Economic, Social and Cultural Rights:

TIME FOR A REAPPRAISAL

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glossary

echr European Convention on Human Rights and Fundamental Freedoms

ecosoc The Economic and Social Council of the United Nations, theoretically equivalent in status to the Security Council

iccpr International Covenant on Civil and Political Rights

icescr International Covenant on Economic, Social and Cultural Rights

icj International Commission of Jurists

ilo International Labour Organisation

imf International Monetary Fund

ngo Non-governmental organisation, usually meaning a private pressure group which involves itself in United Nations activities

udhr Universal Declaration of Human Rights

unesco United Nations Educational, Scientific and Cultural Organisation

about the author

Bernard Robertson came to New Zealand in 1989 with a degree in law from Oxford and a Masters Degree in law from London. He is also qualified as a Barrister of the Inner Temple. Earlier he had a career in the Metropolitan Police which included attending the 12-month Special Course at the Police Staff College, Bramshill. In New Zealand he has taught at the Victoria University of Wellington Faculty of Law and at the Department of Business Law at Massey University. Constitutional law has been one of Mr Robertson's specialities throughout. He has published numerous shorter articles and book reviews on public law matters and has recently published a paper on the Reserve Bank of New Zealand Act 1989 in the *Oxford Journal of Legal Studies*. Mr Robertson is now Editor of *The New Zealand Law Journal* and a freelance writer, researcher and teacher.

preface

The purpose of this paper is to introduce business people, lawyers and public servants unfamiliar with the international protection of human rights to a potentially important matter which receives little public consideration and on which surprisingly little detailed analysis has been published.

The discussion about international protection of human rights tends to be confined to a small group of academics, lawyers and diplomats who have interested themselves in these matters. But anyone concerned with the conduct of government who omits consideration of the international element may be missing an important constraint on, and occasional stimulus to, activity by governments.

The current key issue in human rights talk is the extension of legal procedures to cover not just classical civil and political rights but also economic and social rights. This language arguably is merely a new dressing for old arguments about central planning and state-controlled redistribution. The subject matter should therefore be of vital interest to all who have welcomed the reduction of state economic interference in recent years in New Zealand and who wish reform to continue.

I should like to thank, first, Alan Gibbs for financing this study; Andrew Mikkelsen who researched and drafted the chapter on housing and an adequate standard of living; Geoffrey Walker, Richard Epstein and others who commented on drafts, and

also the New Zealand Business Roundtable for its support and for making possible the publication of this paper in a far shorter time than could have been achievable through normal academic channels. It should not be assumed however, that the views expressed are those of anyone other than the author who is also responsible for any errors or omissions.

Bernard Robertson

executive summary

1 The recognition by New Zealand law of so-called economic, social and cultural rights is being urged by legal academics and others.

2 A distinction between civil and political rights on the one hand and economic, social and cultural rights on the other is not analytically defensible. Instead rights should be analysed as negative, requiring restraint on the part of the government, and positive, which require delivery of services by the government.

3 The recognition of positive rights is not a natural progression from the recognition of negative rights. The recognition of positive rights at best requires rationing decisions which distinguish them from negative rights and at worst requires negative rights to be restricted.

4 Positive economic rights

- require definition by the government of matters which require trade-offs that can only be assessed subjectively;
- mandate delivery by the state of things which can only be achieved through the efforts of individuals; and
- are used to legitimate, in the name of their achievement, the deliberate deprivation of minorities of the same and other rights.

5 The International Covenant on Economic, Social and Cultural Rights cannot stand up to detailed analysis. The rights enumerated in the Covenant are selective and politically biased. Many of the 'rights' contained therein are internally self-contradictory or are impossible for governments to implement while continuing to respect civil and political rights.

6 The International Covenant on Economic, Social and Cultural Rights is the product of a diplomatic decision-making process which exhibits a severe

'democratic deficit'. New Zealand is an enthusiastic signer of such conventions and this process should be subjected to greater scrutiny.

7 If the rights enumerated in the Covenant are reappraised purely as negative rights, the Covenant and the Committee set up to supervise its implementation have the opportunity to make a positive contribution to the welfare of citizens internationally. At present, however, the Committee and many commentators show little sign of understanding the points in paragraph 4 above.

8 The business community should note the importance of non-governmental organisations in assisting the Committee's scrutiny of states' reports under the Covenant and should consider how it can participate in this process.

chapter one

Introduction

The argument is being vigorously propagated that a proper view of human rights requires the recognition as rights of numerous claims which, 50 years ago, would not have been recognised as such. The practical form that this argument often takes is to agitate for implementation, or 'constitutionalisation', of the rights contained in the International Covenant on Economic, Social and Cultural Rights (icescr).

This argument arose at the time that the New Zealand Bill of Rights Act 1990 was being debated. Elements within the Labour Party wanted to include certain 'economic and social rights' but this move was defeated on the grounds that these rights were non-justiciable.[1] Since then argument has continued at both international and domestic levels. At the international level new human rights documents have been framed which mix civil and political rights with social and economic rights and set up supervisory mechanisms formerly associated only with civil and political rights.[2] The International Commission of Jurists (icj), a private body, promulgated the Bangalore Declaration and Plan of Action in 1995 calling for more active involvement of lawyers and judges in implementing economic, social and cultural rights, a term which the Commission seems to treat as synonymous with the content of the icescr. The icj also heard papers advocating the adoption of an Optional Protocol to the icescr, in other words a mechanism by which individuals could complain to the Committee on Economic, Social and Cultural Rights ('the Committee') that their rights were being violated.[3]

Within New Zealand the Bangalore Declaration has been taken up by Paul Hunt of the University of Waikato, describing these rights as the "other half of human rights".[4] Hunt has also written a paper attacking the distinction between civil and political rights on the one hand and economic and social rights on the other.[5] Professor Margaret Bedggood of the same faculty, formerly the Chief Human Rights

Commissioner, has taken up the cause of 'constitutionalisation' of economic and social rights.[6] The New Zealand Human Rights Commission has issued at least one report predicated on economic rights.[7]

Classical civil and political rights

The classical conception of rights was that their purpose was to maintain individual autonomy. It was clearly necessary to have some level of organised government to maintain the framework of law required to enable individuals to pursue their own ends without coercion by others. The powers necessary to achieve this, however, could also be used to threaten individual autonomy. The concept of individual rights which grew up in the common law aimed at ensuring that what government did it did justly. It did not, however, prescribe government activity; indeed in practice it restrained government from venturing into new activities.

One of the fundamental principles of the Rule of Law identified by Dicey[8] was that rights stemmed from the common law and not from legislation. This was an important insight recognising that individual rights could only be ensured when decisions were made on limited sets of facts by decision makers who understood that they could not predict the future effects of their decisions. Since the effects of decisions could not be predicted, rules were fashioned which applied equally to all.

The classic statement of common law values is to be found in the preamble to the Constitution of the United States of America which recognises that all persons have the right to Life, Liberty and the Pursuit of Happiness. The words 'pursuit of' were all important. The achievement of happiness was a matter for the individual. This is because happiness cannot be delivered by the state without first being defined; since happiness is clearly a subjective concept, the state's definition will not necessarily be my conception of happiness. It was also recognised intuitively that the world is not perfect and that while many people will not achieve even their own conception of happiness, the results of governmental attempts to deliver happiness would be far worse.

In the twentieth century the idea has arisen that governments can know enough both to define a common conception of happiness and to be able to act in such a way as to bring this state of affairs about. This has been reflected in growing quantities of legislation aimed at achieving particular results, most of which has failed spectacularly to achieve them.[9]

One of the manifestations of this belief was the framing, after the Second World War, of human rights documents which contained rights outside the traditional bounds of the concept of human rights.

The International Bill of Rights

The 'International Bill of Rights' is a term used to cover three documents:

- the Universal Declaration of Human Rights (udhr), declared by the United Nations soon after its creation;

- the International Covenant on Civil and Political Rights (iccpr); and

- the International Covenant on Economic, Social and Cultural Rights (icescr).

Both the Covenants were drawn up through a slow process which began soon after the inception of the United Nations and continued until 1966.

The Universal Declaration contained several non-traditional rights. It must be borne in mind that the United Nations at the time was a relatively small group of nations, a large number of which had governments of socialist inclination. Even the United States was still under the shadow of the most collectivist president it has ever had, and his widow was a leading force in the human rights activities of the United Nations. The clearest exception to this statement within the United Nations would have been Nationalist China which was preoccupied with its own problems and which was not known for its adherence to classical civil and political rights.

Later, the political complexion of Great Powers such as the United States, Britain and France changed. At the same time, however, the composition of the General Assembly underwent change in the opposite direction. Numerous new countries had come into being, most of which had socialist and dictatorial governments. The old socialist states, forming the Soviet Bloc, were ostensibly committed to the achievement of economic and social rights as a higher priority than civil and political rights. Most of the governments of the new states were simply hostile to any outside interference and to what they represented as the imposition of Western values on their cultures. The end result was the following set of decisions:

- the International Covenants were to contain economic and social rights. This was the price of the adherence of the Soviet Bloc to the instruments;

- the list of rights was to be split into two different covenants, one dealing with civil and political rights and the other with economic and social rights. This was the price of the adherence of the Western world;

- there were to be no legal enforcement mechanisms and no power to issue binding public statements that a government was in breach of any rights. This was the price of the adherence of the Third World.

The whole structure was driven by the need for the United Nations to achieve apparent consensus and unity. It is a revealing example of diplomatic decision making. The alternative was clearly for the Western nations to go ahead with the iccpr alone, giving it much stricter enforcement measures.[10] In effect this would have been an expansion of the European Convention on Human Rights and Fundamental Freedoms which had already been in operation for some years. The West was, however, willing to make concessions in order to obtain the signatures of the rest of

world to the documents – regardless of the fact that the bulk of those governments had no intention of implementing the covenants. The mere obtaining of agreement was regarded as a success. The content of the agreement was secondary.

This paper addresses principally the International Covenant on Economic, Social and Cultural Rights, since that is the focus of current discussion. Such discussion would usually assume the desirability of enforcing or implementing the Covenant in some way. However, the literature on economic and social rights is almost entirely exhortatory and general; detailed analysis of the provisions of the Covenant was almost entirely missing until 1995 when Matthew Craven published his PhD thesis.[11] That being the case, it seems important to analyse at least some of the provisions of the Covenant in order to understand its meaning in practical terms. This is a major purpose of this paper. Reference will be made to other documents where that is helpful to elucidate the argument.

Utopian aspirations?

Finally, it is commonly said that the statements of economic and social rights contained in documents such as the icescr are well-meaning but hopelessly utopian; that the aims are laudable but that their implementation is impracticable. This characterisation does not survive careful scrutiny of the document. It will be found that many of the 'rights' contained in the icescr are so internally self-contradictory as to be impossible to implement even in principle. Meanwhile the aims do not, on closer scrutiny, appear as laudable as at first sight. The mindset is revealed by the preamble to the Universal Declaration of Human Rights (udhr) which declares as its end:

> … that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive … to secure [these rights'] universal and effective recognition and observance … .

This proposal sets out a programme to which the will of all is supposed to be bent. It is hardly compatible with the classical conception of a free society in which people may choose their own ends provided only that they do not infringe coercively on others.

In fact it will be found that the current debate is seriously skewed. It will be seen from this critique that many of those who promote the cause of economic and social rights do so as a camouflage for arguing in favour of a particular sort of economic and social organisation. These adherents are assisted in such activity by some of the drafting of the icescr and by the slant of much of the comment by academics and by the Committee on Economic, Social and Cultural Rights. Such commentary is often laden with assumptions as to what kind of governmental action 'economic and social rights' require.

If these interpretations of the icescr were followed through, then, far from being hopelessly utopian, the implementation of the Covenant would undermine both

individual liberty and the prosperity which offers the only real hope of raising living standards and eradicating deprivation. A redirection of thinking on this topic is required if the concept of economic and social rights is to make a valuable contribution to human progress.

1 Joseph, Philip, *New Zealand Constitutional and Administrative Law*, Sydney: Law Book Co, 1993, p. 851.

2 For example, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women.

3 *The Review of the International Commission of Jurists*, No 55, December 1995 *passim*, especially p. 219.

4 Hunt, P, 'Reclaiming economic, social and cultural rights: The Bangalore Declaration and Plan of Action' [1996] NZLJ 67. In fact, the Declaration itself refers to "more than half of the field of human rights": *The Review of the International Commission of Jurists*, No 55, December 1995, p. 223.

5 Hunt, P, 'Reclaiming Economic, Social and Cultural Rights' (1993) 1 Waikato LR 141.

6 Bedggood, *Constitutionalising Rights: A Second Look at the Bill of Rights,* Lecture at the New Zealand Institute of Public Law, July 1996.

7 Human Rights Commission, *Report on Income and Asset Testing of Elderly People Requiring Permanent Residential Disability Care,* New Zealand, May 1995.

8 Dicey, A V, *Introduction to the Study of the Constitution*, 10th ed, London: MacMillan, 1961, p. 195.

9 In the United Kingdom, the Beveridge Report, for example, assumed that a National Health Service would make the population healthier and that health spending in the long term would decline. The same kinds of assumptions characterised the introduction of the Domestic Purposes Benefit and the Accident Compensation Scheme in New Zealand. In fact expenditure on both has increased far beyond expectations and shows no sign of decreasing, while there is no evidence of any reduction in the problems these measures were designed to address.

10 Australia, for example, argued for an International Court of Human Rights which would have the power to issue binding decisions under the iccpr.

11 Craven, M, *The International Covenant on Economic, Social and Cultural Rights,* Oxford: oup, 1995.

chapter two

Negative and positive rights

It is standard today to offer a threefold classification of human rights, whilst denying that the categories are watertight or independent. These categories are:

- classical civil and political rights such as freedom of speech and liberty of the person;

- economic, social and cultural rights such as the right to work and to housing; and

- solidarity or group rights such as the right to development and environmental rights.

Other names for these divisions include First, Second and Third Generation Rights and 'negative' and 'positive' rights. The clear semantic implication is that one can, and should, progress from the achievement of one category of rights to the achievement of the next. This implies that they are at least complementary if not actually indivisible.

The tendency of the debate has been to assume that the expressions 'positive rights' and 'economic and social rights' are synonymous. But this is not so. The categories are conceptually distinct. Some definitions will be attempted:

- negative rights are rights which are held against the government only, and which are capable of being expressed in a rule which restrains governmental action and which applies equally to all;

- positive rights are rights to be awarded some benefit, delivered some service or treated in a defined manner. These rights may apply against other private individuals as well as against the government;

- civil and political rights govern the relationship of the government and the citizen as a political person; and

- economic and social rights govern the relationship between the government and a person's economic and social activity.

It will be seen at once that the last two categories are defined in circular terms. They are not, unlike the first two, exclusive categories, but divisions of thumb only. The idea that they are exclusive stems from the notion that economics is about money or activity that generates money. Since economics is actually a mode of thought and analysis rather than a compartment of activity it follows that there cannot be a watertight division between 'political' which refers to an area of activity, namely participation in collective decision making, and 'economic' which refers to a mode of analysis.

Furthermore, even if a rough distinction between civil and political rights on the one hand and economic rights on the other is accepted, it is not identical with the distinction between negative and positive rights. We have in fact a two dimensional model which generates four possible types of right:

• negative/civil and political – such as the right to freedom from arbitrary arrest and freedom of speech;

• positive/civil and political – such as a right to have my life protected by the government and a right to vote;

• negative/economic such as the right to enjoy private property and the right of free contracting; and

• positive/economic such as the right to education or the right to work, at any rate in the form in which those rights are commonly presented.

The important distinctions between positive and negative rights (and the importance of distinguishing between them) may be expressed in various ways, for example:

• negative rights are public goods. They are consumed in a non-rival fashion and the addition of a marginal consumer is cost-free. Each individual is entitled to exercise his or her classical civil and political rights to the full. Positive rights, on the other hand, are private goods. Additional consumers cannot be added at no cost. These 'rights' have to be rationed in one way or another, either by being applied only to certain people, or by limiting the extent of their realisation; and

• negative rights consist of general rules applicable to all, subject to prospectively defined exceptions. They establish a predictable framework of rules within which people are left free to pursue their own ends. In their nature, therefore, they do not specify, and cannot guarantee, any particular outcome for any particular person. Positive rights, on the other hand, confer benefits, frequently in practice only upon certain people or groups of people.

