Rights in Action? The justiciability of Economic, Social and Cultural rights in Australia

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At present, Australia has two state-based legislative bills of rights: the Human Rights Act 2004 (ACT) (ACT Charter of Rights) and the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Victorian Charter). Although the inclusion of economic, social and cultural rights (ESCR) was considered by the committees drafting both charters,[1] the resulting legislation has, for the most part, been confined to the protection of civil and political rights (CPR). This article provides an overview of some of the reasons supporting the inclusion of ESCR as Australia moves incrementally towards a system of national legislative rights protection.

Interdependence of rights

The historical reasons for distinctions between the two categories of rights are relatively well documented. Since the Cold War period, Western commentators have voiced fears that support for ESCR to the exclusion of CPR has been too easily justified by repressive governments who claim that their primary obligations to their citizenry are effectively met by the provision of services such as shelter and education, rather than by mechanisms protecting rights such as freedom of speech and association.[2] This distinction has arguably had the potential to be further exploited by reference to the formulations of state party obligations in the International Covenant on Civil and Political Rights (ICCPR), which obliges states to ‘respect and ensure’[3] the rights within the covenant, while the International Covenant on Economic, Social and Cultural Rights (ICESCR) calls upon states to realise rights progressively by undertaking steps to the ‘maximum of [their] available resources’. However, if such fears were ever legitimate, a State’s use of such a justification today would be unlikely to be taken seriously within the international community, since international jurisprudence over the past 30 years has moved away from the standpoint that rights can be regarded as existing in separate categories and towards the theory that all rights must be regarded as complementary and interdependent.

While rights jurisprudence has evolved significantly since the development of the standards governing the
implementation of state party obligations in the ICCPR and ICESCR in the 1960s, it is necessary to acknowledge that lingering distinctions have nevertheless remained regarding the interpretation and implementation of the two classes of rights. Traditionally, the guarantee of a CPR such as freedom of speech has been thought to require legislative protection and an obligation to refrain from acting in a manner which offends the right. In contrast, the provision of housing or a healthy environment ‘to the maximum of...available resources’ necessarily requires a particular allocation of funding by government. The rigidity of this distinction (which overlooks the fact that the implementation and enforcement of CPR also requires the allocation of financial resources) means that ESCR tends to attract the criticism that they are difficult and costly to implement, and that to do so would require burdensome constraints on government spending.

An argument against the implementation distinction, however, is that many CPR remain ‘paper’ rights unless parallel or supporting rights are simultaneously enforced. Indeed, a State’s practical ability to protect CPR will be significantly blunted without considering the concomitant impact of ESCR. In support of this argument, the Committee on Economic, Social and Cultural Rights’ General Comment Number 3 provides that:

While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights ('ICCPR'), it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.

To take an Australian example, the Victorian Charter codifies a right for both minority groups and Indigenous peoples to enjoy their own culture. As is the case with most of the provisions in the Victorian Charter, these articles find their basis in article 27 of the ICCPR, which provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

However, as long as a substantial number of Indigenous people in this country do not have access to an adequate standard of primary health care (a right protected by article 12 of the ICESCR), any article that aims to protect Indigenous culture must ultimately ring hollow. Further, given the spiritual and economic importance of land to the vitality of Indigenous culture in Australia, true protection of Indigenous peoples’ ability to enjoy their culture is meaningless in the absence of a right protecting the environment. Nor is it possible to realistically view protection of environmental quality as part of a longer term strategy to be achieved ‘progressively’ if one is serious about protecting culture. For Indigenous Australians living in the Torres Strait, for example, rising sea levels as a result of global warming will put the entire viability of cultural life at risk unless immediate action is taken.

**Justiciability of rights**

A further related argument in support of a continuing distinction between ESCR and CPR has been that even if a system of rights protection would be more robust by viewing rights as interdependent, the particular financial commitment required by ESCR means that they are not capable of the same sort of judicial remedy as CPR. In particular, it has been argued that the conferral of power on the judiciary to enforce ESCR ‘against’ the wishes of the executive arm of government sits uncomfortably with a legal system predicated on a strict separation of powers because it encroaches on the executive’s prerogative to control policy implementation.

However, even if our governmental system does require that such powers lie exclusively within the executive
branch of government, any system of rights protection in Australia will be substantially weakened if it cannot ensure, at a minimum, that such a governmental prerogative is not exercised in a way that substantially interferes with the human rights of Australian citizens. Further, I would argue that even on a conceptual level, the exercise of judicial power within a legal framework that protects ESCR is not necessarily anathema to the separation of powers. Indeed, the judiciary providing an additional check on the reach of the executive power of government is actually consistent with a separation of powers framework, even if the standard by which they hold them accountable is a new, human-rights based one.

Importantly, it should be remembered that Australia is not the first legal system that has contemplated the domestic protection of ESCR. An examination of some of the international experiences with the enactment of various rights protection mechanisms provides a further illustration of how some of the conceptual objections to the inclusion of ESCR protection have been resolved.

