

# **THE PROTECTION OF SOCIAL AND ECONOMIC RIGHTS: INTERNATIONAL PERSPECTIVES**

Paper 9

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May 1996

## **1 INTRODUCTION**

The debate on the recognition and protection of social and economic rights is gaining momentum across the world. That can be attributed to, among other reasons, the changing economic and social environment in which people and governments find themselves. The role of the state as an agent for addressing societal ills has been growing in importance especially since the turn of the century. Increasingly people are arguing that pressing issues such as unemployment, social services, education and environmental protection cannot be dealt with if the state does not act as the main agent of action and reform.

The trend in developing countries in particular – but also in developed Western countries where economic hardship is experienced by certain classes in society – is for individuals to view the state as an important or even the main supplier of services and goods.

The state, especially in developing countries, is seen as the creator of employment and provider of welfare, and as generally responsible for improving the overall standard of living of individuals. Public expectations of democratization in developing countries are in many cases focused on the belief that liberation will bring economic benefits and that control of the state apparatus will ensure socio-economic advancement. On the African continent for instance there have always been high expectations about the role the state should play as the prime agent for development. Bazaara summarizes this view:

"Democracy should not be understood in the narrow sense of elections held every four or five years. Democracy means access to resources."

In countries across the world it is generally not disputed that the plight of the poor, unemployed and infirm should be dealt with by the state – either alone or in partnership with the private sector and NGO's. There is wide agreement that the state has an obligation to devise policies that will improve the standard of living of all citizens. What is in dispute is whether the state should be placed under a justifiable duty to take certain policy steps in order to address the socio-economic needs of individuals. This is where the protection of social and economic rights (legally enforceable) as opposed to social and economic ideals and aspirations (only morally and politically enforceable) enters the debate.

The twentieth century has witnessed various endeavours to expand the categories of justiciable rights for inclusion in human rights documents. In addition to the traditional first-generation civil and political rights, various proposals have been made, especially by developing countries, for the protection in international and constitutional law of second – and third-generation rights.

The main purpose of social and economic rights is to place the state under a legal obligation

to utilize its available resources maximally to correct social and economic inequalities and imbalances. It has been stressed in the literature and confirmed by practical experience that democratization and the protection of rights can be attained only if the social and economic conditions of individuals are improved. Modernization theorists argue that economic development is critical for successful democratization, and accordingly for the protection of rights. They hold that "without modernization and a minimum threshold of economic development, democracy in divided societies is hopeless."

The aims of this paper are to investigate some of the international developments pertaining to socio-economic rights and to show that there is a tendency (i) for states to become more sensitive to socio-economic rights and claims; and (ii) for courts to interpret traditional civil and political rights in a manner that also recognizes some socio-economic rights.

## **2 COMPARISONS WITHIN LIMITATIONS**

The South African debate on constitutional matters, and in particular the protection of human rights, has been characterized by extensive "case study hunts" (mainly in Western democracies and to the sad neglect of democracies such as those in India, Malaysia, Namibia, Brazil and Botswana) by political parties and interest groups with the aim of finding international experiences that suit their own ideas and philosophies. In the process the experiences of some countries have been misquoted, selectively quoted or referred to out of the historical and political context of the particular country.

It should therefore be emphasized at the outset that although comparative analysis can offer some insight into the way in which other countries have dealt with particular issues, the constitutional model and in particular the bill of rights adopted by any country should bear the imprint of the country and the nation they are meant to serve.

Many constitutions have failed because of the discrepancy between the basic principles on which the constitution is based and the actual circumstances, history and requirements of a particular country.

There is wide agreement internationally as to the categories of rights as well as the specific rights that should be protected in a bill of rights. This agreement is especially apparent in the field of civil and political rights – i.e. freedom of speech, religion, association, political participation and expression. Various countries have also interpreted their bills of rights creatively and have expanded them to include new fundamental rights appropriate to a particular situation.

