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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Social security and the right to dignity in the Northern Territory
The human right to housing and reducing homelessness
Inclusive education in Australia

Human Rights Defender

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The Australian Human Rights Centre
Faculty of Law
The University of New South Wales
Sydney, NSW, Australia, 2052

Phone: +61 2 9385 1803
Fax: +61 2 9385 1778
Email: ahrc@unsw.edu.au
Web: www.ahrcentre.org

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Front Cover Artwork
Leah Robertson, ***Framed #4*** 2008. Giclée print 32.5 x 48.8 cm, edition of 6. Courtesy of the artist and the Centre for Contemporary Photography, Melbourne.

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editorial

Anna Cody

This edition of the *Human Rights Defender* focuses on the practice of implementing economic, social and cultural rights. The authors of the articles are almost all practitioners in Australia in legal aid or community legal centres or work in human rights internationally. What is striking about each of the articles, is the innovative and creative ways in which law is being used to make economic and social rights real and justiciable for disadvantaged communities.

In her article on the right to social security in the Northern Territory, Fiona Hussin analyses how the right has been detrimentally affected by the Northern Territory Intervention and discusses some of the negative impacts that income management has had on communities. The measure introduced in 2007 was aimed at people living in prescribed areas in the Northern Territory who are overwhelmingly Indigenous. As the Australian Government announces moves to apply these measures across Australia, this article is timely for its insights on the discriminatory impacts of such a scheme on disadvantaged people.

A chid rights approach to development is discussed in detail by Annie Pettitt and she draws on the work of Save the Children to demonstrate how this can be effectively achieved. The key elements include direct action to address the violation of children's rights and the gaps in fulfilment of their rights. The second element emphasises the responsibility of governments as duty-bearers and the third element focuses on strengthening the understanding and capacity of children to claim their rights. The work described is hopeful because of its use of a human rights framework in a practical way.

The current Australian government has taken a range of measures to deal with homelessness, many of which are commendable. Emma Golledge discusses these initiatives comparing them with a human rights approach to housing and highlighting the need to move away from a crisis method of management. One of the key reasons for entrenched homelessness is because homeless people have to demonstrate they are deserving of housing and can maintain a tenancy. This significantly impacts on people with mental illness and only serves to entrench homelessness. A human rights approach starts from the premise that all people experiencing homelessness should recieve assistance to end that homelessness, receiving support to maintain their housing and ensure they are not evicted into homelessness, an approach Golledge discusses in her article.

Another area currently in flux in Australia for the practical application of economic and social rights, is in the experience of people with disability. While Australia has had anti-discrimination laws at State and Federal levels for some years, in 2008 Australia ratified the *Convention on the Rights of People with Disability*. The article "The CRPD and Inclusive education in Australia", discusses some of the issues faced by clients of the Disability Discrimination Legal Centre and the potential of the CRPD as an avenue for redress in the area of economic and social rights. The need for schools to make reasonable adjustments for students with disability, to consult with these students and to include them in the curriculum are some of the key issues faced by children with disability. The CRPD provides another means for thinking about how principles of social inclusion in the area of education can be implemented for children with disability.

While we may all believe that the USA protects 'rights' effectively domestically, Cathy Albisa's article argues for the need to use a human rights framework domestically, building on the civil rights movement of the 50s and 60s. Human rights activists in the USA are now focussing on a revitalised US Civil Rights Commission to renew its original vision of human rights being implemented domestically. With President Obama in the White House a new Human Rights Commission with responsibility for safeguarding economic and social rights might be possible.

Another key mechanism discussed in this edition for ensuring the proper implementation of economic, social and cultural rights is the newly created Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This has opened for signature and is yet to enter into force. Hannah Withers examines some of the obstacles to states signing the Optional Protocol including the misconception that ESCR are not justiciable.

Through their description and analysis of the case about the rehabilitation of the Matanza-Riachuelo water basin, Fairstein, Garcia and Kletzel examine the proposition that economic and social rights are justiciable. Their analysis is fascinating and particularly relevant for Australia as the Government is grappling with the recommendations of the Brennan committee which has recommended that some economic and social rights be included in a Human Rights Act. Their conclusion is that courts can be effective in implementing economic, social and cultural rights via a series of hearings with monitoring of the implementation of remedies.

Each of these articles demonstrates different aspects of economic and social rights in a practical sense, either in Australia or internationally. We hope you enjoy reading this edition.

This edition of the Human Rights Defender was guest edited by Anna Cody, Director of Kingsford Legal Centre.

