense of employees having insufficient work).[112] Although the Committee has begun to tackle the question of statistical indicators in general,[113] it has not as yet done so in the context of full-employment.

As noted above, on the basis of their evaluation of the situation, States are expected to pursue a policy with the aim of ensuring that there is work for all who are available for and seeking work.[114] The precise nature of such a policy has not been specifically provided for by the Committee although reference is made to ILO standards in this area,

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[109] Reporting guidelines, *supra*, note 96, at 90.

[110] The following questions are exemplary: What was Jamaica doing to reduce the high unemployment rate, particularly in the case of women? Neneman, E/C.12/1990/SR.11, at 5, para.27. What measures was Canada taking to reduce the high level of unemployment especially among women and children? Mratchkov, E/C.12/1989/SR.8, at 7, para.36. What were the trends of unemployment among young women and ethnic groups? Simma, E/C.12/1989/SR.8, at 8, para.43; Neneman, E/C.12/1989/SR.8, at 9 para.49.

[111] Reporting guidelines, *supra*, note 96, at 90.

[112] *See*, Squire C., Employment Policy in Developing Countries 58-65 (1981).

[113] *See below*, Chapter 9.

[114] Such an obligation is sometimes Constitutionally entrenched, *e.g.* Panama, E/1984/1/Add.19, at 2.

particularly the Employment Policy Convention of 1964 (No.122).[115] One member has commented that the mere identification of four objectives of public policy was not a sufficient indication that an employment policy as envisaged by Convention No.122 had been established. Such a policy "seemed to be required if a State wished to prove that it was making every possible effort to ensure full employment."[116] Beyond the question of the sufficiency of the policy concerned, members of the Committee have looked for both policies to combat unemployment in general[117] and policies that are directed at assisting specific vulnerable and disadvantaged groups.[118]

There is room for the Committee to expand further upon the type of policy it expects. It is submitted that States should be expected to show that they have a coherent strategy of the short, medium and long-term which has as a central aim the achievement of full employment. In this respect it is arguable that a government policy that was directed at the achievement of economic growth at the expense of maintaining a permanent pool of unemployed would be in conflict with that States obligations under the Covenant.[119]

Similarly a stricter level of scrutiny should be directed at policies that relegate employment goals to long-term strategies. In this respect, those States that pursue a pure "monetarist" philosophy where the emphasis is upon the adoption of fiscal measures to reduce inflation and encourage investment, will be required to show that the short and medium-term effects are not unduly detrimental to the employment situation.[120] Although the reduction of inflation may be a precondition

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[115] *See e.g.*, Sparsis, E/C.12/1990/SR.10, at 13, para.82; Alston, E/C.12/1987/SR.6, at 3, para.10. The reporting guidelines provide for reference to the relevant parts of ILO Convention No.122 to avoid repetition. *Cf.* ILO Employment Policy Convention (No.122), 1964, 569 U.N.T.S. 65.

[116] Alston, E/C.12/1987/SR.6, at 3, para.10.

[117] *See e.g.*, Texier, E/C.12/1990/SR.40, at 12, para.57.

[118] *See*, Texier, E/C.12/1989/SR.6, at 5, para.20.

[119] Compare the position under article 1(1) of the European Social Charter, *see*, Harris D., The European Social Charter at 23 (1984).

[120] The "monetarist philosophy" that underlay UK and USA economic policy in the 1980's was essentially a rejection of the Keynsian idea that governments could fix the level of unemployment through monetary and fiscal policies. It was asserted that such measures would lead to inflation and eventually a rise in unemployment. It was advocated instead that governments should concentrate on combatting inflation. If left alone, unemployment would settle at a "natural rate" which was determined purely by the nature of the labour market. *See*, Brittan S., Second Thoughts on Full Employment Policy, 15-22 (1975).

Although the monetarist philosophy does not prevent measures being taken to

for the resumption of steady and stable growth, it should not be undertaken without measures to mitigate its adverse effect on employment.[121]

The Committee has in general paid considerable attention to the enjoyment of rights in the face of structural adjustment.[122] It has been argued in this context that those States that are suffering high levels of unemployment, whether as a result of structural adjustment or otherwise, should demonstrate that certain short-term policies are being taken with the specific aim of reducing unemployment and which are targeted at alleviating the situation of the most vulnerable and disadvantaged and avoiding regional imbalance. A general or long-term policy in such a case would not be sufficient.[123] In addition, where there is a large informal sector, States should adopt, in addition to short-term relief strategies, a policy that has as its aim the full integration of the informal sector into the formal economic and social life of the nation.

Whilst the text of article 6(2) does not require that full employment exist but rather that States pursue policies towards that end, the actual rate of unemployment will be significant in the Committee's evaluation of whether or not the State is committed to a policy to create high and stable levels of employment. There is no evidence yet that the Committee has established a "ceiling" above which unemployment should not rise except in extreme circumstances, although it is open to do so. However, it is clear that the higher the level of unemployment, the stricter the scrutiny of State policy undertaken by the Committee will be. Members of the Committee have quite rightly expressed particular concern over rising levels of unemployment[124] and disproportionately high levels of unemployment among certain groups within a State.[125] Although such situations do not necessarily give rise to violations of the Covenant in themselves, it is clear that they are of

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improve training and flexibiltity in the labour market, it does present a considerable obstacle to the idea that full employment is a matter that can be achieved through government action alone.

