The Justiciability of ESCR: Conceptual Issues

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ESCR as Human Rights: Justifications

- ESCR give expression to the underlying normative values of human rights: Human dignity, freedom and equality.
- ESCR as necessary to guarantee the *substantive* enjoyment of civil and political rights e.g. the effective participation in civic and political life (indivisibility & interdependence of rights)
- ESCR advance *social justice and participatory democracy*: They assist poor people in asserting their interests and having their voices heard when they are not able to make themselves heard in the political process.
ESCR as Human Rights: Justifications

- **Political impact of denying recognition of ESCR:** Negative liberties often benefit those social groups who already have access to social power and access to resources, whereas positive duties to facilitate and provide services and resources benefit marginalised and disadvantaged groups.

- **Promoting a culture of justification and accountability:** ESCRs require the state to justify and account for its actions, not only in the civil & political sphere, but also in areas of policy and legislation that impact on people’s socio-economic welfare. Similar obligations apply with respect to powerful private actors.
The Justiciability of ESCR: Obstacles & Responses

- Democratic legitimacy of judicial review:
- Separation of powers doctrine / State sovereignty – int. law
- Institutional competence and capacity:
  - There may be genuine resource and policy constraints to fulfilling the rights;
  - Complex decisions may have to be made regarding ‘trade offs’ and ‘priority needs’. International judges and experts are not well placed to ‘second guess’ these decisions;
  - There may be a range of appropriate policy solutions to realise a particular socio-economic right. International judges & experts are not well qualified to decide which is most suited;
- ‘Polycentric’ cases: Courts/int. bodies cannot always anticipate the ‘knock-on’ / ramifying effects of their orders on other areas of budgetary and social policy.
The enforcement of human rights norms require a measure of interference with majoritarian democracy, and in the domestic affairs of sovereign States by international bodies)

Justified by protection of vulnerable groups and to ensure full participation by all, protection of certain core values such as human dignity.

All human rights have policy and budgetary implications – Shue’s analysis of obligations to ‘respect, protect, promote and fulfil human rights’:

– General Comment No 14 (CESCR), paras 20 – 29;
– SERAC v Nigeria (AfCHPR), paras 44 – 48;
– Domestic Constitutions e.g. S 7(2) of the SA Constitution.
The Justiciability of ESCR: Obstacles & Responses

- Judges may not be public policy and financial experts but are trained to consider and evaluate evidence;
- The fact that there are a range of policy options for realising a particular rights can be managed by according government an appropriate margin of discretion (‘deference’ / ‘respect’).
- Most judicial decision-making has polycentric implications – human rights guarantees require that policy and budgets be adjusted to give effect to the content of the relevant rights.
- It can be managed to some extent by requiring justification for State’s acts or omissions in the light of human rights obligations, and leaving a margin of appreciation to State regarding precise policy choices in remedying violations.
The Justiciability of ESCR: Obstacles & Responses

- E.g. Art 8 (4) Optional Protocol to the ICESCR:
  - When examining communications under the present Protocol, the Committee shall consider the *reasonableness* of the steps taken by the State party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a *range of possible policy measures* for the implementation of the rights set forth in the Covenant.

- Obligations of conduct and of result: *Maastricht Guidelines on Violations of ESCR, 1997* (para 7)
  - An obligation of conduct ‘requires action reasonably calculated to realize the enjoyment of a particular right’ e.g. adopt a plan of action to reduce maternal mortality.
  - An obligations of result requires States to achieve specific targets to satisfy a detailed substantive standard.’ e.g. provide free primary to everyone within a certain period (see e.g. art 13 (2)(a) read with art 14)
The Justiciability of ESCR: Obstacles & Responses

General Comment No. 9 on the Domestic Application of the ICESCR

“The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would drastically curtail the capability of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.” (para. 10).
1. The idea that CPRs, on the one hand, and SER, on the other hand, are categorically different, and must be treated as such in human rights jurisprudence;
2. The dichotomy between negative and positive rights;
3. The public and private divide;
4. Rigid and ‘bounded’ conceptions of the separation of powers doctrine.
Interdependence

• The interdependence and relatedness of human rights norms
• Vienna Declaration and Programme of Action, 1993, Part I, para 5
• The effective protection of human rights depends on an integrated and holistic protection of a range of interrelated human interests.
  – See, for example, Government of the RSA v Grootboom, paras 23 and 83
• No rigid boundaries between different categories of human rights – context dependant.
Interdependence

- **Organic interdependence**: One right is interpreted to incorporate other rights within its scope
- **Related interdependence**: A civil and political right is relied upon to protect an economic, social and cultural right or interest.
Organic interdependence

RIGHT TO LIFE

Right to livelihood

Right to food

Right to housing
The right to equality

Fair trial rights / admin. justice rights

The right to social security

The right to housing
Negative / Positive Rights

• Traditionally CPRS’s associated with imposing only duties of restraint whereas ESC rights impose duties to provide.
• Critically interrogate:
  • Positive obligations imposed by and resource implications of CPRs: e.g. right to vote, fair trial rights, equality
  • Negative duties imposed by ESCR e.g. forced evictions, legislation permitting learners to be arbitrarily expelled from schools; cutting off of water supply.
  • What is the effect of privileging negative duties in human rights law?
Reviewing resource allocations

- Separation of powers, institutional competence and legitimacy.
- Justification of resource allocation priorities in the light of constitutional or international law human rights obligations.
- State cannot simply “toll the bell of scarce resources”
“[Resource constraints] will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker’s authority to determine what are reasonable and appropriate measures in the overall context of their activities.”