The current status of these four categories in international human rights documents can briefly be described as follows:

• negative civil and political rights have traditionally been recognised in such documents;

• positive civil and political rights are making an appearance through the reinterpretation of human rights documents by courts, committees and commentators;

• positive economic and social rights appear in human rights documents but have typically been regarded as aspirational rather than enforceable; and

• negative economic and social rights have been excluded from international human rights documents altogether and are usually omitted in 'rights talk'. Since this is so, the expression 'economic and social rights' will be used in this paper to mean 'positive economic and social rights' unless it is made clear

that negative rights are being referred to.

The indivisibility of human rights

Since negative economic rights are absent from human rights documents, assertions about the indivisibility of human rights are usually assertions that negative civil and political rights cannot be divided from positive economic rights. This indivisibility is something which is merely reiterated endlessly by supervisory bodies, by special conferences and the General Assembly and then quoted by commentators. Also cited as 'evidence' is the fact that several modern instruments, such as the Convention on the Rights of the Child, contain 'rights' of all three kinds. No argument is ever directed to the point. This concept of indivisibility is in fact open to serious challenges, none of which is answered in the literature.

At the deepest level it is evident that the thinking underlying the pursuit of economic and social rights is based on a view of society as an organisation designed and directed for specific purposes.[12] This is clearly inimical to a free society which does not itself have any purpose beyond providing a secure framework for individuals to pursue their own purposes. A free society in which interactions were determined freely by the actors might or might not result in the aims described as 'economic and social rights'. To (attempt to) ensure that such aims are achieved, the free society must be replaced to some extent by a directed society in which individuals are compelled to channel at least some proportion of their efforts to the achievement of goals which they have not freely chosen.

That this is recognised by the more ingenuous proponents of economic and social rights is illustrated by the following statement in the Report of the unesco Committee on the Principles of the Rights of Men:[13]

> If the new declaration of the rights of man is to include provision for social services, for maintenance in childhood, in old age, in incapacity or in unemployment, it becomes clear that no society can guarantee the enjoyment of such rights unless it in turn has the right to call upon and direct the productive capacities of the individuals enjoying them.

At a more detailed level it will become clear from this paper as the rights enumerated in the icescr are examined, that many, as conventionally interpreted, can only be achieved at the expense of restricting corresponding individual liberties.

Some argument for the indivisibility of human rights can be found, mostly aimed at attacking the postulated distinctions between political and economic rights. Since many commentators have not understood the two dimensional analysis above, it has been found easy to debunk some of their arguments. Proponents of the indivisibility of human rights take this as a vindication of their position. These arguments will now be reviewed. Finally, a rather different argument for the indivisibility of human rights will be made.

State abstention versus state intervention

One of the arguments used to differentiate civil and political rights from economic and social rights is that the former require state abstention and the latter state intervention. This is then attacked by the proponents of economic and social rights through demonstrating that governments have to take action in order to uphold classical civil rights such as the right not to be subjected to inhuman and degrading treatment in prison.

The insight contained in this supposed differentiation is that in order to uphold civil and political rights the government is not expected to initiate whole new programmes, or to involve itself in new areas of activity. What is required is that when the government performs the roles expected of it in a free society it does so in a way that accords with principles of equal treatment and justice.

The objection, however, that governmental action is required to uphold these rights is clearly correct, so some other distinction must be found, some way of distinguishing the one kind of governmental activity from the other. This is not difficult. Negative rights require that what the government does it must do justly. They have nothing to say about what the government is to do. Positive rights, however, specify activities in which the government should engage in order to pursue the rights. Since these specifications are result-oriented, they will be inimical to the kind of procedural restrictions on government known as classical civil and political rights.

Cost-free versus government expenditure

A distinction related to the previous one is the idea that the implementation of classical civil rights is cost free while economic and social rights require substantial government expenditure.[14]

Hunt, for example,[15] aims to show that this is a false dichotomy by showing that civil and political rights require state intervention and that they require substantial expenditure. The example of a right requiring positive state action is the right to be free of torture or inhumane or degrading treatment. In pursuit of this right, Hunt says, the state has to spend considerable amounts of money on prisons of a proper standard. He cites us cases such as *Jackson v Bishop* (1968) 404 F 2nd 571, in which the Court said that "[h]umane considerations and constitutional requirements are not … to be … limited by dollar considerations". Thus, Hunt says, the us courts recognise that civil and political rights are not cost-free and not to be limited for fiscal reasons. The unstated implication is that economic and social rights should not be limited for fiscal reasons either.

What matters, however, is not the quantity of government expenditure but the type of government action required and the aims pursued. Further, there is a marked difference between the expenditure to avoid inhuman and degrading treatment on the one hand and expenditure to realise an economic right on the other. The state

does not initially engage in building prisons in order to protect the human rights of prisoners. The state builds prisons, establishes a police force and so forth in order to create the public good of order and security and to protect rights to integrity of person and property. Unfortunately, the powers conceded to the state to protect personal autonomy have the potential to be abused so as to oppress. These powers must therefore be limited and controlled by, amongst other things, the expression of such rights. But the problem is created by the initial concession of power to the state by individuals. There is always another solution, as was suggested in one of the cases quoted by Hunt, namely that if the state cannot detain people in conditions of decency it will not be allowed to detain people at all (*Hamilton v Love* (1971) 328 F Supp 1182). Obviously no equivalent riposte can be made to a claim that the state cannot afford to implement a right to education or health care.

The distinction does not therefore depend upon the fact of government expenditure. Since all governmental activity costs money, a claim that civil and political rights can be implemented cost free is equivalent to a claim that there should be no government. Nor does the distinction depend upon the amount of money spent. There is no magic figure, whether in absolute terms or as a percentage of gdp, that crosses the line from the implementation of the one kind of right to the other.

Rather the distinction is one of the quality or type of government activity. Positive rights, if 'delivered' by government, require rationing and require the compulsory transfer of resources from one individual to another. Negative rights require only the provision of services equally available at all times to all.

Justiciability versus non-justiciability

'Justiciability' refers to the suitability of a matter for judicial determination. The characteristics of judicial decision making include that it proceeds from pre-existing rules, that the judge is provided with relatively little information and has a relatively narrow question to answer.

The word 'justiciable' can be used in two senses. One is normative, whether in the opinion of the speaker, a decision is suitable to be made within the constraints under which judges labour. The second is purely positive, that as a matter of law, judges have to make the decision in question. Thus if an Act of Parliament were passed instructing a court to determine the appropriate rate of inflation this would in positive terms, but not normative, be a justiciable issue.

It is traditionally said that economic and social rights are not suitable for judicial consideration because of the wide range of issues that have to be taken into account and the uncertainty surrounding effective means of achieving the ends in question. This argument usually implies that, on the other hand, legislative and executive authorities do have the information and understanding required to achieve policy goals. If one starts from the premise that nobody can know enough to achieve particular outcomes beyond his or her immediate circle of influence, then obviously courts cannot know enough either.

It is commonly argued in response that judges make law and do not merely declare it; they are therefore involved in policy decisions. There is consequently no reason why courts should refrain from dealing with the kinds of issues raised in arguments over the implementation of economic and social rights. The first argument can be answered but is not strictly relevant here.[16] The point is that law, however and by whomever made, should consist of general rules of equal application. This century the claim has been made that the approval of a majority of the electorate justifies the introduction of discriminatory legislation. No such justification can apply to judicial decision, however. If decisions are to be made to transfer wealth from group to group this should be done after a process which is public, accessible, transparent and has some hope of gathering sufficient information to lead to the desired result. Judicial decision making clearly fails to meet these requirements.

A specific example sometimes used to illustrate proper cases for judicial intervention in support of economic and social rights[17] is that of a landowner switching the use of land from locally consumed edibles to cash crops, thereby depriving subsistence farmers of their right to food. It therefore seems to be proposed that one has a right, enforceable against other private citizens, to remain a subsistence farmer, presumably paying a proportion of one's crop as a rent in kind, rather than become the paid employee of a cash crop farm. Generalised, this appears to be a right to retain one's present economic status regardless of changes in the world around; an echo of this will be found in President Roosevelt's propositions alluded to later in this study.

Retaining people in a subsistence economy seems about as sensible as proposing that the right to food entails that employers should issue all employees with basic rations as part of their remuneration (as in fact was common in the Soviet Bloc). Nor is individual freedom protected by remaining a subsistence farmer. It is true that the transition from smallholding farmer to employee is one which tends to reduce individual freedom[18] but in this example the farmers do not appear to be smallholders but workers entitled only to a proportion of the crops they raise on someone else's land. The transition from owing a particular service or having to hand over a proportion of one's produce to being paid money for the fulfilment of a contract is, on the other hand, a liberating one.[19] One is also bound to ask what has happened to the human rights of the landowner who has to bear the opportunity cost of this court-ordered production.

No convincing example has therefore been produced of a case in which judges can effectively make decisions allocating positive economic rights. All such decisions are decisions which allocate resources and which therefore have opportunity costs. They also invariably require transfers from individual to individual. Such decisions should be made either by voluntary transactions or by an accountable political process.

Vagueness versus precision

One reason why economic rights are said to be non-justiciable is that their terms are insufficiently precise to guide judges as to the content of the rule. Some caricatures can be produced in support of this argument. Article 22 of the Universal Declaration of Human Rights states

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The natural response is to assert that other, more traditionally justiciable, matters are also vaguely stated or defined. Hunt, for example, argues that some civil and political rights are also vaguely stated, such as the right to be free from inhuman or degrading conduct. But there is a crucial difference. While it may be difficult and even undesirable to be too specific about exactly what constitutes inhuman and degrading conduct we can agree on a reasonably specific statement such as 'this means that the state shall not treat anyone in a way that is regarded by right thinking people as inhuman or degrading'. But in the case of the right to housing it is not possible to make any such statement. It could mean 'the state must not interfere with the tenure of householders' or 'the state must provide everyone with a house of a certain standard' or 'the state must ensure that everyone can afford access to adequate housing'.

Likewise with the right to education. Not only is there a difficulty defining 'education', the equivalent problem to defining 'inhuman and degrading treatment', but there is a problem deciding how far the right is to extend since, clearly, the entire population cannot spend their entire lives in full-time education. The difficulty of definition is not therefore just one of determining appropriate standards. It is that in the case of the right to be free from torture there is a clear principle which guides action: 'the state shall not torture anyone at any time'. In respect of the rights to housing and education on the other hand there is no principle which tells us what action is required of the government, merely a repetition of the terms of the right.

A related argument that is put up to be shot down is that civil and political rights are absolute whereas economic and social rights are qualified.[20] This argument is then tackled by debaters pointing out that most civil and political rights contain exceptions and that states can enter reservations when adhering to an instrument. Both sides of this argument miss the point. However encrusted with exceptions civil and political rights may be, those exceptions are set down prospectively and become part of the definition of the right. What is thus defined is thereafter, within its limits, absolute. But the same cannot be said for economic and social rights. These require to be rationed and no principle can tell us in advance what the appropriate degree of rationing is.

The achievement of civil and political rights depends upon the achievement of economic and social rights

A classic example of this view is found in President Roosevelt's 'Four Freedoms' speech:

> We have come to a clear realisation of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not freemen." People who are hungry and out of a job are the stuff of which dictatorships are made.

As it stands, this statement contains important truths. True individual freedom does indeed require economic security and independence. It may not be necessary that every individual is financially independent, but there needs to be a sufficient proportion of financially independent people in a society to create a culture of independent thought and speech. The final sentence is undoubtedly also correct.

But this statement is at odds with what Roosevelt proposed, with what the proponents of economic rights argue and with what the welfare state has achieved. In particular the final sentence should give the proponents of economic rights pause for thought. The reason the hungry and unemployed are the stuff of dictatorship is that they believe that economic prosperity can be obtained at the expense of (others') civil and political rights. It is also clear that the same belief is held by some of the proponents of economic and social rights and indeed was held by Roosevelt himself. It is noteworthy that Roosevelt was only able to get the New Deal implemented by threatening to pack the Supreme Court.

If one of Roosevelt's purposes, and one of the purposes of the icescr and the welfare state, is to create economic security and independence, they are great and inevitable failures. The welfare state tends to turn large proportions of the population – beneficiaries, the elderly and public servants – into pensioners of the state. Taxation, and especially graduated taxation, makes governmental action a far greater factor in people's standard of living than improvements through their own efforts. The effect of taxation and of other aspects of the welfare state is to push a further proportion into salaried positions in companies which are at least partly dependent on the state or which are constantly concerned about their media image.[21] It is inevitable that the greater the effort the government expends on redistributing wealth and controlling the economy, the greater will be the number of people dependent for their living on the state. Inflation further exacerbates this effect.

It is therefore quite incorrect to argue that the deliberate pursuit by governments of economic and social rights will lead to a more economically secure population, better able to exercise their civil and political rights. To Roosevelt's statement above needs to be added the warning "If you control the way a man earns his living, you control everything about him".

Both categories of right are 'legal rights'

Some commentators have denied that economic and social rights are 'legal rights'. This would appear to be a not very well articulated statement of a normative view of justiciability. The straightforward answer is that the rights we are concerned with

are contained in a treaty which governments have signed and that by signing a treaty governments accept obligations binding in international law.

The interesting point about this argument is that it treats 'law' in a purely positivist sense. Something is law because it is contained in a treaty. Therefore whatever is put into a treaty is law and cannot, on that ground, be regarded as categorically different from anything else in a treaty, such as civil and political rights. But the argument for human rights cannot be sustained in a purely positivist manner. If the concept of 'rights' is to have any meaning other than 'claims which happen to be legally enforceable in a particular place at a particular time' it must have some natural content and not be determined simply by the content of documents. While this argument may demonstrate the weakness of the attack that economic and social rights are not 'legal', it is not a strong argument for the indivisibility of human rights.

Civil and political rights have an economic and social aspect

It is argued that many rights traditionally thought of as civil and political rights in fact have an economic and social aspect. The classical right to property is an obvious example. But this is not evidence that the distinction between the two kinds of right is false. It would only be so if 'economics' was about money and material wealth rather than about preferences in general. Since any 'right' can be exercised so as to maximise one's values, any right has economic consequences. The problem here is one of semantic confusion. Certain positive rights have been labelled 'economic', from which it is then argued that any right to which economic consequences attach belongs to that class.

It is certainly true that the division between the contents of the iccpr and the icescr does not correspond to any analytical distinction between any categories of rights. It is also true that the bare form of words that a person 'has a right to X, Y or Z' can be given either a negative or a positive meaning. But this does not indicate that there is no distinction, merely that intellectual rigour and conceptual clarity were not high on the list of priorities of the diplomats who drafted these treaties. This will often be because it would not have occurred to them that their words were to be interpreted in a 'positive' sense.

The supervisory bodies created by the human rights instruments have also demonstrated conceptual confusion. The Human Rights Committee, for example, in its *General Comment No 6* referred to widespread malnutrition and high infant mortality as breaches of the right to life. General Comments are adopted without any argument being heard. Such argument could have been directed to the language of Article 6(1) iccpr:

> Every human being has the inherent right to life. This right is protected by law. No one shall be arbitrarily deprived of his life.

