

SOCIO-ECONOMIC RIGHTS: LEGALLY ENFORCEABLE OR JUST ASPIRATIONAL?

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Introduction

Although the Universal Declaration of Human Rights of 1948 cited social welfare rights without distinguishing them from civil and political rights, the separation has been widely accepted by judges, scholars and politicians. Historically, the classification of human rights into two groups, with the relegation of socio-economic rights into a lower category of human rights, emerged and developed mainly after the 1950s during the Cold War and ultimately led to the adoption of two separate UN Covenants, with different formulation and enforcement mechanisms for each set of rights; the causes and purposes of that classification are well-documented (Cranston 1973; Alston 1990; Sadurski 2005) and profoundly political.

Scholars and judges have taken significant steps in the last thirty years to cast light on the legal nature of socio-economic rights. Nonetheless, there is still incredulity concerning not only their normative constitutional role, but also their judicial enforceability. Although much ink has been spilt, socio-economic rights are a hot topic again today, due to the current global economic recession and the – often controversial – state actions (or non-actions) that affect the social welfare of millions. Is there any role for the judiciary within this conquered-by-state-policy realm? The goal of this paper is to defend the justiciability of socio-economic rights. To this end, I will present the arguments against their justiciability, after which I will comparatively examine the socio-economic rights jurisprudence, being careful not to get lost in the jurisprudential labyrinth.

Can socio-economic rights be legally enforceable or should they remain aspirational?

Examining the arguments against the justiciability of socio-economic rights is like opening Pandora's box; such is the pluralism here. I will now present and critically evaluate the most important arguments on the issue.

The cost argument

Almost all opponents of the justiciability of socio-economic rights argue about their costly implementation and about judiciary's incompetence to take decisions with economic implications that substantially affect the State budget. Their argument is based on the assumption that judges can perfectly adjudicate on cases dealing with civil and political rights, since the latter do not have any significant effects on State's economy. But is this true? Is it true, to use a well-documented argument, that the right to fair trial does not pose economic burdens on State? Or is it true that the right to life is costless, when the European Court of Human Rights has recognised, under the Article 2 of the European Convention on Human Rights, State obligations to effectively investigate killings,¹ to build an efficient framework regulating the use of force by State officials,² and to protect citizens taking positive, often preventive measures?³ It is evident that civil and political rights bear cost implications, attributed, in part, to their jurisprudential evolution. It also seems irrational to perform any cost comparison between the two sets of rights, in order to reinforce the argument for either.

¹ On the State obligation to effectively investigate killings see *Kurt v Turkey*; *McCann v United Kingdom* (European Court of Human Rights).

² On the State obligation to implement an efficient framework regulating the use of force by State officials see *Makaratzis v Greece* (European Court of Human Rights).

³ On the State obligation to take preventive and positive measures to efficiently protect the right to life see *LCB v United Kingdom*; *Osman v United Kingdom*; *Oneryildiz v Turkey* (European Court of Human Rights).

The crux of the argument here is that judges are neither politicians nor expert civil servants who lead economic policy or design governmental programs. As Mureinik points out ‘...judges are neither elected nor expert, and they can supply neither political accountability nor expert judgment’ (Mureinik 1992, 465). He addresses his own argument, correctly observing a bit later in his article that judges take decisions affecting economic policy while also enforcing civil and political rights. Cost seems, unavoidably, to be an integral part of judicial decisions.

Perhaps the argument has another convincing aspect: judges trying to secure State guarantees for social welfare rights may engage themselves into *policy* decision-making, trespassing in that manner on executive’s territory. However, practice has proven that not all types of socio-economic rights adjudication threaten separation of powers. This argument seems to work perfectly within another camp: it can be used as an argument against certain models of socio-economic rights adjudication, not against their adjudication in general.

