

Against a human rights-based approach to social justice

Human rights activists are increasingly expanding human rights advocacy into the realm of social justice. Yet there is no evidence that an increased judicialization of economic, social and cultural rights delivers better outcomes when it comes to health, education and living standards. Moreover, a brief survey of Amnesty International's reporting on a number of countries shows an overwhelming focus on an abuse-based approach favouring civil and political rights. These findings suggest that a human rights-based approach to social justice is misguided and that human rights activists should resist such a scope creep in their mission.

Introduction

Increasingly the quest for social justice has become interwoven with human rights discourse and advocacy. Since the mid-nineties, the United Nations Human Rights Council (and its predecessor the Commission on Human Rights) has established a number of thematic special procedure mandates related to social justice. These include one on extreme poverty and human rights, which states that:

“The elimination of extreme poverty should thus not be seen as a question of charity, but as a pressing human rights issue. Its persistence in countries that can afford to eliminate it amounts to a clear violation of fundamental human rights.”¹

1 See statement of the Special Rapporteur on extreme poverty and human rights on the website of the Office of the High Commissioner for Human Rights (OHCHR) (date unknown): <http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx>

Amnesty International's annual report from 2010 emphasizes that:

“Increased accountability for the denial of basic economic, social and cultural rights has become ever more important in view of the combined effects of the food, energy, and financial crises which are estimated to have pushed many million more people into poverty. The respect for all human rights, including economic, social and cultural rights, must be an integral part of all national and international responses to the crises.”²

The pursuit of social justice through human rights fits well with one of the central tenets of international human rights, namely the ‘Indivisibility’ of all human rights as affirmed by the Vienna Declaration at the 1993 World Conference on human rights. The concept of indivisibility was particularly aimed at improving the standing of economic, social and cultural rights (ESCR), long the poor relation of civil and political rights (CPR) despite their inclusion in both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

One of the impediments to indivisibility has been the perception that social and economic rights are not justiciable, meaning that they cannot be enforced as individual rights in the same manner as CPR. This perception has been challenged in recent decades as ever

2 Amnesty International (2010), *Amnesty International Report 2010: The state of the world's human rights*, London: Amnesty International Publications. Available at: <https://www.amnesty.org/en/documents/pol10/001/2010/en/>

more states adopted and enforced social and economic rights in their constitutions, as has been the case in South Africa, Brazil, Colombia and elsewhere.

The EU Charter on Fundamental Rights also includes a number of social and economic rights, which can be invoked before the European Court of Justice. Several decisions by the European Court of Human Rights and the Inter-American Court of Human rights have blurred the lines between CPR and social and economic rights.³ The most striking development at the international level was the entry into force of the Optional Protocol to the ICESCR in 2013, which allows for individual complaints against ratifying states, prompting former UN High Commissioner for Human Rights Navi Pillay to state in 2007 that “an optional protocol would help reinforce social justice as a value of the international community”.⁴

Understandably, proponents of indivisibility and social justice have trumpeted this development as evidence that it is perfectly possible to enforce social and economic rights as individual rights, just as is the case with freedom of expression, fair trial etc. And while not all sceptics of justiciability have been swayed, this development has certainly introduced a much less abstract element into the ongoing discussion.

The limited effectiveness of judicializing social rights

Yet while social and economic rights are increasingly being judicialized, very little research has been dedicated to the actual effects of constitutionalizing social rights; in other words does the judicialization of social and economic rights deliver the goods promised by their wording? Do enforceable

social and economic rights deliver social justice? This is a crucial question because despite the heated nature of the debate over social rights, the real question is not whether health, education and adequate living standards are supremely important goods essential for human flourishing, but whether these goods are apt to be realized through the matrix of (justiciable) human rights.

