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Social and Economic Rights: A Critique

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BY WAY OF INTRODUCTION, let me first make clear that I favor a fairer distribution of the world’s resources; however, I believe that the effort to achieve fairer distribution has to take place through the political process. For the most part, although there may be some small exceptions, it cannot take place through the assertion of rights. I do not think that rights are an abstract concept. I think they are a contract between a citizen and a state, or a citizen and her community, and that a citizen has to be able to enforce her side of that contract. Rights only have meaning if it is possible to enforce them. But there has to be some mechanism for that enforcement, and adjudication seems to be the mechanism we have chosen. Therefore, from my standpoint, if one is to talk meaningfully of rights, one has to discuss what can be enforced through the judicial process.

I will readily concede that the enforcement of certain civil and political rights has economic ramifications. That is, if one believes in a person’s right to a fair trial, and that person is to have counsel, there is going to be a cost in providing counsel for those who cannot afford it. Similarly, if one believes that it is cruel and unusual punishment to place people in prisons that are overcrowded and filthy, there is going to be an economic cost in providing decent prisons. But although there certainly will be economic ramifications of efforts to enforce such rights, they do not involve a broad redistribution of society’s resources or its economic burdens. Therefore, I would distinguish the incidental costs of protecting civil and political rights from the much more substantial costs of economic redistribution.

Furthermore, there will always be, in unfair economic distribution, elements of invidious discrimination, discrimination on grounds of race or gender, or denials of due process. In these circumstances, I believe it is appropriate to invoke rights. For example, if a town provides roads and sewage collection, or water and electricity, to people of one race and not to those of another, obviously it is appropriate to invoke discrimination on grounds of race to challenge that kind of injustice. Indeed, that sort of challenge has been made in a number of important cases. But I think of these matters in terms of race discrimination, which involves a denial of civil and political rights, and not economic redistribution.

Finally, I want to make it clear that certain constitutions incorporate some things that could be called economic and social rights with a certain degree of legislative specificity. For example, a constitution may provide that every child shall be entitled to a free primary school or a free secondary school education. When a constitution provides that level of legislative specificity, I think it is certainly appropriate to use the judicial mechanism to enforce one’s rights accordingly.

SOCIAL/ECONOMIC RIGHTS AND THE DEMOCRATIC PROCESS

THE CONCERN I HAVE WITH ECONOMIC and social rights is when there are broad assertions of the sort that appear in the Universal Declaration of Human Rights or that appear in the South African Constitution, which speak broadly of a right to shelter or housing, a right to education, a right to social security, a right to a job, and a right to health care. There, I think, we get into territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail.

In my view, the purpose of the democratic process is essentially to deal with two questions: public safety and the development and allocation of a society’s resources. Alexander Hamilton, writing in The Federalist Papers, called the judiciary “the least dangerous” branch of government because it has neither the power of the purse nor the power of the sword.1 Economic and security matters ought to be questions of public debate. To withdraw either of them from

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“If a person needs a kidney transplant to save her life, another needs a heart-bypass operation, and still another needs lifelong anti-retroviral therapy. All of these are life-saving measures, but they are expensive. Then there is the concern about primary health care for everyone. If you are allocating the resources of a society, how do you deal with the person who says they need that kidney transplant or that bypass or those anti-retroviral drugs to save their life when the cost of these procedures may be equivalent to providing primary health care for a thousand children? Do you say the greater good for the greater number, a utilitarian principle, and exclude the person whose life is at stake if they do not get the health care that they require? I do not believe that is the kind of thing a court should do. Rather, I think that many different considerations need to be taken into account, and that only through a process of negotiation can an outcome be reached that, although it might not satisfy everybody, allows society to grapple with questions that affect a whole community of people.

Consider next the question of education. What if a constitution talks about a right to an education but is silent as to the type of education people should be entitled to? A society may say that it needs a certain elite — scientists, engineers, and brain surgeons — as well as people who are going to be able to work effectively in factories and service jobs. Does someone have a right to say they are entitled to an elite education, that they should have the benefit of a particular education over another? Can you deal with these questions through the adjudicatory process? Again, I do not believe it is possible.