Socio-economic rights are imprecise and vague

Another basic and well-documented argument in favor of the aspirational character of the socio-economic rights is that their content is vague and indeterminate. ‘Social rights suffer from a painful lack of precision’ (Scott and Macklem 1992, 69); therefore, they are not capable of being judicially enforced. For instance, Section 26 of the South African constitution states that the right to ‘adequate housing’ is extremely imprecise. So too are many civil and political rights. What is protected by the freedom of expression, and which is the scope of the right to liberty, are things ascertained evolutionary by judicial jurisprudence; once interpreted and clarified, these norms are no longer considered vague. Courts should be rendered responsible for interpreting legal norms. Scott and Macklem point out that, although socio-economic rights are extremely imprecise, ‘historical, ideological, and philosophical exclusions of social rights from adjudicative experience have resulted in a failure to accumulate experience that would render the imprecision of social rights less and less true as time goes on’ (Scott and Macklem 1992, 73). This view is echoed by Bilchitz (Bilchitz 2003, 264) and Wall (Wall 2004).

Socio-economic rights are positive rights

The distinction between negative and positive rights is well-documented and often coincides with their classification into civil and political rights on the one hand, and socio-economic rights on the other. A common characteristic of both divisions is the expressly justiciable character of the former *a contrario* to the latter (Sunstein 1993, 36). Negative rights can be laconically defined as freedom from State intervention in the enjoyment of one’s rights, while positive rights require State action, often through positive steps, without which the realisation of certain rights would be impossible. Cross argues that the distinction is mainly intuitive and that the mere existence of ‘this generally sensed intuition surely indicates that the distinction exists’ (Cross 2001).

However, it is doubtful whether this classification of rights into ‘separate watertight compartments’ (Lord Lester and O’Cinneide 2004, 18) is, firstly, feasible and, secondly, helpful for their realisation. There are negative rights that implicitly presuppose State action. Take for instance a classic negative right, the right to liberty. At first glance, the foundation of this seems to be State non-intervention. However, we can discern, upon closer inspection, that the right also embodies, in cases of detention, the obligation to inform detainees of the reasons of their arrest promptly and in a language they understand. It also enshrines the right to access to proceedings challenging the lawfulness of the detention, as well as the right to *habeas corpus*. These aspects cannot be realised without the essential structures being built – without State action, in other words. The opposite is also true; there are positive rights with negative aspects. For instance, the right to housing incorporates a State obligation to refrain from evictions unless there is a court order (South African Constitution, S. 26).

Holmes and Sunstein argue that all negative rights include positive obligations (Holmes and Sunstein 1999). Their thesis is challenged by Cross, who alleges that State action is always

essential for the enforcement of laws, and that the realisation of certain rights does not render all rights positive per se (Cross 2001). Beatty argues that courts never had the will or the power to take brave decisions against the other two branches and enforce positive rights, ‘...to the contrary, they have consistently recognised and adhered to the principle of separation of powers...they have never disputed the levels at which any programme of social welfare have been set’ (Beatty 1994). He concludes that the justiciability of socio-economic rights would mean ‘the end of people’s sovereignty to define their own political priorities and community values.’ (Beatty 1994; see also Waldron 1999; Kavanagh 2003).

Although these arguments reflect a – not unfounded – fear for the potential consequences of enforceable positive rights, it is important to axiomatically admit here that human rights are interdependent and interrelated, interacting and indivisible, equally important and not hierarchically classified, and that any absolute distinction into positive and negative rights not only undermines these inherent characteristics, but is also ‘profoundly detrimental to the “human rights quality” of the socio-economic rights’ (An-Na’im 2004, 7).

Dealing with polycentric tasks?

According to Fuller (Fuller 1978, 353), ‘a polycentric situation is many centres “each crossing of strands is a distinct centre for distributing tensions” ’ (Davis 1992, 475). Here the argument is that judges are inexperienced and therefore incapable of addressing polycentric tasks that affect an unknown number of citizens not participating in the litigation; dimensions and effects are knotty to predict. Social welfare rights are blatant examples of polycentricism. Economics consist an important part of the critique since the allocation of State resources by non-expert judges can potentially upset governmental plans (Jheelan 2007, 146) and hinder State efforts to confront complex social issues.

The polycentric argument seems implicitly to be based again on rights classification theories. Judges do participate in resource allocation, and do resolve equally complex issues with wide public impact when taking decisions on civil and political rights. However, no concerns are raised since these rights are considered expressly and indisputably justiciable. Fears that the judiciary cannot deal with complicated issues because the rights in question are social and economic appear unfounded.

