The Protection of Economic and Social Rights

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Preliminary Remarks

Historically Western political theory has been concerned with the classic human freedoms; for example, the right to vote and to hold public office, freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of property, freedom from arbitrary arrest, search and seizure. It is a trite observation that nowadays as much emphasis is placed on the so-called economic and social rights; the right to a decent standard of living, the right to education, or (to take as example the subject-matter of these papers) the right to development.

The dichotomy between these two types of rights is reflected in various documents. The Universal Declaration of Human Rights, which was adopted by resolution of the U.N. General Assembly on 10th December 1948, places both types side by side. Contrast, for example, Article 9: No one shall be subjected to arbitrary arrest, detention or exile and Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him. with Article 22: Everyone, as a member of society, has the right to social security...and Article 25:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family...and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

How, then, do we define 'economic and social rights' for the purpose of this paper? The term is used by some writers to include all rights which touch on the proprietary, commercial or industrial areas of life; for example, the right to peaceful enjoyment of one's property (or, at any rate, the right not to be deprived of it without the payment of just compensation), or the right to form trade unions and to pursue free collective bargaining. In this paper, however, these rights will be included, rather, in the traditional category of civil/political rights. In common with the standard civil/political rights, they require for their implementation mere abstention from action on the part of the State, and to that extent they lend themselves more readily to enforcement by the courts. Economic and social rights, on the other hand, as defined in this paper presuppose for their effective protection:

(a) a minimum level of economic development in the country in which they are to be effectively secured; and
(b) an administrative machinery for the detailed running of the service in question.

In short, such rights are egalitarian in their aim and they require positive intervention on the part of the State. It may be, of course, that the vigorous pursuit of collective bargaining by free trade unions will result in a more egalitarian distribution of wealth. Our dividing line, however, between the two types of rights still holds. The rights associated with the conduct of industrial disputes are secured by marking out an appropriately limited role for the State.

Nevertheless, our crude division between civil/political and economic/social rights is not watertight. This can be demonstrated by taking several sample rights.

The right to education, at first glance, would appear to be a right of the economic/social variety as the extent of its realisation depends on the quantum and allocation of economic resources within the community. On the other hand, the claims to parental control over the nature of their children's education might seem to fall within the traditional class of political rights. In some measure it would seem enforceable, say, by annulling governmental schemes for abolishing the private sector in education. Some reservations, however, should first be entered. Above all, respect for parental wishes in educational matters presupposes the provision of educational services by the State. This obstacle may be circumvented by suitable drafting. For example, Article 2 of the First Protocol to the European Convention on Human Rights provides:

...In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. (Emphasis added).

Moreover, within a publicly provided system of education, procedures would have to be laid down for consulting parents' wishes on the organisation of the schools.

Equally, the right to vote might be considered the paradigm civil or political right. Yet it is clear that its implementation requires very detailed rules on such matters as the demarcation of constituency boundaries, age-limits and residence requirements. To that extent the right to vote has to satisfy requirement (b) of a genuine economic/social right. It utterly fails, however, to demand the satisfaction of requirement (a) in that the vote is not a scarce resource which cannot effectively be enjoyed until the country in question has attained a given level of economic development.
The right to work is the last, and most complex, of our sample rights. It possesses several aspects. Of that right it has been said:

A declaration of a right to work would be silly, not only if it meant that there was nothing wrong in working, but also if it meant that there should be no law forbidding work. To speak of a right to work is to claim that a positive opportunity to work should be provided.\(^5\)

Yet if one examines all the factors bearing on a person's opportunities for work, the most important single determinant - the level of economic demand - lies clearly beyond judicial control. At this level a constitutional guarantee of a "right to work" would amount to nothing more than an exhortation to the government to keep the level of unemployment as low as it is able. By contrast, the judiciary has had an effective role to play when the worker's livelihood has been threatened by either his employer or by a trade union. Threats from the former have been parried in the English common law by the concept of "wrongful dismissal."\(^6\) Threats from the latter quarter have been met by awarding the usual tortious remedies against trade unions seeking to enforce a closed shop. Indeed, the complaint is sometimes heard that only in the latter area, that of the closed shop, has the "right to work" been given judicial recognition.\(^7\)