[121] *Cf.* Report of the ILO Director-General, "Human Rights- A Common Responsibility" Int.Lab.Conf. 75th Sess. at 35 (1978).

[122] *See*, General Comment No.2 (1990), ESCOR, Supp.(No.3), Annex III, at 88, para.9, UN Doc.E/C.12/1990/3 (1990).

[123] *Cf.* Mayer, *supra*, note 90, at 240; Van den Berg and Guldenmund, *ibid*, at 112.

[124] *See e.g.*, Texier, E/C.12/1987/SR.5, at 6, para.23; Sviridov, E/C.12/1987/SR.6, at 5, para.16.

[125] *See e.g.*, Neneman, E/C.12/1989/SR.8, at 9 para.49.

serious concern to the Committee when evaluating whether a State was in fact pursuing an adequate policy.

In accordance with article 6(2), the Committee has also expressed concern that employment should be productive and that measures should be adopted to this end.[126] It would appear to consider that policies merely aimed at producing high levels of employment with no apparent benefit to society are incompatible with the Convention.[127] That States should not undertake unproductive activities merely to boost employment is in line with the principle that they should utilise their resources efficiently towards the realisation of the rights in the Covenant.[128] Thus the view has been put forward within the ILO that increased productive employment is a vital factor in the realisation of other basic economic and social rights (or as the ILO puts it the fulfilment of basic needs).[129]

b) The Opportunity to Gain his Living by Work

The reference to an opportunity to gain one's living in article 6 seems to relate most closely to the right to favourable conditions of work, and in particular the right to fair wages found in article 7(a)(i). Although the Committee does request information in its reporting guidelines as to the proportion of the working population who hold more than one job in order to secure an adequate standard of living for themselves and their family,[130] a more detailed consideration of the matter has occurred under the aegis of article 7.

c) Equal Access to Employment

The right to work in article 6, read together with the prohibition of discrimination in article 2(2), would seem to prohibit discrimination as regards access to vocational guidance and training, access to freely chosen employment, and security of tenure in employment.[131] In fact, whilst adopting the ILO definition of discrimination, the Committee has addressed itself to the question of discrimination in employment as a

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[126] *See*, Reporting guidelines, *supra*, note 96, at 90.

[127] Whereas "false employment" of this kind should be discouraged, the Committee must take heed of the ILO policy to encourage States to time the undertaking of public works in such a way as to reduce industrial fluctuations and unemployment. ILO Unemployment Recommendation (No.1), 1 Off.Bull. 419 (1919-20); ILO Public Works (National Planning) Recommendation (No.51), 22 Off.Bull. 86 (1937).

[128] *See above*, Chapter 2, text accompanying notes .

[129] Valticos N., International Labour Law, 118 (1979).

[130] Reporting guidelines, *supra*, note 96, at 91.

[131] *See generally*, above Chapter 4.

whole. According to the reporting guidelines, the Committee is specifically concerned with "distinctions, exclusions, restrictions or preferences, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, colour, sex, religion, political opinion, nationality or social origin, which have the effect of nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity or treatment in employment or occupation."[132]

It may be implied from the Committee's guidelines that equality of opportunity and treatment should be established for all individuals and groups within society. Quite clearly, any restriction that has the effect of unreasonably impairing the employment opportunities of members of a particular group would be contrary to the provisions of the Covenant. Thus a legal provision in Zaire which required women to seek the permission of their husbands in order to work outside the home was considered by certain members of the Committee to be a violation of the Covenant.[133]

It is apparent that a great number of States allow for distinctions to be made with regard to access to employment on the grounds of sex, national origin, political opinion, religion and sometimes race.[134] According to the general principles of non-discrimination, although many of such distinctions may be considered to be "suspect", distinctions being made as to the inherent requirements of a particular job would not amount to discrimination.[135] The Committee accordingly requests information as to distinctions, exclusions or preferences based on one of the stipulated conditions which are not considered to be discrimination in that country "owing to the inherent requirements of a particular job".[136] In addition, it has requested information as to difficulties, disputes and controversies as to the application of such conditions.[137]

Again, the Committee has not been called upon to establish the legitimacy of certain job requirements. Its approach at this stage seems

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[132] Reporting guidelines, *supra*, note 96, at 91.

[133] *See*, Alvarez Vita, E/C.12/1988/SR.17, at 2, para.3.

[134] *See*, Blainpain R., "Equality of Treatment in Employment" in Hepple B.(ed), Int. Encyclopedia of Comparative Law, Vol.XV Labour Law, Chap.10, at 17 (1990).

[135] *See* above, Chapter 2. *Cf.also* ILO Convention No.111, article 1(2). ILO Discrimination (Employment and Occupation) Convention (ILO Convention 111), 1958, 362 U.N.T.S. 31. Valticos, *supra*, note 129, at 107.

[136] Reporting guidelines, *supra*, note 96, at 91.

