

Achieving Social Rights Through the Principle of Equality

Text of a lecture delivered by Bob Hepple¹ on Human Rights Day, 10 December 2014.

The Universal Declaration of Human Rights

Sixty-six years ago, on 10 December 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR). The foundation stone of the UDHR is the principle of equality. Article 1 declares: “All human beings are born free and equal in dignity and rights”. Article 2 states that “Everyone is entitled to all the rights and freedoms set forth in this UDHR without distinction of any kind, such as race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

These Articles **have three** significant features:

1. they are **universal** – they apply to **everyone**;
2. they apply to all **distinctions of every kind**, not limited to the specific grounds that are listed such as race or sex and they are open-ended – “or other status”;
3. they apply to **all the rights set forth in the UDHR**.

These rights are of four kinds:

1. to **life liberty and personal security** (Articles 3 to 11) – individual rights that had been recognised since the French revolution;
2. **rights in civil society** (Articles 12 to 17) such as freedom from arbitrary arrest and detention, freedom from interference with privacy, freedom of movement, the rights to seek asylum, to a nationality and to own property;
3. **rights in the polity** (Articles 18 to 21) such as freedom of religion and belief, freedom of expression and opinion, freedom of assembly and association and participation in government;
4. **social, economic and cultural rights** (Articles 22 to 27) including the right to social security, the right to work, free choice of employment, to just and favourable remuneration, to form and join trade unions, to rest and leisure, to an adequate standard of living including food, housing, medical care and social services and the right to education and to participate in the cultural life of the community.

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Economic, Social and Cultural Rights (ESCR) – Why are they difficult to enforce?

It is this fourth category of rights; economic, social and cultural rights (ESCR), that has been the most controversial and difficult to achieve. There are a number of reasons for this.

First, ESCRs face **political** objections. The inclusion of these rights was initially supported by the US delegation (led by Eleanor Roosevelt) but opposed by Britain and some Commonwealth countries, notably white-dominated South Africa and Australia. There was soon a shift in attitudes in America where Frank Holman, President of the American Bar Association, dubbed it a “pink paper” that would promote “state socialism, if not communism.”² In the “deep freeze” of the Cold War, the USA became less enamoured of the idea of enforceable ESCR. It had been contemplated that there would be a single human rights instrument to elaborate the UDHR; instead two separate instruments were adopted by the UN in 1966; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The latter of these instruments is a much more aspirational document, and is looked on as inferior to the ICCPR. This was also the fate of ESCR in Europe, with the European Social Charter a much weaker instrument than the European Convention on Human Rights. The separation of ESCRs from civil and political rights has had lasting effects. It has been an obstacle to the enforcement of economic and social rights.

Secondly, there have been **philosophical and ideological** objections to the notion of enforceable ESCRs. The current Chair of the Equality and Human Rights Commission, Baroness O’Neill in her academic writings, influenced by Kant, argues there cannot be a right, “unless others have the obligations to respect these rights”.³ In the absence of agents whose duty it is to provide particular goods and services, such as health care or education, “rights are a mere pretence.” She distinguishes “liberty rights”, such the right not to be interfered with in one’s property or privacy, from positive claims to something like education, healthcare and food. A liberty right is automatically a universal right against all others and all institutions. For example, we all have an obligation not to torture someone else or to invade their privacy, but there can be no universal obligation to provide goods and services. There must be identifiable obligation bearers. These are imperfect obligations. This is not the unanimous view of philosophers, for example, Amartya Sen argues that rights can be attached to imperfect obligations requiring serious consideration to be given by anyone in a position to provide the goods or service to a person whose human right is threatened. The UK legislature has followed Sen’s approach by requiring public authorities to have “due regard” to the need to eliminate discrimination and advance equality of opportunity.⁴

2 Glendon, M., *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, 2001, p. 193.

3 O’Neill, O., *Bounds of Justice*, 2000, p. 97.

4 Equality Act 2010, Section 149.

Jude Browne points out that the distinction between liberty rights as opposed to positive rights in goods and services is not as sharp as O’Neill suggests.⁵ The delivery of liberty rights requires institutional structures such as courts and enforcement agencies in a similar way to those required to satisfy positive claims. But O’Neill’s view remains influential.

The **ideological** objections to economic and social rights (ESR) come from those who want to see a contraction of the state. The collectivist, social welfare ideology of the immediate post-war period in which the UDHR was drafted, has increasingly been replaced by a revival of 19th century liberal ideology; the view that the state and other agencies cannot control civil society and the economy and should not try to do so. This has been the inspiration for the “red tape” challenge of the current Coalition Government in the UK; limiting employment rights and other ESCRs. The threat of continued austerity policies by a Conservative-led government after the next British general election in 2015, carries with it the implication that ESCRs will become even more difficult to realise.

A third obstacle to the realisation of ESCRs is said to be **institutional incompetence**. This is the strongest reason advanced for the failure to enforce substantive socio-economic rights. A court will normally decline to determine the substance of indeterminate obligations such as those to provide “adequate housing” or “sufficient food and water”.