Kingsford Legal Centre is a community legal centre and clinical teaching program of the University of New South Wales. The Centre specialises in discrimination and employment law and advocates on human rights issues domestically and internationally. The Centre most recently co-wrote the Australian NGO reports for the United Nations international committees monitoring Australia's compliance under the Convention on Economic, Social and Cultural Rights and the Convention on Civil and Political Rights.

Perspectives on social rights justiciability in Argentina

Carolina Fairstein, Paola Rey Garcia and Gabriela Kletsel

Laki Sideris Little ***Crowds #1,*** 2008, type C photograph 40 x 50 cm, edition of 5. Courtesy of the artist and the Centre for Contemporary Photography, Melbourne.

In the last two decades in Argentina - and in other countries in the region - the courts have taken on an increased role in channeling the social demands of the community. They have intervened in complex collective disputes and in issues of public policy with high public impact. The courts and the judiciary have been involved outside the traditional framework of legal proceedings,[1] adjudicating on matters traditionally considered policy issues.[2] At the same time, many community groups have begun to formulate their demands in legal terms. Judicial intervention of this type is crucial to the protection of economic, social and cultural rights. The violation of these rights often affects groups or classes of persons, rather than individuals, and has structural causes which stem from multiple factors.

Countries with a European judicial tradition, often have inadequate procedural mechanisms to ensure effective judicial protection of economic, social and cultural rights (ESCR). Where problems of structural or systemic violations of social rights emerge, the challenges for their resolution include:

1. enabling judicial involvement;
2. overcoming the weaknesses inherent in traditional procedural tools designed to handle cases between only 2 parties with private interests;
3. rethinking litigation strategies in order to achieve consistent and appropriate legal remedies; and
4. ensuring that these remedies are effectively implemented.

Litigation of social rights cases often requires complex interventions involving more than one instance of judicial decision-making. Using the courts to obtain a declaration that there is a threat or violation of a social right is insufficient. Conflict is resolved gradually and the orders from the judge are modified once the right has been legally recognised. The judicial decision, rather than being the end of a case, is the starting point for the resolution of the problem. It would be naive to think that resolution can be achieved through one specific decision of a judge and that this would be implemented expeditiously. The development of the form of remedy to be ordered, its implementation and the supervision of its implementation, involve extended periods of activity which in turn raise further challenges.

One cannot measure the results of ligitation of complex cases with the same perspective as one would measure the results of a legal case between two parties. Unless the specific details and challenges of this type of case are understood, it is too easy to conclude that using the courts to arbitrate on violations of social rights does not achieve much beyond symbolic pronouncements without any concrete impact on the lives of people.

In this context, we discuss the litigation aimed at the rehabilitation of the water basin of the Matanza Riachuelo River, one of the most polluted river basins in Argentina and internationally.

The Rehabilitation of the Matanza - Riachuelo River

The Matanza-Riachuelo River constitutes one of the most critical environmental problems facing Argentina affecting an estimated three million people.[4] In effect, the environmental damage covers the entire region, spreading over 14 municipalities within the province of Buenos Aires and 34% of the territory of the City of Buenos Aires.

The problems associated with the river began with the industrialization of the country in the mid-1980s.[5] Various government agencies have committed to clean up the river, however they have all been unsuccessful. The problem has only intensified and worsened over time due to factors such as increasing industrialisation, the lack of proper treatment of sewerage and industrial waste, and the lack of an administrative environmental policy aimed at rehabilitating the river basin.

Moreover, the land surrounding the river is densely populated, with a high percentage of the population who inhabit the area around the Matanza-Riachuelo River living below the poverty line, lacking even the most basic standard of living. The failure of various authorities to develop an adequate environmental and health policy to address the problem triggered a lawsuit by a group of residents who filed a claim against the National Government, the Provincial Government of Buenos Aires, the Government of the City of Buenos Aires and 44 different companies, for damages incurred due to the pollution to the Matanza-Riachuelo River.[6]

At the first hearing on 20th June 2006, after restricting the claim to the prevention of pollution, the restoration of the river and a claim for damages, the Supreme Court decided that the defendant companies should submit a report outlining the precautions that they would adopt in order to halt and reverse the pollution of the area. It ordered the National Government, the Provincial Government of Buenos Aires, the City of Buenos Aires and the Federal Council on the Environment (Cofemer) to present an "integrated plan" which had to include, amongst other issues, an environmental policy for the zone, an environmental impact study of the operations of the 44 companies involved, an environmental education program, and a program for public-information about the environment. The Court also held that all this information should be provided at a public hearing, convened specifically for that purpose.