[137] *Ibid.*

to be to engender debate at the national level as to the desirability of any such conditions. It is submitted that certain considerations should be borne in mind. First, such distinctions should be legitimate "only in the case of jobs which by their very nature involve a special responsibility to contribute to the attainment of the institution's objectives".[138] Secondly, the legitimacy of such distinctions, especially as regards sex, change according to the prevailing social and moral mores of the time. In particular, measures of protection for example that restrict the employment of women in certain types of work (such as coal mines),[139] are increasingly considered to be excessively paternalistic.[140]

Thirdly, whereas distinctions as to race might be legitimate for certain cultural purposes such as the employment of actors of a certain race to enhance realism, it is doubtful whether they should be utilised otherwise. As has been stated, "the term 'race' cannot be given a very precise scientific definition, the essential point being the way in which the persons concerned consider their differences".[141] Given the imprecise nature of such a concept and the possibilities for abuse, it would be better if any necessary distinctions, such as employment for "authenticity",[142] be made on the basis of national origin. Finally, although it is clear that restrictions will be placed upon foreign nationals and those of particular political persuasions on employment in certain higher civil service posts, such restrictions should be limited to posts that bear some relation to the security of the State,[143] and to the extent that those persons can not reasonably be relied upon.[144]

The legitimacy of restrictions on access to employment has arisen

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[138] Rossillion C., "ILO Standards and Actions for the Elimination of Discrimination and the Promotion of Equality of Opportunity in Employment", in Blainpain R.(ed), Equality and Prohibition of Discrimination in Employment at 27 (1985).

[139] *See e.g.*, ILO Night Work (Women) Convention (No.4) 1919, 38 U.N.T.S. 67.

[140] *See*, for example the UK denunciation of article 8(4) European Social Charter which provides for the regulation of the employment of women at night and the employment of women in underground mining. *See also*, Polson T., "The Rights of Working Women: An International Perspective", 14 V.J.I.L., 729, at 736-741 (1974).

[141] Valticos N., "International Labour Law", in Blainpain R.(ed), International Encyclopaedia for Labour Law and Industrial Relations, s.246 (1977).

[142] *Cf.* The exception provided for in the UK Race Relations Act 1976, sect.1(1)(b)(ii). *See e.g.*, Hepple B., "Great Britain", in in Blainpain R.(ed), Equality and the Prohibition of Discrimination in Employment, 117 (1985).

[143] *Cf.* Alston, E/C.12/1987/SR.22, at 5, para.18.

[144] *Cf.* ILO Convention No.143. Valticos, *supra*, note 129, at 107-8.

particularly in the context of political affiliation.[145] In one case, a member of the Committee questioned the operation of the "Berufsverbot" laws in the F.R.G. whereby people were excluded from public service whose political views did not reflect enough fidelity to the "free democratic basic order". Relying upon information from an ILO report which indicated that certain people had been excluded from access to non-security-related jobs, such as teaching, merely because they had criticised the existing economic order in Germany, Professor Alston doubted the legitimacy of those restrictions. He concluded that "economic and social rights could be effectively recognised only if individuals were free to speak out openly".[146]

Members of the Committee have concerned themselves primarily with the position of women in the workforce.[147] However it is clear that the Committee is also attentive to discrimination on the grounds of race, colour, sex, religion, political or other opinion, nationality or social origin.[148] A particularly pertinent point here is the degree to which aliens have a right to equal opportunity in employment.[149] It is readily accepted that foreign workers may be required to obtain special authorisations (or permits) in order to work.[150] Indeed the ILO has generally exercised a certain amount of restraint from prohibiting discrimination between nationals and non-nationals.[151] It might be argued that the Covenant, in specifically allowing for the differential treatment of non-nationals in the case of developing countries (under article 2(3)), impliedly excludes the possibility of restrictions being imposed upon equality of access to employment in the case of developed countries.

A reservation on this point was entered by the UK on ratification. Accordingly it reserved "the right to interpret article 6 as not precluding the imposition of restrictions, based on birth or residence qualifications, on the taking of employment in any particular region or

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[145] *See e.g.* Konate, E/C.12/1991/SR.4, at 10, para.55.

[146] Alston, E/C.12/1987/SR.19, at 9, para.45. The matter also arose in the context of the European Convention, *see*, Kosiek v.F.R.G., Eur.Court H.R., Series A, Vol.105, Judgement of 28 Aug.1986, (1987) 9 EHRR 328.

[147] *See e.g.*, Sviridov, E/C.12/1987/SR.6, at 5, para.16; Rattray, E/C.12/1987/SR.6, at 12, para.66; Jimenez Butragueno, E/C.12/1991/SR.3, at 11, para.51.

[148] *See above*, Chapter 4.

[149] *Ibid*, text accompanying notes 121-140.

[150] Blainpain, *supra*, note 134, at 26. An important exception is found in article 48 EEC Treaty.