A Theoretical Perspective

For certain writers, even to speak of a 'right to development' - in the sense of a moral (as opposed to a legal) right to development - is misconceived. These writers fall broadly into two categories. First, there are those who regard all talk of 'natural' or 'moral' rights as unintelligible. Among these may be mentioned Jeremy Bentham, who, in a well-known phrase, castigated the whole idea of natural rights as 'nonsense or stilts'. A second category comprises thinkers who regard the idea of natural rights as fundamentally tenable, but who take a view of the scope of such rights which would exclude any supposed 'right to development' as spurious. These include H.L.A. Hart\(^8\) and Robert Nozick,\(^9\) who argue for a limited natural right: that of all men to be equally free.

Indeed, to speak of a 'right to development' seems to deploy an inappropriate use of the very concept of a right. To mark out a moral right is characteristically to set an inviolable area which may not be invaded, even if to do so would maximise the utility of the community as a whole. For example, it might be shown that the public policy of detecting criminals would be significantly advanced if all members of the community were obliged by law to provide a record of their fingerprints or, again, if the use of the thumbscrew and the rack were to be legal.
methods of interrogating suspects. Yet the exclusion of such devices is characteristic of the way in which political theorists talk about rights: the community goal must be pursued within the constraints imposed by acceptable methods of policing. As Hart puts it,

There is of course no simple identification to be made between moral and legal rights, but there is an intimate connexion between the two, and this itself is one feature which distinguishes a moral right from other fundamental moral concepts. It is not merely that as a matter of fact men speak of their moral rights mainly when advocating their incorporation in a legal system, but that the concept of a right belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's and so to determine what actions may appropriately be made the subject of coercive legal rules.10

To deny the existence of a right to development is in no way to denigrate the importance of development in the third world, but rather to place the methods associated with economic development in the appropriate category of political vocabulary. Industrialisation, say, might be pursued through economic planning, but not at the expense of standards which (however minimally) forbid the coercive redirection of labour or the expropriation of property without compensation.

To speak of a 'right to development', even if it were coherent, would be to assert a right in the strict sense: i.e., with a correlative duty in someone else to provide the development in question. This aspect of economic/social rights has been pointed out by Professor Maurice Cranston:

To speak of a universal right is to speak of a universal duty...The so-called economic and social rights, insofar as they are intelligible at all, impose no such universal duty. They are rights to be given things, things such as a decent income, schools and social services. But who is called upon to do the giving? Whose duty is it? When the authors of the U.N. Covenant on Economic and Social Rights assert that "everyone has the right to social security", are they saying that everyone ought to subscribe to some form of world-wide social security system from which each in turn may benefit in case of need? If something of this kind is meant, why do the U.N. Covenants make no provision for instituting such a system? And if no such system exists, where is the obligation, and where the right?11
Many of the traditional human rights (for example, of free speech and assembly) are logically distinct. In the Hohfeldian sense they are mere 'liberties' or 'privileges', consisting of the absence of a duty to abstain from speaking one's mind and the absence of a duty to refrain from assembling with whoever one chooses and in support of whatever cause one selects. The economic/social rights, to continue with the terminology of Hohfeld, are 'claim-rights' in that they impose a duty on others.

It should be noted, however, that economic/social rights are not unique in this respect. For example, the right to privacy, in order to make sense, must be a claim-right which imposes a correlative duty on others not to intrude into one's privacy. Equally, freedom from torture or from inhuman or degrading treatment or punishment, or the prohibition of cruel and unusual punishments, are claim-rights imposing a duty not to inflict treatment of the prohibited types. But, once again, the correlative duties are of a negative content, nor do they require the availability of financial resources for their effective observance.