Should socio-economic rights be purely aspirational?

Classifying socio-economic rights as purely aspirational norms would practically mean that their application is left to the discretion of politically-accountable State officials. If this is the case, then their classification as human rights is fallacious, as there would be no mechanism capable of enforcing them apart from pure governmental will. The point is that ‘certain fundamental entitlements are recognised as human rights precisely in order to protect [individuals] from the contingencies of the normal political and administrative processes of any country’ (An-Na’im 2004, 8); otherwise, the *raison d’être* of human rights would be void. As Tushnet points out, ‘a purported right without an accompanying judicially enforceable obligation is, almost literally, toothless’ (Tushnet 2004, 1895).

We should also not bypass the Universal Declaration of Human Rights, which incorporates social rights, as well as civil and political ones, as ‘...a common standard of achievement for all persons and all nations’ (UDHR 1948, preamble). The text recognises not only the importance of social welfare rights as far as human dignity and social security are concerned, but also their necessity in a human rights framework based on normative interdependence. It is important to remember that socio-economic rights often overlap with basic human entitlements; therefore, their enforcement could ensure a full range of rights to the poorest and most vulnerable of people.

Although human rights are indivisible, this does not mean that there is a singular way of adjudicating human rights. The lack of a universal system for doing so makes it unconscionable

for us to reject the justiciability of social and economic rights based on speculations and presumptions stemming from the abstract judicial tradition of civil and political rights. As An-Na'im observes: 'The possibility and role of judicial enforcement should be assessed and developed in relation to each human right, instead of denying it to some purported class of rights because they do not fit the model of judicial enforcement of certain civil and political rights' (An-Na'im 2004, 7). The question now is not whether socio-economic rights can or should be judicially enforceable, but how they can be so.

How can socio-economic rights be justiciable?

Constitutional protection of socio-economic rights can occur directly or indirectly. A prominent example of the direct model of protection is the South African constitution, whose Bill of Rights, apart from civil and political, contains socio-economic rights as well. On the other hand, indirect constitutional protection occurs through the application or interpretation of civil and political rights, most commonly through the application of equality and fair process norms (Liebenberg 2001, 61). Examples of this are cited in Canada, United States and the United Kingdom. Countries whose constitutions contain directive principles as guidelines for human rights interpretation also fall under the indirect protection model. These directive principles have often been used to enrich civil and political rights with social elements, in India and Ireland, for example. Two main judicial approaches emerge from these constitutional models: the 'reasonableness' approach and the 'minimum core' approach.

South Africa: the 'reasonableness' approach

The 1996 South African constitution lists social welfare rights as directly justiciable in its Bill of Rights. One case in which the Constitutional Court was required to canvass the ambit of socio-economic rights was *Soobramoney v. Minister of Health, KwaZulu-Natal*. The judgment focused on the fact that socio-economic rights should be defined in light of the availability of resources, therefore dismissing the claim of a chronically ill and non-curable patient, whose denial of dialysis treatment amounted to a breach of his right to emergency medical treatment. A wide margin of discretion was then allotted to the provincial government as far as budget priorities were concerned; finally, the administrative decision challenged was found rational.

Another famous socio-economic case was *Government of SA v Grootboom and others*. This case dealt with the right to housing of several homeless people, who were expelled from shelters built on private land. The Court found that, according to the constitution, the State should take measures for the realisation of the right to housing within its available resources. The measures selected should be 'reasonable' both in their conception and in their implementation. The conclusion in *Grootboom* was that the measures of the housing programme were not reasonable '...in that [the State] failed to make reasonable provision within its available resources for people...who were living in intolerable conditions...'