[151] Dao (ILO), E/C.12/1989/SR.18, at 5, para.28.

territory for the purpose of safeguarding the employment opportunities of workers in that region or territory."[152] Similarly France has made a declaration to the effect that article 6 is "not to be interpreted as derogating from provisions governing the access of aliens to employment".[153]

It is open to question whether the French interpretative declaration is in fact a "mere interpretative declaration" or rather a "qualified interpretative declaration" that might be assimilated to a reservation.[154] Arguably, France was in fact relying upon its declaration as a condition for its acceptance of the obigations under article 6 in which case the declaration would have the force of a reservation. This appears to have been the view of the French delegation when addressing the subject before the Committee. There, a member of the Committee had raised the question of the compatibility of a French law that restricted the payment of disability benefits to French nationals, with article 2(2) of the Covenant.[155] In reply the French delegate referred to the declaration implying that it had modified the French obligations under the Covenant.[156]

As the Covenant makes no reference to reservations it is presumed that they are legitimate in so far as they conform to the rules of customary international law, which can be taken to be those in article 19 of the Vienna Convention.[157] Neither reservation appears to be incompatible with the object or purpose of the Covenant, nor has any State objected to them. The effect of the UK and French reservations, which may be said to be tacitly approved, are to modify the obligations of those States under the Covenant in relation to other States parties.[158]

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[152] *See*, UN Doc.ST/LEG/SER.E/10, at 127 (1992).

[153] *Ibid*, at 124.

[154] Such a distinction was utilised by the European Court of Human Rights in Belilos v.Switzerland, Eur.Court H.R., Series A, Vol.132, paras 41-49, Judgement of 20 Apr. 1988.

[155] *See*, Alvarez Vita, E/C.12/1989/SR.12, at 12, para.61.

[156] *See*, de Gouttes (France), E/C.12/1989/SR.13, at 10, para.42. At a later stage France submitted a piece of "additional information" in which it specifically utilised the language of article 19(c) of the Vienna Convention in stating that the declaration "cannot be seen as contrary to the object and purpose of the Covenant". E/1989/5/Add.1, at 6, para.25.

[157] Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331.

[158] Articles 20-21 Vienna Convention, *ibid.* An interpretative declaration, on the other hand, does not purport to modify the obligations under the Covenant but rather establishes an understanding of the relevant provision's meaning. Such a declaration, with the tacit acceptance of other States parties, might be seen to be an

They do not imply, however, that the provisions of the Covenant in general allow for such an interpretation.

In so far as the UK and France considered it necessary to rely upon reservations to modify their obligations under the Covenant, it might be assumed that the Covenant otherwise prohibits discrimination against aliens with respect to employment. Given general State practice, however, this would be a difficult position to maintain. Members of the Committee have paid little attention to the complexities of the issues involved. Questions have been asked as to the employment possibilities of foreign workers (including refugees[159]) in the same manner as for other groups.[160] However, when it comes to deal with the question in more detail the Committee might well find it difficult to adopt an interpretation that might prejudice the immigration policies of the States concerned.

It is possible that article 4 might be utilised to some effect here. According to that article States are required to show that any restrictions they impose on the employment opportunities of foreign workers are determined by law and are "solely for the purpose of promoting the general welfare in a democratic society." Although this would not prohibit discrimination as regards aliens wishing to work in the country concerned, it would mean that any restrictions imposed should be extraordinary and justified on the basis of the general welfare.[161]

Whereas article 6 is generally progressive in nature, the prohibition of discrimination is an immediate obligation.[162] In theory then, a State will be obliged to ensure that whatever Stage of realisation of article 6 it has achieved, there should be no vestiges of discrimination in that area. It is clear that the State is obliged to take the necessary legislative and administrative action (whether through enacting new measures or repealing old inconsistent ones) to ensure equality of treatment as to employment and the related spheres of education, vocational guidance and training. Although article 2(1) specifically

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instrument indicating the general interpretation of article 6 in accordance with article 31(2)(b) of the Vienna Convention.

[159] *See*, Taya, E/C.12/1988/SR.3, at 6, para.22; Texier, E/C.12/1990/SR.40, at 12, para.56.

[160] *See e.g.*, Taya, E/C.12/1987/SR.6, at 6, para.23.

[161] The European Court of Human Rights has not deferred entirely to State immigration policies that might affect the enjoyment of the rights of non-nationals. *See*, Berrehab v.Netherlands, Eur.Court H.R., Series A, Vol.138, Judgement 21 June 1988, (1989) 11 EHRR 322. However, it is doubtful whether it would take such a position in the delicate area of employment.

[162] *See above*, Chapter 4, text accompanying notes 176-186.

leaves States with a certain amount of discretion as to what measures are appropriate, members of the Committee have placed a high priority on legislation in the field of discrimination.[163]

In addition, it is clear that the Committee expects States to take appropriate action to ensure observance of the principles of non-discrimination with respect to employment and vocational guidance under private control.[164] Various methods could be employed to achieve this end such as making the receipt of funds or licences dependent upon the observance of such principles. Committee members have also placed some emphasis upon the establishment of appropriate agencies to promote the application of the policy and provide for appropriate remedies.[165]

A point of some interest is the extent to which States are required to control trade union security measures (such as the closed shop), that might effectively limit access to employment through a requirement of union membership. It is possible to argue that such arrangements despite being discriminatory, have a legitimate purpose in ensuring the effectiveness of the trade unions concerned. However, although the Committee has not made any statement as to the legitimacy of closed-shop agreements, the Covenant, like other international instruments,[166] does not expressly prohibit them.