The logically distinct nature of economic/social rights was emphasized by Professor Cranston in urging their elimination from declarations - especially international declarations - of human rights. His argument was that, "...a philosophically respectable concept of human rights has been muddled, obscured and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category."

Quite apart from logical considerations, a universal moral right, according to Cranston, must meet several requirements.

First, there is the test of paramount importance. Are economic/social rights indeed of lesser weight, as Cranston submits, than the classic rights of liberty? Perhaps a blanket answer is impossible to a question posed in such general terms. Much will depend on one's selection of representative rights in the two categories. To starve may be considered a worse fate than being denied the right to elect governments by popular vote, but are holidays with pay really preferable to freedom from inhuman or degrading treatment or punishment?

John Rawls's *A Theory of Justice* is, in part, a defence of the absolute priority of liberty over economic and social advantages, at any rate in a society which has attained a certain level of economic development:

Now the basis for the priority of liberty is roughly as follows: as the conditions of civilization improve, the marginal significance for our good of further economic and social advantages diminishes relative to the interests of
liberty, which become stronger as the conditions for the exercise of the equal freedoms are more fully realized. ... Let us note why this should be so. First of all, as the general level of well-being rises ... only the less urgent wants remain to be satisfied by further advances, at least insofar as men's wants not largely created by institutions and social forms. At the same time the obstacles to the exercise of the equal liberties decline and a growing insistence upon the right to pursue our spiritual and cultural interests asserts itself .... In addition men come to aspire to some control over the laws and rules that regulate their association, either by directly taking part themselves in its affairs or indirectly through representatives with whom they are affiliated by ties of culture and social situation.16

Secondly, in order to qualify as such, a fundamental moral right must in principle be genuinely universal. This argument, it should be noted, is not simply a reworking of the observation that many nation States in the world today are in no way financially able to secure a certain level of economic and social guarantees. Even if there were an abundance of economic resources out of which every nation could guarantee the rights in question, the fact remains that the right to holidays with pay - to take Cranston's example - is only capable of being enjoyed by persons who are employees. Since not everyone belongs to this class, the 'right' cannot be a genuine universal right.

Is Cranston's objection conclusive? Certainly, the rights to free speech and assembly are genuinely universal, being capable of exercise by all persons and at all times. But are there not rights of the classic political/civil type which are capable of being enjoyed only by persons who fall (however temporarily) into a particular class? Are the freedom from unreasonable search and seizure and the privilege against self-incrimination17 not rights which are exercisable only by those who are the object of criminal investigation?

Our objection, then, to the idea of economic and social rights as moral rights (and, in particular, to the idea of a 'right to development') is based on its abuse of the concept of a right. It is not founded on any inherent difference between these and the classic liberal rights on the score of either importance or universality.

Written Guarantees of Economic and Social Rights

It is now time to turn to a consideration of positive law. Here the distinction between the classic political rights and those of an
economic/social nature is borne out in several respects when we examine the diverse methods of their protection and enforcement in written catalogues of human rights.

The rights which are traditionally contained in a Bill of Rights may be enforced in two distinct ways: by direct challenge or by collateral challenge. Direct attack on an allegedly invalid statute (for example, in proceedings for an injunction or a declaration) raises the issue of constitutionality full square. The presence of certain difficulties, however, in this method of challenge - most notably, the difficulty of establishing *locus standi* - renders it less useful than collateral attack. Under this method, say, a person who has been arrested under an arguably unconstitutional provision will bring an action in trespass against the police, the action raising as an incidental issue the question of the constitutional validity of the provision under which the police acted.

