

**THE FORGOTTEN RIGHTS - THE CASE FOR THE
LEGAL ENFORCEMENT OF SOCIO-ECONOMIC
RIGHTS IN THE UK NATIONAL LAW**

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Socio-economic rights relate to an individual's social, economic and cultural entitlements. The *International Covenant on Economic, Social and Cultural Rights 1966* enumerates the following socio-economic rights: Right to work;¹ Right to Social Security and social insurance;² Right to an adequate standard of living including adequate food, clothing, housing and to continuous improvement of the standard of living;³ Right to health;⁴ and Right to education.⁵ In contrast, *The International Covenant of Civil and Political Rights* enumerates the individual entitlements in the political and civil sphere of life – entitlement to respect for life; fair trial; private and family life; freedom of thought, conscience and religion; freedom of expression among others; many of which have been incorporated in the Human Rights Act in the United Kingdom.

Since the enactment of the Human Rights Act (HRA) in 1998, the debate on the issue of legal enforceability of socio-economic rights in the UK national system has intensified. It is idealistic to assume that the recent incorporation of the European Convention on Human Rights (ECHR) into UK national law will provoke *immediate* change to the prevailing notion that socio-economic rights are incapable of being judicially enforced. One needs only to consider the content of the HRA to conclude that its sole focus on *political and civil* rights will impede legal enforcement of *socio-economic* entitlements. Moreover, UK courts are still coming to grips with the scope of their competence in protecting *political* rights under the HRA, to even consider extending their competence to other rights not explicitly covered by the HRA.

This essay seeks to disprove the prevailing notion that socio-economic rights are incapable of legal enforcement. The discussion necessarily requires comparative analysis of other jurisdictions where socio-economic rights are given constitutional status. In the second section, I attempt to transplant the

models of enforcement of socio-economic rights found in other jurisdictions into the present UK system. I will argue that the typical arguments against legal enforcement of socio-economic rights in the UK are unfounded. Moreover, the judiciary has been subtly using HRA and common law principles to minimally enforce some socio-economic entitlements. Given such piecemeal and uncertain judicial enforcement, it will be beneficial to explicitly recognise socio-economic rights as capable of judicial enforcement. The third section of this paper considers the question: 'even if it can be shown that socio-economic rights are capable of being legally enforced, does it necessarily follow that they *ought* to receive constitutional status on par with political and civil rights?'

I. Legal Enforcement of Socio-economic Rights in Other Jurisdictions.

It is worth noting at the outset that the concept of socio-economic rights encompasses a vast array of entitlements. However, the argument that socio-economic rights are not capable of judicial protection because they are hard to define is erroneous. It is true, that one can conjure up an almost limitless number of socio-economic rights, extending far beyond those recognised as fundamental by the ICESCR. For instance, it does not involve a stretch of the imagination to recognise that the 'right to give birth and reproduce' relates to the social and economic facet of life. However, the theoretical difficulty of limiting the range of such rights need not impede their practical recognition. A selective approach to enforcement of socio-economic rights is legitimate, so long as the ambit of the selected rights is definite and clear.

States have made selective choices as to which socio-economic rights to protect using their constitutional apparatus. It does not necessarily follow that national systems that 'pick and choose' rights to protect are flawed, but it *does* show that the constitutionalizing of these rights is influenced by the cultural and political history of the state. For example in South Africa, the right to land is included in the constitution,⁶ in Canada it is not; in South Africa, under the Apartheid regime, deprivation of land proved to be the catalyst for much segregation, and poverty. If legal enforcement is to be given to socio-economic rights in the UK, it is necessary to identify the social and economic conditions that perpetuate marginalisation and disadvantage for individuals within the UK cultural and historical context. Determining the particular content of the rights that

¹ ICESCR Article 6

² ICESCR Article 9

³ ICESCR Article 11

⁴ ICESCR Article 12

⁵ ICESCR Article 13

⁶ Article 25 South African Constitution

should receive constitutional protection in the UK is beyond the scope of this essay.

Aolain and McKeever⁷ make the distinction between different levels of legal enforcement of socio-economic rights. On one end of the spectrum, they identify what they call '*minimal level of enforcement*'. In a jurisdiction which minimally protects socio-economic rights, the constitution does not identify explicit substantive socio-economic entitlements, but seeks to protect these rights in the due process sphere. In effect, courts only have the legal capacity to decide whether access to particular services provided by the state was fair, impartial, non-discriminatory and subject to procedural protections. Indirectly, socio-economic rights are protected. The Constitution of the Union of India 1947 provides a real-life example of this procedural protection of socio-economic rights. The constitution sets out broad policy objectives that the state must direct its policies towards achieving. These 'Directive Principles of State Policy' include socio-economic objectives such as ensuring adequate means of livelihood for all citizens, equal pay for equal work for men and women, the protection and improvement of the environment. More importantly, the constitution provides that these 'Directive Principles' are not enforceable in any court. However, the Indian Supreme Court can legitimately review executive or legislative acts to ensure that the 'Directive Principles' are 'taken into account as a relevant consideration' in exercising discretionary powers.⁸

Aolain and McKeever also identify a more '*substantive model of enforcement*' which gives protection directly and substantively to socio-economic rights. The South African Constitution is an example of substantial legal enforcement, where the rights to health, housing and the environment are explicitly recognised in the constitution.