Meanwhile, a State decision to provide an antiretroviral drug only within a small number of research sites was found unconstitutional in *Minister for Health v Treatment Action Campaign*, as it was deemed inconsistent with the duty to adopt reasonable measures in order to secure the right to health care.⁴ Bilchitz criticised the court for basing its conclusion solely on the existence of the State obligation to take positive measures, without seeking to cast light on the exact content of the right (Bilchitz 2003, 264). Davis agreed, criticising the 'reasonableness' approach as being deferential and inadequate (Davis 1992, 477). Nevertheless, Steinberg argued that the Court singled out this approach and applied the 'reasonableness' test 'striving for the right balance between judicial supervision of government and respect for its imperative to govern' (Steinberg 2006, 264); the majority seemed to promote a concept of judicial minimalism (Sunstein 2001). As

⁴ The South African constitution guarantees the right to health care in its S. 27(1). In S. 27(2) the SA constitution explicitly encompasses the State obligation to take positive measures 'for the progressive realization of this right.'

an aside, it should be stressed that necessity is the epicentre of judicial minimalism; this means that judges should focus only on the necessary aspects of each case to reach a decision, refraining from broad theories, rules and definitions, and keeping ‘only what is necessary to justify an outcome’ (Sunstein 2001, 3). Judicial minimalism seems conceptually valuable in socio-economic cases, where the judiciary lacks the expertise and legitimacy to enter policy decisions. Moreover, Sunstein, as quoted in Steinberg’s article, is right to point out that the minimalistic approach is a safe response to complex legal issues as courts, in avoiding broad decisions, simultaneously avoid the danger of erroneous judgements and, at the end of the day, admit their own limitations.

We also have the case of *Kbosa v Minister for Social Development*, in which the court found the exclusion of permanent residents from security protection programs unconstitutional, basing its decision not on the right to housing but on human dignity and equality – principles central to the South African Constitution. The Court also found a violation in *President of South Africa v Modderklip Broedery SA*, a case concerning the enforceability of an eviction order which affected thousands of homeless individuals. The decision was based not on the right to housing, but on the principle of the rule of law in conjunction with the right of access to courts. The Court found the State obliged to ensure that no eviction orders would be issued in the event of social upheaval. Finally, in *Berea Township and Another v City of Johannesburg and Others* the court dealt with eviction orders against homeless people residing in unsafe buildings in Johannesburg; the orders were issued in order to protect those individuals. The court applied the *Grootboom* reasonableness test, but found an extra positive obligation to ‘engage meaningfully with the occupiers both individually and collectively’ on the managers of the municipality, who should always be aware of the potential consequences of their decisions.

India: building a ‘minimum core’ through directive principles

Apart from fundamental rights, Part IV of the Indian constitution includes a set of directive principles encompassing socio-economic rights; these directive principles were originally envisaged as distinct from fundamental rights, and inferior in status and legal effect to them. It was not until 1978,⁵ after the Indian emergency period,⁶ that the Supreme Court of India breathed substantive life into directive principles and commenced their creative interpretation (Sripati 1998, 413; Justice Srikrishna 2005). The substantive due process doctrine, considered integral to the chapter of fundamental rights, was also asserted and a Public Interest Litigation concept (PIL) was judicially developed to allow easier access to justice for everyone. This was part of a struggle to achieve ‘social justice’ (Bhagwati 1985, 561; Muralidhar 2004, 25).

In *Maneka Gandhi v. Union of India*, the Court, applying directive principles in its interpretation, found under the right to life and liberty the right to travel abroad. This was followed by a series of cases in which socio-economic elements fortified the minimum core of the right to life. In *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* case, the Court found certain socio-economic entitlements under the right to life; in *Bandhua Mukti Morcha v Union of India* it declared unconstitutional the inhumane conditions of work as contrary to the right to life; in *Olga Tellis v Bombay Municipal Corporation* case, the eviction of pavement dwellers without processual due process and with no provision for alternative accommodation was found unlawful on the same grounds. In a more recent case, the Supreme Court of India adopted a more cautious approach in *Balco Employees’ Union v Union of India*, which examined the validity of a State’s decision to be divested from its shares in the public manufacture of aluminium; in this case, the Court notoriously declared its incompetence to deal with policy issues. Many scholars conceived this cautious stance as a signal of the abandonment of the hitherto prevailing model of judicial activism.

⁵ In 1978, a historical case signalling an all-new era for the Supreme Court of India was decided; this case was *Maneka Gandhi v Union of India*.

⁶ The Indian Constitution stood suspended for two years during the emergency period (1975-1977) declared by the Indira Ghandi government. Vast human rights violations allegedly took place during that period.