Numerous reasons can be advanced for Africa's scant success in developing stable systems of human rights protection. It is not within the scope of this paper to analyze or comment on these reasons. What can be stressed, however, is that in the human rights debate there has been a tendency to overemphasize Western human rights philosophy at the expense of finding an African rationale for the protection of certain rights. For example, as important as his contribution to human rights philosophy is, one cannot separate John Locke's perception of human rights and the role of the state in them from the circumstances of his times. The importance that Locke and others attached to limited government, a bill of rights as the bulwark against a too-powerful government, the desirability of a passive and non-interventionist government, and the role of civil society in relation to government have formed the backbone of Western political and constitutional thinking.

Laudable as Lockean principles may be, insufficient attention has been paid to finding a philosophical African "home" or rationale for human rights which is based on African beliefs, experiences, values and expectations. For instance, even the African Charter has been described as of "near irrelevance to Africa's political life". In Africa there are numerous instances where the role of civil society vis-à-vis government is uncertain, where the place of customary law in relation to modern legal principles needs clarification and where African values should come to the fore more often in the interpretation of bills of rights.

The transplantation of human rights documents from other countries without taking into account the circumstances that gave rise to the particular rights and their formulation, has proved to be problematic – both in terms of the credibility and the legitimacy of bills of rights.

### **3 NEW RIGHTS – NEW INTERPRETATIONS**

International experiences show that although there is general agreement on the type of rights that should be included in a bill of rights, new rights are constantly being added and new interpretations are being given to "old" rights. This phenomenon emphasizes the dynamic nature of human rights protection and the need to be creative and open to societal changes and requirements.

In the drafting process of the South African Bill of Rights this dynamic should be taken into account. On the one hand it is impossible to define every possible right in the constitution and it may be necessary in future to add further rights. On the other hand the courts should show a willingness to interpret rights creatively in a manner that covers factors that were perhaps not anticipated by the drafters of the constitution.

The list of rights that formed the basis of the first ten amendments of the US Constitution has grown remarkably since the adoption of the constitution more than 200 years ago. This expansion of rights can partly be attributed to the fact that as circumstances change, new issues in the state-individual relationship have emerged. Another reason is that while the US Bill of Rights was influenced by the Lockean perception of a passive state and limited government, the role of the state as a supplier of social services, education and promoter of culture has in the meantime increased.

Some of the new rights that have been included in state constitutions are the

- right to education (e.g. Germany a7, South Africa a32) and even in some cases the right to state-supported mother tongue education (e.g. India a30, Canada a23);
- rights of families and children (e.g. Ireland a41, Germany a6, Namibia a14 and 15, South Africa a30);
- rights of the unborn (e.g. Ireland a3);
- rights of minorities, cultural and language groups (e.g. Canada a16, India a29, Namibia a19, South Africa a31);
- rights of workers (e.g. Brazil a4, South Africa a27);
- right to a healthy environment (e.g. South Africa a29);

- right to strike and lockout (e.g. South Africa a27).

Traditional civil and political rights have also been subjected to new interpretations with the passage of time. A particular right will for example be interpreted differently in the year 2000 than was the case two centuries earlier. This is evident for instance in the way the US Supreme Court has gone through various phases in its efforts to apply the equality clause. Let us not forget that it was under the US Bill of Rights that "separate but equal" education was at one stage held to be constitutional. (Refer to Plessy v Ferguson 1896.)

The new content and interpretation that have been given to fundamental rights are also evident in the following cases:

- The qualification of the equality principle to provide for the constitutionality of measures to address past injustices through affirmative action.
- Expanding the meaning of right to life to include the quality of life of a person – thus providing the Supreme Court of India with a rationale for preventing the eviction of people from their dwellings.
- Protection against inhumane treatment and respect for the right to dignity being interpreted as forming the basis for claims for social assistance (e.g. electricity supply) from the state
- The right to dignity is interpreted as including having access to proper medical and health facilities and treatment.

In countries with heterogeneous populations it could also include the right of minorities to maintain and develop their cultural identity

Why, one could ask, are new interpretations of old rights necessary? There are various reasons. Firstly, societal circumstances change and the interpretation given to bills of rights must keep track of the needs and requirements of society. Secondly, the legal obligation of the state to take certain active steps to realize and respect individual rights is increasingly acknowledged. Related to this is the enormity of the problems facing many (especially developing) countries and the belief that only the state has the resources and capacity to effectively address certain issues. Thirdly, human rights philosophy acknowledges that fundamental rights have to be adaptable, as more insight into human nature and the organization of government is gained.