In accordance with its approach to non-discrimination generally,[167] the Committee has looked towards the achievement of *de facto* equality of opportunity.[168] Thus members of the Committee have expressed interest both as to the level and type of employment in different social groups.[169] There does appear to be some expectation that States take specific measures to develop the employment prospects

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[163] *See e.g.*, Sviridov, E/C.12/1987/SR.6, at 4, para.14. Alston, E/C.12/1987/SR.6, at 3, para.8.

[164] *See e.g.*, Simma, E/C.12/1989/SR.8, at 8, para.46; Muterahejuru, E/C.12/1987/SR.5, at 10, para.46.

[165] For the ILO position, *see*, Valticos, *supra*, note 129, at 110.

[166] In the case of the European Social Charter, the text itself is neutral on the question of closed-shop agreements. The Committee of Independent Experts, however, has found union security agreements to be incompatible with article 5. *See*, Conclusions XI-1, at 78 (1989).

[167] *See above*, Chapter 4, text accompanying notes 26-41.

[168] *See e.g.*, Simma, E/C.12/1988/SR.3, at 3, para.8.

[169] *See*, Muterahejuru, E/C.12/1987/SR.5, at 10, para.46; Texier, E/C.12/1989/SR.6, at 5, para.24.

of disadvantaged groups. As with the ILO,[170] it would seem that any such differences aimed at promoting equality of opportunity and treatment, would not be considered discriminatory. The ILO additionally has considered that specific quotas in employment are not necessarily discriminatory if their effect is to "secure an equilibrium between the different communities and ensure protection of minorities, or to compensate for discrimination against the economically less advanced population group".[171] Although it might be possible to infer from the Committee's general approach that affirmative action measures are legitimate, the necessity of taking those measures in the context of employment has not been clearly established.

d) Employment Services

In contrast to the European Social Charter (article 1(3)), the Covenant does not specifically provide for the establishment and maintenance of employment agencies, nor has the Committee made mention of such an obligation in its reporting guidelines. Indeed individual members have only mentioned the matter infrequently.[172] However, there is little doubt that the provision of placement services is crucial not only to the full exercise of the individual's right to freely chosen work of an appropriate nature, but is important as far as the effective use of human resources is concerned. That the State stands to gain from the maximisation of its human potential suggests that a right to employment placement services could be inferred from the obligation to achieve steady economic, social and cultural development and full and productive employment.[173]

e) Occupational Training

Article 6(2) provides that the steps taken to achieve the full realisation of the right to work shall include "technical and vocational guidance and training programmes". It might be considered that the right to technical and vocational training would fall under article 13 which establishes the right to education. In as far as article 6 provides for an individual right to technical and vocational guidance and

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[170] *See*, Article 5, ILO Discrimination (Employment and Occupation) Convention (No.111), 1958, 362 U.N.T.S. 31.

[171] Valticos, *supra*, note 129, at 108.

[172] *See e.g.*, Texier, E/C.12/1989/SR.10, at 8, para.40; Jimenez Butragueno, E/C.12/1987/SR.14, at 11, para.32.

[173] The standards on the organisation of a public employment service are found in the ILO Employment Service Convention (No.88) 1948, 70 U.N.T.S. 85.

training, like article 13, it is logically of a progressive character.[174] The ultimate objective is clearly for every individual to be given the opportunity for appropriate guidance and training with regard to their personal capacity and relevant employment opportunities. Such a service should be free or financially assisted in appropriate cases.

At this early stage, the Committee has limited itself to requesting information as to the mode of operation and practical availability of such training programmes. Information is requested specifically as to the situation with respect to persons according to their race, colour, sex, religion, and national origin.[175] Members of the Committee have also been concerned with the financing of such schemes.[176] Although private training establishments were to be accommodated, it was felt that there should also be a central authority for evaluating the needs of industry[177] and coordinating the activities of the public and private training schemes.[178]

2) Free Choice in Employment

Article 6 provides that the right to work includes the opportunity to gain one's living by work which is freely chosen or accepted. Members of the Committee have stressed the need for free choice in employment,[179] but little has been said about how it should be ensured in practice. The Committee's guidelines merely suggest that there should be provisions ensuring freedom of choice.[180] In theory, the concept of freely chosen employment seemingly extends to ensuring the fullest opportunity for each worker to use his or her skills in a suitable job.[181] However, there is a possible tension between absolute individual choice and the limited options that might be open to him or her in the

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[174] Although the right to occupational training is to be implemented immediately under Article 10 of the European Social Charter, it would probably be too burdensome for many developing States.

[175] Reporting guidelines, *supra*, note 96, at 91.

[176] *See e.g.*, Badawi El Sheikh, E/C.12/1987/SR.5, at 3, para.11.

[177] *See*, Sparsis, E/C.12/1987/SR.5, at 7, para.31.

[178] *See*, Jimenez Butragueno, E/C.12/1988/SR.3, at 4, para.9. For the ILO position in this area *see*, General Survey of the Committee of Experts, Human Resources Development: Vocational Guidance and Training, Paid Educational Leave, ILC 78th Sess, Report III (Pt.4B), (1991).

[179] *See e.g.*, Badawi El Sheikh, E/C.12/1987/SR.13, at 7, para.30; Alvarez Vita, E/C.12/1987/SR.21, at 12, para.54; Rattray, E/C.12/1987/SR.13, at 6, para.24.