Nevertheless, judicial encroachment on executive territory is alive and well, at least as far as environmental protection cases are concerned (Sripati 1998). The Court has recently found a right to the environment under the right to life; despite this, however, 'social justice' objectives do not seem to be on the top of its priority list any longer, as judges have been accused of promoting their own political agenda instead. Cases like *Almitra Patel v Union of India*, concerning slum clearance operations, and *M.C. Mehta v Union of India*, about judicially enforced policy measures regulating vehicular pollution, elucidate an emerging double standard.

Ireland: directive principles as general guidance

The Irish constitution contains both a section of fundamental rights in Articles 40-44 as well as a set of directive principles in Article 45. Article 40(3) contains a general requirement for the state to 'guarantee in its laws respect for the personal rights of the citizen, and, as far as practicable, by its laws to defend and vindicate those rights.' The phrase 'personal rights of the citizen' has been interpreted in *Ryan v. Attorney General* as constituting a source of unenumerated constitutional rights (Casey 2005, 123).

Social welfare rights under Article 45 of the Irish constitution have a non-justiciable character; they serve 'as a general guidance.' According to Tushnet, that does not mean that they are 'legally irrelevant' (Tushnet 2004, 1895); on the contrary, they can be supplementary to the interpretation of other constitutional provisions. Unlike India, it is not only Article 45 that has led to the notion that socio-economic rights are not judicially enforceable, but the Irish judicial approach as well. In the case of *O'Reilly and others v. Limerick Corporation*, concerning the lack of appropriate residence for travelling groups, the Court found itself incompetent, due to the separation of powers, to take decisions affecting the allocation of state resources. A similar position was held by the Supreme Court in *Sinnott v Minister for Education*, a case dealing with the boundaries of the right to education and the healthcare for autistic children. On the same wavelength, the Constitution Review Group of Ireland stated in 1996 that social welfare rights are for the people to 'address and determine' due to their inherent political character, explicitly constraining that way the role of the judiciary (Wall 2004, 1).

United Kingdom: employing a narrow interpretation of the 'minimum core'

A landmark socio-economic decision during the pre-HRA period involved *R v Cambridge Health Authority ex parte B* (Van Bueren 2002, 464). A girl suffering from leukaemia was refused further treatment by medical authorities, due to strong scientific evidence of limited chances of success. Health authorities then claimed the lack of financial resources and argued that resource allocation should always be made 'to the maximum advantage of the maximum number of patients.' The Court deferentially affirmed the competence of administrative authorities for resource allocation issues. Palmer criticised the decision arguing that 'it is characteristic of an inherent conservatism against any attempt in challenges against the fairness of rationing decisions to carve out an evaluative role for courts which is separate from that undertaken by administrators' (Palmer 2000, 8).

In *Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants*, the Court of Appeal found that regulations removing the entitlement to income support and housing benefit from certain categories of asylum seekers were *ultra vires* due to a 'very basic' common law, the right of freedom from destitution. This was a bold decision, with the court effectively identifying its own minimum core standard of welfare, 'in a manner unlike the post-Warren US Supreme Court' (Usher 2008, 163). O'Conneide points out that although the decision echoes the developing ECHR case-law concerning State responsibility for individual destitution, its limited application in strictly specific circumstances reminds us that the European Convention is not actually a socio-economic instrument (O'Conneide 2008, 583).

Meanwhile, in *R (Bernard) v London Borough of Enfield*, a severely disabled woman alleged that State failure to provide her with accommodation appropriately adapted to her special needs amounted to disrespect for her family life, as protected under Article 8 ECHR. The Court upheld her complaint – perhaps influenced also by the ECHR jurisprudence⁷ – and held that authorities breached their positive obligation under Article 8 ECHR, since there was a ‘direct and immediate link’ between the State action to be taken and ensuring respect for the right. That judgment notwithstanding, the application of the ‘direct and immediate link’ criterion has been limited, applied so as to leave a respectable margin of appreciation to the State authorities where lack of resources are concerned.