#### **4 SOCIO-ECONOMIC RIGHTS**

The intensity of the international debate on social and economic rights reached new heights after the Second World War, when the welfare state emerged and increasing attention was given to the plight of people in developing countries. Up to that stage the general wisdom had been that only classical civil and political rights ought to be protected in a constitution. Some examples of proposed socio-economic rights are the right to work, the right to shelter, the right to freedom from hunger and the right to protection of health.

The proponents and opponents of protection of social and economic rights differ mainly as to whether the state should have a passive and non-interventionist role, or whether it should be

under a justifiable legal obligation to be active and interventionist in correcting socio-economic disparities. Although there is general agreement that the state has an obligation to the poor and infirm, there are different views on the nature of this obligation is it legally or only politically enforceable?

The following are some of the arguments that have been raised in favour of and against the inclusion of socio-economic rights in the South African Constitution:

- Yes, the state should be under a justiciable obligation to protect socio-economic rights. International law and various agreements support this argument. No, the state only has a moral and political obligation to improve the situation of the poor. In international law a distinction is drawn between justiciable rights (e.g. Covenant on Civil and Political Rights) and aims of policy (e.g. Covenant on Social, Economic and Cultural Rights).
- Yes, new rights should be added to the bill of rights as circumstances change. No, most socio-economic aims or ideals have not been defined sufficiently and clearly as rights to be included in the bill of rights. " Yes, the general population will be looking at the bill of rights with expectations that their needs will be recognized and addressed. No, the inclusion of unenforceable "rights" will erode the credibility of the whole bill of rights. Political parties should develop policies aimed at meeting public aspirations.
- Yes, the state has the infrastructure and capacity to alleviate the desperate position of the poor. No, the state has in general failed to deliver services efficiently and sustainably.
- Yes, the judiciary is well placed to review government priorities. No, the separation of powers will be threatened by the courts interfering in political decisions.

The recognition and protection of social and economic rights has gained more ground in international law than in the constitutional and legal frameworks of individual states. Four international documents that illustrate this are the Universal Declaration of Human Rights; the Covenant on Social, Economic and Cultural Rights; the European Social Charter; and the Banjul (African) Charter on Human and Peoples' Rights. The social and economic rights provided for in the African Charter are all, individually and collectively, "geared towards development". However, as in the case of the other three documents, the African Charter is non-binding: states are not legally obliged to uphold the rights contained in it.

Experience in the protection of social and economic rights in international law is varied. The arguments raised against their inclusion in state constitutions have, albeit to a lesser degree, also been applied to international law. Support for their recognition at that level has, however, been increasing and is currently of such a nature that Pecses-Barba concludes:

It is true that one can no longer speak, even from the most classic positions of juridical science, of an en bloc rejection of economic, social and cultural rights which, at least in part, adopt techniques of organization similar to those of the rights of liberal origin.

A difficulty with the operationalization of social and economic rights – and the setting of universally acceptable benchmarks for their realization – is that capacities, standards,

priorities and resources differ substantially from country to country. This raises the question whether one could not develop a "minimum threshold for human rights realization". This would mean that thresholds would be used to measure indicators such as nutrition, infant mortality, unemployment, income and life expectancy.

A national standard could be devised so as to enable the identification of problem areas and communities, the setting of priorities and the launching of programmes. A "core list of rights", accompanied by minimum thresholds, could for instance include rights to food, health and employment. However, account will have to be taken of the fact that even within countries differences will exist in capacities, resources, income levels, etc. The protection of socio-economic and some other human rights requires a form of state intervention in the economy which will ensure at least a minimum level of development and availability of public services. At the same time critics have emphasized that state intervention actually weakens the ability of a country in the long term to develop its economy. Consequently, whatever a state does to meet basic needs will in another way reduce the country's ability to satisfy those needs.