Human rights organizations, in other words, when deciding on whether to dedicate more of their already scarce resources towards the pursuit of social justice, should take into account whether their expertise based on the framework of human rights is likely to help advance the plight of the poor. The absence of robust research prompted this author and Danish economist Christian Bjørnskov to examine this question in-depth. We did so by surveying the constitutions of 188 countries and identifying those states that included social rights in their constitutions (75 at the time of the survey) as well as those countries in which these rights had been made justiciable (37).⁵

Doing so allowed us to build a unique dataset covering the years between 1960 and 2010, where we traced the constitutional status of three main social rights: the right to health, education and social security (which are also protected at the international level in the ICESCR). By statistically comparing the evolution of health, education and relative income differences across countries that have or have not introduced social rights (taking into account a wide range of factors such as national income, democracy and regime type) our findings suggest that the introduction of social and economic rights do not, in general, have robustly positive effects on the population’s long-term social development. We, for example, find no effects of health rights on immunization rates or life expectancy, regardless of whether they are justiciable or not. Even more surprising, we found that the legalization of economic and social rights had a strongly negative medium-term effect

3 See for instance the European Court of Human rights case, *Kjartan Ásmundsson v. Iceland*, 12 October 2004 (App. No. 60669/00), and the Inter-American Court of Human rights Case, *Children’s rehabilitation vs. Paraguay* 2 September 2004, [Ser. C] No. 112.

4 OHCHR (2007) ‘High Commissioner backs work on mechanisms to consider complaints of breaches of economic, social and cultural rights’, Geneva, 16 July. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6155&LangID=E>

5 A working paper is available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323539. An updated version is forthcoming in *The American Journal of Political Science*.

on education, as well as a robustly negative medium-term increase of inflation and detrimental effects of the right to health on child mortality.

Why does the legalization of economic and social rights have negative consequences? Our hypothesis is that the introduction of these new rights cause disruptions, most of which are borne by those already in the education system, and by those least likely to have access to the legal and political system, i.e., the poor. Since the rights do not give governments or private actors more resources, what is likely to occur is simply that governments reallocate scarce resources towards those more likely to claim their newly given rights, whether they are individuals or identifiable groups.⁶ Of course, one can point to people whose lives have been saved by courts ordering expensive treatments, as has happened in Colombia, or people escaping abject poverty based on a right to a certain level of income. But these individual examples obscure our study's broader, macro-level findings.

One might object to such a seemingly cold and calculated 'spreadsheet approach' to human rights, and insist that the individual's human rights should not be subjected to a utilitarian calculus. But in the domain of social rights, one can only do this by turning a blind eye to the effects on real people that are not immediately apparent from the numbers and graphs of our study. The Colombian courts may have saved the lives of a few, but we must ask ourselves: how many died, or were forced to live with a disease that could have been cured, because of resources diverted from them to others who were lucky enough to have access to a good lawyer?

And what about the people whose access to education, housing or social security is affected by the diversion of funds to health, or vice versa, depending on the outcome of cases that appear before courts in no particular order? By definition, resources are scarce, and governments must prioritize. This sits uneasily with the notion of human rights

as a 'trump card' taking priority over other considerations. So while the constitutionalization of social and economic rights has been a victory for human rights activists, it is not clear that it has done very much for the people who were supposed to benefit. These findings are in line with studies on the efficacy of international human rights conventions that generally find very little relation between ratification and improvement (across the whole board of rights) and even less so when it comes to social rights (Hafner-Burton 2013: 79).

It is true that the provision of civil and political rights is not cost-free and also involves priorities and trade-offs. An independent and well-educated judiciary, a civil service committed to the rule of impersonal laws rather than clientelism and corruption, prisons free from torture and a police force protecting the people rather than a regime are all goods that require means. But the level of resources needed to realize social rights are far higher than those needed to ensure a basic system of justice. Moreover, the core content of a number of fundamental freedoms, the absence of censorship, torture, arbitrary arrests and wilful killings, can be achieved by even very poor countries. For instance abolishing censorship does not require significant resources and in most instances the enjoyment of freedom of expression, privacy etc. does not affect other citizens' ability to do the same.

The Danish case

When looking at the relationship between social rights and social justice it is interesting to take the case of Denmark, a well-functioning liberal democracy that combines universal welfare with a deeply entrenched commitment to the rule of law and civil liberties (though a certain erosion of civil liberties has been apparent since the turn of the millennium). Denmark commits some 57 per cent of its GDP to government spending, 32 per cent to social protection, but merely 0,9 per cent to its courts, police, prisons and prosecution services.⁷ It is also interesting that with a few

⁶ Ibid.

