

On Social and Economic Rights: A Needs-Based Approach

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The topics of social and economic rights are two of the most controversial issues within rights theory and practice. At times, the status of these topics as human rights is questioned. When social and economic rights are recognized as human rights, their aspirational character is distinct from the clear and present enforceability of civil and political rights. Although some international documents speak about the indivisibility and interdependence of many kinds of rights, this formulation does not satisfy either the proponents or opponents of civil and political rights who put more weight on social and economic rights than on civil liberties. In fact, it has always been the differing status of social and economic rights that has separated various concepts of human rights. This was a crucial dividing line between liberal and socialist/Christian concepts of rights. Today, the attachment to social and economic rights is one of the main differences between the South and the North.

Constitutionally Enforced?

When social and economic rights are recognized as human rights, there are many controversies about their legal status. International documents do not provide for effective international enforcement of social and economic standards, and the reporting procedure implied by the International Covenant on Social, Economic, and Cultural Rights (ICESCR) is not binding to states. International covenants suggest that such rights are included in the internal legal framework of states, particularly that their implementation can be on the level of statutes. Nevertheless, numerous constitutions include detailed chapters on social and economic rights.

In some constitutions, such rights are seemingly identical to civil and political rights, which implies they will either be identically enforced or not, as with Italy and Hungary. The constitution of South Africa makes social and economic rights equally justiciable as civil liberties and political rights. The constitutions of the Czech Republic, Slovak Republic, and Poland offer different enforcement to at least some social and economic rights than to civil liberties. There are also constitutions that contain chapters on social and economic goals of a state, such as those of Spain and Portugal, or directive principles guiding public policy as in India. Still others, such as Germany's, have just one general clause that is used by the governments to introduce social and welfare policies on a statutory level. At times, the reference to social goals is made only in a preamble to the constitution, as with France's and Sweden's. Finally, some constitutions do not make any room for social and economic rights, as is the case with the United States.

This picture is made even more complex when considering the adjudication of constitutional courts. In some cases, courts are limited to the justiciability of social rights included in a constitution, as is the case with some decisions of constitutional courts in Hungary. In other instances, constitutional courts have used provisions on rights to invalidate public policy of the government (e.g. the Constitutional Court in South Africa in the housing case). Indian courts have provided enforceability to social and economic rights on the basis of a constitutional concept of dignity and the right to life. And in the United States, the adjudication of the Supreme Court has given life to some social and economic rights.

Legal Wrangling

The legal protection of human rights, however, does not solve other theoretical and empirical questions. Additional issues relate to the separation of powers and court interference in the allocation of resources and formulation of state budgets -- functions usually restricted to executive and legislative powers. Differences between the legal protection of rights and the political processes of setting public policy goals in a democracy are particularly relevant here.

Other problems relate to differences between various categories of rights. Social and economic rights do not only provide limitations to the powers of a state; they also include entitlements to direct the provision of goods and services to right holders, as well as to regulate the state's imposition of certain conditions on private-party contracts (e.g. most labor rights). In this regard, there are many questions related to the effectiveness of the direct provision of services by a state, for example, of implied arbitrariness and possible corruption, as well as incentives for state welfare agencies to perpetuate problems rather than solve them.

Still other controversies focus on moral aspects of social and economic rights, particularly in relation to individual incentives and responsibilities for one's life. This is because social rights consist of providing some groups and individuals with the goods and services that are bought on the market by the majority of people and are financed by the same majority through taxation. Also, while civil liberties and political rights cannot be made contingent upon the performance by a recipient of his or her duties toward community, social and economic rights may imply some contribution to the society by the recipients of services. In the absence of such contribution, the opposition to social benefits by the non-recipient may arise.

Finally, there is a problem with the applicability of the very concept of rights and rights enforcement mechanisms to the aspirations that are to be "achieved progressively" to the maximum of the available resources. The purely legalistic language of rights may be inadequate to meeting such public goals. While the language of rights was appealing to the drafters of the Universal Declaration of Human Rights in 1948, the differences in enforcement led to the separation of social, economic, and cultural rights in different covenants. Today, the language of rights as applied to all values protected by international covenants only increases confusion and, in fact, prevents the usage of rights enforcement mechanisms when they may be applicable to human rights. (For example, it seems impossible to enforce by legal right the means of the right to work (Article 6 of the ICSECR); the "continuous improvement of living conditions" (Article 11); the right to "the highest attainable standard of physical and mental health" (Article 12); or the right "to enjoy the benefits of scientific progress and its applications." On the other hand, it seems possible to assure the rights to form trade unions (Article 8) or the rights to social security (Article 9).