The first sentence sets out the right. The status of the third sentence is ambiguous. Is it merely an example of how the provision can be breached? Or is it a definition? If the former, why bother to state it? In fact this right can perfectly well be left as a negative right, namely to protection from arbitrary deprivation of life by state action. This interpretation is reinforced by article 6(2) which deals with the death penalty and article 6(3) which deals with genocide. The Human Rights Committee has taken a quite clear step from that concept to the positive concept that the state has a duty to deliver the essentials of life to people, or at any rate to some people, in order that they should live a normal healthy life. The fact that the Human Rights Committee has made this unwarranted move from the category of rights it is supposed to deal with to a different category does not demonstrate that there is no distinction.[22]

Another example is given by Scheinin[23] from the jurisprudence of the European Court of Human Rights on Article 6 of that Convention. This article guarantees that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

A number of controversial decisions have been made by deeply divided courts over the application of this right. For present purposes the relevant line of cases is those extending the meaning of 'civil rights'. This phrase is used in the Convention in its Roman Law sense, meaning one's rights under the civil law of obligations, in other words, contract, tort, equity etc. The meaning is clear. The European Court of Human Rights, nonetheless, has extended the meaning to cover instances in which some governmental regulatory decision has interfered with the ability of someone to make a contract, e.g. the registration of doctors.[24] This has inevitably had the effect, just as it has in New Zealand administrative law, that the requirements of 'natural justice' have had to be watered down to meet the different circumstances of regulatory bodies.[25] This development has been subjected to considerable criticism and resulted in the proposal by the States Parties of a further Optional Protocol covering administrative procedures and making it clear that Article 6 did not apply to them. Again, the fact that the European Court of Human Rights took a deliberate decision to extend a right beyond the meaning intended by the States Parties does not itself indicate that there is any conceptual blurring between categories of rights.

Most remarkably of all, Scheinin quotes, as an example of the 'integrated approach' to the two categories of rights, occasions when the European Court of Human Rights has failed to protect a right in the Convention because action by the state in pursuit of some economic or social goal was considered a justification. Cases such as *James v The United Kingdom*[26] in which the Court upheld a UK law enabling tenants to buy their houses compulsorily from private landlords, are cited as examples of individual rights protected by the Convention having to give way to the pursuit of 'social justice'. It is surprising to find this quoted as an example of the 'integrated approach' when proponents of the icescr deny that economic rights inevitably entail restriction rather than enhancement of civil and political rights. Alston, for example,

implies that the argument that economic and social rights are easily exploited to excuse breaches of civil and political rights is of questionable validity.[27]

The so-called integrated approach proves at least that the supervisory bodies had taken deliberate decisions to launch into new and unexpected areas and at worst illustrates rather than refutes the argument that economic and social rights necessarily restrict civil and political rights. It does not prove that there is no conceptual distinction between the two categories.

The argument that civil and political rights do have economic and social consequences does lead us, however, to an entirely different kind of argument about the indivisibility of human rights.

The indivisibility of human rights

Adam Smith's argument about the functioning of the free market was that desirable ends such as an increase in the standard of living would be achieved, not by their deliberate pursuit by governments, but as a consequence of individuals being allowed to pursue their own much more limited ends.

Put into the terms of the present debate this is to say that the aims expressed as positive economic and social rights are best pursued by allowing individuals to exercise their negative rights for their own purposes. This is hard to accept for those who cannot understand the concept of a spontaneous order and who believe that problems must be tackled by deliberate governmental action.

Indeed this is the argument we find made by Human Rights Watch. Whereas, at least in 1984, Philip Alston, the former Chair of the Committee on Economic, Social and Cultural Rights, regarded satisfaction of the right to food primarily as a distributional matter,[28] Human Rights Watch argues that famines are invariably caused by a combination of poor government policy (often involving breaches of the right to property) coupled with breaches of civil and political rights. Famines do not occur in countries with a free press, for example. In almost all cases famines are caused by governments suppressing information about an impending problem.[29]

It is thus not the case that there is a necessary trade-off, as socialist countries used to argue, between civil and political rights on the one hand and the satisfaction of the demands commonly known as economic and social rights on the other. The history of the last 50 years, in fact of the last 200 years, demonstrates that the fastest economic progress has been in those societies which have allowed basic civil and political rights and have not concerned themselves with the deliberate pursuit of economic and social rights.

Conclusion

There is a clear and important distinction to be drawn between negative rights and positive rights. It will be seen from the detailed examination of rights that follows

that this terminology should not lead to the assumption that having satisfied negative rights we should move on to satisfy positive rights. Nor should we fall for any semantic trickery that implies that 'positive' rights are more desirable than merely 'negative' rights. The relationship between negative and positive rights is a mathematical one. The imposition of a positive right cancels out negative rights. The enforcement of negative rights prevents the pursuit of positive rights, but turns out to have positive consequences.

12 The preamble to the Universal Declaration of Human Rights being an outstanding example.

13 unesco, *Human Rights, Comments and Intepretations*, 1945, Appendix. See also Pettit, P, 'Can the Welfare State Take Rights Seriously?', pp. 67–85 in Sampford, C and Galligan, D (eds), *Law, Rights and the Welfare State*, London: Croom Helm, 1986, in which he argues that welfarism is a consequentialist philosophy and that consequentialists "can have no truck with fundamental rights". He then asserts simply without argument that, nonetheless, there are good reasons for the welfare state to take "rights" seriously.

14 Bossuyt, M J, 'International Human Rights Systems: Strengths and Weaknesses', in Mahoney, K and Mahoney, P (eds), *Human Rights in the Twenty-First Century,* Dordrecht: Nijhoff, 1993, p. 47. Bossuyt may have been struggling to express the concept of a public good, namely that the marginal consumer is cost free.

15 Hunt, P, 'Reclaiming Economic, Social and Cultural Rights' (1993) 1 Waikato LR 141.

16 In brief, the point is that judges make law unconsciously. The law is only determined by the retrospective observer, such as a judge in a later case. As soon as judges themselves get the idea that they can make law and consciously start to 'develop' the law, they become in effect legislators and suffer from all the problems that beset legislators without the benefit of the mechanisms to supervise activities that the executive has and without any conception of opportunity costs and trade-offs within a limited budget.

17 Shue's illustration in Saduski, 'Economic Rights and Basic Needs', in Sampford, C J G and Galligan, D J (eds), *Law, Rights and the Welfare State,* London: Croom Helm, 1986, p. 57. Hunt, *supra*, changes the example so that the reason for the change is government incentives and so that the focus of the judicial review is on the decision to offer these incentives. The answer to that example is that governments should not offer incentives for particular forms of land use as this conflicts with rights such as to choose one's occupation.

18 Hayek, F A, 'Employment and Independence', in *The Constitution of Liberty*, London: Routledge, 1990, chapter 8.

19 Simmell, G, *The Philosophy of Money,* London: Routledge, 1978, pp. 284 *et seq*.

20 An argument tackled, without any example of its use being given, by Matas, D, 'Economic, Social and Cultural Rights and the Role of Lawyers: North American Perspectives', *The Review of the International Commission of Jurists*, No 55, December 1995, 123, pp. 127–128.

21 In 1800 about four fifths of the population of the United States were 'private enterprisers'. By 1950 only one fifth could be described this way, the bulk of the population having become employees. Mills, C W, *White Collar,* New York: Pioneer, 1951.

22 The European Commission on Human Rights has taken a similar step in announcing that the right to life under the echr requires governments to protect the right to life by taking preventive measures against terrorism *App 9348/81 v uk* (1983) 5 ehrr 504. The Commission then declined in that and a later case, *App 9825/82 v uk* (1985) 8 ehrr 49, to consider in detail the appropriateness and efficiency of measures taken by the United Kingdom against terrorism in Northern Ireland. The Commission thus asserted a positive right to life but refused to tackle the rationing questions which follow. Since the Commission rejected both applications as manifestly ill-founded these questions have yet to be considered by the Court.

23 Scheinin, M, 'Economic and Social Rights as Legal Rights', pp. 41–62, in Eide, A, Krause, C and Rosas, A (eds), *Economic, Social and Cultural Rights*, Dordrecht: Nijhoff, 1995.

24 *Feldbrugge v The Netherlands* (1986) 8 ehrr 425, *Deumeland v Germany* (1986) 8 ehrr 448.

25 See, e.g., *Bryan v uk* (1995) 21 ehrr 342.

26 (1986) 8 ehrr 123.

27 Alston, P, 'us Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' (1990) 84 ajil 365, 373.

28 Alston, P, 'International Law and the Human Right to Food', in Alston, P and Tomasevski, K (eds), *The Right to Food,* Dordrecht: Nijhoff, 1984, p. 11. Interestingly, both Alston and Human Rights Watch use the Bengal Famine of 1943 to illustrate their point. Alston, however, merely states that there was no loss of food production that year, from which he infers that distribution could have solved the problem. Human Rights Watch actually examine the sequence of events to try to discern some causal relationships between events. Alston's discussion also completely lacks any dynamic analysis.

29 The United Nation's contribution to this has been to allow unesco to create a 'New Information Order' which would have legitimated control of the media by Third World governments. Fortunately, this initiative has been entirely ineffective.

chapter three

The Nature of the obligations under the icescr

Is International Law 'law'?

This is a jurisprudential question on which much has been written. Only a few observations are in place here.

During the nineteenth century the philosopher of law, John Austin, propounded what is often known as the 'gunman' theory of law. According to this theory, law is that which can be enforced. During the twentieth century people have become accustomed to thinking of law as made by some authority such as parliament, and enforced by another such as the courts. From this position, it is hard to see international law as 'law' since enforcement mechanisms, and especially effective enforcement mechanisms, are more or less lacking. Even where they are present, as

in the ability of the un Security Council to impose sanctions, each individual enforcement action requires political approval.

To an evolutionary theorist, however, Austin's proposition is exactly the wrong way round. In the evolutionary view, the law evolves as a result of individuals' interactions with one another. Whatever short-term gains might be made by unilateral and coercive action, most people recognise that in the long run it is in their interests to have a stable society governed by rules. The rules are then enforced because they are the law.

From this standpoint, there is no difficulty in recognising international law as law. It merely lacks a formal enforcement mechanism. That does not mean that countries will not regard themselves as obligated to obey a rule even if it is contrary to their short-term interests. The law on diplomatic immunity is an example easily grasped. Nonetheless, the lack of an enforcement mechanism does have serious effects. Chief of these is that in the last analysis international law cannot be enforced when a Great Power feels its vital interests to be threatened, which is why un enforcement action requires political approval.

For the purposes of this paper, at any rate, it will be assumed that there is such a thing as international law which is capable of creating legally binding obligations on national governments.

Such obligations are classically owed only to other governments and not to individuals. They cannot, therefore, be enforced in municipal courts. In particular, in the common law systems treaties do not become enforceable in domestic courts until enacted into legislation. This view of the icescr was affirmed in *Lawson v Housing New Zealand*.[30]

In some other countries treaties become part of the law of the land on ratification. It should be noted, however, that in New Zealand as in most other common law countries ratification of a treaty is a purely executive act. In countries where treaties become law on ratification, the legislature often has some role in the ratification process. In the United States, for example, ratification of treaties requires the 'advice and consent' of the us Senate.

The statement that international law cannot be enforced in court is subject to at least two glosses:

- customary international law is part of the common law. There is little in customary international law, however, which might arise in domestic litigation; and

- when interpreting statutes the courts will assume that parliament intended to comply with New Zealand's international obligations, or the court's interpretation of them.[31] If it is possible to interpret an Act so as to comply with those obligations, that is the way it will be interpreted. If parliament's

meaning is clear however, then the words of the statute are supposed to be determinative.

Early international human rights documents

Historically, treaties were in the nature of contracts between two or more states. They dealt with matters that could only be dealt with between governments and in the event of breach by a state party one of the others will usually have had a direct interest in complaining about the breach and even taking enforcement action, such as declaring war.

International human rights treaties are not in the nature of a contract between states which have a direct interest in their observance. Nor do they deal with matters that are necessarily international. In the typical human rights document a large number of states simply adhere to the document and undertake to comply with the terms of it. This has led some international lawyers to argue that these documents are not treaties at all but unilateral declarations by states.

During the period in which these documents have been drawn up, an assumption has steadily been taking hold that disputes between states should not be dealt with bilaterally but in designated fora. This will often mean the participation of third party states or decision by a body of people who at least in theory act as individuals rather than as representatives of states. Human rights documents have contributed to this trend.

The first major such document was the Universal Declaration of Human Rights, which is simply a declaration of rights, with no procedural mechanisms at all. The next most important step was the European Convention on Human Rights and Fundamental Freedoms.

The European Convention created a system for enforcement involving two new bodies and a new role for an already existing one. Initially states would take their disputes to the European Commission on Human Rights which would make available its good offices to enable the parties to reach a friendly settlement. If this was not possible, the Commission would write a report on the matter and forward it to the Committee of Ministers. This Committee is an organ of the Council of Europe and consists, as its name implies, of the foreign ministers of each member state. This Committee had the power to determine, by a two thirds majority, that a breach of the Convention had occurred and that that determination would be binding (Article 32(4) echr).

Alternatively, and this has become a standard procedure, either the Commission or the state involved could refer the matter to the European Court of Human Rights. The decision of the Court is binding on the states parties (Article 53 echr).

Over time the Commission has come to function more and more like a court and the Court as a court of appeal. This process is now to be formalised. The Commission is

to be abolished and the Court will hear cases in chambers (which in continental terminology is the equivalent of 'benches') with the whole Court hearing appeals.[32]

In the European Convention, as in nearly all such documents, there is a requirement that the complainant has exhausted all domestic remedies in the state complained of. This is one of many features which serve to emphasise that the primary responsibility for upholding human rights lies not with the international organs but with the states parties.

The International Covenants

The final comment above is especially true of the International Covenants. The 'International Bill of Rights' was divided as discussed in chapter 2. There are two distinctions between the Covenants:

- the rights in the iccpr are said to be immediately effective and self-executing while the rights in the icescr are said to require progressive implementation; and

- the iccpr set up a Human Rights Committee which was to play the same kind of role as the European Commission on Human Rights.

The differences between the Covenants are, however, reduced by the following considerations:

- although the rights under the icescr are to be progressively realised, this does not mean that there is no immediate legal obligation on states parties. There is an obligation to set about the progressive realisation of the rights, in other words to be moving in a particular direction rather than to be at a particular place. There is, therefore, the potential for immediate complaint that a state is not complying with its obligations. Furthermore, some of the provisions of the Covenant are clearly immediately effective, such as Article 14 which requires states which do not at present provide free primary education to draw up a plan for doing so; and

- the Economic and Social Council of the United Nations subsequently resolved to set up a Committee on Economic, Social and Cultural Rights which would imitate the Committee created by the iccpr. It can at present only receive reports and issue 'General Comments'. Any complaints role would have to be awarded by a Protocol which states parties could choose to sign;[33] it could not be created by a resolution of ecosoc.

It is to be noted that not even under the iccpr is any mechanism created for laying down binding rulings on the interpretation of provisions of the Covenant, nor that a state is in breach. There is certainly no such mechanism under the icescr. The only mechanism for supervision of the implementation of the Covenant is a requirement for states parties to report to the Secretary-General of the United Nations on

measures taken and progress made in implementing the Covenant. The Secretary-General forwards the reports to ecosoc and to specialised agencies of the United Nations. ecosoc can transmit the reports with its comments to the un Human Rights Commission and to the specialised agencies. There is no provision in the Covenant for any body to issue binding instructions to a state party.

The responsibility for determining the meaning of the provisions of the icescr, and how the goals it sets out are to be pursued, therefore falls upon the states parties. The Committee cannot issue a binding decision of any sort. Nonetheless it should be noted that there are already calls for the Committee to indicate what specific steps should be taken by a state party[34] and for an individual complaint mechanism to be introduced.[35] The former step would be a most significant one, as will shortly be shown.

Reporting and the Committee on Economic, Social and Cultural Rights

ecosoc established sessional working groups early in its existence to 'assist' with the consideration of the reports, but this did not prove a satisfactory arrangement. In 1985 ecosoc adopted a resolution setting up the Committee on Economic, Social and Cultural Rights, which is evidently designed to resemble the Human Rights Committee established by the iccpr.

Members of the Committee are elected by ecosoc from a list of nominees submitted by states parties to the Covenant.[36] Although the members are supposed to serve in their personal capacity, they are elected, as is usual in the United Nations, by groupings which reflect geographical and political links amongst states (New Zealand, for example, is part of the Western Europe and Others Group).