Per O’Regan J, SA Constitutional Court: Rail Commuters Action Group and Others v Transnet Ltd T/A Metrorail and Others 2005 (4) BCLR 301 (CC), para 88.
Reviewing resource allocations

• See, for example, General Comment No 15, UN Committee on Economic, Social and Cultural Rights
  “The State party bears the burden of showing that resource constraints render it impossible for a State to comply fully with its Covenant obligations.” (paras 40, 41).

• The more basic and urgent the need, the greater ought to be the burden of justification.
The public /private divide

<table>
<thead>
<tr>
<th>Public / State</th>
<th>Private sector: family; market</th>
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<tr>
<td>• Degree of power exercised depends on context – many weak States in regions of the world and in globalised economy</td>
<td>• Degree of power exercised depends on context – power of large corporations, investors and creditors, currency speculators</td>
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<tr>
<td>• Outsourcing and privatization</td>
<td>• Increasing role of private utilities and companies in water service delivery, social security schemes, international and bilateral trade treaties etc.</td>
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<tr>
<td>• Strong duties of accountability imposed by human rights norms</td>
<td>• Weak, indirect or non-existent duties of accountability</td>
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The public /private divide

- International law – doctrine of State responsibility – ‘duty to protect’
  - Int. Am. Ct. HR: Velásquez Rodriguez Case: The exercise of ‘due diligence to reasonably prevent harm. Context-specific assessment of reasonableness that takes into account resource constraints and competing rights and duties (para 175)
  - Int. Am. Ct. HR: Awas Tingni Case: Nicaragua’s acts and omissions in granting a concession to a foreign corporation to undertake logging on untitled land which including the ancestral lands of an indigenous community as well as their failure to demarcate and title the territory in question violated the right of the community ‘to the use and enjoyment of their property’ (art 21)
The public/private divide

- International law – doctrine of State responsibility – ‘duty to protect’
  - AfCommHPR: SERAC v Nigeria
    “The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.” (paras 57 – 58).
## The public /private divide

- No direct horizontal application of rights in international human rights treaties, but textual and interpretative indications that non-state actors have human rights responsibilities, also in respect of ESCRs. E.g. preambles of international covenants, art 30 UDHR; art 5(1) of ICCPR & ICESCR; ‘Duties’ (Ch II) of AfCHPR; General Comments of CESCR.

- Plethora of ‘soft law’ instruments, non-legally binding codes of conduct: UN Norms on responsibilities of TNCs and other business enterprises with regard to human rights; ‘Ruggie Mandate’

- Relevance of distinction between negative and positive obligations in this context?

- Question of effective methods of accountability
The public /private divide

- **Domestic law**
- Constitutional norms providing for direct or indirect horizontal application e.g. s 8(2) and (3) and s 39(2) of the SA Constitution.
- Judicial development / interpretation of the codified or common law private law system in line with human rights norms e.g. modification of absolute notions of property rights in balancing against housing rights norms.
- Regulatory legislation in various spheres e.g. eviction legislation, tenant protection legislation, equality legislation, legislation regulating private medical aid schemes
“In sum, the Constitution imposes new obligations on the courts concerning rights related to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.”

Per Sachs J in Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC), para 23.
The separation of powers doctrine

• **Purposes:**
  
  (1) Enable complex tasks of governance, law-making and law-enforcement to be performed by the institution that is best-placed to perform these functions;
  
  (2) By dividing power and creating systems of mutual control, it helps prevent one branch of government gaining a monopoly of power – system of checks and balances of which judicial review of human rights norms is a major component.
The separation of powers doctrine

**The Theory**

- **Legislature:** makes law e.g. enactment of legislation
- **Executive:** Developing and implementing policy and law
- **Judiciary:** Interprets law.
- **Civil society**
The separation of powers doctrine

The Reality

Civil society

Legislature

Executive

Judiciary

Civil society
The separation of powers doctrine

The Ideal

- Flexible, interactive, responsive, co-operative, mutually accountable model of separation of powers doctrine
- Facilitating participatory democracy
- A “constitutional dialogue” between the three branches of government and civil society
- No branch of government or organ of civil society ‘dominates’ “the conversation”.