Achieving Rights

One way of overcoming many difficulties is to limit the application of the language of rights in social and economic spheres. A more fruitful approach would be to acknowledge the existence of legitimate social, economic, and cultural needs of individuals and groups of individuals. Such needs include, among others, all goods and services mentioned in international documents of social, economic, and cultural rights. These needs, however, can be fulfilled by a broad spectrum of means and instruments. Rights and the mechanisms for enforcement of rights will cover only one section of this spectrum.

Individual and community efforts. Most often, individuals' social, economic, and cultural needs are satisfied by individual and community efforts. People can satisfy their needs directly within the family and through professional and other associations, or they can earn the means necessary to buy needed goods and services on the market.

Regulatory action by the state. Proper fulfillment of social and economic needs may call for the regulatory action by the state. Such action can take the form of the regulating markets; conditions of work; environmental standards; and criminalizing behavior that threatens the social, economic, and cultural needs of others.

Setting public-policy goals by the state. In some cases, this serves to fulfill social and economic needs of the population. The state can introduce policies that aim to maximize

possible employment, facilitate housing needs, protect the environment and public health, etc. In a modern democracy, there is an agreement that public policy should take the needs of the poorest, most helpless and vulnerable groups into particular consideration. Implementing such public-policy goals requires the allocation of resources in a state's budget.

Public-policy goals are usually enforced by political means. However, there is a danger that democratic political processes may neglect the needs of the most vulnerable and needy groups of citizens. Therefore, some special mechanisms that support needs-based policies can be designed. For example, the Bill of Rights and Freedoms draft (in 1992, but was later aborted) in Poland suggested that the government, with a yearly motion for the absolutorium, would be obligated to submit a detailed report about what it did in the realm of social and economic goals of the state. Such a report was to include not only state expenditures but also independent assessments of the effectiveness of steps taken by the government.

Another reinforcement of needs-based political processes could be a required supermajority vote on the motion for the absolutorium. While all other parts of the budget could require a simple majority of votes for approval, the report on the social and economic tasks of a state might need 61 percent or a two-thirds majority. Without such support, the government would face the same consequences as the rejection of the absolutorium, i.e. the dismissal.

Still another solution was suggested by David Trubeck, professor of law at the University of Wisconsin, at the very beginning of the post-Communist transition in Poland. While discussing an argument about the lack of available resources for welfare in bankrupt economies, Trubeck noted that by the time resources are generated, a new power structure may emerge that would oppose welfare spending. Trubeck proposed that a constitution pre-commits a certain percentage of the future growth in the GDP to social expenditures.

Public policy in a constitution. Society's vulnerable populations and weakest groups cannot always rely on political processes. If this happens, there is room for intervention by constitutional courts. They can use constitutional provisions to demand the development of public policy in the spheres of social welfare from the executive and legislative powers. They can also make a judgment if a given public policy protects constitutional values and principles. For example the constitutional court of South Africa rendered unconstitutional the government's housing policy on the grounds that it did not attend to the needs of the most vulnerable groups in the society. Such decisions do not seem to violate the principle of the separation of powers. To respect this principle, however, the courts should refrain from issuing executive orders designing a particular welfare policy. This task should be left to the executive and legislative branches so that they may be reviewed, once again, by a constitutional court.

Goods and services. Public authorities may also provide goods and/or services directly or buy needed goods and services on the market to some vulnerable group members that cannot provide for themselves, and/or are victims of past discrimination.

Goods and services as matters of right. Some such goods and services can be provided as a matter of rights. Such rights can be based on a statute, which means that they are protected against an executive's discretion but only within the limits of a statute. The majority can grant such benefits as well as take them away. Other rights can have constitutional protection. In such cases they are also protected against the majority by the judicial and constitutional courts.