The resolution setting up the Committee requires that the members be "experts with recognised competence in the field of human rights". Craven suggests that there is also a need for 'experts' in housing, nutrition and discrimination, and regrets the fact that most members have a legal background.[37] Expertise in economics does not seem to be regarded as a necessary qualification, a comment which can be extended to most un activities in this area. A legal background does not always mean that the members are independent practitioners; many are public servants, diplomats or academics at universities controlled by governments. Only the English-speaking countries have a consistent record of appointing independent practitioners and academics to such bodies.[38]

The Committee receives reports from states parties at five-yearly intervals and, after consideration of each report, engages in 'constructive dialogue' with representatives of the state. Where states consistently fail to submit reports the Committee may set up a mechanism for making its own assessment of the situation in that country. New Zealand has now submitted two periodic reports, which are referred to where appropriate in the consideration of specific rights below.

The Committee also meets for 'general discussions' of topics which may result in 'general comments' giving the Committee's views on how various rights might be implemented.

Since the Committee meets for only three weeks a year, plus an additional week for working groups, reports – which are often submitted late in any case – may not be considered for up to two years after submission.

When the Committee considers a report it may take into account information obtained from specialised agencies of the United Nations and also from non-governmental organisations (ngos). An interesting and unusual feature is that the Committee is not restricted to hearing from ngos with consultative status to ecosoc. In theory ngos may only submit written statements to the Committee but there are in practice opportunities for ngos to make oral presentations especially during the pre-sessional working group period and during 'general discussions'. There is nothing to stop ngos communicating with Committee members individually and in fact the formal invitation to submit written statements was intended partly to deal with the objection that states were not privy to 'the case they had to meet'.

Although to lawyers used to sanctions for breaches of rules the reporting mechanism appears toothless, within the diplomatic world, where so much store is set on playing the same game as everyone else, it can be an effective process. Some other comments are also relevant:

- since New Zealand's report is the responsibility of the Ministry of Foreign Affairs and Trade, there is the potential for comments on detailed matters to fail truly to reflect policy. An example would appear to be a question on the Second Periodic Report in regard to university fees. The New Zealand representatives dealt with the question about fees as an issue of affordability rather than of effective resource allocation and encouragement of wider access;

- the publication of the report also serves as an internal accountability mechanism, allowing pressure groups within New Zealand to monitor what the government is saying to international bodies; and

- it might be desirable for pressure groups to contribute to the process of drafting the report as well as to have the opportunity to pass information to the Committee.

'… to the maximum of its available resources'

Article 2 of the icescr provides:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, 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, including particularly the adoption of legislative measures.

Of particular significance is the phrase "to the maximum of its available resources". Doubtless originally designed as a fudging or let out clause, this clause is today deployed by writers in a prescriptive fashion. Thus interpreted, the phrase seems to assume that the government, which is the only body that can be held responsible under the icescr, has resources of its own or that it can raise resources in ways that do not themselves create human rights problems.

A number of observations may be made about this phrase:

> • if negative economic and social rights, such as the right to property, are recognised, then a state has no resources save what it takes by taxation from businesses and individuals. The term 'maximum available' therefore either:
>
> – has no meaning separate from the amount a state chooses to spend. In this case it has no meaning at all and in practice means that a state is always open to the charge that it is not employing the maximum available resources, or
>
> – means that the whole energy of the population must be bent to this task, in other words that a totalitarian state must be created; [39]
>
> • the phrase clearly implies that the problem is one of distribution rather than growth and that the role of growth is to make more resources available for redistribution; and
>
> • resources taken by the state through taxation and expended on realising the rights in the Covenant are merely redistributed. No wealth is created directly by this process. The process itself, however, has costs, both in terms of the expenditure required to administer the system and in the deadweight costs from alteration of behaviour to reduce tax liability. Such redistribution therefore reduces the general welfare and reduces national income below what it might have been. The more resources are redistributed in this way, the greater will be these effects. The redistribution of resources in pursuit of the goals in the Covenant therefore inevitably has the effect of reducing the ability of the inhabitants of the state to achieve core goals, such as the continuous improvement of living conditions.[40]

Committee members have attempted to assert an ability to make an objective judgment of whether a government is complying with this requirement. So far such comments have been vague in the extreme except when expressing disapproval of a reduction in the proportion of gdp devoted to social services.[41] This suggests a crude approach in which opportunity costs are forgotten and it is apparently considered that there is no limit to the proportion of gdp that might be devoted to pursuing one right without endangering others.

A more sophisticated approach might be to consider that 'the maximum of available resources' means that level of government expenditure which maximises economic growth (the right to continuous improvement in living conditions), employment (the right to work) and even tax revenue over the medium term. This would also recognise a trade-off between applying the maximum resources available now and maximising the reources available in future. Excessive government spending acts as a brake on the economy and hinders employment.[42]

Conclusion

The only binding obligation under the icescr is to fulfil the terms of the Covenant. The responsibility for determining the meaning of those terms is on the states parties and not on any international body.

Given the inherent vagueness of many of the provisions, and the lack of any mechanism for explicating them, it can always be argued that a state is in breach of some provision and the allegation will be extremely difficult to deny.

However, the fact is that New Zealand, like many other countries, has signed both the iccpr and the icescr. It will be seen that the provisions of the icescr are frequently interpreted in such a way that they necessarily undermine rights contained in the iccpr – indeed one example has already been given. It must be assumed, however, that New Zealand did not intend to sign two documents of directly contradictory effect. Where possible, therefore, the provisions of the two documents should be interpreted so as to render them consistent with each other. Since the iccpr is the more specific and has a stronger supervisory system, this means that the icescr should, where possible, be interpreted in a way that does not undermine the rights in the iccpr.

41 For example, in the 'Concluding Observations' on Kenya's Periodic Report, E/C 12/1993/6 paragraph 17.

42 Craven considers that the Committee is unlikely to accept such an approach (which he refers to as a 'philosophy') rendering likely a collision with some governments, Craven, M, *The International Covenant on Economic, Social and Cultural Rights*, Oxford: oup, 1995, p. 138.

30 (1996) 3 hrnz 285.

31 This view has been challenged by McGee who argues that if parliament wanted a treaty incorporated into domestic law it would have enacted it. McGee, D, 'Treaties – A Role for Parliament?' [1997] *Public Sector* 1.

32 Eleventh Protocol to the European Convention on Human Rights and Fundamental Freedoms. This will come into force when ratified by 40 states.

33 Such a role is under active consideration by the Committee at the instigation of ecosoc. See Nowak, M, 'The Need for an Optional Protocol to the icescr', in *The Review of the International Commission of Jurists*, No55, December 1995, pp. 153–165.

34 Eide, A, 'Future Protection of Economic and Social Rights in Europe', in Bloed, A *et al.*, *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms,* Dordrecht: Nijhoff, 1993, p. 217.

35 Alston, P, 'No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant', in Eide, A and Hegelsen, J (eds), *The Future of Human Rights Protection in a Changing World*, Dordrecht: Nijhoff, 1991, p. 79. Interestingly, and providing an insight into the way these processes develop, only a year previously Alston had assured Americans that the only 'enforcement' mechanism under the icescr was the reporting mechanism: Alston, P, 'us Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' (1990) 84 ajil 365, 370.

36 Note that this means that countries which are not party to the Covenant may take part in the election. Also there is no rule to prevent the nomination and election of a non-national of a state party but this has not so far occurred.

37 Craven, M, *The International Covenant on Economic, Social and Cultural Rights,* Oxford: oup, 1995, p. 46.

38 Often assisted by the fact that the nominees may be nominated by the countries of which they are nationals but earn their living in others.

39 Committee members have so far fudged this point. The first argument is accepted, so that it is denied that the assessment may be purely subjective, but the second point is not recognised.

40 If the phrase 'global income' is substituted for 'national income' then this argument applies equally to international aid.

chapter four

Self-determination and Collectivism

Article 1(1) of the icescr provides:

> All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The right to self-determination is placed in a somewhat separate category and appears as Part I of both the iccpr and the icescr. Despite its appearance in the iccpr it is generally regarded as a non-justiciable right.

A great deal has been written on self-determination and no attempt to contribute to that debate will be made here. Suffice to say that the major philosophical problem surrounds the definition of 'peoples'. One of the many practical problems is raised by a 'people' that does not exclusively occupy a defined geographical area, such as Maori. What self-determination means under such circumstances is not clear.

The expression "freely pursue their economic, social and cultural development" is also open to varying interpretation. It could mean that the people as a group must be

free to pursue its development free from outside interference or it could mean that the individual members of the group are free to pursue their own economic, social and cultural development. The latter interpretation would be more consonant with individual freedom and rights such as the right to choose one's occupation. The former interpretation, however, seems more natural in the context of self-determination and the free determination of political status in the previous clause.

In that case, the right to self-determination would legitimate a situation in which the collectivity, or some group within it, has the opportunity to decide what 'development' means and how to pursue it. This is clearly inimical to individual rights to the pursuit of economic, social and cultural development, since the individual's conception of these may not coincide with the majority's or the decision makers'.

A notable aspect of the right to self-determination is Article 1(2) which provides:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of sustenance.

What does "their natural wealth and resources" mean? The starting point in a society characterised by individual freedom and respect for negative rights would be that natural wealth and resources belonged to the property owner. It is unclear therefore why any policy that underlies this provision cannot be achieved by recognising and respecting the right to property. Shorn of any connection with the right to property, this provision appears to legitimate collective control of resources. It can then be used as an excuse for infringing the right to property, for example by expropriating foreign landowners. Likewise it can be made an excuse for discriminatory legal provisions such as requiring foreigners to undergo some special procedure before being entitled to purchase land.

It may also be noted that the provision assumes that wealth lies in natural resources, from which it follows that these resources belong to the 'people' who happen to occupy the ground in which those resources are found. In fact wealth lies in the use made of resources. Without the internal combustion engine, for example, oil would not be recognised as a significant natural resource. This implies that the ownership question is more problematic than commonly assumed.

The assumption that wealth lies in the land appears to be continued by the final sentence. It is not clear how a 'people' may be deprived of its means of sustenance if individuals' primary assets are their labour and ingenuity. Immigrants to the United States in the nineteenth century, for example, were frequently better off in a short space of time than if they had remained on their ancestral land. However, if a 'people' is both deprived of its natural resources and prevented by immigration controls from moving to a place where its members can sell their labour, then it is caught in a trap.

The final sentence of Article 1(2), if a negative right, would mean that governments may not deprive a 'people' of its means of sustenance. This is a position that can be supported by reference to principle and to the practicalities of enforcement. If however, a 'positive' approach to this sentence is taken, the meaning is potentially much wider. A 'people' might be deprived of its means of sustenance by natural process or disaster, or by its members' own unwise decisions (for example, the Midwest 'dust bowl'). Interpretation of this Article as a 'positive right' would then mean that governments had to exert themselves to guarantee the means of sustenance. This effectively means that the 'people' concerned have the right to be subsidised by those who have made wiser decisions or who have paid more to live in areas less susceptible to disaster. It is therefore submitted that this sentence should be interpreted only in its classical or negative sense that the government may not decide to deprive a 'people' of its means of sustenance.

chapter five

AN ADEQUATE STANDARD OF LIVING

Article 11(1) of the icescr states:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing the essential importance of international co-operation based on free consent.

This particular right is in many ways the core right contained in the icescr. Most of the other rights are arguably merely examples of the right to an adequate standard of living.

From a materialistic point of view, guaranteeing to deliver continuous improvement in living conditions is equivalent to guaranteeing to deliver happiness. The framers of the us Constitution referred only to a right to the 'pursuit of happiness' and not to the delivery of happiness. The distinction between these two goals marks the distinction between free and totalitarian societies. To be consonant with a free society the icescr should merely guarantee the right to pursue improvement in living conditions. The wording tends to indicate that its drafters were willing to countenance pursuing goals by directing the efforts of individuals.

This right appears to have two limbs: everyone has a right to:

- an adequate standard of living; and
- the continuous improvement of living conditions.

The first of these two limbs is stated to include "adequate food, clothing and housing". This limb will be dealt with below.

As a negative right, the right to continuous improvement in living conditions presumably means that the government should not take any decision deliberately aimed at reducing the living conditions of any group. This would entail not levying discriminatory taxation on any group even if the aim were redistributional, since the rich are as entitled to this right as anyone else.

If this right were a positive right it would verge on absurdity. It would raise the spectacle of wealthy entrepreneurs claiming that the government must ensure the continuous improvement of their living conditions, irrespective of the success of their own business activities. It also apparently means that the government must insure every person against a fall, or even stagnation, in their living standards, thereby removing one of the major incentives to self-improvement.

However, we are told in the literature that such a view:

> … results from a very narrow understanding of the nature of these rights and of the corresponding state obligations … the individual is expected, whenever possible through his or her own efforts and by the use of own resources, to find ways to ensure the satisfaction of his or her own needs.[43]

It might be retorted that this mistaken view actually results from taking seriously the claim that positive economic and social rights are 'rights' in the same sense as civil and political rights. It is the responsibility of governments to act in such a way as to ensure that the civil and political rights of individuals are respected. Such rights are in effect instructions to government as to how it is to conduct itself. If, therefore, positive economic and social rights were 'rights' of the same type, the statement of a right would be a statement of the responsibility of the state to ensure that a given result is achieved. It is not the case that in the field of civil and political rights it is ever the responsibility of the individual to ensure that he or she is accorded the rights. This seems an important ground of distinction between the two categories.

The point grasped by the writer above is that, as with all positive rights, action to pursue this right must be rationed. However, since the right and this gloss contain two words of indeterminate nature, 'adequate' and 'possible', it seems that it will be difficult to determine when this 'responsibility' has passed from the individual to the state.

These difficulties can all be avoided by simply interpreting the right to continuous improvement of living conditions as a negative right.

Can we raise living standards by fiat?

There is in fact only one way in which the living conditions of everyone can continuously be improved and that is through economic growth. (This is not to say

that the living conditions of everyone will be continuously improved if there is economic growth, but only that it is the only way in which everyone's living conditions can be improved simultaneously.) This 'right' therefore appears tantamount to asserting a right to have economic growth occur. But economic growth does not occur directly because of the activities of governments, and especially not because of the activities of the United Nations or international conferences. It occurs because of the actions of individuals.

Furthermore, it is inevitable in a free market that relative living standards will change. These relative changes reflect changes in technology and preferences and the wisdom or unwisdom of the way people choose to invest their resources, including their labour. It follows that the relative living standards of some people and occupations will fall. If relative living standards are to change, therefore, while everyone's absolute standard rises, economic growth needs to be fairly rapid and sustained. It may be noted that the Western world has in fact achieved this feat relatively successfully in the last 50 years, without any help from the Committee or from the United Nations, and while its mechanism for doing so has been continuously denigrated by the supporters of 'economic rights'. So not only is the concept of a positive universal individual right to continuous improvement of living conditions somewhat ridiculous, it is not even desirable. The threat of decline of living conditions is a major spur to efficiency and effort.

The Committee has not dealt in any depth with this right, but it has routinely emphasised the positive nature of the obligation on states to realise the right. The wording of the Articles themselves suggests a positive obligation: Article 11.1 states that "[t]he States Parties will take appropriate steps to ensure the realization of this right", and Article 2.1 states that "[e]ach State Party … undertakes to take steps … to the maximum of its available resources". It would therefore be difficult for a government to submit to the Committee that the right is purely negative in character. But it is impossible for the government to take positive steps towards the achievement of this right for some without at least risking violating it for others.

In a constructive vein, one could say that if the right is a positive right it could attach to broad policy goals rather than to individual circumstances, so that ordinary financial ups and downs would not have to be underwritten by the government. This is born out by Question 1(a) in the Committee's *Guidelines on Country Reports* which asks "Has there been a continuous improvement in living conditions for the entire population, or for what groups?". The Committee has in fact done little to help define the obligations under this right, limiting itself to requesting macro-economic indicators such as the per capita gnp of the poorest 40 percent of the population. However, this is inconsistent with the supposed nature of the right as a *human* right which attaches to each and every individual, purely on account of their being human. If the right is truly one which attaches to one's humanity, it must be realised for each human being, not simply the ones whom the policy has provided for.