Therefore, empirical evidence does exist to show that socio-economic rights *can* be legally enforced in national systems. The constitutions of India and South Africa both incorporate either substantive rights or procedural protections that serve to enforce socio-economic rights indirectly. However, the question remains – although there is evidence of legal enforcement of some socio-economic rights in some national systems, should such protection exist in all national systems? More to the point, can socio-economic rights be enforced in the UK?

⁷ Ni Aolain and McKeever, "Thinking globally. Acting locally. Enforcing socio-economic rights in Northern Ireland" (2004) EHRLR 2004

⁸ *Pandy v State of West Bengal* (1988) LRC (Const) 241; *Delhi Development Horticulture Employee's Union v Delhi Administration* (1993) 4 LRC 192.

The flexible nature of the HRA, in terms of structure and practical ease of amendment makes the UK an insightful case study for discussion on the possibility of enforcement of socio-economic rights. This is an important background for discussing their legal enforcement, as the debate in the UK context can zoom in on the primary issue – whether or not these rights deserve to be protected in the national legal system, without being sidetracked by the subsidiary issues of practicality and technicalities of implementation.

The unwritten constitution of the UK creates a legal system in which the competences of the branches of government are not 'set in stone', unlike the US system, where the separation of powers is entrenched in a written constitution and the Supreme Court enjoys judicial supremacy over all matters of the constitution. Therefore, questions of legitimacy of the judicial enforcement of socio-economic rights, which necessarily entails policy decisions, are particularly relevant. Much of the judicial competence in this area will be left to political debate. However, providing the argument in support of legal enforcement of socio-economic rights endures the onslaught of political resistance, socio-economic rights can be included in the structure of the existing rights protection framework with no constitutional amendment difficulties. As Ewing⁹ states, the 'unfinished business of human rights' can most easily be completed in the UK national system. The HRA is merely an Act of Parliament that can be repealed or amended in order to include the originally excluded socio-economic rights. Therefore, there is scope within the UK to correct the flaws of the original HRA more easily than in another national system where such rights are excluded from the constitution.

II. Dispelling the Myth that Socio-economic Rights are Incapable of Judicial Enforcement.

*If your life is struggling to survive...voting is not a priority...*¹⁰

Traditionally, there has been hostility towards the judicial enforcement of socio-economic rights. Underlying this hostility is the notion that socio-economic rights involve complex resource allocation issues best suited for decision by the democratically elected lawmaker. Sir Thomas Bingham MR in *R v Cambridge Health Authority ex parte B* aptly summarised the prevailing ethos when he stated: 'Difficult judgments on how a limited budget is best allocated to the

⁹ K D Ewing, "Constitutional Reform and Human Rights: Unfinished Business" (2001) 5 ELR

¹⁰ The Guardian, 25 April 2000

maximum advantage of the maximum number...is not a judgment a court can make'.¹¹

However, 'policy' decisions do not automatically fall outside the competence of the judiciary. The courts' compulsion of the public authority or government to expend resources is commonplace. Judges make decisions to award damages to individuals by state parties which have profound financial implications. One only needs to look at the current UK case law involving national security issues in order to appreciate the willingness (and legitimacy) of the judiciary to scrutinise issues involving public authorities' actions in a public emergency when HRA political and civil rights were violated. I submit that in the 21st century, when terrorism is rampant, the judiciary's adjudication of such issues affecting national security involves far greater policy complexities, than the issues of redistribution of resources inherent in socio-economic rights enforcement. In the recent *Belmarsh* decision,¹² the House of Lords held that they would defer the question of the existence of a public emergency to the government. However, they would apply stricter scrutiny to the secondary issue – whether the actions taken to avert this emergency were necessary and proportional, given the violations of fundamental civil rights under the HRA.

The economic burdens placed on the state by the courts' enforcement of political/civil rights are evident in *Airey v Ireland*,¹³ where Article 6 (on the right to fair trial) was held to necessitate the granting of criminal and civil legal aid. In the UK, the government's expenditure on legal aid runs into millions of pounds per year. Similarly, in the *Prolife* case,¹⁴ an anti-abortion campaigning group claimed that their freedom of speech had been breached by broadcasting regulations requiring party political broadcasts to comply with standards of taste and decency. The issues involved in the case are insightful, in revealing the relationship between a right recognised as a civil/political right and resource allocation issues. As much as the case involved the right to freedom to impart information, what was restricted was the party's access to public resources to do so.

Jeff King¹⁵ attempts to rationalise the courts' approach in determining whether a case that involves complex resource allocation issues is justiciable. He identifies three common features of cases which courts claimed involved non-justiciable matters of resource allocation. First, the decision of the public authority is an exercise of its discretionary

power conferred by law; secondly, the decision of the public authority took into account the cost of allocation; thirdly, the challenge of the decision was made under the 'irrationality' ground of judicial review. King postulates that where these 3 features exist, the courts are likely to hold that they are incompetent to adjudicate disputes in which the claimant challenges the public authority's resource allocation decisions.

The cases in which a claimant challenges a public authority's decision to deny access to medical treatment under normal administrative law support King's assertions. In *R v Cambridge Health Authority ex parte B*,¹⁶ the claimant challenged the health authority's decision to deny access to medical treatment for cancer. The courts held that they would not 'second guess' the discretionary decision of the public authority operating on a limited budget – cost factors were claimed to be a factor in the decision of the public authority. Bingham MR refused to compel the health authority to explain the decision to allocate its limited resources. Recently, in *R v Swindon NHS Primary Care Trust*,¹⁷ the claimant challenged the decision of the health authority for refusing to fund access to the breast cancer drug. Although other factors¹⁸ influenced the court's decision in finding that the health authority's decision was irrational, the major factor was that the public authority made no 'cost limitation' claim. In this case, the authority did not claim to be operating with limited resources, or under budgetary constraints.