Even in states where social and economic rights are justifiable, they differ from civil and political rights in that their implementation is normally limited by financial and other constraints; or provision is made for their gradual implementation only and not with immediate effect; while in other countries they are recognized as state goals and not as justiciable rights.

In a number of states provision is made for so-called "directive principles of state policy" which cover certain non-justiciable social, economic and other ideals while falling short of being human rights as such. Ireland and India were the first two countries to include directive principles in their constitutions, but numerous countries have followed their lead, for example Spain, Portugal, Brazil, Nigeria, Namibia and Germany.

The experiences of countries with directive principles are varied. While the Irish directive principles have basically been ignored, the Indian and German directive principles have played a crucial role in shaping socio-economic policy in the respective countries.

India has over a period of 40 years seen the development of directive principles from mere unenforceable guidelines to powerful constitutional and thus legal provisions that could be used to limit fundamental rights in order to achieve certain socio-economic goals. The directive principles paved the way for the establishment of what was called an "economic democracy".

The application and the interpretation of India's directive principles have gone through various phases since their inception:

- During the first phase the fundamental rights were regarded as "sacrosanct" and of far greater importance than the directive principles. This meant that any legislation that was in conflict with the bill of rights, even if it sought to further the aims of the directive principles, was null and void.
- The second phase witnessed more intense efforts to harmonize the bill of rights with legislation that provided for social and economic restructuring. The courts were

forced by political and other pressures to pay greater attention to the directives and to treat them as complementary to the bill of rights.

- The third phase has thus far been characterized by an even greater awareness by the judiciary of the need for social and economic restructuring, and of the obligations placed upon the state by the directive principles. In the landmark ruling of *State of Tamil Nadu v Abu Kavier Bai* the court ruled that it had a duty to harmonize the principles with the bill of rights, even if the directive principles were not justiciable. The obligations arising from the principles could therefore be used as a rationale for imposing limitations on fundamental rights. As a result the Supreme Court ruled that legislation providing for minimum wages did not infringe on the freedom of contract, that fixing of prices was constitutional given the obligations placed on government by the directive principles, and that land reform legislation which required property to be transferred only to certain communities, was constitutional.

In Germany the Basic Law contains a number of directive principles or *Staatszielbestimmungen* as they are called, for instance that Germany shall be a democratic, federal republic, that it shall be a social state, and that the environment shall be protected. Although the German directive principles do not create justiciable rights, they have been used to interpret the bill of rights and to limit certain rights in order to achieve the objectives of a "social state". The German Constitutional Court has ruled that the purpose of the "social" clause is to enable the state to take steps to protect the weak and infirm (BVerfGE 5, 10), to enable and encourage the state to implement measures aimed at combating unemployment, to provide social benefits to the population and to address social inequalities in general (BVerfGE 1).

## **5 THE SOUTH AFRICAN DEBATE**

The South African debate between those in favour of and those against the inclusion of socio-economic rights in the constitution has been characterized by arguments similar to those referred to in other states. The ANC has since the acceptance of the Freedom Charter in 1956 been committed to the recognition of these rights, and in its constitutional proposals of 1988 it was again emphasized that socio-economic rights should be placed on the same footing as civil and political rights. The ANC did however concede that the realization of such rights had to take account of "affordability and the issue of appropriate forms of enforcement".

The South Africa Law Commission stressed that although a clear distinction could not be drawn between various "generations" of rights, socio-economic rights in general still had to be defined in a manner that would make their enforceability achievable. The commission stated that while socio-economic rights were laudable from a political point of view, they did not in many cases comply with the requirements for inclusion in a bill of rights.

The possibility of the inclusion of directive principles was also raised in the drafting process. Davis argued for instance that the inclusion of directive principles in the constitution "is an exercise in constitutional integrity for it announces clearly and unequivocally that second – and third-generation rights can only be protected by way of negative constitutional review". However, during the debates in the Constitutional Assembly it was felt in general that directive principles would not offer sufficient legal guarantees that the socio-economic aspirations and claims of individuals would be met.