In September 2006, a public hearing was held by the Supreme Court at which the defendants presented the *Plan for the Rehabilitation of the Matanza-Riachuelo River Basin* and reported on the creation of an inter-jurisdictional river basin committee. Meanwhile, various civil society organizations that joined the case as third parties[7] - the Environment and Natural Resources Foundation (FARN), the Centre for Socio Legal studies, and the Neighbourhood Association of Boca and Greenpeace (CELS), were invited to present their arguments. The civil society organisations used the opportunity to highlight the manner in which the Government should address these issues, the Court's role in dealing with the case, the importance of providing emergency health care to the populations at risk and the responsibility of the corporations and public authorities for the environmental damage to the river.

In February 2007, a second hearing was held in which the Environmental Minister outlined the progress made since the submission of the Rehabilitation Plan six months earlier. In turn, the Court resolved to commission independent experts (appointed by the University of Buenos Aires) to submit a report on the feasibility of the Rehabilitation Plan submitted by the National Government, in conjunction with the Provincial government and the government of the City of Buenos Aires. The study was made available to all interested parties who were then given the opportunity to express their views and comments in a further hearing convened by the Court.

Finally, on 8th July 2008, the Supreme Court issued a landmark ruling, holding that responsibility to ensure the prevention of future damage, and for rectifying existing environmental damage to the river, ultimately resided with the National Government, the Provincial Government and the City of Buenos Aires.

The ruling carefully designated responsibility for carrying out the necessary rehabilitation work, and the time-frame in which the work had to be carried out, whilst simultaneously leaving open the possibility of imposing fines should any of the responsible authorities fail to comply in the future. Another notable aspect of the hearing was a court order requiring information about public health risks to the local community to be produced to the Court. On the basis of this information, an emergency health plan was implemented.

Public hearings constitute a suitable venue for judges to be able to extract explanations, and attempt to shed light on matters which are being swept under the rug. They contribute in a substantial way to the ability of the Court to design responses and remedies specifically tailored to the circumstances of each case.

Furthermore, the judicial decision set a precedent by authorising the Ombudsman's Office and the various NGOs who were joined in the case to form a *Rehabilitation Plan* monitoring body, paving the way once more for public participation and control in the implementation process.

Impact of the case

Without wishing to make a categorical evaluation about the value of public hearings in this case, what is certain, is that the opening up of institutional spaces by the Court has enabled forms of participation on which NGOs can reflect in greater depth.

Firstly, it is important to note that the hearings took place prior to the Supreme Court's final ruling. The *informative* nature of the hearings elucidates the intention of the Court to use them as a procedural mechanism to hear and question the parties on aspects of the case. By doing so the Court was able to elicit the most information possible and was thereby able to arrive at the best solution to reverse the environmental damage suffered by the river.

In relation to this, the greater the ability and the willingness of the presiding judges to question and scrutinise the arguments presented by the parties, the greater the benefit which will be derived from the hearings. Public hearings constitute a suitable venue for judges to be able to extract explanations, and to attempt to shed light on matters which are being swept under the rug. In this way they contribute in a substantial way to the ability of the Court to design responses and remedies specifically tailored to the circumstances of each individual case.

In this particular case, the Court sought - through the institution of four hearings in less than two years - to establish an environment conducive to transparent and inclusive discussion and to identify possible courses of action and potential responses to the problems brought before them. The Court's role throughout the hearings was active and incisive.

It did not abstain from investigating when given the opportunity to do so; it submitted exacting and concrete questions to the representatives of the Government and private companies about the measures they should adopt. It criticised some of the proposals in the *Rehabilitation Plan* and identified the lack of progress when the Government was not taking sufficient action. The Court even made ironic comments when the companies attempted to hide behind specious arguments.[8]

Finally, as previously mentioned, the hearings have made visible the complexity of the issues in Riachuelo and have facilitated the involvement of the entire community. However, in order to guarantee that the community can continue to participate effectively in the process and monitor progress, it is necessary – as the Court has ordered – for information to be produced and to be made accessible to the public, especially to those who are directly affected. [9]

To ensure that the community can realize their rights to be heard, and participate in the design and implementation of policy, as well as being able to insist on the enforcement of human rights obligations, it is essential that this information remains unrestricted.