The case law involving judicial review challenges of the public authority's allocation of resources indicates that the mere fact that socio-economic rights involve resource allocation issues need not be an automatic bar to enforcement. Courts, albeit in the administrative law arena, have overturned public authorities' resource allocation decisions, when the issue of limited resources has *not* influenced that authority's decision. It must be admitted that in reality it is uncommon for public authorities to operate with unlimited expenditure/unlimited resources, or to make decisions without taking into account cost (either implicitly or explicitly). However, it remains evident that although it may be difficult to enforce socio-economic rights with its complex redistributive element, resource allocation issues alone should not render them non-enforceable in all cases.

¹⁶ [1995] 2 All ER 129

¹⁷ *R (on application of Anne Marie Rogers) v Swindon NHS Primary Care Trust, Secretary of State for Health* [2006] EWCA Civ 392

¹⁸ The NHS policy for granting funding of the drug was inconsistently applied by the local authorities- some required patients to show 'exceptional need', others required only medical recommendation

¹¹ [1995] 2 All ER 129 (CA)

¹² *A v Secretary of State for Home Department* (2005) 2 AC 68

¹³ (1981) E.H.R.R. 592

¹⁴ *R (Pro Life Alliance) v BBC*(2004) 1 AC 285

¹⁵ Jeff King, [2007] MLR 197-224

In recent cases, the judiciary has stated that socio-economic rights are legally enforceable as ‘target duties’. Target duties are owed by the public authority to the public and not enforceable by individuals.¹⁹ This is merely a restatement of the above-mentioned principle, that where socio-economic rights are an issue under normal judicial review principles, the public authority commonly takes into account cost/resource considerations in exercising its discretion to provide public services. In such cases, despite the adverse impact on the particular claimant, the judiciary will not second-guess the public authority’s decision. It is still the case, that there exists a window of opportunity for the legal enforcement of an individual’s socio-economic rights, when the power conferred on the public authority is not discretionary,²⁰ or cost has not implicitly or explicitly been a factor in the public policy’s decision to deny access to medical/health or education facilities to the particular claimant. In Section III (iii), I suggest a scheme of socio-economic rights enforcement within the HRA which will allow ‘target duties’ to be converted into ‘specific duties’ owed to individuals absolutely. Under such a scheme, the legal enforcement of individual socio-economic rights will avoid the difficult second-guessing of policy and resource redistribution that the judiciary is reluctant to engage in.

Although the argument that the redistributive element involved in socio-economic rights enforcement does not automatically lead to the conclusion that they are non-justiciable is correct, my argument is based on a different premise. The notion that socio-economic rights are non-justiciable while their counterparts (political and civil rights) are, is fundamentally flawed. It is based on the erroneous assumption that ‘rights’ exist in different categories. The concept of ‘citizenship’ erases the distinction between rights that are political and civil, and those that are social and economic. T. Marshall²¹ identified that the concept of ‘citizenship’ entails ‘full membership of a community’. Although this concept is primarily a sociological one, it relates to the central argument that national systems must focus on the ‘totality of rights’. An individual without an income,

without a home, without adequate health care, will be unable to take part in the political community. Full membership of society requires that everyone be entitled to enjoy what the community considers as good and desirable.²² Devlin’s concept of ‘public morality’ involves identifying the values that society deems ‘good and desirable’ by placing the question to a hypothetical ‘reasonable man on the omnibus’. A practical example in a real world context best illustrates this point: a claimant who faces homelessness never says ‘I want to make a social and economic rights claim to a right to housing’ where (s)he lives in squalid living conditions. Similarly, another does not say that (s)he wants to make a ‘civil and political rights claim to the right to privacy’.

Latin American case law implicitly reinforces the notion that citizenship includes enjoyment of both socio-economic and political rights. In the Venezuelan case *Cruz del Valle Bermudez v Ministry of Health and Social Assistance*,²³ the Supreme Court found it impossible to sever the right to life from the right to access science and technology where the applicant was denied new HIV treatment free of charge.

Even in the UK, where there is not explicit recognition of socio-economic rights, the evidence of the indivisibility of rights is clear. In *R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants*,²⁴ regulations purported to withdraw benefits for asylum seekers in the UK; Simon Brown LJ held that the denial of benefits, given that asylum seekers could not work, would create ‘life so destitute that no civilized nation could tolerate’. The majority recognised that socio-economic rights could be an essential to the exercise of the ‘right to life’ that was subsequently entrenched in the HRA as a ‘civil right’. K.D. Ewing²⁵ reiterates the notion that social rights are ‘logically prior’ to exercising political and civil rights. This argument further underscores the claim that socio-economic rights are not a distinct compartment of ‘rights’.

The value of ‘dignity’ has been recognised in many jurisdictions as a fundamental principle.²⁶ In practice, the constitutional value of ‘dignity’ may generate duties on public authorities to provide assistance to those who would otherwise be left destitute. This gives rise to something in the nature of social or economic rights which at least extends as far as what is necessary to maintain life.