This is illustrated by the South African case of *Mazibuko*.⁶ Section 27(1)(b) of the Constitution confers a right of access to “sufficient water”. Section 27(2) provides that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of this right. The Water Services Act 1997 sets out criteria for determining the sufficiency of water supply services. The City of Johannesburg restricted the free basic water supply to all residents to the standard of 25 litres per person or 6 kilolitres per household per month, which is the standard set out under the 1997 Act, whose constitutionality was not challenged. The High Court held that this national standard was insufficient to meet residents’ basic needs, and ordered the City to provide 50 litres per person per day. The Supreme Court of Appeal held that 42 litres per day was sufficient, taking into account expert evidence and also decided that a system of prepaid water meters was unlawful. However, the Constitutional Court overturned these decisions. In a judgment written for a unanimous Court, O’Regan J said:

Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the

5 Browne, J., “O’Neill and the Political Turn against Human Rights”, *International Journal Politics, Culture and Society*, Vol. 26, 2013, pp. 291–304.

6 *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC). See the critique by Liebenberg, S., *Socio-Economic Rights Adjudication under a Transformative Constitution*, 2010, pp. 466–480; and generally McClean, K., *Constitutional Deference: Courts and Socio-Economic Rights in South Africa*, 2011.

*right. This is a matter, in the first place for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.*⁷

There is a long tradition of judicial deference to the legislature, as well as a deeply entrenched separation of law and politics in democratic countries. Under a democratic constitution, the notion of institutional competence has been justified by the separation of powers, and the unaccountability of the judiciary. The independent judiciary is essential. Its duty is to keep the legislature and executive within their powers, but the flip side of this is that it is bound to respect the policy choices and operational decisions made by the elected organs of government. The result is that the role of the judiciary in relation to positive duties is essentially managerial and process-oriented.

A fourth and even deeper reason for the difficulty in directly enforcing ESCRs is their **incompatibility with a market system based on the right to private property**. By its nature the free exercise of this right in a market system generates inequality, cyclical unemployment, and poverty, the very evils that socio-economic and equality rights seek to remedy. After the crisis of the First World War, a new generation of social democratic lawyers, notably the Austro-Marxist Karl Renner, detected a functional transformation in the institution of private property. Using the example of state regulation of a privately-owned railway company, he observed that private property had in effect become a public utility, though it had not become public property. “The sovereign owner of private property has suddenly, by one stroke of the pen, been converted into a subject who has public duties.”⁸ He believed that the development of public law institutions and procedures regulating labour, housing, education etc. represented the “first unavoidable step to nationalisation.”⁹

By the end of the Second World War, however, the experience of the great depression of the 1930s and its outcome in fascism and war, made theorists of the post-1945 welfare state take a more pessimistic view about the possibility of restricting private property rights through social legislation in a democratic capitalist state. For example, Polanyi argued that this would undermine the functioning of the market system, and said it was implausible that there could be a lasting solution to the problem of poverty and unemployment in a market-based economy.¹⁰ This conclusion is shared by those neo-liberal economists who see social and labour

7 *Ibid.*, Para 61.

8 Renner, K., *The Institutions of Private Law and their Social Functions*, 1949, pp. 118–122. For a critique see Kinsey, R., “Despotism and legality” in Fine, B., et al (eds) *Capitalism and the Rule of Law*, 1979, pp. 46–64.

9 *Ibid.*, p. 121.

10 Polanyi, K., *The Great Transformation: The Political and Economic Origins of our Time*, 1944, p. 234.

regulation as contributing to rising labour and social costs, increasing unemployment, and putting a country which has such rights at a competitive disadvantage in the global economic system.¹¹ In the present period of almost unrestrained financial capitalism in which large sums of capital can be moved around the globe at the touch of a computer key, the weakness of nation states in protecting the poor and vulnerable against the growing power of corporate private property is self-evident.

The South African Constitutional Court has recognised the tension between enforcement of socio-economic rights on the one hand, and the right to property, on the other hand. It has arrived at the conclusion that the best way of balancing these rights in order to achieve just and fair outcomes is through dialogue. In *Port Elizabeth Municipality v Various Occupiers*¹² Sachs J, delivering the Court's unanimous judgment, elaborated that the Constitution:

[I]mposes new obligations on the courts concerning rights relating to property not previously recognised by the common law...It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home... The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant to each particular case.¹³

After remarking that there are some contradictory values that are intrinsic to the way our society operates that neither the legislature nor the courts can solve them with "correct" answers, he continued:

In seeking to resolve [these] contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.¹⁴

11 Hepple, B., *Labour Laws and Global Trade*, Hart Publishing, 2005, p. 10.

12 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

13 *Ibid.*, Para 23.

14 *Ibid.*, Para 39. The continuing importance of the owner's common law rights is shown by *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), where the state was required to compensate owner for occupation of its property where the state is unable to provide occupants with suitable alternative accommodation).

