

(RE)POSITIONING SOCIO-ECONOMIC RIGHTS AS REAL RIGHTS: A RESPONSE TO SCEPTICS.

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Abstract

In place of a unitary international bill of rights, there are two international covenants. This has given rise to the misleading impression that some rights may be less important than other rights and that certain rights are justiciable while others are statements of political principle. This paper tries to respond to the critics of socio-economic rights by (re)-addressing the concerns raised and re-asserting the indivisibility and inter-dependence of human rights across regions and societies. Specifically, this paper addresses issues of justiciability, lack of minimum standards, resource constraint, monitoring and implementation.

Introduction

The 20st Century can be referred to as the ‘century of human right’² going by the huge number of international human rights instruments developed during this period. Ironically, the same period was, characterised by the most heinous human rights abuses that reached the peak during the Second World War in 1945, consequently resulting into the establishment of new international human rights instruments³. Key among these was the charter establishing the UN in 1945 and the UDHR in 1948.

However, the negotiation on human rights instruments, which seemed to have picked momentum in 1945 was continuously slowed down by ideological difference on what exactly human rights doctrines should encompass⁴.The soviet Union, together with developing countries strongly vouched for the socio-economic rights while the Western countries, were pre-occupied with the civil and political rights⁵.It’s these conflicts that led to the development of two human rights charters, one on civil and political rights and the other on socio-economic rights. However, whereas there seems to be some consensus on the Civil and political rights, disagreement exist on whether Social economic rights are ‘real rights’ or whether they are merely aspirations or statement of principle⁶.This paper starts by examining the philosophical foundation of rights before seeking to reposition socio-economic rights as ‘rights proper’

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² See Bobbio, Noberto. (1996). *The Age of rights*. Cambridge, UK, Polity Press.

³ Ibid

⁴ Buergenthal,Thomas (1997) .The Normative and Institutional Evolution of International Human Rights , *Human Rights Quarterly*, 19, pp. 703-723.

⁵ Ibid pp 711-716

⁶ Ibid

What are human rights?

The definitions of what human rights are perhaps as varied as the number of scholars who engage with the human rights discourse. On one hand, some scholars regard human rights as fundamental entitlements that one should be guaranteed as a human being. This school of thought proceeds from the standpoint that human rights are natural and that an individual is born with them; they are not given⁷. They argue that human rights precede law, and must thus be distinguished from legal rights, which stem from legal statutes⁸.

However, on the other hand there are those who view human rights as basic rights that must be guaranteed by governments in order to meet a minimum standard of moral legitimacy. Supporters of this view note that rights are requirements for citizens to develop and exercise their autonomy⁹. This conception of rights however implies that rights are given, something that is highly disputable, because human rights are natural rights¹⁰. Upendra Baxi on the other hand insists that if one proceeds on the premise that something is his human right, he immediately creates a notion of there being someone with an obligation to grant that right. In other words all rights must be characterised by corresponding obligation, thus further problematizing the notion of rights being natural¹¹.

However, to navigate through the complex definitional barrier of human rights, I will take a more philosophical approach by focusing on the key principles that underpin human rights. These are survival, dignity, equality, and freedom¹². I will thus define human rights as the necessities that human beings are entitled to so as to live a life of dignity, freedom and equality¹³. I proceed from the natural law perspective that these requirements are entitlements by virtue of being human and are thus not given nor can they be taken away.

Are socio-economic rights ‘real Rights’?

The convention on socio-economic rights, lists right to work, education and health, among others as human rights and proceeds to note that these rights may not be realised at once but can be achieved progressively by governments with the possible help of the international community¹⁴. Critics however brand these rights as statement of aspirations because they don't identify duty holders. O'neill, one of the critics, argues that though rights need to be

⁷ Donnelly Jack (1982). Human rights as natural rights. *Human Rights Quarterly*. 43, 391-405

⁸ Ibid

⁹ Talbott, William (2011). The Consequentialist Project for Human Rights. In , *Human Rights and Human Well-Being*. Retrieved 7 Mar. 2013, from <http://0-www.oxfordscholarship.com.pugwash.lib.warwick.ac.uk/view/10.1093/acprof:oso/9780195173482.001.0001/acprof-9780195173482-chapter-1>

¹⁰ See Donnelly Supra note 7

¹¹ See Baxi Upenda (August, 2012) *Re-Thinking Human Rights : Preliminary Reflections Concerning Human Rights thoughts and Folkways*. Unpublished.