¹⁹ *R v Inner London Education Authority ex parte Ali* [1990] 2 Admin LR 822; *R(G) v Barnet LBC* [2003] UKHL 57

²⁰ Lord Nicholls dissenting judgment *R v Barnet LBC* (2003) UKHL 57- “the more specific and precise the duty the more readily the statute may be interpreted as imposing an obligation of an absolute character, the broader and more general the terms of the duty the more readily a statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty.”

²¹ T. H Marshall, *Essay on Citizenship and Social Class*, 1950 pg 8

²² Devlin, *The Enforcement of Morals*, chapter 1

²³ Supreme Court of Justice, No.916, July 15,1999

²⁴ (1996) 4 ALL ER 385 CA

²⁵ Ewing, “Constitutional Reform- Human Rights- Unfinished Business (2001) 5 ELR

²⁶ South African Constitution Section 1 (a) identifies ‘dignity’ as one of the values on which the democratic South Africa is founded; also see Canadian Bill of Rights.

It is uncertain whether the value of ‘dignity’ has achieved constitutional status in the UK. Although Dawn Oliver²⁷ argues that the value of dignity, respect and security has emerged as a constitutional principle in UK law, this argument is controversial. Undoubtedly, the judiciary has referred to the idea of ‘dignity’ in several cases involving human rights issues. In *ex parte Joint Council for the Welfare of Immigrants* (above) the Court of Appeal established a clear link between the ‘dignity’ principle and the civil and political right to life. Also in *R (Q and Others) v Secretary of State for the Home Department*,²⁸ the Court of Appeal held that to withdraw financial support for destitute asylum seekers would be a violation of Article 3. However, the limitations of ‘dignity’ make it unlikely to be very influential as a constitutional principle. It is unclear what rights ‘dignity’ encapsulates, on a political/civil and, more importantly, on a socio-economic level. Lord Hoffman in *Mathews v Ministry of Defence* summarised the uncertainty of using ‘dignity’ as a source of socio-economic entitlements when he stated:

Human rights are the rights essential to life and dignity of the individual in a democratic society. The exact limits are debateable...there is no trace of economic rights in the Convention...without which many of the other rights would be a mockery.²⁹

The use of ‘dignity’ as a basis for identifying socio-economic rights that deserve judicial protection is inadequate. Any judicial enforcement of socio-economic rights must aim to protect the wide range of conditions that marginalises individuals. If the judiciary is left to develop socio-economic rights protection using the ambiguous notion of ‘dignity’, the minimalist right to life will undoubtedly be artificially stretched to protect areas not within the ‘core’ of the meaning of the right. In doing so, they will face legitimate criticism that their activism is infringing into area of legislative competence.

III. Transplanting the Legal Enforcement of Socio-economic Rights into the UK National System – Templates for the Legal Enforcement of Socio-economic Rights in the UK

(i) *Minimal Protection*

Two options exist for providing legal enforcement to socio-economic rights in the UK. In the UK at present, there is indirect (and unintentional) protection of socio-economic entitlements that amounts to a form of ‘minimal judicial enforcement’. Under the Indian constitution, there exist procedural guarantees to protect socio-economic rights; ‘Directive Principles’, allied with a broadly defined non-discrimination clause, operates to ensure equal access to social and economic provisions. In the UK national system, none of these legal enforcement mechanisms exists. However, limited protection is afforded to socio-economic rights under normal judicial review principles. For example, in *R v North and East Devon Health Authority ex parte Coughlan*³⁰ the decision of the local authority to close an old persons’ home was reversed using standard judicial review grounds of ‘legitimate expectations’. Moreover, where there is an intersection between a civil and political right recognised at common law or under the HRA, and a socio-economic concern, there *might* be enforcement of that socio-economic entitlement.

There is a recent line of UK cases where courts have adjudicated complaints over the failure of health and local authorities to meet welfare needs. For the present purpose, it is important to note the prevailing trend in those cases.

First, courts face fundamental difficulties in protecting civil rights (legally enforceable) where they are inextricably bound up in socio-economic issues (that are held to be non-justiciable). Therefore, courts are reluctant to intervene in the resolution of resource allocation disputes even where civil and political rights are an issue, and the result is that both sets of rights go unprotected.³¹ When local authorities ‘toll the bell of tight resources’,³² all kinds of uncertainties are revealed in the judicial approach. In *R v Gloucestershire County Council ex parte Barry*,³³ where the local authority withdrew the cleaning services of an elderly man because of a lack of resources, the majority of the House of Lords held that ‘need’ was a relative concept that shifted depending on the amount of resources available at the time. In this

³⁰ (2000) 2 W.L.R 622

³¹ Categories of rights are used here for simplicity. I have already disputed the assumption that there are watertight divisions between civil/political rights and socio-economic rights.

³² Lord Bridge in *R v Cambridge Health Authority ex parte B*

³³ (1997) AC 584

²⁷ D. Oliver, “The Underlying Values of Public and Private Law”, Chapter 11, in M. Tuggart, *The Province of Administrative Law*, 1997

²⁸ (2003) EWHC 2507

²⁹ (2003) UKHL 4, para.26

case, not only did the judiciary fail to protect the claimant's civil and political rights under Article 8,³⁴ but the socio-economic counterpart.³⁵

Secondly, there have been practical and teleological contradictions in UK jurisprudence, as courts attempt to give minimal protection to individuals suffering from severe socio-economic destitution in contravention of Article 3 HRA. It is ironic, that the courts have developed this protection using the concept of human 'dignity'. However, they intervene only in cases of *extreme* and *exceptional* degradation. In overlooking other less severe cases of destitution, they contravene the value that they are trying to uphold. In *R (Bernard) v London Borough of Enfield*,³⁶ the applicant living in squalor and dreadful living conditions with her children was denied adequate housing by the local authorities. The Court held that this failure did not violate Article 3 (guarantee of freedom from inhumane and degrading treatment). The level of socio-economic destitution that is sufficient to raise an issue under Article 3 is inherently uncertain. Kay J in *R (S) v Secretary of State for the Home Department*³⁷ rejected the argument that the level of destitution required to raise an issue of breach of Section 3, was evidence that the local authority's act or failure to act resulted in 'physical and mental' impairment of the individual, or amounted to the 'commissioning of a crime'. However, subsequent cases indicate that the threshold of severity seems to be almost as high as this.