The denial of economic/social rights, by contrast, will seldom be the outcome of a statute, decree or regulation. (It may take the form of a benefit being granted to one group in society which is withheld, for discriminatory reasons, from similarly placed groups). More often it will take the form of a general unavailability of some benefit or service, which can only be the subject of direct investigation. For example, the standards of the European Social Charter are kept under scrutiny by a detailed system of reporting,18 under which the Contracting Parties are obliged to inform the Secretary-General of the Council of Europe at two-yearly intervals about the observance of the obligations which they have accepted under the Charter. A similar reporting procedure - through the U.N. Secretary-General to the U.N. Economic and Social Council - constitutes the method of implementation of the International Covenant on Economic, Social and Cultural Rights. Both these instruments lack the sort of procedure founded on the grievance of the individual which is such a striking feature of the parallel documents in the realm of the traditional rights - the European Convention on Human Rights (under Article 25) and the International Covenant on Civil and Political Rights (under the Optional Protocol).

With these preliminary observations now made, it will be instructive to examine the techniques of protection of economic/social rights under both international law and constitutional law.

The difficulty with any international guarantee of human rights (of whatever type) is that it must perforce lay down a common minimum standard for a number of nation States which have diverse legal traditions and differing levels of economic performance. Thus, it is not uncommon to encounter references in the case law to the 'margin of appreciation' to be granted to States in fulfilling their obligations under human rights documents of the traditional type, even though the document itself imposes obligations in the most absolute and peremptory terms. The obligation itself, however, is qualified and circumspect in
documents treating of economic/social rights. Contrast, for example, the
categorical terms of the European Convention on Human Rights ("The High
Contracting Parties shall secure to everyone within their jurisdiction
the rights and freedoms defined in Section 1 of this Convention") with the European Social Charter ("The Contracting Parties accept as the aim of their policy, to be pursued by all appropriate means ... the attainment of conditions in which the following rights and principles may be effectively realized:"). Again, the U.N. Covenant on Civil and Political Rights provides that each Contracting State "... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...", while the Economic and Social Rights Covenant requires each State Party "... to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant..."

However programmatic such obligations may be, they nevertheless impose binding obligations in international law.

The problems associated with economic and social guarantees may seem less intractable in domestic law. The constitution makers would be concerned only with the economic capabilities of the one country. Here, however, difficulties stem from a different source. The restrictions of the judicial role, as it is traditionally conceived, render the judiciary an unsuitable instrument for weighing such complex questions as the financial need of classes or groups and the allocation of scarce economic resources. Such issues, it is felt by even the most activist of judges, should be entrusted to the exclusive care of the legislature. As de Smith perceptively wrote, "To fail to guarantee the right to work or to enjoy social security may be bad politics, but it is not thought to be bad law; ..." This approach, of course, would create a bias in favour of the classical 'abstentionist' freedoms.

Rather than omit all mention of economic and related rights, some constitutional documents entrust the safeguard of certain rights exclusively to the legislature while that of other rights rests primarily with the courts. This approach has been adopted most notably in the constitutions of the Irish Republic, India and Nigeria. Sir Kenneth Wheare wrote:

An appreciation of the difficulties which arise if Courts are asked to enforce or apply declarations of rights in a Constitution has led sometimes to a decision by the framers of a Constitution that the declaration of some rights at any rate shall not be regarded as a collection of rules of law in the sense that Courts are to be asked to recognise and apply them, but rather as a statement of desirable objectives.
To take the Irish Constitution of 1937 by way of example, in addition to the justiciable fundamental rights guaranteed in Articles 40-44, Article 45 (entitled "Directive Principles of Social Policy") states:

The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.

An examination of the content of Article 45 reveals loosely defined economic and social aspirations.²⁷

Again, the Constitution of India 1949 was drafted so as to contain both justiciable fundamental guarantees (Part III) and "Directive Principles of State Policy" (Part IV). Article 37 states that the latter "shall not be enforceable by any court" while recognising that they are "nevertheless fundamental in the governance of the country". Article 39, for example, stipulates that the State shall "direct its policy toward securing" such objects as "(d) that there is equal pay for equal work for both men and women" and "(f) that childhood and youth are protected against exploitation and against moral and material abandonment."