[180] Reporting guidelines, *supra*, note 96, at 90.

[181] *See*, Konate, E/C.12/1987/SR.7, at 2, para.2.

employment market.[182] It is not realistic to suggest, for example, that the State has to create work opportunities that correspond entirely to the wishes of individuals seeking work.[183] As the Austrian representative stressed before the Committee:

> "The right to work, understood as a right to a job or a specific job, was not included in the Austrian legal order, and it was impossible for the State to guarantee a certain job to a certain person in a certain place. Employment opportunities clearly depended on the economic situation. What could be guaranteed was the right to help in finding a new job and in overcoming the difficulties associated with unemployment."[184]

An obligation to ensure freedom of choice can only imply that the State should provide appropriate employment training, guidance and placement services. These have already been dealt with above.[185]

However, as was made clear in the drafting of article 6, the reference to freely chosen and accepted employment was also considered to entail a prohibition of forced labour.[186] Such a conclusion may also be drawn from the term "opportunity" and indeed from the idea that a right to work implies simultaneously a right not to work. The ILO has dealt extensively with the question of forced labour particularly in Convention No.29 of 1930[187] and Convention No.105 of 1957.[188] The latter Convention deals with various matters that are of relevance to the application of the right to work within the Covenant. It prohibits *inter alia* the use of forced labour as a method of using labour for purposes of

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[182] *See*, Badawi El Sheikh, E/C.12/1987/SR.22, at 2, para.2.

[183] *See*, Sieghart P., Ziman J. and Humphrey J., The World of Science and the Rule of Law, 71 (1986).

[184] Berchtold (Austria), E/C.12/1988/SR.4, at 3, para.13. Similarly, as the Director-General of the ILO noted:

> "While this [freedom of choice] does not mean that work must be made available in accordance with individual preferences irrespective of a need for the services concerned, it implies the development of programmes to foster skills for the use of which opportunities can reasonably be expected to exist."

Report of the ILO Director-General, *supra*, note 121, at 33.

[185] *See above*, text accompanying notes 172-178.

[186] *See above*, text accompanying notes 45-51.

[187] ILO Forced Labour Convention (No.29) 1930, 39 U.N.T.S. 55.

[188] ILO Forced Labour Convention (No.105), 1957, 320 U.N.T.S. 291.

economic development and as a means of labour discipline (specifically for having participated in a strike).

The Committee as a whole has not made any specific references to the question of forced labour and does not make it a matter for general response in its reporting guidelines. Although there might be a general desire not to inpinge upon the work of the Human Rights Committee with respect to article 8 ICCPR, individual members of the Committee have not been so restrained in their approach. In one case in particular, great concern was expressed as to the position of Haitian workers in the Dominican Republic who seemed to be recruited by force and compelled to work for the entire sugar-cane harvest season.[189]

Whilst article 6(2) stipulates that among the steps to be taken to realize the right to work, States should create policies and techniques to achieve steady economic, social and cultural development, it is clear that the right to choose employment prohibits the adoption by States of measures such as the compulsory requisitioning of labour to achieve economic growth or full employment.[190] It is arguable, nevertheless, that States may rely upon the provisions of article 4 to justify compulsory labour in cases of emergency where the "general welfare" so demands.[191] Thus some States allow a certain amount of compulsion in employment in cases of *force majeure*.[192] However, any such exception would clearly have to be "determined by law" and proportionate to the emergency faced.

Whereas the ILO has considered that compulsory employment training programmes or "youth schemes" are contrary to the prohibition of forced labour[193] (with certain limited exceptions[194]), article 6 does not seem to cover them to the same extent. In particular, free choice of employment appears to be confined to cases of remunerative work alone, excluding those

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[189] *See*, Texier, E/C.12/1990/SR.44, at 12, para.54.

[190] *See*, Valticos, *supra*, note 129, at 98.

[191] This would broadly cover the exception found in article 8(c)(iii) ICCPR.

[192] Vallaro (Panama), E/C.12/1991/SR.5, at 2, para.5.

[193] *See*, Abolition of Forced Labour- General Survey by the Committee of Experts on the Application of Conventions and Recommendations, 65th Sess. (1979). ILO II.65/3 (4B), at 41.

[194] Special Youth Schemes Recommendation, 1970 (No.136), para.7(2)(a) and (b), in ILO, International Labour Conventions and Recommendations (1919-1981), at 81 (1982).

schemes that provide for little or no remuneration. It might be argued that as article 6(2) provides that the pursuit of economic development should not infringe upon "fundamental political and economic freedoms" of the individual, youth schemes would be similarly prohibited. However, freedom from forced labour would be described more precisely as a civil right.

Given the lack of textual clarity, it is open for the Committee to interpret free choice in employment as applying to all forms of employment whether remunerative or otherwise. In doing so, however, the Committee would have to consider how far it wishes to extend the scope of the Covenant. For example, this would bring in questions such as the legitimacy of forced labour as part of penal service.[195] It is submitted that as other institutions already deal with such questions,[196] it would be better for the Committee to confine itself to issues of work as a remunerative activity.