Moreover, the judiciary has tried to surmount the linguistic restrictions of Article 3 in order to offer some semblance of protection for individuals' socio-economic entitlements. Article 3 prohibits 'inhumane and degrading treatment' which implies a negative obligation to refrain from any activity which causes such treatment. Courts have interpreted 'treatment' for the purposes of Article 3 as applying to inaction by authorities where it causes severe levels of degradation. The logical complexity of this can not be

³⁴ *Poplar* established the limits to Article 8 which does not extend to a right to a home, but only to respect for home one already has.

³⁵ Other cases where this trend can be noted- *R (W) v Lambert LBC*, involved a challenge against the authority's refusal to provide accommodation for a homeless mother and 2 children. The Court of Appeal held that no Article 8 rights were engaged as the local authority only had a duty to provide accommodation for the children, not a wider duty to assist the family with housing. Although, the Divisional Court in *R (J) v Enfield LBC* recognised that such a duty would lead to a separation of child from the family and breach Article 8, no such breach was found in *R (W)*.

³⁶ (2002) EWHC Admin 2282

³⁷ (2003) EWHC Admin 1941

ignored. A *negative* obligation of the state to refrain from inhumane treatment converts into a *positive* obligation where the economic deprivation of an individual is sufficiently severe. Practical questions arise from this: how are authorities to determine when an individual's situation meets the requisite level of severity, requiring them to redistribute resources to eliminate the disadvantage, when courts are grappling to determine clearly what level of severity is required to breach of the Convention? Also, does this 'core minimum'³⁸ of rights protection (determined by severity) extend across all the aspects of social and economic life? Much of the UK case law concerns severe deprivation in terms of housing conditions or denial of welfare support where the asylum seeker is not able to work.³⁹ Undoubtedly, such rights violations are easier to identify using the 'freedom of destitution right'. However, it remains to be seen if this 'freedom of destitution' will be developed by courts where for example, trade union membership is curtailed, or where social security payments are reduced to nominal levels. What is certain is that the use of the 'destitution test' will leave many of socio-economic entitlements unprotected.

(ii) *Substantive legal enforcement of socio-economic rights.*

By far the most comprehensive approach to the legal enforcement of socio-economic rights in the UK would be the incorporation of these rights into the HRA. Following the South African example, explicit recognition of these rights is possible within a constitutional document. At first sight, the constitutional and practical problems of this approach seem insurmountable in the UK context. However, on deeper analysis it will be shown that in the UK national system, the perceived problems of substantive judicial enforcement of socio-economic rights can be easily and, more importantly, legitimately overcome.

It should be noted that the HRA makes a few explicit references to social rights in Article 8 (right to peaceful enjoyment of possessions and private life), Article 3 (the right to life), Article 11 (the right to association). When these explicit social rights are coupled with Article 14 (right to equality in the enjoyment of Convention rights⁴⁰), the claimants may

³⁸ Colm O'Connell, 'Socio-economic entitlements and the UK rights framework', *Irish Human Rights Commission*, 2005

³⁹ *R(Q) v Secretary of State for Home Department* (2003) EWCA Civ 364; *R v Secretary of State for Home Department ex p. Limbuela* (2004) EWCA Civ 540

⁴⁰ The term 'Convention rights' relates to the political-civil rights that have been set out in the European Convention Of Human Rights, and incorporated in UK law, by the Human Rights Act 1998.

receive some benefits similar to social or economic benefits. Article 14 is engaged where the subject matter of the claim falls within one of the convention rights, the claimant was less favourably treated than his relevant comparator, and the difference in treatment is not reasonable and proportional and can not be justified.⁴¹ Therefore, in *Ghaiden v Godin-Mendoza*,⁴² the House of Lords upheld the decision of the Court of Appeal that an Act which allowed the spouse of a protected tenant to succeed to the tenancy on the tenant's death should be read so that the word 'spouse' included a homosexual partner. The Article 8 right to privacy and home-life was engaged on the facts of the case, therefore discrimination on the grounds of 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status' was prohibited.

Although there is some explicit reference made to some social rights in the text of the HRA, it is in no way sufficient in protecting socio-economic rights. When claimants are afforded medical treatment, or adequate housing, it is not because of judicial enforcement of socio-economic entitlement to it, but because they have been discriminated against on prohibited grounds whilst exercising their HRA convention rights. Notably, under the HRA the prohibition of discrimination on 'other status grounds' is not interpreted as including poverty or low economic status. Moreover, the claimant must prove that the case falls within the ambit of a civil or political convention right; therefore, there is no possibility of challenging state action across the range of social and economic life.