Finally, consider the question of jobs. Suppose that a decision is made through the legislative process that we have to spend a certain amount on building roads because we want peasants to be able to take their goods to market for sale. Suppose further that we have to build a port to export those goods. Again, can you deal with a society's decision to spend some of its resources on these matters rather than provide jobs at a certain level for every single person? Can the judicial process deal with the question of the short-term need for jobs and social security as opposed to that of long-term socio-economic growth? The same policies are not going to be appropriate to deal with short-term needs and long-term economic interests. It is the political process that has to strike the appropriate balance on such questions.

**Civil and Political Rights**

*Part of my concern with this question of so-called economic and social rights is that I am a believer in very strong civil and political rights: the right to free speech, the right to assemble, the right not to be tortured, etc. Those rights have to mean exactly the same thing everywhere in the world. With social and economic “rights,” however, it is inevitable that they are going to be applied differently in different places. That is, if you are talking about one country with extensive resources and one that is very poor, there is not going to be the same right to shelter or to health care. Resource allocation has to come into*
play in determining what is going to be provided, and it is appropri-
ate that countries should deal with these matters in different ways
depending upon their resources.

But suppose that one takes that same idea — that different
stages of development mean different things for each country —
and applies it to the concept of civil and political rights. Suppose
China or Zimbabwe says it is not a developed country and there-
cannot provide the same civil and political rights as a developed
country. If you introduce the idea that different stages of develop-
ment mean different things as far as rights are concerned, it is not
going to be possible to prevent that from carrying over into the
realm of civil and political rights. Therefore, I think it is dangerous
to allow this idea of social and economic rights to flourish, particu-
larly because there will always be different stages of development
and different resources to consider in determining benefits.

Another way in which the idea of social and economic rights
is dangerous is that you can only address economic and social dis-
tribution through compromise, but compromise should not enter
into the adjudication of civil and political rights. I do not want a
society to say that it cannot afford to give individuals the right to
speak or publish freely, or the right not to be tortured. Instead, I
want to be able to argue as strenuously as possible for these rights
and say it does not matter what your other concerns are. Everybody
is entitled to speak. No one may be tortured, no matter the situa-
tion. We know that there are many people who argue that there are
considerations that ought to allow governments to torture some-
body because of “exigent circumstances.” But I do not want to leg-
itize compromises as far as civil and political rights are concerned.
Putting economic and social rights on the same plane as civil and
political rights implicitly takes an area where compromise is essen-
tial and brings that into the process of rights adjudication.

Then of course there is the way in which economic and social
rights were dealt with by the Soviet Bloc countries (when there was
a Soviet Bloc), and the way that China deals with such questions
today. Such governments claim that they balance economic and
social rights against civil and political rights. In fact, the Soviet
Bloc did not provide fair distribution of economic and social
resources, but it argued that although it might not have been ade-
quately protecting free speech it was providing the right to social
security. It balanced one set of rights against another. I think such
a balancing approach is very dangerous to civil and political rights.

Finally, I would say that it is important to recognize how sig-
nificant civil and political rights are in dealing with economic and
social inequities. Probably the best-known work on this subject is
Amartya Sen’s research on famine, in which he persuasively demon-
strated that no famine has occurred since the end of the Second
World War in countries where there was democratic accountability
and the ability to communicate freely.2 Civil and political rights can
be tremendously significant, not only in the area of famine, and
often are crucial when dealing with economic and social inequities.
Accordingly, I believe it is important to ensure that civil and polit-
ical rights are as strong as possible. This is not only because of their
intrinsic significance, and not only because of their essential role in
making the democratic process possible, but because civil and polit-
ical rights, although not an ultimate solution to the unfair distribu-
tion of resources, are among the most effective ways to address
social and economic injustice.

ENDNOTES: Social and Economic Rights

1 The Federalist No. 78 (Alexander Hamilton).
2 See Amartya Sen, Development As Freedom (Anchor 2000); Hunger and
Entitlements (World Institute for Development Economics Research 1987);