A majority of social and economic rights can have a statutory character. They imply the redistribution of resources and choices between competing values. Such choices belong to political processes rather than to judicial competence.

The statutory character of social and economic rights would also render them less “absolute” and open the possibility of exercising such rights contingent upon some conditions. While civil and political rights cannot be made contingent upon the performance of one’s duties toward society, social and economic rights may be. The right to a fair trial or the rights of prisoners are granted to an individual not only when she does not fulfill her duties to society, but also when she has violated other people’s rights. Social and economic rights, however, consist of the provisions of goods and services that are given to some people and generally earned or bought on the market by others, most often by a majority. Welfare benefits are provided for those who cannot earn them. Therefore, they can be made contingent on some other contribution to the society. An important task of the state and other public authorities should be to organize conditions in which such contributions could be made.

Constitutional protection. Some social and economic rights, however, should have constitutional protection and be granted unconditionally. The design of directly enforceable constitutional social and economic rights could be ruled by the following principles:

- Constitutional rights should not exceed basic minimums necessary for social and economic security;
- Constitutional rights should be granted unconditionally to people kept under coercive power of the state;
- While social and economic rights may be made contingent upon the requirement of a recipient’s contribution to the welfare of a society, constitutional rights should be granted to vulnerable populations, such as disabled individuals, who cannot contribute to society.

Other social and economic rights in excess of this threshold can be granted by a statute and limited later if a (democratic) society decides to change its priorities. Such rights could also be enforced on the basis of individual claims by the court but only within the limits set by a statute.

It goes without saying that an individual should have a constitutional claim to courts in every case of discrimination in the enjoyment of rights, regardless of their constitutional or statutory character.

Merging the concept of rights with capabilities. Some important social and economic needs cannot be satisfied even with the use of the instruments of rights. Even when social rights are made constitutional, it does not necessarily help the situation of the rights holders. Many rights do not easily translate into the improvement of social conditions or an increase in an individual’s control over their lives. One promising approach to this problem is merging the concept of rights with capabilities as defined by Amartya Sen and Martha C. Nussbaum. The capabilities approach is not limited to formal rights but is interested in what a right-holder is “actually able to do and to be.” According to Nussbaum, “... it is concerned with what is actually going on in the life in question: not how many resources are sitting around, but how they are actually going to work in enabling people to function in a fully human way.” This approach forms a new important resource for the fulfillment of social, economic, and cultural needs.

Conclusion

The needs-based approach to social and economic rights may be helpful in limiting some confusion implied in the notion of social and economic rights as rights. This approach clarifies the distinction between social policies and rights. It also helps to see the difference between various remedies attached to particular rights. The main postulates of the needs-based approach to social and economic rights can be summarized as follows:

- Constitutional rights should protect a basic security-based minimum, particularly for vulnerable populations; they may, however, make the benefits contingent upon a contribution to society.
- All remaining social and economic needs can be left for social policy of the state as defined by statutes and state budgets.

The needs-based approach calls for focused research that would make it more comprehensive and practical. Theoretical research should focus on the following problems:

- The differences between social and economic rights and other categories of rights. Such differences concern origins of these rights, their content, their relation to obligations and duties, as well as the implementation of rights.
- The analysis of the effectiveness of various mechanisms and instruments to realize the needs acknowledged in international covenants on social, economic, and cultural rights.
- The definition of situations when rights seem to be the most effective instrument toward the fulfillment of such needs.
- The elaboration of the relationships between rights, needs, and capabilities.

The most fruitful research should not be limited to general theoretical considerations. Of crucial importance would be the review of particular rights in the perspective outlined in this article. The research project could focus on particular social and economic “rights” as formulated in the covenant to see which elements of a particular need would be best realized by which means. The right to health care, the right to food, and the right to shelter would be good examples to start such research with.

Finally, on the basis of such research, the civil-society actors could be involved. Human rights organizations could define for themselves which elements of a particular needs-based right they would like to monitor or enforce. NGOs acting in the field of public-interest law could seek remedies to ensure such rights and/or focus on the use of general constitutional clauses by the courts to ensure the choice of proper public policy and allocation of resources. NGOs acting in the field of charity and philanthropy could attend to more general needs of populations without necessarily using the instruments of rights.

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