Recent UK case law suggests that there is a possibility that the judiciary is moving towards a more substantive enforcement of socio-economic entitlements by adopting a wide approach to the 'ambit' issue of Article 14. The UK courts may be following the European Court of Human Rights' approach⁴³ by increasing the areas of life that can fall within the ambit of a Convention right. In *Carson and Reynolds*⁴⁴ the courts considered that Article 14 applied to the facts where different social security payments were paid to pensioners abroad and those living in the UK. In essence, welfare payments could potentially fall within the ambit of the right to enjoyment of property and home life under Article 8.

⁴¹ *Wandsworth LBC v Michalak* (2003) 1 WLR 617

⁴² (2004) UKHL 30

⁴³ In *Sidabras v Lithuania*, the ECHR found that the restrictions placed on the employment of ex-KGB officers were so great that they had considerable impact on their Article 8 rights to privacy and home life.

⁴⁴ *R v Secretary of State for Work and Pensions ex parte Reynolds*; *R v Secretary of State for the Home Department ex parte Carson* (2005) UKHL 37

It is likely that the UK has embraced the ECHR notion that there exists no watertight compartment of civil/political and socio-economic rights.⁴⁵ It remains to be seen how flexibly they will interpret the 'ambit' issue when it comes to other areas of life. *Carson and Reynolds* recognised welfare benefits as falling within the scope of enjoyment of property rights, *a fortiori*, it is likely that the judiciary will recognise *significant* restrictions on employment as falling under the subject matter of Article 8.

Despite the judicial approach to equality in *Carson* and later in *R (Hooper) v Secretary of State for Works and Pensions*,⁴⁶ more substantive protection can be achieved for socio-economic rights in the UK national system. More direct judicial enforcement is needed instead of hitching socio-economic entitlements on the backs of political and civil rights. By explicitly incorporating socio-economic rights in the HRA, the judicial approach, and possibly the final outcome, will not be much different from that of *Carson* and *Hopper* once the 'ambit' issue is removed.

Hypothetically, on the facts of *Carson*, where socio-economic right welfare was a constitutional right but was denied to the claimant because of geographical locations, the courts will consider the state's justification for differentiating treatment. At that stage of the test, the courts would adopt a proportionality assessment – did the less favourable treatment have a legitimate aim? Secondly, was the means necessary and proportionate to that aim? This approach is similar to the approach used by the House of Lords in deciding *Carson*. In the original case, the judiciary concluded that the UK was entitled to manage the resources available. The standard of living of UK residents was higher than those living abroad; therefore, the public authority was justified in making a geographical distinction in paying social security. If socio-economic rights are explicitly included in the HRA much of the same analysis will be adopted.

In the South African Constitution and other constitutions of states that substantively enforce socio-economic rights, there are limitation clauses. These limitation clauses make it clear that the duty imposed on the state to provide these social and economic rights is limited to the available resources. These clauses are almost identical to the proportionality test used in *Carson* under Article 14. In essence, it involves judicial consideration of the available financial resources of the state (based on

⁴⁵ In *Airey v Ireland* the courts stated that there were no watertight divisions separating convention rights and socio-economic rights although it showed no inclination to intervene in resource allocation even where convention rights were an issue.

⁴⁶ (2005) 1 WLR 1681

evidence presented by the government) and other economic criteria.

(iii) *Socio-economic rights protection under the HRA- a hybrid system of protection*

An important aspect of incorporating socio-economic rights protection into the HRA, is recognising the differences between the structure and nature of socio-economic rights and that of political-legal rights. As discussed earlier, policy and redistributive considerations make the enforcement of individual socio-economic rights difficult, but not impossible. Moreover, the nature of these rights require that they are phrased broadly,⁴⁷ and as such requires that the public authority be given discretion in fulfilling their duties as they concern them. However, the protection that is afforded indirectly to socio-economic rights especially, in the development of the ‘severity test’ hitched to the right to life, is testimony to the fact that the legal enforcement of socio-economic rights is emerging, albeit in an inconsistent, unclear and minimalist way. I propose that a hybrid of rights protection within the structure of the HRA ought to be developed. The principles established at common law as regards socio-economic rights protection, together with the framework advantages of the HRA, can be applied to achieve legal enforcement of socio-economic rights.

Recent judicial review case law has reinforced the distinction between ‘target duties’ and ‘specific duties’. The right to education and welfare has been held to be a target duty, not owed to individuals absolutely. In *R v Inner London Education Authority, ex parte Ali*⁴⁸ the claimant challenged the decision of the local authority under the *Education Act 1944* Section 8 that provides that ‘it shall be the duty of every local education authority to secure that there shall be available for their area sufficient schools...for primary education’. More recently in *R (G) v Barnett LBC*,⁴⁹ the claimant challenged the public authority’s action under the *Children’s Act 1989* Section 17 (1) that imposes a duty on the local authority to ‘safeguard and promote the welfare of children within their area who are in need’. In both cases, the courts held that the rights were not owed to individuals but was owed by the local authority generally. However,

⁴⁷ For example, the ‘Right to Food’, assuming it goes beyond merely what is necessary to sustain life, begs the questions –‘what precisely is that right, what does it include, what are the main threats to fulfillment, when is it breached?’ Express inclusion of the right to food in a constitution document can not specify the amount of food that should be provided to prevent breach of this right.