In considering the report of Zaire, it was noted that the ILO Committee of Experts had commented on the requisitioning of medical practitioners and graduates and had emphasised the need to bring all legislation concerning civic service into conformity with the Forced labour Convention (No.29 1930).[197] Members of the Committee relied upon this information to enquire into the general situation of forced labour in Zaire.[198] Following an assurance by Zaire that such requisitioning had been discontinued, the matter went no further. One might infer that the Committee will concern itself with issues of civic service[199] (and presumably military service), but in absence of its own detailed standards, the Committee will initially draw upon those of the ILO in its

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[195] This question did arise in the case of Panama, but only following the comments of the ILO representative, *see*, Swepston (ILO), E/C.12/1991/SR.3, at 5, para.21; Ucros (Panama), E/C.12/1991/SR.3, at 13, para.61.

[196] *See e.g.*, Article 8(3)(c)(ii) ICCPR.

[197] *See*, Dao (ILO), E/C.12/1988/SR.17, at 9, para.59. One of the exceptions to the prohibition of youth schemes relates to obligations of service that have been accepted as a condition of training. The Committee of Experts has considered that such an exception may operate only where there is full compliance with the forced labour conventions.

[198] *See e.g.*, Alston, E/C.12/1988/SR.17, at 8, para.45.

[199] For the approach of the European Commission on Human Rights in this area, *see*, Nedjati Z., Human Rights Under the European Convention, 73 (1978).

interpretation of the Covenant.[200] This was seemingly accepted by Zaire in the present case.

According to the ILO, freely chosen employment would also seem to prohibit the use of compulsory labour as a means of labour discipline either to ensure the performance of a contract or as a punishment for breaches of labour discipline. Unlike the question of penal labour, this would appear to fall clearly within the realm of the Covenant. The Committee has not adopted any coherent policy on such a question and individual comments have only centered on the question of the right not to work in general.[201] It is submitted that the Committee should ensure that workers have the right to terminate contracts of employment (with reasonable notice in appropriate cases). In particular care should be taken when the law provides for the enforcement of the individual labour contract, especially where it is by use of criminal law.[202]

A similar concern relates to the right to strike. Although not necessarily relating to the right to terminate employment, excessive restrictions on the right to strike may well entail some form of coercion to work against the worker's better judgement.[203] The Committee has dealt with the question of the right to strike in the context of article 8 of the Covenant where it is specifically provided for.[204]

Perhaps the area that has concerned members of the Committee most is where States provide for a "duty to work". As noted above, certain members of the Committee have stressed that the right to work implies a right not to work.[205] Accordingly a legally enforceable duty to work might well be in contravention of article 6 of the Covenant.[206] In many States, a duty to work may

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[200] For the Committee's willingness to utilise ILO standards *see*, Konate, E/C.12/1990/SR.42, at 5, para.18.

[201] *See e.g.*, Rattray, E/C.12/1987/SR.21, at 13, para.63.

[202] The enforcement of contracts of employment through criminal law has been considered to be contrary to the European Social Charter, *see*, Harris, *supra*, note 119, at 27.

[203] *See*, General Survey of the Committee of Experts, *supra*, note 193, paras 122-131; Ben-Israel R., International Labour Standards: The Case of Freedom to Strike, at 24-25 (1988).

[204] *See below*, Chapter 6, text accompanying notes 226-274.

[205] *See*, Rattray, E/C.12/1987/SR.21, at 13, para.63.

[206] *See*, Neneman, E/C.12/1988/SR.17, at 4, para.23.

be Constitutionally defined,[207] yet remain merely a moral obligation without concomitant legal sanctions.[208] Members of the Committee have looked towards the precise legal value of such provisions when they are apparent, and have warned against the possible abuses to which the obligation to work could give rise.[209] There is no evidence as yet, that the mere existence of such provisions will be considered to be contrary to the provisions of the Covenant.

3) Guarantee Against Arbitrary Dismissal

In providing for the right to work in article 6 it might reasonably be concluded that one element should be the right not to be arbitrarily deprived of work.[210] Indeed this would be the logical result of an obligation upon the State to respect and protect the right to work. Whilst the Committee as a whole has not made reference to such a right in the context of the right to work, individual members have been strong advocates of freedom from arbitrary dismissal. Indeed one member commented that "[w]ithout a fundamental guarantee against arbitrary dismissal, the right to work would be meaningless."[211]

The most commonly established rules on employment security provide that termination of employment should not take place unless there is a valid reason connected with the capacity or conduct of the worker or based upon the operational requirements of the undertaking concerned.[212] Members of the Committee have not indicated whether they will adopt this general principle, but have merely suggested that dismissals should not be "arbitrary". Members thus appear to expect States concerned to establish their

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[207] *See e.g.* Yemen, E/1990/5/Add.2, at 2, para.3; Costa Rica (article 7 of the Constitution), E/1990/5/Add.3, at 2, para.6; Panama (article 59 Constitution of 1972), E/1984/6/Add.19, at 2.

[208] *Cf.* General Survey on Forced Labour, *supra*, note 193, para.45.

[209] *See e.g.*, Mratchkov, E/C.12/1990/SR.40, at 13, para.63; *ibid*, E/C.12/1991/SR.4, at 12, para.66; Neneman, E/C.12/1991/SR.3, at 8, para.41.