¹² Williams Lucy (2006). Towards an Emerging International Poverty Law, in Williams Lucy (ed) *International Poverty Law: An Emerging Discourse*. London, Zed Books.

¹³ Ibid

¹⁴ See , The International Covenant on Economic, Social and Cultural Rights.

institutionalised to make sense, attaching the obligation for socio-economic rights on the international community isn't reasonable because there is nothing that connects international community to the individual¹⁵. Clair, in an apparent response, points out that the obligation lies with a specific agent for each specific right (either within or without the state)¹⁶, something heavily dismissed by O'Neill who insists that even if there was a possibility to identify a duty bearer, it would be impossible to justify the obligation¹⁷. I however note that because socio-economic rights lie at the foundation of human well-being and may be a prerequisite for the enjoyment of civil and political rights, regarding them as mere statement of aspirations negates their very necessity in human existence¹⁸. In addressing these rights, we need to transcend national boundaries and view humanity as a single community with an obligation towards each other¹⁹. This would then tie obligation to capacity so that the part of humanity with the capacity will be considered to owe more obligation with regard to these rights. The justification for this (as demanded by O'Neill), would be that lack of these rights emanate from the failure of the distributive, and redistributive global systems to guarantee the welfare of everybody, therefore providing loopholes through which inequality in the attainment of these rights by different regions develop²⁰. Areas that have thus benefited the most from this system thus bear the greatest responsibility.

Moreover, if the argument advanced by the advocates of civil rights that rights are a necessity for human beings to live in dignity and freedom is anything to go by, then clearly its very fundamental for human beings to be guaranteed socio-economic rights²¹ because lack of food, shelter and a housing are just as indignifying as the absence of civil liberties.²² Pursuing this line of thought, Sen argues that the failure to attain adequate levels of education reduces ones choices in life, therefore compromising his freedom which is required by the individual as a condition for the process of development²³. Freedom here implies the opportunity to use the power which one possesses (in this case education), to achieve his individual goals and influence his destiny. Clair, refers to socio-economic needs as positive liberties and argues that its very necessary for a human being to possess them as they enables him to secure whatever he needs for his life's fulfilment²⁴. Thus the foundation of the power and freedom

¹⁵ O'Neill, Onora. (1986). *Faces Of Hunger: An Essay on Poverty, Justice and Development*, London: Allen and Unwin.

¹⁶ Clair Asuncion (2006). How Can Human Rights Contribute to Poverty Reduction? A Philosophical Assessment of the Human Development Report, 2000 in Williams Lucy (ed) *International Poverty Law: An Emerging Discourse*. London, Zed Books, pp 17

¹⁷ O'Neill, Supra note 15 at 17

¹⁸ Young Katharine (2012). *Constituting Economic and Social Rights*. Oxford, Oxford University Press.

¹⁹ Andrew Kuper, (2000) Rawlsian Global Justice: Beyond the Law of Peoples, to a cosmopolitan Law of Persons' *Political Theory* 28(5) pp 640-674

²⁰ Young, Supra note 18 at 46

²¹ Sengupta Arjun (2002). On the Theory and Practice of the Right to Development, *Human Rights Quarterly*, 24, 4, pp 837-889

²² Nussbaum, cited in Young Supra note 17 at 33

²³ SEN, Amartya. (1999). *Development as freedom*. New York, Knopf.

²⁴ Clair, Supra note 16 at 16

,lie in the attainment of positive liberties²⁵.In other words whereas it's an individual's freedom to choose the type of employment she wants ,this choice is fully dependent on her level of education. Lack of enough education therefore compromises her freedom of choice in relation to work. In the contemporary world lack of education also limits (both absolutely and comparatively), people's abilities to participate fully and effectively in the political and economic life of their country²⁶.