Despite the seemingly conclusive wording of Article 37, the "Directive Principles of State Policy" have been employed by the Indian Courts in ruling on constitutional issues.²⁸ For example, when a law has been challenged as imposing an unreasonable restriction on any of the seven justiciable rights guaranteed in Article 19, the fact that the law in question sought to further one of the Directive Principles (e.g., the maintenance of free competition) went some way towards indicating that it imposed "reasonable restrictions" on one or more of the justiciable rights (e.g., the right to "acquire, hold and dispose of property").

When we turn to glance at a few modern West European constitutions, we see the short shift given to rights of a socio-economic nature. The Constitution of the Fifth French Republic (1958) lacks a specific Bill of Rights, referring only to the French people's attachment to rights laid down, inter alia, in the Preamble to the 1946 Constitution. These rights include the right to work (paragraph 3) and the right to social security (paragraph 9). An (admittedly circumspect) right to work is declared in Article 12(1) of the Constitution of the Federal Republic of Germany.²⁹ Article 38 of the Italian Constitution guarantees in general terms a right to social security in circumstances such as illness, old age or involuntary unemployment.

Perhaps the most interesting of recent developments have occurred in the case law of the U.S. Supreme Court. Under cover of guaranteeing due process or the equal protection of the laws or facilitating interstate
movement the Court has enforced the payment of a range of welfare benefits\textsuperscript{30} - and all that while interpreting a constitutional text impregnated with the classical libertarian rights of the eighteenth century.
1. See, for example, President Franklin D. Roosevelt's call to the U.S. Congress in January 1941 for a world founded on "Four Freedoms": freedom of speech and expression; freedom of every person to worship God in his own way; freedom from want; and freedom from fear.

2. The Universal Declaration was not in itself conceived as creating binding obligations for the Member States of the United Nations. Its precise status today is controversial. Arguably it possesses, at most, the character of customary international law. The African Charter on Human and Peoples' Rights, adopted on 26 June 1981, follows the same pattern in enumerating civil and political rights, followed by a catalogue of economic, social and cultural rights.

3. The very fact that the educational right was left to the First Protocol, and not entered in the main body of the European Convention on Human Rights, indicates that the recognition of the right was the occasion of major controversy among the framers of the Convention.

4. See, for example, section 17(5) of the United Kingdom's Education Act 1944:

"Before making any order under this section in respect of any school, the Minister shall afford to the local education authority and to any other persons appearing to him to be concerned with the management or government of the school an opportunity to make representations to him with respect thereto,..."


6. The limitations of that remedy (in respect of such matters as pecuniary compensation) led to the introduction of the statutory remedy of "unfair dismissal".

7. "The signs are that it is against the organisational strength of trade unions in one-hundred-per-cent membership situations that the judicial 'right to work' concept is to be employed and extended" - from a letter written by Professor Wedderburn to The Times, 18 December 1975.


14. The Eighth Amendment to Constitution of U.S.A.

15. Cranston, *op. cit.*, 65. Professor D. D. Raphael has argued, on the contrary, that economic and social rights may be regarded as fundamental rights (albeit in a 'weaker' sense), the extent of their possible realisation varying from State to State. The debate is set out in full in Raphael, *op. cit.*, Chapters 4 ("Human Rights, Real and Supposed") ("Human Rights: A Reply to Professor Raphael") by Professor Cranston and in Chapters 5 ("Human Rights, Old and New") and 9 ("The Rights of Man and the Rights of the Citizen") by Professor Raphael.


17. As guaranteed in the Fourth and Fifth Amendments to the U.S. Constitution.


20. Part I.

21. Article 2(1).

22. Article 2(1).

23. Such questions have been described as 'polycentric'. A decision, say, to allocate certain funds to a particular social service cannot be treated in isolation: of necessity, it will have effects which permeate the national budget and the management of the economy as a whole. See Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353, at 394 ff.


27. See, for example, Article 45.2.2:

"The State shall, in particular, direct its policy towards securing...that the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good."


29. "All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law."