Extracted from an article by Carolina Fairstein, Paola Rey Garcia and Gabriela Kletzel, entitled: 'In search of an effective judicial remedy: new challenges for the justiciability of social rights', at press

Carolina Farstein is a lawyer with the Centre for Legal and Social Research (CELS) in Argentina which specialises in economic, social and cultural rights.

Paola Rey Garcia and Garbiela Kletzel are human rights lawyers in Argentina.

Endnotes

1 Cf. Abramovich, Víctor, "Access to justice and new forms of participation in the political sphere", in Birgin, Haydée and Kohen, Beatriz (comp.) Access to Justice as a Guarantee of Equality: institutuions, stakeholders and compared experience. Buenos Aires, Biblos, 2006.

2 Cf. Uprimny Yepes, Rodrigo, "The transformation of policy into the courts in Columbia: cases, possibilities and risks. in *Sur. Revista Internacional de Derechos Humanos;* n. 6, año 4, 2007; Sieder, Rachel, The transformation of policy into the courts in Latin America., *Universidad del Externado de Colombia*. L. Schjolden y A. Angell Eds., Colombia, Octubre 2008. CELS, *The Struggle for Law: Strategic litigation and human rights.*.

3 Fairstein, Carolina, Rossi, Julieta, Commentary on General Comment 9 of the Committee on Economic, Social and Cultural Rights, in CELS- Universidad Nacional de Lanús, Revista Argentina de Derechos Humanos, Año 1, Vol. 0, Ed. Ad -Hoc, pg.336-7.

4 Cf.Ombudsman for the People, Special report: water basin of Matanza-Riachuelo, 2003. Available at www.defensor.gov.ar/informes/riachuelo.pdf

5 For the history of the water basin of the Matanza Riachuelo, see, Ombudsman for the People, Special report: water basin of Matanza Riachuelo, 2003., Informe Especial: Cuenca Matanza-Riachuelo.

6 At first instance, the case was against the National Government because of its role in overseeing the regulation of these issues, which came from the National Constitution. The Province of Buenos Aires was also responsible for the protection and regulation of natural resources under Articles 121 and 124 of the Fundamental Law. The City of Buenos Aires was implicated because it is responsible for any asset within its boundaries and particularly the use of wáter and the other resources of the river basin such as the subsoil, the flora and fauna. Finally the local businesses were included as respondents because they were directly responsbile for spills of dangerous substances and for not having built treatment plants or developing other methods for dealing with waste.

7 Various organisations including the Foundation for the Environment and Natural Resources, Greenpeace Argentina, the Metropolitan Foundation, City Foundation , Community Power, the Center for Social and Legal Research and the Neighbourhood Association of La Boca were all listed as third parties under article 90 of the Civil Process Code. The NGOs were only recognised by the Court in accordance with the statutory aims as outlined above.

8 See, for instance, *'El Gran Bonete en el Riachuelo'*, 13/09/06, http://www.pagina12.com.ar/diario/sociedad/3-72930-2006-09-13.html, p.12.

9 On this point, the Court in its judgement of the 8 July 2008 ordered the parties to "Organise within 30 days, a system of electronic distribution of information including all data, reports, chronologies, costs etc via internet so that the general public can be informed of the details of the case in a clear and accesible manner. Cf. CSJN, case "Mendoza, Beatriz y otros c/ Estado Nacional y otros s/ daños y perjuicios", previously cited

Installation view: *CCP Documentary Photography Award 2009*. Photo: Oliver Parzer

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Centre for Contemporary Photography
404 George Street, Fitzroy, Victoria, 3065
T 03 9417 1549 W www.ccp.org.au

The *Australian Human Rights Centre* is an inter-disciplinary research and teaching institute based in the Faculty of Law at the University of New South Wales. Established in 1986, the *AHRC* aims to increase public awareness about human rights procedures, standards and issues within Australia and the international community. The Centre undertakes research projects on contemporary human rights issues and provides accessible information on developments within the field. The *Human Rights Defender* is published as part of this commitment to raise public awareness and ecourage public debate on emerging and significant human rights issues. **To subscribe to the *HRD* please visit www.ahrcentre.org/content/Publications**

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Politics is about power. It is about the power of the state. It is about the power of the state as applied to individuals, the society in which they live and the economy in which they work. Most critically, our responsibility in this parliament is how that power is used: whether it is used for the benefit of the few or the many. - Kevin Rudd

Tom Williams, ***Turanga Building, Waterkloo 2007***, Inkjet print, 39 x 39cm, Edition 9 + 1AP. Courtesy of the artist and Centre for Contemporary Photography, Melbourne.

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