[210] For the travaux preparatoires on this point *see above*, text accompanying note 29.

[211] Badawi El Sheikh, E/C.12/1987/SR.5, at 3, para.12. *See also*, Mratchkov, E/C.12/1990/SR.40, at 13, para.63.

[212] *Cf.* ILO Termination of Employment at the Initiative of the Employer Recommendation, (No.119) 1963, in ILO, International Labour Conventions and Recommendations (1919-1981), at 138 (1982). *See also*, Hepple, *supra*, note 93, at 478-480.

own rules governing whether or not a dismissal is "justified",[213] but nevertheless will comment upon the adequacy of such rules. For example in considering the report of Trinidad and Tobago it was noted that the concept of "retirement in the public interest" appeared to involve "a risk of arbitrariness".[214]

In certain circumstances the dismissal of an employee for arbitrary reasons might amount to discrimination. Thus in the case of Czechoslovakia, it was noted that a report of the ILO Committee of Experts drew attention to fact that workers might be dismissed for shortcomings related not only to their professional skills, but also to their civic engagement, moral or political qualities. The Committee pointed out that protection of workers against discrimination on the ground of political opinion should also be extended in respect of activities expressing opposition to established political principles. One member commented:

> "Even if the aim of the authors of Charter 77 had been to change the existing social order, in the absence of any indication that they sought to bring about that result by violent or unconstitutional means, such an aim should not constitute grounds for considering them as being beyond the protection afforded under article 2(2) of the Covenant."[215]

It appears that the termination of employment on such grounds would amount to a violation of article 2(2) in conjunction with article 6.

In the practice of a number of States, certain procedural safeguards are apparent. These may include the communication of reasons for dismissal to the employee; consultation with, or notification of the fact of dismissal to the relevant trades unions; and the provision of advance notice to the employees concerned in cases of contracts of indefinite duration. In cases of dismissal for serious misconduct, notice may not be required, but should only take place after a hearing and then only where the employer cannot be expected to take any other course.[216] Certain members of the Committee have made reference to these principles in their

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[213] *See e.g.*, Mratchkov, E/C.12/1987/SR.6, at 12, para.62; Mratchkov, E/C.12/1987/SR.21, at 10, para.43.

[214] Marchan Romero, E/C.12/1989/SR.17, at 17, para.89.

[215] Simma, E/C.12/1987/SR.13, at 9, para.40.

[216] *See*, Hepple, *supra*, note 93, at 493-4; Kennedy T., European Labour Relations at 386 (1980). *See also*, Valticos, *supra*, note 129, at 169.

questions.[217] In one notable case, a rule that the employer only had to give notice of dismissal or make redundancy payments to workers with more than ten years service was considered too restrictive.[218] However, nowhere has the Committee made reference to such principles *in toto*.

The Committee's main cause for concern seems to have been that there should exist adequate safeguards to enable any worker who feels he has been unjustifiably dismissed to appeal,[219] or take a case of judicial review,[220] against that decision to a court or some other independent body. Additionally members have stressed that the individual should be provided with some form of remedy for an invalid termination of contract,[221] which might take the form of compensation[222] or reinstatement.[223]

The concept of workforce reductions may be distinguished from disciplinary dismissals in that it generally affects a larger number of employees and has more significant social and economic consequences for society as a whole.[224] As members of the Committee have only occasionally alluded to the specific nature of workforce reductions,[225] it is submitted that certain general principles may be borne in mind. First, whereas job security may be provided for it is not often of a uniform nature. As one commentator noted:

> "There is a hierarchy of ranks in the labour market from whole-time secure employment through less secure forms of whole-time employment, part-time

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[217] *See e.g.*, Did trade unions play any role in protecting workers from arbitrary dismissal? Sviridov, E/C.12/1987/SR.6, at 4, para.16. Did the concept of "grievous fault" exist in Czechoslovakia whereby workers could be dismissed without notice? Texier, E/C.12/1987/SR.13, at 10, para.49.

[218] *See*, Sparsis, E/C.12/1989/SR.11, at 15, para.66.

[219] *See e.g.*, Texier, E/C.12/1987/SR.5, at 5, para.22; Konate, E/C.12/1987/SR.22, at 3, para.6; Mratchkov, E/C.12/1988/SR.3, at 4, para.10; Rattray, E/C.12/1987/SR.6, at 12, para.67.

[220] *See*, Rattray, E/C.12/1987/SR.5, at 9, para.43.

[221] *See*, Mratchkov, E/C.12/1987/SR.13, at 4, para.12.

[222] *See*, Mratchkov, E/C.12/1987/SR.6, at 12, para.62.

[223] *See*, Mratchkov, E/C.12/1990/SR.34, at 7, para.47.

[224] *See*, Hepple, *supra*, note 93, at 479.

[225] *See e.g.*, Texier, E/C.12/1988/SR.3, at 5, para.15; Mratchkov, E/C.12/1988/SR.17, at 5, para.30; Jimenez Butragueno, E/C.12/1988/SR.17, at 8, para.52; Jimenez Butragueno, E/C.12/1989/SR.18, at 5, para.20.