



The justiciability of economic, social and cultural rights

Suzanne Lambert
1 Crown Office Row

JUSTICE student network

19 May 2007

What are economic, social and cultural rights (“ESCRs”)?

- A category of fundamental human rights which appear alongside civil and political (“CP”) rights in the Universal Declaration of Human Rights
 - Historical division between CP rights and ESCRs
 - Sometimes called “positive rights”
 - ESCRs include the right to:
 - adequate standard of living
 - freedom from hunger
 - education
 - highest attainable standard of health
-

How are they protected internationally?

- International Covenant on Economic, Social and Cultural Rights (“ICESR”); adopted by UN General Assembly in 1966, came into force in 1976.
 - Additional obligations contained in other international instruments e.g. ILO Conventions
 - 1961 European Social Charter and the European Committee of Social Rights
-

International Covenant on ESCRs

- Commits the 155 state parties **to work toward** the granting of ESCR to individuals.
 - UK signed in 1968 and ratified in 1976. US President signed in 1977 but Senate has yet to ratify.
-

The Committee on ESCRs

- “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means....” (Article 2(1) of ICESCR)
 - Committee is body of independent experts that oversees implementation of ICESCR
 - States required to report every 5 years and Committee makes recommendations on reports in form of “concluding observations”
 - Committee cannot consider individual complaints
 - Draft Optional Protocol under consideration
-

The European Social Charter

- 1961 treaty of the Council of Europe. Revised in 1996
 - Sets out ESC rights and freedoms in relation to housing, health, education, employment, legal and social protection, movement of persons, and non-discrimination.
 - Establishes a supervisory mechanism overseen by the European Committee of Social Rights
-

The European Committee of Social Rights

- Made up of 15 independent, impartial members elected by the Council of Europe
 - Every member state required to submit a report re: implementation of Charter in law and practice
 - Committee determines whether national law and practice conforms with the Charter (Article 24) and publishes decisions in form of “conclusions”
 - Failure of member state to take action on a decision results in the Committee of Ministers addressing a “recommendation”
 - 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints procedure. BUT limited to NGOs and trade unions, must be declared admissible before a public hearing held, and many member states (including UK) have not signed
-

Important features of ESCRs in international instruments

- Concept of ‘progressive realisation’: meeting higher standards ‘to the maximum of available resources’ but cannot defer indefinitely
 - Regression in times of recession must not affect vulnerable
 - Minimum obligation: no derogation of core rights based on threshold of human dignity, lack of resources is no excuse
 - Negative and positive obligations
 - Obligation to give effect to Covenant in domestic law “by all appropriate means” (General Comment No. 3 (1990))
-

The case against justiciability?

- Vagueness e.g. right to adequate standard of living
 - ESCRs regarded as political in nature
 - Courts lack accountability to make political resource allocation decisions
 - Courts not competent to determine resource allocation
 - Difficulty achieving consensus regarding applicable or minimum standards
 - Would unduly strengthen workers' and unions rights, and hamper economy
-

The case for better protection of ESCRs

- CP rights and ESCRs are equal and indivisible so should be protected equally
 - Some CP rights are equally vague, e.g. right to respect for family life (Art 8 ECHR). Some ESCRs are quite easily identified and justiciable e.g. right to education (Art 13 ICESCR)
 - The courts make decisions which impact on resource allocation in relation to CP rights. Re: qualified rights under ECHR, the courts enter into a balancing exercise. Why can this not be done with ESCRs?
 - Not necessary for courts to make policy decisions re: resource allocation rather than carrying out a balancing exercise in individual cases
-

The case for better protection of ESCRs

- Poverty and socio-economic deprivation prevent the enjoyment of CP rights
 - We should not rely on generosity of particular governments; minimum standards of protection and basic entitlements should be set in law particularly in countries such UK, which are relatively wealthy
 - States need not deliver on all rights immediately; rather they need to work towards their progressive realisation given resource constraints
-

Justiciability in the UK

- “The UK supports the view that all human rights are universal, indivisible, interdependent and interrelated. Economic, social and cultural rights therefore have equal status with civil and political rights. ***But whereas respect for civil and political rights does not depend on significant resources, respect for economic, social and cultural rights can only be realised progressively, within the limitations imposed by the availability of public resources.***” (FCO 2006 Human Rights Annual Report, p.233, emphasis added)
- Reflects historical philosophical division between CP rights and ESCRs (ICESR separate from International Covenant on Civil and Political Rights; European Social Charter separate from ECHR; HRA vs ??)

Justiciability in the UK

- Overlap with CP rights means that some ESCRs can be protected indirectly through HRA 1998
- E.g. in relation to asylum seekers, ECHR Article 3 cases regarding inhuman and degrading treatment may also engage ESCRs such as ICESCR Article 9 (social security), 11 (standard of living), 12 (physical and mental health)
- *C.f. Limbuela v SSHD* [2005] UKHL 66: refusal to support asylum seekers and prohibition from seeking employment or claiming state support left them destitute
- See also *Coughlan v N & E Devon HA* (CA) [2000] 2 WLR 622 : closure of a nursing home breached legitimate expectations and rights under Art. 8 ECHR of residents that it would be their home for life

Overseas examples of justiciability: South Africa

- 1996 Constitution enshrines various ESCRs e.g. housing, health care, food and water, social security
 - “I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.” Yacoob J, *Grootboom v Republic of South Africa* (2000)
-

Overseas examples: South Africa

- Many are qualified rights requiring regard to resources. Constitutional Court willing and able to adjudicate and uphold ESCRs by carrying out a balancing exercise and applying the standard of “reasonableness”
 - Yet does not mean that the court will necessarily interfere with policy choices made in relation to allocation of resources e.g. *Soobramoney v Minister of Health Kwa Zulu Natal* (1997)
-

Overseas examples: India

- Directive Principles of State Policy (DPSP) in Part IV of the Constitution has been used by the Supreme Court to impose positive duties on the state
 - Thus non-justiciable ESCRs have been enforced via creative interpretation of CP rights on the basis that paucity of the former prevents full enjoyment of the latter
 - E.g. Right to life (Article 21) has been interpreted to give rise to the right to livelihood, to health, and to education
 - However, enforcement of decisions has proved difficult: detailed court orders are often ignored by state officials especially if they are inconsistent with existing statutes
-

Overseas examples: Canada

- The Supreme Court has relied on the principle of “equality” enshrined under s.15 of the Constitution
 - Broad interpretation of equality imposes a negative obligation on the state not to create further inequality, although it does not require the state to address existing causes or symptoms of inequality
 - *Eldridge v British Columbia* [1997] 3 SCR 624: failure to provide sign-language interpreters as part of publicly funded health care system was discriminatory as it prevented disadvantaged members of society to take full advantage of health care benefits
-

Questions for discussion

- Do ESCRs only exist on paper so that policymakers can pay lip-service?
 - Can they really mean something in practice for those who want to invoke these rights before the courts?
 - What is the best way they should be dealt with in the legal system?
 - Should the UK have a bill of rights that includes ESCRs?
-



The justiciability of economic, social and cultural rights

Suzanne Lambert
1 Crown Office Row

JUSTICE student network

19 May 2007