Another criticism that has been advanced against the recognition of socio-economic rights as 'proper rights' is the issue of feasibility²⁷.According to critics, it doesn't make sense to label something a right if it is not realizeable. Such critics further argue that due to resource constrains that characterize developing countries, it is practically impossible for them to realize these rights unlike civil and political rights which don't require much resources but simply expects the state to abstain from interfering with the individual²⁸.These critics however ignore many contentious issues such as:

(a) That even civil and political rights need resources for their realization²⁹.Take the example of the right to fair trial. It requires the government to establish and maintain a vibrant judiciary capable of dispensing justice and in some instances may even require legal and institutional reforms which need massive resources to be realised³⁰.The same applies to democracy and representation in parliament which requires massive allocation of resources to the legislative arms of government as well as comprehensive voter education³¹.The view, that civil and political rights require no or less resources is therefore not absolutely correct.

(b)The very nature of human rights, doesn't tie them to resources because rights are fundamental entitlements arising out of the very identity as a human being and precede the state as an allocator of resources³².Thus by asserting certain rights such as the right to health, the claimant isn't calling for a sudden allocation of resources to his health needs, rather this is a call for recognition of this right. Once there is recognition, the question of resources then arise. On this I concur with those who argue that this call doesn't necessarily restrict action to the state, but to anyone anywhere with the means to act³³.This boils down to a general critic that has been advanced on the entire human rights regime, that is; the misconception of the state as the sole provider of right. This misconception separates human rights from their socio-cultural context. Rights are often realized in day to day life experiences, which is often outside the state context³⁴.In other words, there are myriad of players at the domestic level

²⁵ Ibid

²⁶ Hodgson Douglass. (1998). *The human right to education*. Aldershot, Ashgate.

²⁷ Sengupta,Supra note 21 at 864

²⁸ Ibid

²⁹ Donnelly supra note 7

³⁰ Nickel, James, "Human Rights", *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta (ed.), forthcoming URL = <<http://plato.stanford.edu/archives/sum2013/entries/rights-human/>>

³¹ Ibid

³² Sengupta,Supra note 21 at 866

³³ Clair,Supra note 16 pp 23-27

³⁴ Gregg, Benjamin. (2012). *Human Rights as Social Construction*. Cambridge University Press. Retrieved 7 March 2013, from <<http://lib.myilibrary.com?ID=358038>>

who contribute to upholding or violation of human rights .By attaching responsibility only to the state, we run the risk of ignoring other major human rights violators and guarantors³⁵ .

The Covenant on socio-economic rights requires the state to ‘recognize certain rights’ and to ‘take measures’ towards their realization .This call doesn’t necessarily tie the state to allocating resources ,rather it implies that the state should first recognize these as rights ,then provide a suitable environment for their realization. Once this is done ,other internal and external players can then intervene towards the realization of these rights³⁶.This doesn’t necessarily mean that the state is free from directly promoting these rights ,rather implies that the state isn’t the sole provider and that there are other players ,in the socio-economic rights regime³⁷.Moreover, unlike civil and political rights which require comparatively lesser time to be realised, socio-economic rights are only realizeable progressively. Furthermore ,whereas resources can be limited at the national level the question of resources at the international level doesn’t arise ,because there is ,certainly enough resources that can contribute meaningfully to the realization of these rights³⁸.Finally, as noted by Nickel, deciding whether to embrace social rights isn’t really a matter of deciding whether to bear the burden or not. Rather ,it is deciding whether to continue reliance on a system of informal provision that distributes assistance in a very spotty way ,and whose cost fall unevenly on families. This is because Even in jurisdictions where social rights are not provided or recognised by the government, families and friends still provide them³⁹ .

Another controversial issue is justiciability.Sceptics argue that due to lack of a clear duty bearer,it would be impossible for an individual to move to court to have these rights enforced⁴⁰.However, it is important to note than states such as South Africa and Germany, have in the recent past, inculcated some socio-economic rights within their constitutions⁴¹.This thus makes it possible for individuals to move to court to claim these rights. Sen while dismissing justiciability as a basis for rejecting socio-economic rights, argue that human rights are more than legal rights, that they have a broader moral content that go beyond the law⁴².Thus though some rights may be unrealised or hard to implement, they still remain rights ,due to their high moral foundation. Other critics of socio-economic rights argue that they are unjusticiable because they are, basically issues of resource distribution and redistribution that lie in the domain of politics since it’s the political system which determines the amount of resources allocated to an individual and not the courts⁴³.For