Canada: individual socio-economic entitlements into civil and political rights

The Canadian Charter of Rights enacted in 1982 does not contain socio-economic rights guarantees. Courts tried to read social welfare rights into the Charter of Rights, as in UK jurisprudence. We take, for example, the controversial case of *Chaoulli v Quebec*, in which the Supreme Court struck down Quebec’s legislation prohibiting private medical care, after having taken into account evidence of foreign health care systems; it was found, *inter alia*, that the right to security of person had been violated. King argues that the conflict between liberty and equality was ignored by the court; this could have been avoided had there been a right to health care with positive dimensions explicitly recognized, as in the South African constitution (King 2006, 631).

United States: ‘weak substantive rights’ approach and political influence

The US Supreme Court has never practiced a consistent approach in adjudicating human rights and socio-economic cases do not form an exception. The rationale behind this, as Rosenberg points out, is that ‘...American courts are political institutions... they are a crucial cog in the machinery of government’ (Rosenberg 1991; Abraham and Perry 1998; Cross 2001). In 1954, the Supreme Court recognised a right to equal access to education under the Fourteenth Amendment in *Brown v Board of Education*, rejecting the hitherto ‘separate but equal’⁸ doctrine of segregation and acknowledging education as one of the foundations of a democratic society.

In the 1960s, the Supreme Court affirmed a private right of action against state agencies administering the Aid to Families with Dependent Children programme (AFDC), revising or ignoring jurisdictional rules that seemed to bar the way, and spurning the conventional remedy of federal funding cut-offs in favour of injunctive relief (Forbath 2007, 101). This approach was substantially altered after the appointment of four conservative judges by President Nixon. In *Dandridge v Williams* the Court kept a hands-off stance and did not declare unconstitutional the Maryland State policy, which imposed a maximum amount of money that a family could receive under the financial support programme. A similar approach followed in *San Antonio School District v Rodriguez*, where it was held that school-financing systems based on local property taxes did not violate the equal protection clause. According to the majority, the appellees did not satisfactorily prove that education is a fundamental right, or that the financing system was subject to strict scrutiny; the Court missed the ‘opportunity to remove, or at least ameliorate, wealth-based barriers to equal educational opportunities as well’ (Sutton 2008). According to Tushnet, socio-economic rights are treated as weak substantive rights under the US Constitutional Law, which means that the legislature has a ‘broad range of discretion about providing those rights’ (Tushnet 2004).

⁷ On that see the influential *Botta v Italy* case. It was then that the European Court of Human Rights found that States should take positive measures to provide social support to the destitute if there exists a ‘direct and immediate link’ between the measures sought and the private or family life of the individual.

⁸ Introduced in 1896 by the landmark U.S. Supreme Court case *Plessey v Ferguson*.

Conclusion

The 'minimum core' and 'reasonableness' approaches are not, as it has been implied, two completely different methods of socio-economic rights adjudication; instead they resemble two concentric rings. The inner circle is the minimum core, which tends to form a universally respected individual social welfare standard, mapped out by fundamental principles like human dignity, equality and freedom from destitution. The outer circle, that of reasonableness control, cannot exist without its core, simply because State actions violating it can never be reasonable.

Furthermore, although the formulation of a socio-economic minimum core seems conceptually solid and democratic, practice has proven that this is not always so. Judges employing the minimum core concept have either produced limited effects by interpreting constitutional provisions narrowly or, as in the Indian example, used the minimum core doctrine as the *carte blanche* through which they managed to encroach on executive territory. The 'reasonableness' approach (mainly employed by the South African Constitutional Court) despite being criticised as subjective, deferent and inadequate, it has unexpectedly been transplanted into a minimalistic judicial concept, perfectly harmonised with the separation of powers and polycentricism; it appears to be a more sensible long-term solution.

The question of the nature of socio-economic rights as legally enforceable or just aspirational norms has, ultimately, an evident political tinge. Enforceable socio-economic rights could provide Courts with enhanced powers, proving a potential threat to politicians and economists. Moreover, social welfare rights are usually inextricably linked with huge costs and executive policy-making. Yet these possibilities have no patent basis in human rights or laws. At the end of the day, political constraints and ideologies are unsuccessfully camouflaged under theoretical and complex legal arguments. Their legal disguise cracks when we take into account the role and character of human rights norms; it cracks even more when we consider the cautious stance most Courts have adopted in dealing with social welfare rights. The disguise collapses and what emerges is the need for brave, substantive political will. The question is whether or not we are ready for it.

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