**Overcoming the conceptual barrier: International experiences**

In 1996 South Africa enacted a new Constitution which entrenched the majority of rights contained within the ICCPR and the ICESCR. Under the Constitution ESCR are justiciable in the South African Constitutional Court. In the lead-up to the adoption of the Constitution, a number of arguments made in public discourse echoed the concerns of those outlined above: essentially, that adjudication on matters of public or government policy should not be brought within the realm of the courts because of financial constraints and separation of powers concerns. However, as Professor Sandra Liebenberg has argued, the implementation of ESCR in South Africa has been extremely successful. Over time, the Court has been able to develop significant jurisprudence distinguishing between the positive and negative duties imposed by ESCR, holding that, as a minimum standard, courts may make orders preventing any proposed executive or governmental policies that would improperly interfere with the exercise of such rights. [8]

While the South African Constitution may be the most recent and prominent example of ESCR being made constitutionally justiciable, decisions in a number of other jurisdictions have also realised the possibility of judicial protection of ESCR. Since the European Convention for the Protection of Human Rights and Fundamental Freedoms[9] came into force in 1953, the European Court of Human Rights has considered litigation on a range of matters relating to ESCR, including discrimination in educational languages, housing rights and the right to a healthy environment.[10]

Such cases have also been considered in jurisdictions with common law traditions more akin to the Australian system. India, for example, has developed a rich tradition of ESCR-based litigation following the judgment in Fertilizer Corporation Kamgar Union v Union of India[11] in 1981, which acknowledged that rules of standing could be liberalised to allow for submissions regarding a wide range of rights protection. Indian case law has also been an important influence on the development of housing rights protection for citizens subject to forced evictions in Bangladesh. [12] Advocates in Canada[13] and Argentina[14] have also been able to litigate for protection of ESCR as diverse as rights to health care, water and shelter.

**The Australian context**

In many ways, such international experiences may seem remote from the Australian legal system, where rights protection has developed in only a piecemeal and incremental fashion. Given the lack of a national legislative or constitutional mechanism protecting ESCR in Australia, it is arguably spurious to discuss at length the methods by which such rights could be litigated, let alone legislated for.

However, insofar as the non-justiciability of ESCR continues to pose a conceptual barrier to the development of
such mechanisms under Australian law, it is worth noting that a starting point for such a discussion might be the development of a new standard of ‘reasonableness’, similar to that currently used by the judiciary when scrutinising ministerial decisions in the administrative context. Effectively, this might mean that if executive power was exercised in a way that unreasonably interfered with the exercise of ESCR, such action would be able to be struck down by courts as ‘not for a proper purpose’ or ‘outside the scope of ministerial power’. 15

Such a development would be a modest one, in that it would limit the power that rights potentially have to create substantially new remedies or governmental obligations. Indeed, the initial purpose of rights in such a system might merely be to safeguard citizens against manifest overreaches of ministerial power. However, by gradually developing an aspect of Australian law that already accepts judicial scrutiny of executive decisions, it may be possible over time for the courts to formulate a more complete ESCR jurisprudence in Australia in a way that does not ‘fracture the skeleton’ of our current legal system.

**Conclusion**

Considering both the growing international trend to view rights as necessarily interdependent and also the variety of states that have now given some form of judicial expression to ESCR, it seems clear that Australia would be undertaking no ‘bold new experiment’ by legislating for ESCR protection. Further, while the Australian common law has evolved in distinct and often separate ways from that of other jurisdictions, it would be patently untrue to say that our governmental system is so fundamentally unique that the largely successful experience of other states in protecting ESCR cannot be brought to bear on the Australian situation.

Of course, it is important to acknowledge that appropriate forms of legislative protection for both CPR and ESCR in Australia will take time to develop. In order to ensure their acceptance and success, these protections will also inevitably need to be informed by the traditions of the Australia’s own legal system. However, such concessions are consistent with - not contrary to - the idea that carefully developed ESCR protection will enhance any rights culture that we hope to lay the foundations for as we move towards national rights protection in Australia.

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**References**


5 For example, when considering how best to protect against racial discrimination (prohibited by art 2 of the ICCPR), it is clear that any serious commitment to do so would not only involve enacting legislation setting out prohibitions on racist conduct, but also a commitment to educational programs stressing the value and benefits of multiculturalism. It would also necessitate the devotion of financial resources to programs that ensure cultural
protection and vitality of minority group cultures.


7 Donna Green, ‘What are the legal dimensions to climate change in the Torres Strait?’ (Paper submitted at the Greenhouse 2007 Conference, Sydney Hilton Hotel, 2-5 October 2007) 1.


11 Fertilizer Corporation Kamgar Union v Union of India (1981) AIR 344.

12 Ain o Salish Kendra (ASK) v Government and Bangladesh & Ors (1999) 19 BLD 488.


15 Such a model would extend the power given to the judiciary by the charters of rights currently in operation in Victoria and the ACT, which only confer upon courts the jurisdiction to declare that legislative provisions are incompatible with the rights contained within the charter.