⁷ Data retrieved from Statistics Denmark: www.statistikbanken.dk/OFF29 and www.statistikbanken.dk/UDG11.

minor exceptions, the Danish constitution does not protect social rights. Moreover, both center-right and center-left governments have rejected incorporating human rights conventions with social and economic rights into national law, whereas the European Convention on Human Rights has played an ever more important part in Danish law since 1992, ensuring a stronger protection of, inter alia, press freedom, private and family life, and against arbitrary deprivations of liberty. During the adoption of the Optional Protocol to the ICESCR, the Danish government explicitly rejected ratification thereof:

“Denmark firmly believes that the majority of the rights in the ICESCR is insufficiently judiciable and therefore less suited to form the basis of an individual complaints mechanism. Moreover, due to the vague and broad nature of the rights in the covenant, Denmark fears that there is a serious risk that the Committee on Economic, Social and Cultural Rights will end up both functioning as a legislator in the area of economic, social and cultural rights and determining the allocation of state parties’ resources within this sphere. Denmark finds both scenarios unacceptable, as we place great importance on the fact that the allocation of resources within the economic, social and cultural sphere is a national matter, which is the responsibility and prerogative of national, democratic institutions with direct, popular legitimacy.⁸”

The Danish position demonstrates that a rejection of justiciable social and economic rights does not necessarily entail a rejection of the underlying ideal of social justice based on a universalist welfare state, and that in fact the divisibility of human rights is perfectly compatible with the achievement of this ideal. The Danish welfare state has been built and maintained by various governments with different ideological positions. Some of these governments have sometimes felt compelled to adopt reforms such as increasing the retirement age, lowering and limiting accessibility to certain benefits, slashing spending on

8 Explanation of Position of Denmark at the 63th session of the United Nations General Assembly, 16 September 2008.

vulnerable groups and numerous other pragmatic policies that are difficult to square with a human rights-based approach to social justice. What has been crucial for the development of the welfare state, however, has been the ability for civil society and mass movements to mobilize public support that would ultimately crystallize into political power.

This struggle for a social welfare state was intimately interwoven with the fight for civil and political rights, as the founding members of the Danish labour movement were frequently arrested, imprisoned, harassed and sent into exile in the late 19th century, due to their political views which were regarded as seditious (Engberg 1975). Accordingly, the first manifesto of the Danish Social Democratic Party demanded: “The abolishment of all press laws, association- and assembly laws, and all other laws whereby a People can be restricted from manifesting its thoughts in word and writing”.⁹ Only when these basic freedoms were ensured were its members able to create the platform that would catapult that movement into power, making the Social Democratic Party the most successful party in Danish political history, measured by the number of terms in power.

Limited usefulness of legalizing economic and social rights to pursue social justice

The difficulties of applying a human rights approach to social justice in practice, rather than in mere rhetoric, is also demonstrated by an, admittedly, brief and non-exhaustive, overview of Amnesty’s actual reporting on twenty countries from 2005-2015. The overview focuses on ten ‘Global Players’ (US, UK, France, Brazil, Russia, China, South Africa, Argentina, India and Saudi Arabia) and the ten least developed countries in the world (Congo, Niger, Mozambique, Chad, Burkina Faso, Mali, Eritrea, Central African Republic, Guinea and Burundi).

9 The ‘Gimle programme’, paragraph 4 adopted on 6-8 June 1976. Available (in Danish) at http://www.historiefaget.dk/typo3temp/tx_cliopdfprint/KildeopgaveomSocialdemokratiet_685002_jesp476b.pdf

The brief overview suggests that Amnesty continues to prioritize work on classic civil and political rights: 80 per cent of the rights violations identified in Amnesty’s reports on what I label ‘Global Players’ related to civil and political rights, 12 per cent related to ‘hybrid rights’ (such as rights of migrants that include both elements of CPR and social and economic rights) and a mere 8 per cent of the rights identified were social and economic rights. For the least developed states the corresponding numbers were 86, 10 and 4 per cent respectively.

Even when the reports focus on social and economic rights, the criticism is often aimed at abuses (such as forced evictions and discrimination), rather than more general criticisms of economic policy or fiscal priorities such as the lack of provisions of public goods such as housing, jobs or social security. While these findings are only indicative and should be followed up by a more comprehensive study, they strongly suggest that Amnesty’s country-specific research overwhelmingly reflects an ‘abuse-based approach’, that naturally favours a predominant, but not exclusive, focus on CPR, that protect individuals against such readily identifiable abuses by state authorities.