This must further mean that if the right is positive, the state must control the economy to such an extent as to insure its population against any fall in living

conditions. However, the lesson of experience is that almost the only governments which have managed to achieve an overall fall in the living conditions of their people since World War ii have been those which have ostensibly committed themselves to the course suggested by this interpretation. Such a level of control would also be incompatible with civil and political rights, including concepts mentioned in the context of the right to work, such as the right to choose one's occupation.

A positive right to continuous improvement of living conditions therefore emerges as an extreme example, even a parody, of the whole concept of positive rights. It has three characteristics which are shared to some degree by all positive 'rights', namely:

- it requires definition by the government of something, namely "continuous improvement in living conditions", which actually requires trade-offs which can only be assessed subjectively. Pursuit of this goal can therefore at most achieve what the government regards as an improvement in living conditions which may not be regarded as such by all individuals;

- it mandates delivery by the state of something which can only be achieved through the efforts of individuals; when it is achieved it is not due to any deliberate government plan. In fact deliberate pursuit of this goal by governments in practice leads to more spectacular failure to achieve it than if the government abstains from managing the economy. The degree to which this right is realised around the globe is in almost inverse proportion to the government's ostensible degree of commitment to economic and social rights; and

- in the name of the achievement of this goal, governments and commentators are willing to countenance deliberately depriving minorities of this right, for example by purporting to redistribute wealth through graduated labour taxation.

If, on the other hand, the right to continuous improvement in living conditions is viewed as a negative right then it emerges as a vindication of the individual's right to pursue happiness in his or her own way without direction or obstruction from government.

Housing

Introduction

The right to adequate housing appears in 11 different international instruments to which New Zealand is a signatory.[44] The focus of discourse is Article 11.1 of the icescr.

There has been a wealth of discussion about the right to housing over the last decade. Nonetheless, the right to adequate housing has yet to be either satisfactorily

or authoritatively defined. It is instructive to examine the writings of the Committee, un organs, non-governmental organisations and academics. The bulk of the material comes from the Committee and those in favour of a strongly positive approach to the right; in particular, the Special Rapporteur to the United Nations on the Right to Adequate Housing, Rajindar Sachar. On the side of those favouring restraint and a limited role for government activity, a notable champion is John Turner, whose seminal book, *Housing for People: Towards Autonomy in Building Environments*[45] is a strong statement against public housing schemes.

The analysis that follows takes the views of the Committee and the Special Rapporteur as examples of the interventionist approach to the right. Turner's thesis will provide a basis to discuss the enabling approach, which emphasises individual autonomy and the importance of markets to deliver housing.

Adequacy

How to define 'adequate housing' is a major issue. It is also, for reasons canvassed above, an intractable one.

In the Committee's *General Comment No 4,* the Committee endorses the definition put forward by the Global Strategy for Shelter to the Year 2000:

> Adequate shelter means … adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost.

The Committee itself defines the right as consisting of seven factors which must be fulfilled to an adequate standard. These are:

- legal security of tenure;
- availability of services, materials, facilities and infrastructure;
- affordability;
- habitability;
- accessibility;
- location;
- cultural adequacy.

This sets an extraordinarily high threshold on adequacy. For instance, an adequate 'location' requires that adequate housing is in a location which allows access to employment options, health care services, schools, child care centres and other social facilities. It follows that if these are not accessible from your house, your housing is inadequate. Further, this applies to urban and rural areas, "where the temporal and

financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households".

Under the heading "accessibility", "disadvantaged groups" must be accorded full and sustainable access to adequate housing resources and must be accorded some degree of priority. Disadvantaged groups include the elderly, children, the physically disabled, the terminally ill, hiv-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters and people living in disaster-prone areas.

Other commentators follow a similar line. The Campaign for Housing Rights in India sees the right as entailing employment opportunities, health and education services, special meeting places for women, affordable public transport, and shops, markets and burial grounds.[46]

Similarly, the Conference on Legal Aspects of the Urban Shelter Problem in New Delhi considered that adequate housing meant housing that is secure, accessible and affordable, but also housing that is non-profit, non-speculative and community-controlled. Here we have it posited as a human right not only that one should be provided with something but that it should be financed and controlled in a certain way. The requirement of 'community control' would seem to sit uneasily with the concept of a human right, since human rights in their classical exposition, negative civil and political rights, aim to sustain individual autonomy and not to force people to take part in group activities.

Scott Leckie has outlined six elements of the right, all of which must be met to an adequate standard if the right is to be realised. These are: physical structure, site, infrastructure and facilities supplied, cost, location, and legal security of tenure. This is a similar check-list to the Committee's; however, unlike the Committee, Leckie does not spell out a specific definition of 'adequacy' for each category.

Leckie, the Committee and other groups are unclear about what they mean by legal security of tenure. This can be viewed in a number of ways:

- the first requirement is for a clear set of rules allocating ownership and defining the attendant rights. Where ownership is unclear or complex or where restrictions on ownership springing from attempts at economic control or from ideology exist (e.g. 'influx control' in the cities of South Africa under apartheid and in the Soviet Union), then shanty towns will quickly grow. The presence of a shanty town almost invariably indicates a desire on the part of a number of people to live in a particular area together with a legal structure which discourages them from developing the property. The same phenomenon is noticeable on land held under the Maori Land Act 1993;

- security of landlords' tenure against the state: for land to be developed and enhanced in value, landowners must be confident that they cannot be deprived of ownership unpredictably or without compensation. Nor must the

incidents of ownership, such as the ability to earn income from land, be regulated to the point where an owner is unable to deal with the land or profit from it; and

• security of tenants' tenure against the landowner: one suspects that this is where the focus of attention probably lies. The degree of security that a tenant has should flow from the terms of an agreement. Only the parties are best able to assess the optimum balance between rent and security, for example. However, in recent years it has become common for there to be political interference, supposedly on behalf of tenants, in such forms as rent controls and statutory restrictions on eviction. In fact it is sometimes assumed that these may help to ensure the right to housing.[47] The inevitable consequence is to make rental housing less profitable and hence to reduce the stock of housing available for rent. This in turn can help to drive up the purchase price of houses, making it harder for lower paid people at the beginnings of their careers to buy houses. The United Kingdom is a prime example of all these tendencies.

Under the heading 'affordability' the Committee proposes:

• states parties should ensure that the percentage of housing-related costs is, in general, commensurate with income levels;

• states parties should establish housing subsidies for those unable to obtain affordable housing; and

• tenants should be protected by appropriate means against unreasonable rent levels or rent increases.

The problems caused by state intervention in the housing market, in particular that rent controls will limit the amount of housing made available for rent and that even subsidies may cause price inflation at the lower end of the market, are not considered. Further, the focus on housing as a 'need' has resulted in an assumption that demand for housing is price-inelastic. This is clearly not so. At least some housing decisions are discretionary, for example the decision of a young person whether and when to leave the parental home. Reducing the cost of housing is bound to increase demand and the entirely static analysis undertaken by the Committee and the Rapporteur is inadequate.

Turner's thesis

These rights-based approaches can be contrasted with the views of John Turner on the meaning of "adequate". Although Turner does not explicitly discuss a right to housing, his views about the meaning of adequacy, dignity and the role of the State are instructive.

John Turner's *Housing for People: Towards Autonomy in Building Environments*[48] is a seminal text on the philosophy of housing systems. His 'Three Laws of Housing' sets out the psychological, social and economic bases of his thesis:

> • when dwellers control the major decisions and are free to make their own contribution to design, construction or management of their housing, both the process and the environment produced stimulate individual and social well-being. When people have no control over, nor responsibility for key decisions in the housing process, dwelling environments may instead become a barrier to personal fulfilment and a burden to the economy;
>
> • the important thing about housing is not what it is, but what it does in people's lives: dweller satisfaction is not necessarily related to the imposition of material building standards; and
>
> • deficiencies and imperfections in your housing are infinitely more tolerable if they are your responsibility than if they are somebody else's.

There is a potential ambiguity in the first proposition, which could be compatible with ideas of 'community control' but it is clear from the remainder of Turner's writing that he is referring to individual householder control.

Turner's central and most widely accepted proposition is that the value of housing is not in what it is, but in what it does in people's lives. As he says:

> The real use-value of housing cannot be measured in terms of how well it conforms to the image of a consumer society standard. Rather, it must be measured in terms of how well the housing serves the household.

Thus, it is a mistake to measure 'adequacy' by material standards. The important measure is in the relationship the house facilitates between the actors, their activities and their achievements. This is in effect a recognition of a basic principle of economics, namely that preferences are personal and subjective.

For most households, it is not possible to realise every housing wish. It is notorious that it is usually impossible to buy the house you want, in the place you want, at the price you want. When compromises have to be made, it is desirable that householders themselves prioritise their needs and wishes rather than that the government do it for them through public housing schemes. In Turner's experience, the matters which seem important to governments are rarely important to the tenants of low-cost housing. While centrally-planned housing agencies routinely equate adequacy with high material standards, tenants often are willing to forego high material standards in return for lower rents.

In the context of housing he then presents what is, in fact, a critique of the whole concept of economic and social rights, deliverable by governments and assessable by committees:

> It seems that all national and international housing and planning agencies mis-state housing problems by applying quantitative measures to non- or only partly quantifiable realities. Only in an impossible world of limitless resources and perfect justice – where people could have their cake and eat it too – could there be a coincidence of material and human values. For the present we must accept that as long as there are unsatisfied desires for material goods and services people must choose between the cakes they can afford to eat. So long as this fact of life remains, and as long as people's priorities vary, the usefulness of things will vary independently of their material standard or monetary value.

This is to say that the Committee's definition in *General Comment No 4* is to ask for the moon. In the richest of countries people are routinely faced with trade-offs between house price (or size), commuting time, access to schools and so forth. Trade-offs have to be made and individuals and their families should be left to make them.

Turner is adamant that the smaller scale the provider of the housing, the better it is placed to deliver what is appropriate, and that centrally-administered systems cannot provide the diversity necessary to house disparate groups adequately:

> [t]he complexity and variability of individual household priorities and consequent housing behaviour are beyond the practical grasp of any central institution or organization. … big, far from being better, is not only more expensive and more wasteful of resources, but also increases the mis-matches between the provision of, and people's variable demands for housing … . Only people and local organisations – localised housing systems – can provide the necessary variety in housing and the great range of production techniques needed to build it.

As a negative right

If the right to adequate housing is viewed as a negative right the consequence would be that the government would have to create structures which facilitated the search for housing by individuals, or at least avoided obstructing it.

A high priority would be legal protection of ownership and a registration system which facilitated the transfer of land. New Zealand scores well on these requirements, save so far as the land held under the Maori Land Act 1993 is concerned.

Next the government would need to examine what measures it was taking that obstructed individuals in seeking housing. This would include any measure which had the effect of raising house prices, particularly at the bottom end of the scale. Here New Zealand does not score well at all. The planning controls enforced under the Resource Management Act 1991 inevitably restrict the amount of land available for housing and increase the cost of developing it. The fact that sharp rises in house prices are associated with local authorities' resource management policies rather than with movements in population indicates that government policies are indeed obstructing the search for housing.[49] It is also clear that some local authorities have taken it upon themselves to develop policies about where and in what kind of housing people should live. This clearly usurps individuals' rights to decide for themselves what constitutes adequate housing.[50]

Dignity

It is argued by Anne-Marie Devereux[51] and the Special Rapporteur[52] that the basis of the Covenant lies in the dignity of human beings. Their argument is that inadequate housing leaves the person affected living in an undignified manner, and that the provision of adequate housing saves the person from indignity. But while it is undeniable that housing can contribute to a dignified life, it is not in principle the case that lack of housing deprives the human being of a dignified life. The story of Diogenes and Alexander the Great provides an extreme example.[53]

Devereux's argument that economic rights in general should be measured against a yardstick of dignity is countered by Turner's point that dignity is a subjective measure. It cannot be said that every person who lives in an inadequate house feels undignified as a result. Indeed, it may be a deliberate choice to enable resources to be invested in some future benefit. The real issue is poverty and it is the poor, not the bureaucrats, who are faced with the opportunity costs of investing in quality housing.

There then seems to be an assumption that since bad housing detracts from dignity, the state should set about providing housing. The unspoken assumption here is that state housing will provide dignity. But it is clear that, at least in developed countries, the people living in the least dignified circumstances are often those in state-provided housing. Often, they cannot choose where to live, cannot choose to move without official backing, and are surrounded by the squalor, vandalism and serious crime characteristic of publicly provided housing projects. These factors hardly contribute to dignity.

The continued advocacy of state intervention in housing to ensure human dignity therefore seems somewhat of a triumph of hope over experience.

Implementation

The question of how these particular rights should be implemented has been the subject of study.

The Special Rapporteur

Although the Special Rapporteur has advocated decentralised housing systems, he has also adopted a hostile stance towards the marketplace. In his Report to the United Nations, he is concerned that the commercialisation of land and housing leads to inequality and a loss of human rights:

> We hear reports daily of growing economies, liberalization of trade regimes, globalization of the world market and other such fancy phrases, as if such things were all that mattered in our world and these issues were inherently good for humanity. Sadly, the Special Rapporteur can only express dismay at the enduring and rapidly growing despair of the world's least advantaged citizens as the rights which were meant to be bestowed upon them are increasingly denied or ignored.

> The adherence to the principle of economic parity is especially crucial in a period when more and more Governments are flirting with 'free market' policies. This trend is increasingly evident in both countries that are adopting 'economic adjustment' policies and in others that are adopting the 'enabling the private sector' approach. The overall effect is that there are severe cuts in allocations to the sectors (health, employment, environment and so forth) that affect housing activity.

Sachar cites speculation and commoditisation of housing as substantial barriers to housing.[54] He says it is a fundamental duty of government to intervene in the interests of eroding these two barriers. He also expresses disappointment that there is no country he is aware of in which a claimant can receive a dwelling from the state immediately upon request.

It is remarkable that the Special Rapporteur even speaks slightingly of 'growing economies' as if there was any other way in which the rights he is concerned with can be provided. The idea that "the rights of the world's least advantaged citizens … are increasingly denied or ignored" is just at odds with the facts. There has been substantial economic growth in the world in the last half-century. The fact that certain countries have failed to participate in that growth is due almost entirely to their own governmental policies or instability. Comparison may be made, for example, between Ghana and South Korea which in 1960 had similar standards of living. Ghana since then has been in receipt of large-scale aid and until recent years followed policies of governmental intervention aimed at achieving social goals. South Korea, meanwhile, has been largely following the policies decried by the Special Rapporteur.

The Committee

In some respects, the Committee takes a more realistic approach than the Special Rapporteur. In a 'General Comment' the Committee argues that because public housing projects are usually commercially unfeasible, they are often unworkable in practice, and for this reason enabling strategies should be encouraged.[55] Unlike the Special Rapporteur, it accepts that economic restructuring may be necessary, providing that when it does occur, disadvantaged groups' needs should not be neglected. It proposes that finances should be directed towards creating the conditions for a higher number of persons to be adequately housed (as opposed to finances being used to create housing).

The General Comment, however, makes it clear that the state should play an active role in realising the right. It says that the essence of the obligation is to demonstrate that the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the injunction to apply the maximum of available resources. Not only does this assume that the problem is one of redistribution rather than growth but it drives the state towards an agenda of centralised planning.

The Committee's prescription that adequate housing must afford access to, for example, child care centres cannot be achieved in a free market but only by heavy

regulation. To argue that the right entails matters such as these is inconsistent with the Committee's view that policies may reflect whatever mix of public and private sector measures is considered appropriate and that the Committee is neutral between political and economic systems. It is also inconsistent with an enabling approach, which the Committee endorses in other sections of the Comment.

Habitat ii

On 3–14 June 1996, the Second United Nations Conference on Human Settlements (Habitat ii) was held in Istanbul. The Conference brought together 170 countries plus housing interest groups and advisers. The agreement that was reached was, like most un texts, the result of much negotiation and compromise.

The agreement shows a marked shift towards accepting markets as providers of housing, encouraging enabling strategies as means towards realising the right, and advocating decentralised housing systems. This approach stands in stark contrast to the approach of the Committee and the Special Rapporteur, and suggests that their stances are out of step with those who must bear responsibility for realising the right to adequate housing.