³⁵ Ibid

³⁶ Williams ,Supra note 12 at 6

³⁷ Ibid

³⁸ United Nations Development Programme (1998) *Human Development and Human Rights:Reports of the Oslo Symposium*,Copenhagen:UNDP

³⁹ Nickel,Supra note 29

⁴⁰ Young,Supra note 18,at 6

⁴¹ Marius Oliviera and Linda Jansen (2006).South African Poverty Law : The role and influence of the International Human Rights Instruments,in Williams Lucy(ed)*International Poverty Law:An Emerging Discourse*.London,Zed Books.

⁴² Amartya Sen,cited in Clair,supra note 16 at 25

⁴³ Bilchitz David (n.d) Are Socio-economic Rights a Form of Political Rights? Accessed from <http://www.nyslawreview.com/wp-content/uploads/sites/16/2014/11/Bilchitz.pdf>

instance in a poor country like Mali, it would be unrealistic for one individual to move to court to demand his right to health, because the allocation of resources to an individual's health needs is done by the government and is not a court issue, unless a clear discrimination exist. However I note that the difference lie in the methods of attaining the two sets of rights ,rather than in the rights themselves because socio-economic rights can be realised within group contexts⁴⁴.Thus construction and equipping of schools or hospitals ,and providing for a suitable environment towards recognition of worker's rights, serve to guarantee individual rights, but within groups ,whereas political rights only target individuals.

Other critics argue that because there is no universally agreed standard of what minimum health, education or nutrition is, and that the available data is still contested by scientists, considering these rights as legal rights in court would raise the issue of interpretation⁴⁵. Moreover, since each country has its own standard of what basic health and education is, allowing country-specific standards to be used would result into relativism, which has hugely been opposed by most advocates of the civil rights⁴⁶.These critics ignore the fact that difference in interpretation and lack of minimum standards isn't only unique to socio-economic rights . Even in the civil and political rights, freedom of information, torture and speech have all been subjects of contestations overtime⁴⁷.Thus even in the united states, which is considered as a bastion of civil rights, there are increasing allegations that its standards relating to the right to information have been compromised by the war on terror, with a lot of information being labelled as classified by the government⁴⁸.Thus if civil and political rights are accepted amid contestations in interpretation, then the same should apply to the socioeconomic rights. Moreover as Sen notes, rights must be justified based not only on their just procedure but also on their good outcome⁴⁹.Thus the right to health can be justified based on its outcome: the capability to promote proper functioning of the human being. Contrasting this with libertarian rights ,Sen argues that Libertarian rights can be justified based on their just procedure but not always on their good outcome unlike socio-economic rights⁵⁰.

In examining the thresh hold of what should be considered as human rights, Nickel argues that such an examination should analyse whether the norm:

⁴⁴ Young supra note 18 at 44

⁴⁵ Ibid at 40

⁴⁶ Kennedy David(2002)The international Human Rights Movement:Part of the Problem?*Havard Human Rights Journal*,15,pp101-125

⁴⁷ Amartya Sen,cited in Young at 42

⁴⁸See Chilling Effects of Anti-Terrorism:National Security" Toll on Freedom of Expression Accessed from http://w2.eff.org/Privacy/Surveillance/Terrorism/antiterrorism_chill.html, accessed on 21/04/2013 at 10.50 am

⁴⁹ Ibid at 23

⁵⁰ Ibid

‘... ensures that people can have minimally good lives, whether it has high priority, and whether it can be supported by strong reasons that make plausible its universality and high priority.’⁵¹

Looked at from this standpoint, it can be argued that socio-economic rights are not mere statements of principle but are indeed real rights because ,their attainment would enable people to have good lives and should thus be a high priority area ,with the underlying principle that the whole existence of humanity can be compromised by the failure of the global and national systems to at least partly guarantee these rights. Moreover, socio-economic rights reflect universal needs, such as the need for education and food.

