

The Justiciability of Social and Economic Rights: An Updated Appraisal

The debate about whether social and economic rights can be or should be adjudicated and enforced by courts or other bodies has been ongoing since the 1960's, when the rights in the Universal Declaration of Human Rights were divided into two separate covenants. One contained economic, social and cultural rights, while civil and political rights were set out in the other. Though both sets of rights were affirmed to be indivisible and interdependent, commentators have often distinguished between the two categories of rights by asserting that economic, social and cultural rights are not justiciable.

Those who dispute the justiciability of social and economic rights tend to rely on three primary arguments:

First, it is argued that social and economic rights are different in nature from civil and political rights and are therefore non justiciable. Unlike civil and political rights, social and economic rights are said to impose positive duties rather than negative ones; to require government action rather than government restraint; to require allocation of resources and progressive fulfillment rather than immediate compliance; and to be vague and open-ended rather than precise and legally defined.

A second common claim is that it is undemocratic and a violation of the separation of powers for unelected courts to interfere with social and economic policy adopted by elected branches of government.

A third claim is that social and economic rights involve complex issues and competing claims on resources which courts are not competent to decide.

This article addresses these three arguments.

1) Are Social and Economic Rights Different in Nature from Civil and Political Rights?

As a result of the development of a greater understanding of human rights, stereotypical characterizations of social and economic rights as being fundamentally different from civil and political rights have been largely rejected. It is now widely recognized that all human rights give rise to a combination of negative and positive obligations and involve various degrees of resource allocation. The right to vote, for example, entails considerable

state expenditure and requires the state to take positive steps to ensure that elections are held at periodic intervals.

Obligations imposed by social and economic rights have often been expressed as a tri-partite typology of obligations: the duties, to respect, protect and fulfil. All of these obligations have been found to be justiciable and courts have enforced both the positive and the negative aspects of the different duties. Even the more negative obligation to respect a right such as the right to housing has been held to entail important positive obligations such as providing adequate procedural safeguards and ensuring alternative housing in the case of evictions. Similarly, when enforcing equality rights, courts have not only dealt with the duty of states to refrain from discriminatory action but have also addressed states' positive obligations to address the unique needs of disadvantaged groups such as people with disabilities.¹

Courts and tribunals have assessed the positive measures that are required to give effect to social and economic rights and have ordered governments to take concrete steps and allocate resources towards fulfilling those rights. In some instances, courts have defined minimum requirements of benefit programs. In other cases they have expressly delineated the measures that states must take in order to satisfy their obligations to progressively realise rights within the limits of available resources.

Courts have generally found that the distinction between state action and inaction is often difficult to apply, as most examples of government 'inaction' can be recast as examples of 'action'. It is inappropriate to use this distinction as a basis for determining whether or not a right is justiciable, particularly when the most serious violations of rights are often the result of government refusals to do anything to help particular groups.

The argument that social and economic rights are too vague or indeterminate for courts to define is belied by the increasing body of jurisprudence involving such rights. It has become clear that "it is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity".² Social and economic rights are no more vague or open-ended than civil and political rights such as the rights to security of the person or 'privacy' which courts have defined and elaborated over time.

2) Legitimacy of Courts Adjudicating Social and Economic Rights

The question of whether it is undemocratic for courts to interfere with social and economic policy must be assessed in light of the recognized function of human rights in enhancing, rather than undermining, democratic governance. Judicial oversight of minority rights is usually seen as enhancing democracy by ensuring that relatively powerless and vulnerable groups do not have their rights violated. The same dynamic is now being recognized in relation to those deprived of adequate food, clothing or housing, or of access to health care or education. In adjudicating social and economic rights, judges have reaffirmed the role of courts in ensuring that the rights of vulnerable groups such as the poor are not ignored and have emphasized the extent to which social and economic rights are tied to basic human rights values of dignity and equality. As noted by the UN Committee on Economic, Social and Cultural Rights, neglect by the courts of their responsibility in this area would “drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”³

With respect to concerns about the separation of powers, experience has shown that conferring courts with the authority to adjudicate social and economic rights does not mean that they assume the function of designing social programs. Enabling courts to adjudicate social and economic rights simply means that courts can hear and adjudicate claims involving alleged rights violations. Under the doctrine of the separation of powers, it is the job of courts, not legislatures, to consider allegations of rights violations and to determine whether a right has been infringed. Arguably, leaving the legislature to ensure its own compliance with social and economic rights would amount to a violation of the doctrine of separation of powers.

3) Judicial Capacity to Adjudicate Social and Economic Rights

There is no doubt that, like those involving civil and political rights, some social and economic rights claims require courts to address complex issues of evidence and law. However, experience thus far demonstrates that courts are quite capable of performing these tasks where they are convinced that it is their responsibility to do so.

Where governments are limited by competing demands on resources, this evidence has been effectively conveyed to courts and courts have given it full consideration. It must also be recognized that in some instances, courts are better equipped than legislatures to assess complex evidence - particularly in

relation to the effects of policies on disadvantaged groups who may have been ignored by legislators.

It has also become clear that social and economic rights claimants do not turn to courts for some kind of superior expertise in social and economic policy. Rather, they rely on the traditional competence of courts to provide a fair hearing and to review facts and evaluate government decisions or policies against the requirements of the law. Even if an issue is multi-faceted and complex, the court still has a responsibility to uphold and protect fundamental rights. Limitations of judicial competence are best assessed on a case by case basis, rather than being the basis for declaring an entire category of rights to be non justiciable. Where courts feel that they lack the necessary competence or information in a particular case, there are a variety of means by which they can access additional expertise or information, or rely on the government to fashion the appropriate remedy, without abdicating their responsibility to uphold rights.

Conclusion

The evolving jurisprudence on social and economic rights has made it clear that, where courts are given the mandate to adjudicate social and economic rights, they are capable of fulfilling this mandate competently, without intruding on the legislative domain. Furthermore, traditional distinctions between these two categories of rights have been found to be overly simplistic.

In light of these developments, the debate about social and economic rights need no longer be dominated by the question of justiciability. Nor should it focus primarily on the relationship between courts and legislatures. Human rights govern the relationship between citizens and governments. The role of the courts is to interpret and apply those rights that are identified as fundamental to democratic citizenship.

Experience around the world demonstrates that courts are quite capable of adjudicating and enforcing social and economic rights. This allows us to insist upon a discussion about how important these rights are to citizens, and how, if they are to be recognized as fundamental human rights, they should be adequately protected and enforced in law.

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¹ Descriptions of and references to cases demonstrating these developments and others referred to in this article are found in our longer paper on this topic, prepared for the Human Rights Consortium, with coauthor Malcolm Langford. Copies available from CAJ office.

² Liebenberg, S., "Social and economic Rights" in Chaskalson et al, Constitutional Law of South Africa (Cape Town; Juta, 1996) 41-11.

³ Committee on Economic, Social and Cultural Rights, General Comment 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998) para. 10. 5