Global players

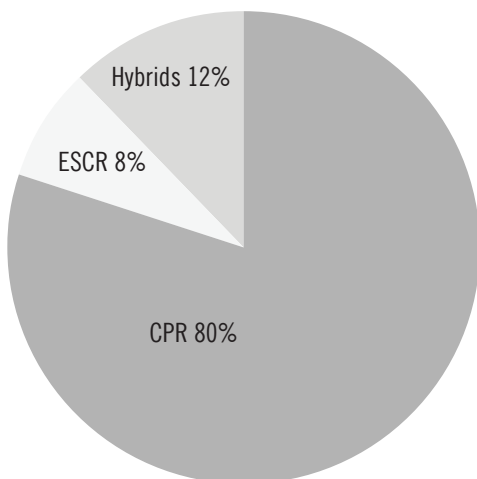


Table 1: Rights violations mentioned in Amnesty’s annual reports (2005-2015) for US, UK, France, Brazil, Russia, China, South Africa, Argentina, India and Saudi Arabia

Least developed countries

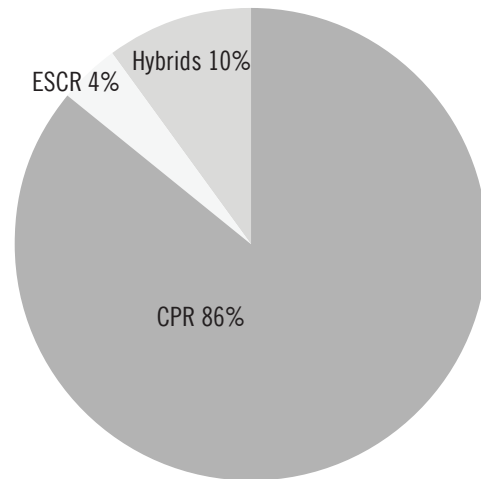


Table 2: Rights violations mentioned in Amnesty’s annual reports (2005-2015) for Congo, Niger, Mozambique, Chad, Burkina Faso, Mali, Eritrea, Central African Republic, Guinea and Burundi

Amnesty’s apparent bias towards CPR, it is submitted, reflects that when moving from rhetoric to concrete action, social justice is an elusive concept that cannot be neatly captured by the limited and simplistic language and framework of human rights. Questions of social justice are infinitely more complicated and complex than instances of censorship, torture or arbitrary arrests that can readily be identified as human rights abuses. There is no set and agreed upon universal formula for alleviating poverty, and in democracies political parties and the electorate will have legitimate differences of opinion on how to achieve social justice and how to resolve the inevitable trade-offs and priorities involved in matters of economic and social policy.

Amnesty’s approach thus seems to prove right veteran human rights defender (and contributor to this essay volume) Aryeh Neier (2013), who recently argued against social justice, insisting instead that:

“Human rights, in my understanding of the concept, are a series of limits on the exercise of power. The state and those holding the power of states are forbidden to interfere with freedom of inquiry or expression. They may not deprive anyone of liberty

arbitrarily. They are prohibited from denying each person the right to count equally and to obtain the equal protection of the laws. They are denied the power to inflict cruelty. And they must respect a zone of privacy.”

The way forward

The lesson of these findings is not that we should be indifferent to the plight of the poor or abandon the quest for social justice, but rather that human rights are a blunt and ineffective instrument for alleviating poverty, or securing access to health and education. Human rights can help shine a light on, and remedy, instances of clear abuse, including in the economic and social domain such as large-scale forced evictions, policies of deliberate food deprivation (think North Korea and Ethiopia), or discrimination in access to health and education. They cannot, however, deal efficiently with the complexities of general policies on health, education and poverty.

However, it would be mistaken to conclude that turning our backs on a rights-based approach to health, education and poverty also means turning our backs on the sick, illiterate and poor. It is not that these goods are any less important than free speech or the prohibition against torture. But the inherent complexity of these goods makes human rights ill-suited to provide them for those in need.

What the human rights movement has succeeded spectacularly in, is to provide the basic framework that allow those in civil society who care about poverty, health and education to campaign, disseminate ideas, hold political leaders accountable and ultimately achieve political change. As such, human rights activists help provide the platform for social justice activists, who can then use their skills and expertise campaigning for their vision of the good global society. But by using ‘human rights’ to solve other vital policy questions, those who care most about the poor may actually be making things worse.