The interim constitution surprisingly contains very few references to socio-economic rights. This is at least partially due to the nature of the negotiating process at the time and the fact that the ANC realized that a political compromise would be difficult to secure if extensive socio-economic rights were proposed. As a consequence the interim bill of rights contains some second and third-generation rights – e.g. rights to education, culture, workers' rights and environmental rights – which are formulated in a way that stresses the passive role of the state.

The text of the new constitution and its bill of rights – which will replace the interim constitution – had not been finalized by the Constitutional Assembly when this paper was written (March 1996). However the draft provisions include various socio-economic rights:

- the right to access to adequate housing (a25)
- the right to access to health care services, sufficient food and clean water and social security (a26)
- the right to basic education (a28)
- the right to a clean environment (a23)

These rights are qualified by a provision similar to that found in the Covenant on Social, Economic and Cultural Rights, namely that the state "must take reasonable and progressive legislative and other measures to secure each of these rights" (a26(3)). This qualification means that these rights are not immediate and absolute, that their realization will be based on progressive measures, and that the limited capacities of the state will have to be taken into account by courts when adjudicating disputes.

The way in which these rights are qualified ("reasonable and progressive steps") is tantamount to a directive principle as found in other constitutions and in international legal instruments. However, the fact that these rights are included in the constitution gives them more legal, moral and political weight than those of directive principles. This also places them on the same footing as all other civil and political rights. This inclusion of socio-economic rights therefore goes further than most constitutions have gone.

Only time will tell what interpretation will be given to these socio-economic rights. They could form the basis for at least the following four purposes:

- Firstly to provide a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state, although the courts will probably be hesitant to rule on legislative policy that clearly relates to party political priorities. They could also form the basis to claim "passive" state action. An individual could for instance prevent the state from taking certain action (e.g. eviction, industrial developing, privatization) on the basis that it will encroach on his/her socio-economic rights.
- Secondly they could be used as a basis for interpreting the rest of the bill of rights and other provisions of the constitution. The content given to other rights such as the right to life and dignity, could be expanded on the basis of the socio-economic rights. The



powers of the national parliament to override provincial legislation and/or to set national standards could be substantially expanded by these rights.

- Thirdly they could be used to limit the application of other rights. The right to property could for instance be limited by the right to shelter. As in India the state might initiate land reform measures which might appear to be contrary to the property clause but, when read with the right to shelter would be valid. The same could apply to interpretation given to freedom of contract, the right to a clean environment, workers' rights, etc.
- Fourthly the rights could be used as a yardstick for the evaluation of government policy in general and spending priorities of particular departments. Departments could for instance be required to report to parliament on their progress or adapt policies in a "reasonable and progressive" manner to protect and further these rights. The Human Rights Commission could itself investigate the progress of departments in this regard and report what it perceived to be wrong spending priorities and/or policies. The rights could thus become important directive principles of state policy.

## **6 SUMMARY**

The approach to social and economic rights in international and constitutional law can be summarized as follows:

- There is a realization that the classic distinctions between civil and political rights on the one hand, and social, cultural and economic rights on the other, are not always based on sound theory or praxis – in many cases first-generation rights also require positive state action. It is also incorrect to group all social and economic rights together as mere "aims", when many have been refined as justifiable human rights;
- States have been stronger in their support for social and economic rights at the international level through treaties and other agreements, than in their support for the inclusion of similar provisions in their own constitutions and human rights documents;
- "Normal" civil and political rights are being subjected to new interpretation in order to keep abreast of changes in society, while "new" rights are being added to constitutions;
- International and constitutional law has not been able to define many socio-economic "ideals" precisely enough to transform them into justifiable "rights". More effective remedies and mechanisms will have to be developed to ensure that social and economic rights agreed upon are enforced;
- There is a realization that the definition and application of social and economic rights, including a "minimum threshold", may differ between countries on the basis of factors such as resources, state of the economy and national and regional average standards; and
- The inclusion of socio-economic rights in the new South African bill of rights is not only a watershed in constitutional law, its effects on policy formulation in general and the setting of spending priorities will be substantial.