⁴⁸ [1990] 2 Admin LR 822

⁴⁹ [2003]UKHL 57

in a very powerful dissent, Lord Nicholls in *Barnet LBC* established a ‘specificity test’ that provides:

The more specific and precise the duty, the more readily the statute may be interpreted as imposing an obligation of an absolute character. The broader and more general the terms of the duty the more readily a statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty ...⁵⁰

The scheme of protection I propose will incorporate the principles expounded by the majority *and* minority in *Barnet*, general common law principles, and principles encapsulated in the HRA. First, socio-economic rights should be incorporated into the HRA document as ‘target duties’. These duties will be similar to the ‘Directive Principles of Social Policy’ incorporated into the Indian Constitution. In essence, an obligation will be imposed on the public authority, and Parliament to consider these rights in resource allocation decisions and national economic policy. Moreover, the *de facto* ‘target duties’ imposed on the public authority and the legislature will prevent the courts from engaging in complex redistributive decisions of the public authority operating with limited resources. *Prima facie*, these rights will not be enforceable by individuals.

Aspects of Aolain and MacKeever’s programmatic model of socio-economic rights enforcement⁵¹ should be incorporated into the legislation. This would add substance and clarity to the ‘target duties’ of the public authority to provide socio-economic benefits to the public. The ‘target duties’ incorporated into legislation, coupled with aspects of the ‘programmatic model’ would require that socio-economic entitlements be considered in

⁵⁰ *ibid*

⁵¹ See Aolain and MacKeever (2004) EHRLR 158 for further details of their programmatic model of enforcement. It combines the legal obligation of government and public bodies to take cognisance of the impact of their policy on socio-economic disadvantaged groups, and take steps to avoid detrimental impact, with juridical scrutiny to ensure that the duty is fulfilled and socio-economic entitlements are considered in the decision-making process. The advantages of the programmatic model are clear- it focuses the mind of government and public authorities at the policy creation stage, and ‘mainstreams’ such rights. Also, the emphasis is shifted from judicial enforcement of the right which requires the individual to suffer the breach of the right, before attempting to challenge it in the courts, to a system where the socio-economic breaches are foreseen by the government through impact assessments of policy decision, and the policy changed to avoid the adverse effect on socio-economic entitlements.

the process of policy making, local authority decisions and legislation. Aolain and MacKeever suggest the formation of impact-assessment review groups to determine empirically the potential effect of governmental policy on groups of low socio-economic status. The statutory duty imposed on public authorities will require that they take into account the adverse impact of their decision on socio-economically disadvantaged groups. Also, it would require public authorities to target available resources on groups of greatest socio-economic need.⁵² Moreover, if this duty is incorporated in legislation, it will prevent public authorities from devising policies that perpetuate further socio-economic disadvantage.

Secondly, the 'severity test' developed in the common law in relation to Article 3 (right to life) should be applied to these explicit socio-economic rights. In effect, extreme rights-denial would convert the 'target duty' into a 'specific duty' that is enforceable by the individual affected by the breach of the right/duty. There may be difficulties encountered, in practically applying this 'severity test' to establish with certainty when a breach has occurred and the crystallisation process has taken place. For example, where a social housing tenant is £300 short, would that breach his right to housing? These difficulties are real but can be mitigated within the context of the HRA which allows for a proportionality assessment of the public authority's action – whether the aim was legitimate and the means proportional. Express limitation clauses, which limit the duty of the state to provide these social and economic entitlements 'as far as resources permit', will also be considered. Also, the doctrine of

⁵² Aolain and MacKeever identify two methods of measuring the incidence and extent of social need. The 'group method' involves measuring geographical areas to determine the extent of their social deprivation. This involves identifying the sources/'domains' of deprivation (e.g. employment, health, environment) and weighing them to determine which area suffers from multiple and more severe deprivation. The second method involves measurement of the individual's level of deprivation. A 'public poverty consensus' on what amounts to the basic necessities of life, is used to determine practical indicators for poverty. This is used to measure the severity of the deprivation of the particular individual. The weaknesses inherent in both these methods need not impede government from devising its own workable system for measuring breaches of socio-economic rights. The former 'group method' ignores the deprivation of the individual, while the latter is based on an assumption that there will be public consensus on the definition of poverty. It also ignores the difficulty in devising practical indicators for destitution.

'progressive development'⁵³ employed by the courts in India can be a useful mechanism to avoid regression of the standards of socio-economic benefits already provided by the local authority.

More importantly, the judiciary's reluctance to engage in 'second-guessing' of the public authority's allocation of socio-economic entitlements will be reduced by this model of socio-economic rights protection. Lord Bingham in *Cambridge Health Authority* is correct in asserting that complex resource allocation decisions are not within the competence of the courts, and should be left to the primary decision maker, given the uncertainty of the law in this area. The underlying rationale for the judiciary's reluctance to criticise a public authority's resource decision, is that at present there exist no clear principles to limit the courts' power to intervene. The 'severity test', progressive development provisions, and a proportionality assessment will set clear guidelines for courts to determine when it is within their competence to address individual challenges to the public authority's decision. This scheme of protection will also provide clearer guidance to the public authority in fulfilling its duty to provide socio-economic benefits to the public, and individuals. The principles inherent in the 'severity test', progressive development and proportionality assessment, should clarify the public authority's duties and facilitate easier and clearer decision-making.