"Achieve progressively"

The Committee in *General Comment No 4* said that the requirement to achieve progressively the realisation of the right carries with it the obligation not to implement policies that have the effect of driving down living conditions. This is a particular problem for poorer countries which have got used to living beyond their means and have to restructure. In richer countries such policies can also be identified, however. In New Zealand the policies identified by McShane on the part of Auckland Regional Council and some city councils in the Auckland area clearly have the effect of driving down living conditions. If it were the case, for example, that many people preferred high density inner city housing to houses on sections in the outer areas, there would be no need for local authorities to have policies giving preference to the former.

Conclusion

The New Zealand government considers that it satisfies the right to housing by providing an accommodation supplement to beneficiaries. Accommodation supplements are preferable to state provision of housing because they entail fewer intrusions into private property, but this raises the question of why the government in providing welfare should also allocate welfare across basic needs rather than leaving those decisions to the beneficiaries.[56]

The Habitat II conference is a tentative step in the right direction.[57] It does not seem to be appreciated in the literature, however, that in this area, as in others, we face a paradox. The government cannot guarantee to ensure the desired outcome. The greater the efforts deliberately to approach the stated goal, the worse the situation

gets. Experience shows that a closer approximation to the goal can be attained by not deliberately pursuing it at all.

As things stand, it seems that in practical terms either:

- the government can be satisfied if there has been a general increase in living standards; or

- the government can be required to intervene to prevent falls in the living conditions of identifiable groups. This, however, can only be at the expense of others' living conditions.

Either approach is inconsistent with the assertion of this right as a human right to the benefit of which each individual is entitled without discrimination as to status (Article 2 icescr).

56 There are two possible answers: one is that the rules on accounting for capital assets suppress the distinction between beneficiaries who live in their own house, debt free and those who do not. The other is that we do not trust beneficiaries to spend their money on 'sensible' items.

57 Provided one ignores the opportunity costs of such conferences.

43 Eide, A, 'Economic, Social and Cultural Rights as Human Rights', in Eide A, Krause, C and Rosas, A (eds), *Economic, Social and Cultural Rights*, Dordrecht: Nijhoff, 1995, p. 36.

44 Apart from the icescr, these are the:

– Convention on the Rights of the Child;

– Convention on the Elimination of All Forms of Discrimination Against Women;

– Convention Relating to the Status of Refugees;

– Declaration of the Rights of the Child;

– Declaration on Social Progress and Development (1969);

– Declaration on the Right to Development (1986);

– International Convention on the Elimination of All Forms of Racial Discrimination;

– Housing (1961);

– Universal Declaration of Human Rights;

– Vancouver Declaration on Human Settlements (1976).

45 Turner, J, *Housing for People: Towards Autonomy in Building Environments*, London: Marion Boyars, 1976.

46 This paragraph and those following are distilled from Leckie, S, 'The United Nations Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach' (1989) 11 *Human Rights Quarterly*, p. 522.

47 Krause, C, 'The Right to Property', in Eide A, Krause, C and Rosas, A (eds), *op. cit.*

48 London: Marion Boyars, 1976.

49 McShane, O, *The Impact of the Resource Management Act on the Housing and Construction Component of the Consumer Price Index,* Reserve Bank of New Zealand, 1996.

50 Some such controls, such as the rule enforced by some authorities that a farm property must generate sufficient income to support a family, also breach the right of individuals to choose their employment.

51 Devereux, A, 'Australia and the Right to Adequate Housing' (1992) 20 Federal Law Review 203.

52 Sachar, R, *The Right to Housing: Report of the Special Rapporteur,* un E/CN4/Sub.2/1995/12.

53 The philosopher Diogenes lived in a barrel, clothed only in the most primitive way. People came from far and wide to listen to him speak. Alexander the Great, master of the known world, determined to go to see him. Shocked at the conditions in which he found Diogenes living, he asked whether there was anything he could do for him, to which Diogenes replied "Yes, kindly move out of my sunlight".

54 Sachar, R, 'The Right to Adequate Housing', Working Paper to the United Nations, un Publication E/CN 4/ Sub.2/1992/15.

55 *General Comment No 4 on the Right to Adequate Housing*, E/1992/23, p. 114.

chapter six

The Right to Work

Article 6 of the icescr provides:

> 1 The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to gain his living which he freely chooses or accepts, and will take 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 all 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.

As a negative right

Interpreted simply as a negative, or civil and political right, the right to work would include the right not to be obstructed by the government from doing the work of one's choice. This would entail:

- avoidance of legislation which discourages individuals and businesses from making work available;

- governmental abstention from interfering with working relationships save as required to protect the public by establishing qualifications required before certain work could be undertaken;

- governmental abstention from imposing forced work or slavery;

- the use of the criminal law to prevent any private person imposing forced labour or slavery; and

- abstention from measures which favour or disfavour particular methods of earning a living.

It would then be necessary to identify governmental activity which discourages work from being made available and which interferes in working relationships. Examples in New Zealand might include:

- legislation setting minimum wage rates;

- legislation granting the right to carry out certain activities to particular legal persons or groups, such as producer boards or pharmacists;[58]

- excessive levels of income tax, the gearing effect of which effectively prevents people acting in their private capacities making work available, with particularly severe consequences for the unskilled;[59]

- tariffs which favour the jobs of some at the expense of others and which may well reduce employment overall.

A question appears in the *Guidelines on Country Reports* on minimum wage rates, but it is far from clear that the Committee regards minimum wages as an impediment to the right to work. No questions on the other two matters appear in the *Guidelines*.

As a positive right

As a positive right, however, the content of the right to work appears unknown. It is frequently reiterated that it does not mean that everyone has a right to be given work of a particular kind whenever they wish. Alston tells us that

> … notwithstanding allegations to the contrary [the right to work] has always been interpreted by international organisations so as to avoid the implication that a job is guaranteed by the state to all and sundry.[60]

Drzewicki says that:

> The normative content of the *sensu largo* right to work has often and wrongly been equated with its comprehension as of a right to employment, or to be provided with work.[61]

But no one can tell us what it does mean. If the positive concept of the right to work consists of more than the negative elements above but does not include the right to be provided with work, it is hard to see what it does consist of. No guidance is forthcoming in the literature or in the Committee's publications. In fact what indications one can find are entirely consistent with the view that Alston and Drzewicki deny.

For example, Question 2(b) under Article 6 in the Committee's *Guidelines on Country Reports* requests: "Please describe the principal policies pursued and measures taken with a view to ensuring that there is work for all who are available for and seeking work". There seems here to be a clear implication that it is the job of the government to ensure that there is a job for all and sundry. Furthermore, Alston's denial seems inconsistent with his own approving reference in the same article to Franklin D Roosevelt's proclamation of:

> The right to a useful and remunerative job in the industries, or shops or farms or mines of the Nation.
>
> The right of every farmer to raise and sell his products at a return which will give him and his family a decent living.

Before those claims can be discussed in detail it is necessary to consider the meaning of the central word 'work'.

The meaning of 'work'

The definition of 'work' nowhere seems to be discussed.

First, it should be observed that 'work' is a transaction and not a good in itself. One side sacrifices leisure or other opportunities and the other money. The transaction is only worthwhile if the one receives enough money to make the sacrifice of leisure or other opportunities worthwhile and the other receives outputs of greater value than the cost of employment, including both wage and non-wage costs. If two parties voluntarily enter into a contract for labour it can be assumed that these conditions are met.

Roosevelt referred to 'useful' work. The icescr refers to 'productive' employment. The obvious question is who is to decide whether work is useful or productive? The answer just given is that it can be assumed that voluntary transactions are 'productive' but the same assumption cannot be made about jobs created by the government. If any form of compulsion is exercised, such as the use of taxes to purchase and distribute goods and services, then we have one set of people making a judgment about what other people should regard as useful.

That being the case it is impossible for a government to achieve "full and productive employment". Productive work will be demanded by the market. If work is provided by the government, apart from the work involved in the production of public goods, it will be impossible to say whether it is genuinely productive.

Likewise, the concept of 'work' as producing goods and services that others freely purchase is incompatible with governments taking measures to ensure that there is work for all who are available for and seeking work. Indeed, such language treats 'work' as a good rather than as a transaction. It is difficult to discern how Question 2(b) can be approached unless 'work' is interpreted simply as being a way of passing the time in return for which one is paid.

Franklin D Roosevelt's right to work

President Roosevelt is claimed as one of the progenitors of economic rights, especially by Americans or in response to allegations that economic rights are rooted in Marxism.

The two 'rights' quoted above from Roosevelt's 'Four Freedoms' message are worthy of detailed consideration. For convenience they are repeated:

> The right to a useful and remunerative job in the industries, or shops or farms or mines of the Nation.
>
> The right of every farmer to raise and sell his products at a return which will give him and his family a decent living.

The first sounds very like a right to be provided with work. There must be a corresponding duty on someone, presumably on the owners and operators of factories, shops and other firms. In that case this 'right' imposes duties on private individuals. There can be few clearer differentiations from negative rights, which do not impose positive duties on private individuals. It is to be noted that the 'right' in Article 6(1) refers to jobs being freely chosen or accepted but not to being freely offered.

The right of every farmer to raise and sell products is a clear example of a statement that a specified group of people is owed a living. In order for the farmer to sell products at a return giving a decent living someone must be coerced into paying a price above what would be paid otherwise (if the right is to have any practical effect). This must be at someone's cost. There are three possible sets of victims:

- consumers, who have to spend a proportion of their income on food above what they would otherwise have spent; and/or
- taxpayers who have to pay taxes used to purchase products for subsequent resale at lower prices; and/or

• overseas producers of food who could otherwise sell their products in the United States.

In either of the first two cases, of course, less money is available to be spent on or invested in other activities. This 'right' is actually therefore a privilege granted to one group at the expense of other groups. In the case of the overseas producers, these will include some of the poorest and most vulnerable people in the world. This 'right' therefore amounts to giving the claims of American farmers preference over those of other human beings.[62]

It is also apparent that if this 'right' is to be implemented with anything approaching a degree of common sense, the choice of what products are to be grown cannot be left to farmers. Left to themselves and with a guaranteed price, farmers would produce whatever gave the best return without any regard for whether anyone wanted to eat that kind of food. There would therefore have to be rationing of supply by the government. In other words farmers would have to be directed or persuaded to produce or not to produce particular goods to fit in with the grand plan. This is clearly incompatible with the concept of a free society. The 'right to work' leads ineluctably to being directed as to what work to do. At this point independence is lost for, as Trotsky realised "in a country where the sole employer is the state, opposition means death by slow starvation".[63] The effect is similar if less dramatic where the state directs employment.

Control of the labour market may then lead to the restriction of civil and political rights and even negative economic rights. An example of this appears in ilo Convention Number 96 Concerning Fee-Charging Employment Agencies. This countenances the prohibition of private employment agencies. So apparently, in the pursuit of the right to work, some people may be prohibited from carrying out the work they choose, namely operating a private employment agency.

In so far as any positive content is ever proposed for the right to work, the proposals quite clearly do not amount to human rights that are in the same category as civil and political rights. If 'work' is not freely demanded it can only be provided at others' expense. A right to work therefore ends up as a right to have one's own claims attended to rather than others. Nor can this always be justified as a transfer from more to less fortunate, as the example of the American farmers demonstrates.

A connection between the two sets of rights

Alston tells us that the provision in article 6(2) that the rights in article 6(1) should be pursued "under conditions safeguarding the fundamental political and economic freedoms of the individual" strongly reaffirms the link between the two sets of rights.[64] This is mere uncritical recitation of verbiage.

Any positive steps by governments to 'create' jobs would seem to involve:

• taxation, thereby creating deadweight losses and opportunity costs. There is little research ever done to demonstrate that such tax-supported schemes lead to a net increase in employment; and

• governmental preference for one kind of work over another, expressed in the form of preferential treatment or actual direction.

These steps would seem incompatible with the requirements of a negative right to work. The requirements of a 'positive' and of a 'negative' right to work would therefore seem to be mutually incompatible. If Article 6(2) required such positive steps it would demand the impossible. It would be nothing more than a verbal construct designed to obtain rhetorical agreement from the representatives of governments of incompatible political and economic views.

There is nothing in Article 6(1) which requires the definition of the 'right to work' to be extended beyond a purely negative formulation. Article 6(2) merely lists the nostrums fashionable at the time the Convention was drafted. If experience shows that employment is best created by government policies which merely recognise and refrain from interfering with a negative right to work, then the Committee should not allow its "neutrality between systems" to prevent it from saying so.

Rights in work

One of two statements must be correct about the rights contained in Articles 7 and 8 of the icescr, 'rights in work'.

• They apply only to a section of the population into which and out of which one can voluntarily contract, in which case they are not human rights of any category. Since they consist of making special rules for employees which do not apply to the self-employed, to farmers or entrepreneurs they also create classes of citizens, offending against the basic principle of negative rights that the government should treat all equally.

Not only do these rights in work apply only to a group of which membership is voluntary, but the group can only be defined in circular terms. Since there is no analytical distinction between an employee and a contractor, the only general definition of employee can be 'a person to whom the courts or legislators believe that the rights of an employee should adhere'.

• Alternatively, rights to, for example, minimum remuneration extend to the self-employed.[65] Presumably, this would take the form in practice of a prohibition on self-employed people taking work at rates below some level of compensation at which they themselves were willing to contract. This 'right' would then clearly be a restriction on individual liberty and an example of the substitution of a bureaucratic assessment of utility for the individual's.

This should be sufficient to dispose of rights in work as human rights. Nonetheless, one or two further observations should be made. The icescr is characterised by some opponents as the 'holidays with pay treaty' to which Alston replies in injured tones:

> … some of its most persistent critics have long singled out that particular provision as indicative of the utopian and highly demanding nature of all the rights recognized in the Covenant. While it is tempting to be diverted into a debate on that issue, it must suffice in this context to note that although the right to take an occasional break from work … is an important one, it is perhaps less self-evidently fundamental than several of the other rights dealt with.[66]

Alston has clearly missed the point. The point is not that a right to a holiday is 'demanding', but that it is fatuous.

The provision is written as if a holiday with pay is manna from heaven that can be conferred upon employees without cost to themselves. In fact, the 'right' to a holiday with pay cannot possibly be a human right for two simple reasons:

- it cannot apply to human beings but only to the proportion that voluntarily adopt the status of employee. It is nonsense to suggest, for example, that self-employed people or business owners are entitled to holidays with pay or remuneration for public holidays; and

- an employee can only be paid what the employer is prepared to pay in total for the outputs the employee produces.[67] This is clear in the case of salary earners whose pay is just divided into twelve monthly instalments regardless of the number of holidays and annual leave days taken in a particular month. It follows that any holiday pay is deducted from the normal hourly rate received by wage earners for days at work. What is represented as a human right is in fact merely a particular way of organising payment of wages. The alternative is to pay a higher hourly rate with no holiday pay. It is absurd to elevate to the status of a human right an arrangement for payment of wages that employees might or might not, given a free hand, negotiate for themselves.[68]

Fair wages

It is difficult to understand how governments can meet any bureaucratically determined criterion of 'fairness' in wages without creating a centralised system for fixing wages. Craven provides a list of factors which, in his view, should affect the determination of 'fair wages' from which supply and demand are conspicuously absent.[69] Crucially, he does not say by whom these fair wages are to be 'determined', although it appears that a system in which the government fixes wages is acceptable to the Committee provided that there is worker input[70] and Craven himself clearly countenances 'wage fixing machinery' with extensive coverage.[71]

It goes without saying that any such 'machinery' constitutes an inroad into freedom to contract and to choose one's own work. To see that that is so, consider the

inevitable demands that these terms should also apply to self-employed people. This would mean that a self-employed person would presumably be unable to take a job that is only available at a very low fee for the sake of exposure or experience, or because it recycles previous work, or pro bono. These factors apply in principle just as much to employees who should not be prevented from accepting work that might not be available at a higher wage, for similar reasons.