It can also be argued that socio-economic rights are indeed implicit in the civil and political rights⁵². Thus the right to own property presupposes that an individual already has the property for which he wants a right to own. Interestingly, this is never addressed by the advocates of civil and political rights. How can you address the right to own property while not focusing on the individual’s capability to acquire it? Assuming that the individual has right to property but has neither property nor capability to acquire it, will this right make sense to him? Isn’t the capability to own property (which is definitely within the realm of socio-economic rights) implicit in the right to own it.? Supposing we take the counter argument that, an individual can have the right to own property even if he doesn’t have the property, Doesn’t this therefore compel us to also agree that an individual can have the right to education even if it’s feasibly impossible for him to attain it owing to the country’s socio-economic status? Moreover the right to own property is only achieved upon adulthood yet for one to be an adult, he needs immunization food and other forms of care which when denied, would compromise his development or in extreme cases ,his very existence in which case the individual may never mature to ever realize his right to own property. Another example is freedom from torture. Supporters of civil and political rights exalt the significance and universality of this right on grounds that everybody should be free from induced pain and that pain is universal⁵³. But this argument fails the test of what Nickel calls "robust justification"⁵⁴. This is because, it assumes that torture results only from physical pain inflicted by the state, state agent or a human being. However ,looked at more objectively, torture can be caused by several factors including extreme environmental conditions, diseases or hunger⁵⁵. To label physical torture as a violation of human rights while ignoring torture from hunger and disease ,is ‘a form of unequal treatment of rights, a violation of the principles of equality’⁵⁶. The same applies to the right to health. What’s the justification for citing human rights violation when life is lost due to ethnic persecution but ignore loss of life

⁵¹ Nickel, Supra note 30

⁵² Young, Supra note 18.

⁵³ Ibid

⁵⁴ Nickel, Supra note 30

⁵⁵ Fortman Bas De Gay (2006) Poverty as Failure of entitlement: Do rights Based Approach make sense? in Williams Lucy (ed) *International Poverty Law: An Emerging Discourse*. London, Zed Books.

⁵⁶ See Donnelly supra note 7

due to poor health? The South African Constitutional Court, in a broad conception of the right to life correctly argues that:

‘The right to life isn’t a mere organic matter that the constitution cherishes ,but the right to human life: the right to live as human beings ,to be part of a broader community ,to share in the experience of humanity...The right to life is more than existence, it’s the right to be treated as a human being’⁵⁷.

Viewed from this perspective, it can be argued that the right to life includes both the right to proper health and nutrition not only to ensure the person doesn’t die, but also to ensure he has a dignified living.

Another way to justify the importance of social rights is to show their importance for the full implementation of civil and political rights. Eliminating hunger and providing education to everyone promotes people's abilities to know, use, and enjoy their liberties, due process rights, and rights of political participation⁵⁸. This is easiest to see in regard to education. Ignorance is a barrier to the realization of civil and political rights because uneducated people often do not know what rights they have and what they can do to utilize and or defend them⁵⁹. Education and a minimum income also make it easier for people to see the value of participating in the political process.

Conclusion

Conclusively, we can argue that the domain of human rights remain controversial, not because of any material difference between the philosophical and moral principles behind socio-economic and civil-political rights, but mainly due to ideological reasons⁶⁰. The fact that the rights discourse has been (and is still) influenced by western civilization ,has led to huge emphasis on civil and political rights at the expense of socio-economic rights, though rights in their strict sense have their origin in all societies⁶¹. However ,the emergence of the welfare state, coupled with the global financial crisis is making western states to rethink their perspectives concerning the socio-economic rights⁶². Finally as demonstrated by this paper, socio-economic rights are real rights, because the contestations raised against them do not successfully erase their inherent significance ,both in promoting human well-being and also in the realization of all other rights.

⁵⁷ South African Constitutional Court, cited in Young, supra note 18 at 42

⁵⁸ Supra note 8

⁵⁹ Hodgson Supra note 26

⁶⁰ Donnelly Jack (2007) The Relative Universality of Human Rights, *Human Rights Quarterly*, 29 pp ,281-306

⁶¹ Ibid See also Makau Mutua(2001). *Savages, Victims and Saviors: The Metaphor of Human Rights*, Harvard International Law Journal, 42, 1, pp 2001-245

⁶² Young, Supra note 18 at 133

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