It has already been seen that principles of 'equality' under the HRA can be used indirectly to protect socio-economic rights. However, in order to guarantee social services and economic entitlements, it may be necessary to incorporate 'poverty' or 'low socio-economic status' as one of the 'other status' grounds for which discrimination is prohibited under Article 14. At the very least, the UK approach to constitutional equality should follow the freestanding equality clauses of other jurisdictions. Any case of discrimination can be brought under this freestanding equality right, however different levels of scrutiny are applied by courts depending on the grounds on which the differential treatment is based. *Carson* sets the stage for such an approach. The House of Lords in that case recognised that discrimination on the grounds of geographical location would receive only a lower level of scrutiny by the courts, compared to 'suspect reasons' for distinction where a high level of justification would be required for legitimate use of this distinction. I propose that this 'sliding scale of justification' should

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<http://www.ambedkar.net/ACJP%20Activities/News%20-%20Socio-Economic%20Rights%20And%20The%20Supreme%20Court.html>

be employed in relation to socio-economic rights, where courts would adopt a medium level of scrutiny where state benefits and services are denied on socio-economic grounds. In such a case, the courts will allow, as in *Carson*, the state to raise the issue of budgetary or financial constraints and submit relevant and sufficient evidence to corroborate their justification.

(iv) *Judicial legitimacy in substantially enforcing socio-economic rights using the HRA.*

Explicit reference to socio-economic rights in the HRA does not overstep the constitutional boundaries of the judiciary. The idea of the incorporation of such rights into the HRA is not contrary to the idea of ‘deference’ and ‘separation of powers’ which are themselves UK constitutional principles. Richard Clayton⁵⁴ has suggested that the courts’ role in interpreting the HRA is not one of ‘deference’ but of ‘democratic dialogue’ with government. Although Clayton was referring to the review of administrative acts and legislation that contravene *civil and political* rights of the HRA, the argument can be used to support the notion that it is legitimate for courts to review for socio-economic rights violation. This idea of ‘democratic dialogue’ suggests that there is an interaction between the branches of government. The very structure of the HRA supports this conclusion – Parliament can legislate to derogate from Convention Rights under Section 19, and when it is not possible to read a statute compatibly with the Convention, a declaration of incompatibility is made and the issue referred to Parliament, who then may decide to make a fast-track remedial order under Section 10.⁵⁵

In the context of socio-economic rights enforcement, the idea of ‘democratic dialogue’ will prove even more useful to courts in their effort to avoid the charge of judicial activism and illegitimacy. For example, if the right of access to health care and facilities is incorporated in the HRA, courts will review Acts of Parliament and executive decision to ensure that this right has not been violated. It is entirely possible that the proportionality analysis used by the courts in reviewing civil and political rights will trump this right to health care, especially if the government raises the issue of financial constraints.

⁵⁴ R.Clayton, “Judicial Deference and ‘Democratic Dialogue’: the legitimacy of judicial intervention under the HRA” (1998) P.L. 2004 33-47

⁵⁵ In *R(on the application of Anderson) v Secretary of State for the Home Department*, the courts made a declaration of incompatibility of the Home Secretary’s role in setting the tariff for mandatory prisoners. Subsequently, a remedial order was made by Parliament to remove the incompatibility in the Criminal Justice Act 2003.

Alternatively, the judiciary may declare an Act of Parliament incompatible with the right to health care, apply the incompatible Act to the instant case, and refer the issue to Parliament to make amendments.

Conclusion: Predicting the Future – Constitutional Socio-economic Rights on Par With Political and Civil Rights.

The judiciary has developed piecemeal protection for socio-economic rights using common law principles of dignity and HRA principles of equality. In doing so, they have indirectly confirmed the importance of socio-economic entitlements. In the future, it will be necessary to untangle the complexities that this minimalist and indirect socio-economic protection has created. If the importance of socio-economic entitlement is conceded, the next step would be to directly and substantially protect socio-economic rights within the HRA. This requires a shift from what is perceived to be bestowed on individuals by virtue of the benevolence of a welfare state, to that of a right.

No longer can the courts refuse to address individual challenges to the public authority’s decision in this area, or characterise the socio-economic benefits as ‘target duties’ owed only to the public and not to individuals. Recent case law shows that socio-economic issues and their resource allocation component have been emerging in challenges against breaches of explicitly recognised political-civil rights. The artificially constructed dividing line between socio-economic rights and political-civil rights is blurring.

Socio-economic rights need not be incorporated into the HRA structure in the same way as political-civil rights. Their differences make identical enforcement difficult, if not impossible and ineffective. The source of the difference is in the nature of the rights, not in their value. As such, a unique form of rights protection ought to be applied to socio-economic rights, within the structure of the Human Rights Act. Anything less than this would be an admission that these rights are of lesser value than their political-civil counterparts.

The hybrid model of socio-economic rights protection that I propose will take into account the unique nature of socio-economic entitlements, especially the complex resource allocation issues involved in decisions relating to their enforcement. Inclusion of these rights into the HRA will ensure that there are clear guidelines for the interaction between the primary decision maker and the courts when socio-economic benefits allocation disputes arise.

More importantly, legislative input is

necessary to ensure legitimacy in the judicial enforcement of socio-economic entitlements, and to establish clear limits to the judiciary's power to address challenges to public authorities' decisions in this area. Tushnet⁵⁶ is concerned that, in cases where rights are constitutionally guaranteed but not judicially enforceable, these rights are devalued and amount to mere 'declaratory rights'. Socio-economic rights may be similarly 'watered down' and devalued in the UK should their incorporation into the HRA be accompanied by provisions giving the executive and legislature almost unlimited scope for justification. In future, it will be necessary to prevent the 'weak rights-strong rights' scenario from developing in the UK.

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