Job security

A right to work would include a right not to be arbitrarily deprived of the opportunity to work by governmental action or by discriminatory law. Unfortunately some in this field mistakenly believe that it implies a right not to be deprived by one's employer of the particular job one is currently doing without (what a third party considers) good reason, in other words a right to job security.[72] But a single employer in a competitive labour market cannot deprive one of the right to work, only of a particular job. To argue that the right to work entails job security is like arguing that the right to education means that one cannot be expelled from one's current school. The right to work is best protected by the existence of a flexible and competitive labour market and is most threatened by monopolistic employers, especially when that monopolist is the government.

Since job security can only be provided at the cost of a reduction in wages,[73] the strictures about holidays with pay apply equally to this argument. This 'right' emerges not only as a restriction on freedom of contract but also as a privilege for those currently in employment as opposed to those seeking work.[74]

All 'rights in work', whether relating to pay, safety or holidays, can only be obtained by increasing productivity. This can be done through technological innovation or improvements in the efficiency of work opportunities. None of the 'rights' contained in the Covenant are likely to encourage improvements in productivity, and governmental action will seldom have this effect (apart from the removal of government imposed barriers). It should also be noted that impositions on nations such as reporting requirements and conferences required by the Covenant and other international instruments can only decrease productivity in the aggregate.

Conclusions

- The right to work can be clearly stated in negative terms, but what it means as a positive right is unclear in the extreme. Despite denials in the literature it would appear to mean that the government is obliged to provide everyone with some means of passing the time in exchange for payment.

- Recognition of the right to work as a negative right consistent with individual freedom on the one hand and as a positive right on the other hand would appear to lead to precisely opposite consequences for fiscal and economic policy. The two conceptions are therefore incompatible.

• 'Rights in work' are either not 'human' rights or, if made to apply to all, are threats to individual liberty, not to mention productivity.

58 A restriction on dealing with prescriptions may be justified as a general rule setting a standard to be attained in the public interest, but in New Zealand only a pharmacist may own and operate a pharmacy, a restriction which clearly offends against the right to choose one's work. Likewise one cannot export certain types of produce without the permission of the relevant producer board which consists of the representatives of the current exporters.

59 At current New Zealand rates, a taxpayer has to earn $15 in order that someone privately employed, e.g. to work on a house or section, can take home $6.67. The first $5 is the employer's income tax and the $3.33 the contractor's tax.

60 Alston, P, 'us Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' (1990) 84 ajil 365, 369.

61 Drzewicki, K, 'The Right to Work and Rights in Work' in Eide, A, Krause, C and Rosas, A, *op. cit*., pp. 169–188.

62 The European Union's Common Agricultural Policy is another egregious example of such privileges and of the problem discussed in the next paragraph. Interestingly, Garcia-Sayan raises this issue as a major problem for economic and social rights without showing any awareness that the provisions of the icescr are used to argue for such schemes: 'New Path for Economic, Social and Cultural Rights' *The Review of the International Commission of Jurists*, No 55, December 1995, p. 75.

63 Trotsky, L, *The Revolution Betrayed,* New York: Pioneer, 1937, p. 76.

64 Alston, P, 'us Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' (1990) 84 ajil 365, 369.

65 Craven, M, *op.cit.,* p. 229. Craven is at least to be congratulated for recognising the existence of the self-employed, a group which appears to have been forgotten by the salaried diplomats, academics and others responsible for the Covenant and nearly all the commentary upon it.

66 Alston, P, (1990) 84 ajil, pp. 365, 368.

67 There is a canard that the cost of improvement in working conditions can come out of 'profits'. Drzewicki's chapter refers to a conflict of interest between labour and capital. In fact, not only will a reduction in profitability below normal levels simply cause investment to move elsewhere, thereby reducing employment in that industry or country, but also the major shareholders of many public companies today are pension funds and insurance companies so that 'dividends' are in fact employees' superannuation.

68 See, for example, *Drake Personnel (nz) v Taylor* [1995] 2 ernz 67, 82–83 where the Employment Court, after referring to the icescr, explains at some length why employees should receive holiday pay in a lump sum at the termination of a contract rather than have it incorporated into their weekly pay and be expected to set aside money for the holiday period. This decision was subsequently overturned in respect of casual employees only by the Court of Appeal.

69 Craven, M, *op. cit.,* p. 233.

70 Craven, M, *ibid,* p. 235.

71 Craven, M, *ibid*, p. 236.

72 Craven, M, *ibid*, p. 221.

73 A point which would be clear if one imagined oneself as a potential contractor requesting such a clause in a contract.

74 This argument was missing from Alston's article aimed at encouraging the ratification of the icescr by the United States: Alston, P, (1990) 84 ajil, p. 365. Since 'at will' contracting is the normal form in the United States outside the public sector, this is just one of many reasons why ratification could have major implications for the United States.

chapter seven

The Right to Education

As a negative right

Education has long been recognised as an adjunct of civil and political rights. A democracy requires an informed public; one of the prime functions of education is to liberate the mind and to open it to a wider range of possibilities, thereby increasing opportunities, especially for those least likely to have a wide view of the world given to them by their families.

At first, education was recognised as a civil and political right. The draft German Constitution of 1849, which was instrumental in the developing concept of the *Rechtstaat* in Central Europe, recognised that education was a concern of the state which had a responsibility to ensure that the poor had access to a free education (but not necessarily one which the state provided). It also asserted the right of all to found and direct schools and to teach their own children at home.

As a negative right, the right to education would seem to have two main requirements:

- the state should not obstruct people from achieving the kind of education they want for themselves and for their children; and

- whatever the state does in the field of education must be done without discrimination (including non-discrimination by the state against providers of education who wish to discriminate).

As a positive right

The idea that the state should provide education for all is descended directly from Marxist traditions and appears as a constitutional right for the first time in (Stalin's)

Soviet Constitution of 1936. It was then taken up by organs of the United Nations which, in this area as in others, were dominated by socialists (the British representatives on the unesco Council were Professors Laski and E H Carr).

The positive aspect is obviously that the state should take steps to ensure that everyone has access to at least a minimum level of education. Since more or less universal state education was already provided in many of the states creating the United Nations, and given the identities of those drafting the icescr, the idea that the state should actually provide education was taken for granted. The relevant articles of the icescr in fact differ markedly from other articles. In particular, Article 13 sets out more detailed provisions than other Articles and is susceptible to more detailed analysis.

Overview of the Articles

Article 13 (1) sets out a fundamental right 'to education'. It also sets out certain aims which 'education' is expected to pursue. One of these is the furthering of the activities of the United Nations for the maintenance of peace.

Article 13(2) sets out a mechanism for achieving this. This consists of the immediate implementation of free (i.e. publicly provided) primary education and the progressive provision of free secondary and tertiary education.

Article 13(3) requires 'respect' for the right of parents and guardians to choose a system of education other than that provided by the state.

Article 13(4) recognises the liberty of private individuals and groups to set up educational institutions, subject to the power of the state to lay down minimum standards.

Article 14 imposes a requirement for states which do not provide free primary education to produce a plan for doing so.

Literature

Unlike rights such as the right to housing, almost no writing can be found on the definition and scope of the right to education. The only attempts to define the right to education appear in official publications of un organs, some of which are referred to below. Such attempts are partial at best, usually being in the context of the study of some special group.

A survey of the history and different interpretations of the right to education is to be found at Nowak, M, 'The Right to Education'.[75] This is largely a recitation of the texts of various human rights documents and some related decisions, with no critical evaluation beyond a suggestion that children should have greater say in choosing their own education.

Comments

Paragraph (1) does two interesting things:

> • it sets out an overt political agenda which is said to be the goal of education;[76] and
>
> • it embodies some inarticulate assumptions as to what education consists of and how long it lasts. Everyone cannot be entitled to spend an entire lifetime in full-time publicly provided education, but this is what the paragraph might imply if it were to be interpreted in the same way as a civil and political right. What these assumptions as to the extent of 'education' are is difficult to say. Certainly one would be wrong to think that education as of right was for the young: *General Comment No 6*[77] announces that:
>
> … older persons should have access to suitable education programmes and training and should be given access to various levels of education according to their preparation, abilities and motivation.

Paragraph (2) is unique in the Covenant. Elsewhere in the Covenant rights to food, housing and to a 'decent standard of living' are recognised. In no other case is a detailed programme set out specifying how these rights are to be pursued. Article 12 on health, for example, does not specify that the government must provide health care free at the point of use but requires at para 2(d) only:

> The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The prescription in Article 13(2) appears to undermine the Committee's own statements that it is for the signatory states to decide how to implement the Covenant so as to achieve the goals set out. It has not suggested, for example, that the right to housing requires that the state provide everyone with a house free. It seems to be regarded as axiomatic, however, that the right to education should be satisfied by state provision.

Not only is a detailed programme set out (which includes the provision that the material conditions of teaching staff shall be continuously improved, apparently without limit) but the implementation of this programme will in fact prevent the realisation of the negative rights in paragraphs (3) and (4).

Paragraph (3) requires that governments respect the liberty to send children to schools other than those established by the state. There is obviously an element of weaselling in the word 'respect'. This arguably means that the slant of the whole Article is towards favouring state education with private provision for a few eccentrics. But in other areas it is common to talk of "effective implementation", in other words that it must actually be possible for the population to enjoy a right. This is clearly not the case so far as access to private education is concerned. Typically, only the relatively well off can afford to send their children to a private school

without assistance with fees. This is an inevitable consequence of the implementation of paragraph (2). The provision of a state provided 'free' education system means that high levels of taxation have to be levied down to relatively low income levels. The effect of this is to prevent the effective enjoyment of this right by a large part of the population. There are possible ways of overcoming this obstacle which are discussed below.

Even if parents can afford to send children to a private school they may not really escape the state system because of the requirement to follow a national curriculum. It is clearly envisaged in the Article that the state be able to set minimum standards, but a national curriculum of the sort now being implemented in New Zealand is not a minimum standard: it specifies in detail what is to be taught and purports to specify clear 'learning outcomes' against which students' achievement can be assessed. The provision of a 'national curriculum' subsidised by taxes clearly crowds out alternative curricula such as the International Baccalaureate which parents might otherwise choose. In fact it is clear that at least some of the support for the National Curriculum derives from views that New Zealanders 'ought' to be educated in a particular way in order to achieve various social goals.

Paragraph (4) requires that private individuals be allowed to establish educational institutions subject to the setting of minimum standards by the state. This article is currently breached in New Zealand in a number of ways.

First the government, by providing a chain of 'free' schools and subsidised state tertiary institutions, effectively crowds out and marginalises private school and tertiary provision. This clearly prevents effective enjoyment of this right. The government also sets standards for recognition far in excess of minimum standards. Furthermore, private schools are discriminated against, since those with buildings which do not come up to standard will not be allowed to commence operation, whereas state schools with sub-standard accommodation are allowed to continue to function.

Secondly, there are some legislative restrictions which constitute clear breaches of paragraph (4). The most obvious is s 159 Education Amendment Act 1989 which prevents anyone other than the government from setting up a university. Similar restrictions apply to polytechnics. Private Training Establishments can apply to the New Zealand Qualifications Authority to use the word 'university' in their title but they will not be universities and their vice-chancellors will not be members of the Vice-Chancellors' Committee (s 240(3)). In practice the university cartel has been vigorous in maintaining its monopoly over the title 'university', threatening litigation on the only occasion a Private Training Establishment has applied to use the term 'university' in its title.

The status of paragraph (2)

Paragraph (2) is clearly of lesser status than the remainder of the Article. It does not set out fundamental rights but a 'recognition' by the States Parties that the way to

achieve the right to education is by the mechanism set out. Since the Covenant was drawn up in 1967 we have learned by experience that the mechanism set out is not necessarily the best way to achieve the rights set out in paragraphs (1), (3) and (4). Other methods of provision are under frequent discussion and, whatever their relative merits, it seems ridiculous to argue that particular methods of achieving universal access to education infringe fundamental human rights.

It has been argued above that implementation of paragraph (2) renders effective implementation of paragraph (3) impossible. There are ways of reconciling them, however. If there were a universal voucher scheme, the state would finance access to public and private schools. Conversely, a scheme whereby only the poor receive financial assistance to attend school and the remainder are required to pay from their own resources would fail to meet the obligations under paragraph (2) and Article 14.

Yet the only difference between the two schemes is that under the universal voucher scheme money belonging to a large chunk of the population is churned via a number of public servants. The bulk of taxation is derived from middle income families and the bulk of the benefit returned to the same people. The universal scheme, however, requires the employment of public servants to administer the raising of the taxation and the issuing of the vouchers, thereby incurring deadweight losses and draining away money which the taxpayers want spent on education. It is ludicrous to describe a requirement to churn money and employ public servants in this way as a human right.

Furthermore, experience in the United States and elsewhere shows that universal voucher schemes are liable to capture by interest groups such as teacher unions and educational theorists in the same way as a centrally funded education system. A universal voucher scheme therefore always offers the potential for the state to undermine the implementation of paragraphs (3) and (4) by attaching onerous conditions to the acceptance of vouchers.

The Slant of debate

The commentators and the Committee tend to focus on paragraph (2) rather than on paragraphs (3) and (4).

In its *Guidelines on States Reports* for example,[78] several questions are asked about the steps taken to ensure 'free' education, about the percentage of the national budget spent on education, activity in building new schools, and schooling schedules. Only one question is asked on the proportion of students at private schools. This is followed up with a purely evaluative question on whether any difficulties have been encountered by those wishing to establish or gain access to those schools? There are no questions relating to concessions by the state to parents who send their children to private schools or about legal or practical discrimination against private schools.

The *Initial Report of New Zealand under articles 16 and 17 of the Covenant*[79] contained references at paragraphs 741–747 to the "liberty to establish and direct schools". The Report states that respect for the liberty is evidenced by the fact that a number of independent schools had been set up during the period under review. But paragraphs 697–701 reveal that the number of private schools and private students actually fell during that period. The Report referred to the necessity for private schools to meet building and health standards. It made no mention at all of universities and the statutory prohibition on the establishment of private universities.

When New Zealand was questioned before the Committee there were questions on the reimposition of tertiary fees, although this was by the universities and not by the government. The reaction of the New Zealand representatives was essentially a defensive one, making it an issue of affordability rather than of effective allocation of resources.[80] There were no questions on the New Zealand Qualifications Authority and its framework, which breach paragraphs (3) and (4), nor on the legislative prohibition on private universities, nor on the affordability of private schooling.

The inevitable conclusion is that the Covenant is seen by those actively involved with it as a vehicle for increasing state power rather than as a check on it, as human rights documents are generally expected to be. The 'rights' laid out in the Article are conflicting and laden with assumptions as to the desirable way of achieving goals, something which the Committee purports to eschew. There are also fundamental and inarticulate assumptions about how much education one is entitled to. The positive 'right to education' is placed deservedly in inverted commas, since, given that resources are always scarce, it is clearly not a right which even ought to be available to all people at all times, subject to carefully defined exceptions. It is something the provision of which must be rationed one way or another.

78 Committee on Economic, Social and Cultural Rights, 5 un escor C12 Supp (No 3) un Doc E/C 12/1990/8(1991) Annex iv relating to states reports.

79 New Zealand Government, un E/1990/5/Add.5 1 Feb 91.

80 One can contrast the situation in New Zealand, with a policy of expanding participation in tertiary education paid for partly with fees, and in Germany where a smaller percentage of students, selected by rigorous examination, get the chance of completely free tertiary education. Which solution better advances the 'right to education'?

75 Eide, A, Krause, C and Rosas, A, *op. cit.,* pp. 213–228.

76 For example, is it within the definition of 'education' to argue that the role of the United Nations in Bosnia was pernicious and that New Zealand ought not to have supported it?

77 Committee on Economic, Social and Cultural Rights, un Economic and Social Council Official Records, 1996, Supplement No 2.

chapter eight

Cultural Rights – A right to subsidy?

Article 15 (1) somewhat vaguely guarantees the right of everyone:

- to take part in cultural life; and
- to enjoy the benefits of scientific progress and its applications.

A number of definitional questions arise, such as what is 'cultural life' and for that matter what is 'non-cultural life'? Answers are not required to these questions, however, as long as this right is interpreted in the purely negative sense as a civil and political right to lead one's life and engage in pastimes without interference from the government or from others.

Needless to say, proponents of economic and social rights argue that the right to take part in cultural life means that the state should intervene to promote participation in cultural life. A clear example is the argument that public funding for the Maori Language Commission and Maori broadcasting are required in order to ensure the right of Maori to use their language.[81] At this point the difficult questions cannot be avoided as it needs to be moderately clear what the government is supposed to be promoting.

The *Guidelines* for country reports ask for details of government funding of 'cultural development' and 'public participation in cultural life'. The questions go on to ask about:

> … the institutional infrastructure established for the implementation of policies to promote popular participation in culture, such as cultural centres, museums, libraries, theatres, cinemas and in traditional arts and crafts.

From this it seems that 'culture' consists of a combination of urban liberal-intellectual pastimes and surviving features of pre-industrial cultures. For some reason gentlemen's clubs, hunting, shooting, rugby and A & P Shows are not included despite the fact that numbers of New Zealanders might well regard them as part of their 'culture'. In other words the question represents the viewpoint of the kind of people who become members of the Committee.

In practice, this provision confronts a government with one of two courses of action:

- funding and promoting the pastimes of people who are far from obviously amongst the worst off, at the expense of others who have no desire to take part in those activities; and
- funding and promoting (and thereby controlling) all other aspects of working and leisure life that could be regarded as 'cultural'.

Starting from the proposition that one should be free to choose one's lifestyle, we end up in a position where we are apparently compelled to support other peoples' lifestyles. The intermediate step is the argument that one does not have a genuine 'choice' of lifestyle if one cannot afford to lead the life one happens to want to lead. This is the argument at the root of economic and social rights, that rights only have meaning if one can actually exercise them unconstrained by resources. This example clearly demonstrates that this argument entails the restriction and eventual destruction of individual rights.

Scientific progress

The *Guidelines* ask states to report on

> … measures taken to ensure the application of scientific progress for the benefit of everyone, including measures aimed at the preservation of mankind's natural heritage and at promoting a pure and healthy environment.

One can only observe that, generally speaking, the countries in today's world where members of the population have the freest and greatest actual access to the benefits of scientific progress are those where the government does least to ensure that this is the case. By far the most efficient and effective distributor of the benefits of innovation is a free market. Countries which have in the generation prior to 1990 accorded greatest rhetorical commitment to the pursuit of economic and social rights are characterised today by a backward lifestyle, lacking in what Westerners consider basic amenities, and by a devastated environment.

The benefits of scientific progress will best be encouraged in a society in which innovators have to assess what people will want to buy and provide it for them before anyone else. Competition will then provide the stimulus to improvements and price reductions in order to stay ahead of new entrants to the market.

The correct answer to this question, therefore, as to so many others, is that the government has provided a framework of law and protection for individual rights which enables the market to distribute these goods rapidly to those who demand them. The only exception is the provision of public goods of which a healthy environment is arguably one. Even here scientific progress will be of little help without innovation which will only occur if there is predicted to be a demand for the goods on the part of consumers.

81 This is an example given by Hunt of government expenditure on a 'non-economic' right: Reclaiming Economic, Social and Cultural Rights' (1993) 1 Waikato L R 141, and an assumption made by Lawrence, C and Berryman, C, 'He taonga te reo', *Tirohia: The Newsletter of the New Zealand Human Rights Commission,* March 1997, p. 11.

chapter nine

The missing right

If I cannot be confident that I will be able to harvest my crops and apply them to my own and my family's well-being, there is no point in my planting them. Likewise there is little point in a 'right to work' if I will not be able to apply the resulting income to my own purposes.

If the government has discretionary power to remove my wealth or income, then I cannot plan my own self-advancement. My energies will be diverted from increasing my own wealth to influencing the collective processes which will distribute wealth. If I am unable to exert substantial influence over those processes I will be at the mercy of them.

Furthermore, without property rights most other rights, including civil and political rights, would be endangered. A free press, churches and all other voluntary institutions of a free society require the protection of property rights for their survival to be assured. If property were not protected by law, such institutions would constantly be vulnerable to governmental interference, whatever fine phrases about freedom of speech and religion were contained in Bills of Rights.

Individual autonomy requires, therefore, that I should be able to protect the products of my labour against others and also that the government should not deprive me of them without some predictable and lawful process.

From this stems the recognition that a right to property is:

- the indispensible basis of individual autonomy and of a free society; and
- an obstacle to the state power required to direct the economy and 'society'.

Since the governments which acceded to the early human rights documents were mostly of socialist orientation, no right to property appeared in the European Convention or other enforceable human rights documents. A right to property appeared subsequently in the First Optional Protocol to the European Convention, but this right can be infringed upon whenever the 'general interest' requires. This, coupled with the European Court of Human Rights consistently allowing a 'wide margin of appreciation' to state parties in determining what is in the 'general interest', makes the right essentially meaningless.[82] This attitude contrasts interestingly with ringing statements, usually in the context of criminal procedure, that "individual liberties entail social costs".[83]

Neither does a right to property appear in the New Zealand Bill of Rights Act 1990. It is unclear why it does not do so, unless it were that the mere mention of a right to property would have aroused the ire of Labour members. Since the Bill of Rights Act 1990, cannot override any other statute, there seems no logical ground on which to oppose the insertion of a right to property unless one intends that the government should have the power to deprive people arbitrarily of property by regulation or discretionary decision.

In the United States, by contrast, a constitutionalised 'right to property' has been used to maintain owners' rights against environmental regulation and other forms of interference. The us government has nonetheless been able to engage in substantial environmental planning and collectivisation of aspects of agriculture (such as irrigation) by virtue of the fact that it owns a substantial proportion of the land in the western United States.

A great deal has been written on the American aspect, some of which at least depends upon the precise wording of the us Constitution. This chapter will be limited to discussing the arguments made about the right to property in the context of the division between civil and political rights on the one hand and economic and social rights on the other.

A right with economic aspects

The fact that the classical right to property obviously has economic consequences is argued as evidence that the distinction between the two kinds of right is false. This is evidently fallacious, partly because economics is about preferences and not about material wealth. Since any 'right' can be exercised so as to maximise one's utility, any right has economic consequences. The problem here is one of semantic confusion. Certain rights have been labelled 'economic' from which it is then argued that any right to which economic consequences attach belongs to that class.

Conflict of the classical right to property with economic and social rights

As an example of current writing on economic and social rights and the way in which they are purportedly equated with civil and political rights, one cannot do better than quote the opening paragraph of the chapter on property from a recent textbook on economic and social rights:[84]

> The relationship between the right to property and economic and social rights (hereinafter social rights) is somewhat restrained. While an effective realization of social rights calls for the redistribution of wealth and resources, the right to property protects acquired rights and can thus run counter to social rights. Narrowly understood, the right to property only entails that the institution of (private) property is guaranteed and that acquired property rights are protected from arbitrary interferences. On the other hand a more general right to property, which contributes to a decent standard of living and to life in dignity for everyone does not conflict with the protection of social rights.

It will be noticed that in this passage:

- there is an unargued assumption that the realisation of social rights requires the redistribution of wealth;

- the economic context in which private property rights are placed is a static one; the effects of the presence or absence of property rights on those who wish to improve their living conditions is ignored;

- there is a clear admission that the classical civil and political right to property cannot be protected while economic and social rights are pursued; and

- we are promised a redefinition of the term 'property' which will render a 'right to property' compatible with the pursuit of economic and social rights.

This redefinition is pursued in three ways:

First, mention is made of the article by Reich 'The New Property' in which Reich attempted to represent social security benefits as 'property'.[85] Three observations may be made about this argument:

- it tends to be forgotten by its proponents when they argue that the distribution of wealth is 'unfair' because X large percentage of wealth is in the hands of Y small percentage of people. Clearly, if social security benefits and superannuation were to be capitalised the figures would be substantially altered;

- the effect is to include within the concept of 'property', rights which clearly stem from state action and which are necessarily susceptible to state regulation and rationing. The next step is doubtless then to argue that all property is held by permission of the state and must be regulated and rationed for the common good; and

- its appearance in a paper published in 1995 is remarkable as, in terms of current debate about social welfare provision, Reich's argument is utterly dated and irrelevant.

Secondly, the argument is made that "the inherent conflict between the right to property and social rights can be avoided by giving more weight to the social function of property". The author then gives as examples housing rights which 'require' rent controls, and environmental 'rights' both of which restrict owners' property rights. It is to be noted:

- that this argument is laden with assumptions about how tenants, for example, can best be helped; and

- that we are not dealing here with a "social function of property" but simply with the restriction of property rights in purported pursuit of an economic or social right.

Finally, we have the argument that the right to property entails a right actually to have property and if necessary be given it by the state. This exhibits serious conceptual confusion: the confusion being between the concept of 'property' and the colloquial sense of property as things owned. The right to property is a 'right to rights', to legal security in one's possessions and to enforcability of choses in action.

This third proposition, however, only makes sense if it is interpreted as a right to be given things.

This argument is a microcosmic version, therefore, of the whole argument about the distinction between the two categories of rights. First it is denied that there is a distinction and then it is argued that, of course, the economic and social right entails that one actually has a material claim satisfied whereas classical rights merely entail that the government does not interfere with the individual's activities. Finally, the classical rights are redefined to the point of meaninglessness.

Intellectual property

It is not entirely true, however, that no right to property is contained in the icescr. In the section on 'cultural rights' we find in Article 15 (1):

> … the right of everyone:
>
> (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Although this right is expressed as attaching to 'everyone', it clearly is only for the benefit of those who choose to engage in certain activities. There are two possible justifications for the protection of intellectual property:

- without such protection of property rights there will be less production of scientific, literary or artistic materials; or

- such products are of such benefit that their producers deserve in some sense to be protected.

What is not explained is why the same protection of fruits of endeavour is not to be extended to the entrepreneur and innovator who develops a scientific invention in a useful and affordable form, nor to the publisher of books, nor to those who engage in other socially desirable pursuits such as putting their capital at risk to build houses for others to live in, and so on.

Quite obviously the arguments for protecting intellectual property apply equally to all other forms of endeavour. The inclusion of this provision can only be attributed to the priorities of the kind of people who draft such conventions and their lack of understanding of, in fact disdain for, the mechanisms that actually make these things available and useful to most people.

Conclusions

- The omission of the right to property from both the iccpr and the icescr is a serious omission in documents supposedly aimed at protecting human rights.

Without the right to retain and freely dispose of the fruits of one's labours, few other rights have any purpose.

• The literature on the right to property clearly demonstrates that the pursuit of economic and social rights is incompatible with the enjoyment of this classical right.

85 Reich, C, 'The New Property' (1964) 73 Yale L J, pp. 733–787.

82 See *Spadea and Scalabrino v Italy* (1995) 21 ehrr 482.

83 Steiker, 'Second Thoughts about First Principles' (1994) 107 Harvard L R 820.

84 Krause, C, 'The Right to Property', in Eide, A, Krause, C and Rosas, A, *op. cit.,* pp. 143–157.

chapter ten

Conclusions

Economic rights

Apart from the right to property, which would include a right not to have one's savings eroded by inflation, one can identify other economic and social rights which do not appear in the icescr, such as:

• freedom of contract, including the freedom to agree the form of contract which best suits the mutual purposes of the parties making it;

• the right to obtain the best goods and services regardless of country of origin;

• the right to choose one's employment subject only to general rules made for public safety; and

• the right not to be born into debt not incurred for one's own future benefit.

These rights can be protected in the same way as classical civil and political rights, by rules which instruct the government to abstain from activities such as interfering in contracts, inflationary spending, imposing tariffs and quotas, according privileges to particular groups and deficit budgeting.

That these rights are missing from the icescr demonstrates that its contents and the contents of similar documents are selective and reflect the political philosophy of the drafters and the conventional wisdom at the time of drafting. These factors support the view that the icescr encourages central planning and regulation rather than individual liberty or rights.

The literature

The rhetoric about economic and social rights is characterised by an intellectual laziness exemplified by:

- the unsupported recitation of statements about the compatibility of economic and social rights with civil and political rights; and

- the unargued assumption that realisation of economic and social rights requires systematic redistribution of wealth.

Most of this rhetoric is provided by writers who clearly have little understanding of or sympathy for economics and who, in particular, do not understand the role of the market in allocating resources and enabling individuals to make their own choices. This is all the more disturbing since the international human rights community is one in which people seem able to carve out their own careers, writing articles of this nature, appearing before committees and ultimately being appointed to them. Very few members of these bodies will ever have put any capital at risk; nearly all are life-long salaried academics and public servants.

Diplomatic decision making

There is an obvious democratic deficit at every stage of the international decision-making process. International instruments are drafted by more or less self-selected groups of like-minded and unaccountable people. The results are portrayed as an international agreement that the nation must accede to because many other countries are doing so.[86] The agreement can then be signed and ratified by executive action, without any parliamentary supervision and with a minimum of public discussion.

In this world the mere fact of agreement constitutes success, even if the agreement is value-reducing by virtue of consisting of mutual concessions of a harmful nature. There are clear incentives for the inhabitants of this diplomatic world to recommend more conferences, international instruments and implementation mechanisms. This process has opportunity costs but makes little obvious contribution to the improvement of anyone else's living conditions.

Subsequently the implementation of those instruments is overseen by committees consisting of two classes of people: those from totalitarian states who are picked by their governments and those from the West who are largely self-selecting in the way described above.

At these committees non-governmental organisations are allowed to participate in various ways, submitting information relevant to country reports and contributing to general discussions. In the nature of things these organisations represent overwhelmingly the kind of people already on the committee and not the risk-takers, entrepreneurs and innovators on whose efforts the achievement of economic and social well-being actually depends. On one occasion before the Committee on

Economic, Social and Cultural Rights a prolonged discussion occurred between members of the Committee, un specialist agencies and ngos on the right to housing. One of the specialised agencies represented was the International Monetary Fund. One has to sympathise with its representative who wasted a good part of a day listening silently to the discussion and at the end was the only person to ask who was going to pay for all the proposals, a question which was brushed aside.[87]

The root of the problem

The problems faced by those trying to implement positive economic rights do not stem from lack of resources, but from the fundamentally intractable problem created by imagining that the aspirations expressed as rights in the Covenant can be pursued by governmental action, whether national or international. To repeat the points made when considering the central right, the right to an adequate standard of living, positive economic rights:

- require definition by the government of matters which require trade-offs which can only be assessed subjectively;

- mandate delivery by the state of something which can only be achieved through the efforts of individuals; and

- are used to legitimate, in the name of their achievement, deliberate deprivation of minorities of the same rights, for example by purporting to redistribute wealth through graduated labour taxation.

Consequences for business

It is clear that the activities of the Committee and the international human rights process have potentially harmful consequences for business and for economic growth, and therefore for the achievement of the ends the icescr is supposed to pursue. This is true both at domestic and international levels.

There are, however, substantial opportunities, even within the mechanism of the icescr, to argue for the recognition of negative eonomic rights which alone can create the growth necessary to realise in a practical way the aspirations expressed as 'rights' in the Covenant. It is clear that negative and positive economic rights are in conflict and that this conflict has not been faced by the Committee or by the writers.

The voices of those who believe in individual liberty, who understand the connection between political and economic freedom and who wish to generate wealth in order to better the lives of all, are rarely heard in these processes. Such individuals and groups should bear in mind an important comment of the Chair of the Committee on Economic, Social and Cultural Rights which contains both a warning and an opportunity:

… the potential effectiveness of the reporting procedure clearly lies less in the formal exchanges between the Committee and the state party and more in the mobilization of domestic political and other forces to participate in monitoring government policies and providing a detailed critique (assuming one was warranted) of the government's own assessment of the situation.

86 Even when this is not true. New Zealand is a world leader in signing and ratifying such instruments, from which it follows that it ratifies instruments that few others adopt.

87 Committee on Economic, Social and Cultural Rights, *General Comment No 6*, un Economic and Social Council Official Records, 1996, Supplement No 2.

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