I have argued elsewhere that “meaningful engagement” between the state and communities affected by its policies. In other words “deliberative democracy” is likely to be the best way to realise ESCRs, and that the courts have a role in encouraging and supervising such engagement.¹⁵

Using the principle of equality

But there is also another approach that can be taken, and this is elaborated in the Equal Rights Trust’s *Economic and Social Rights in the Courtroom: a litigator’s guide to using equality and non-discrimination strategies to advance economic and social rights*.¹⁶ The Trust is deeply concerned that, in all the 30 or more countries in which it works, there continues to be significant inequality in the enjoyment by different groups of ESRs. The Guide argues that one way to move towards the realisation of these rights is through an approach based on the principles of equality and non-discrimination. It provides a detailed step-by-step guide for litigators as to how to raise equality arguments in relation to ESRs.

Although relatively few states have incorporated enforceable ESRs into their constitutions (more usually they are “directive principles of social policy”) progressive equality legislation is increasingly available. Using this legislation to realise ESRs can have special benefits. It can be enforced against non-state actors (increasingly involved through privatisation in the provision of public services). Most states outlaw both direct and indirect discrimination. International law imposes positive duties to ensure equality, and some national legislation requires pro-active steps by the state to eliminate discrimination and promote equality. In the UK we have the Public Sector Equality Duty.¹⁷ This has been of considerable value, despite some limitations, in the current period of austerity by stopping or delaying cuts in public services where it can be shown that the authority failed to give due consideration to the impact on one or more groups with protected characteristics. Some countries require affirmative action, in others such as the UK it is voluntary. This can enhance the realisation of ESRs. Equality legislation has particular enforcement mechanisms to ensure access to justice unfortunately, this is no longer the situation in the UK with the imposition since 2013 of crippling tribunal fees, resulting in an 80% drop in case load).

There are many examples, both in the case law of international bodies and courts, and in domestic law, of the use of the equality principle to achieve ESRs. The claim may be based on direct discrimination on a prohibited ground such as race or gender, or indirect discrimination because of a practice or policy which puts members of a particular group at a disadvan-

15 Hepple, B., “Negotiating social change in the shadow of the law” *SA Law Journal*, Vol. 248, 2012.

16 Equal Rights Trust, *Economic and Social Rights in the Courtroom: a litigator’s guide to using equality and non-discrimination strategies to advance economic and social rights*, December 2014. There is an accompanying online compendium of case law available at: <http://www.equalrightstrust.org>.

17 Equality Act 2010, Section 149.

tage which cannot be justified on objective grounds. It may also be based on a failure to take appropriate positive action.

The classic case is, of course, *Brown v Board of Education*.¹⁸ The US Supreme Court ruled that the provision of racially segregated schooling for black children was a violation of the 14th Amendment (equal protection of the laws) to the US Constitution, even in cases where the physical facilities in white and black schools were substantially similar. The Court found that the effects of segregation had adverse psychological effects, engendering feelings of inferiority of black people and depriving them of the benefits of mixed schools. The Supreme Court's decision not only led to desegregation in schools, but helped to shape the civil rights movement. This was achieved without any explicit recognition of the right to education or other ESRs in the US Constitution. The *DH* case¹⁹ and *Croatian schools* case²⁰ are examples of where the right to education and the principle of equality were used against indirectly discriminatory practices which excluded Roma children from ordinary schools. Examples can also be found in other Roma cases on the rights to family life, to housing and of migrant workers not to be expelled initiated by the European Roma Rights Centre in 2010 and 2011 before the European Committee of Social Rights (ECSR). The ECSR found a catalogue of systemic direct and indirect discriminatory violations of these rights by France. The decisions affirm that account must be taken of the needs of vulnerable ethnic groups by decision making bodies. The ECSR has used the principle of equality to achieve inclusive education for children suffering from autism, even in the absence of specific legislation on disability discrimination.²¹ In Canada, the Supreme Court held that the failure to provide interpreters for deaf hospital patients (thus increasing risks of misdiagnosis and ineffective treatment) was a violation of the right to equality in Article 15 of the Canadian constitution.²² These examples, in addition to various others are available in the Trust's Guide and the online compendium of cases.

There is a great debate as to whether discrimination law does or should prohibit discrimination on what has been variously labelled as "socio-economic disadvantage"²³ or "poverty". Some advocate for a specific prohibition of discrimination based on "socio-economic status". One objection to this is that it would benefit the rich as well as the poor (for example, property owners subjected to a mansion tax). Socio-economic status has not been recognised as a basis for discrimination in international law (although "social origin" is) nor in the most progressive jurisdictions. More promising is the notion of "socio-economic situation" such as living in poverty or being homeless, which can lead to stigmatisation and stereotyping. There are several cases in which this has been linked to a prohibited characteristic to support a

18 *Brown v Board of Education* 347 US 483 (1954).

19 *DH and Others v the Czech Republic*, (Application No. 57325/00), 13 November 2007.

20 *Oršuš and Others v Croatia*, Application No. 15766/03, 16 March 2010.

21 *Autism-Europe v France*, Complaint No. 13/2000, 4 November 2003.

22 *Eldridge v British Columbia Attorney-General* [1997] 3 SCR 624.

23 See above, note 17, Section 1 (not brought into force).

finding of unlawful discrimination. The main advantage of being able to rely on “socio-economic disadvantage” is that it is inclusive. For example, if it is found that a particular practice is indirectly discriminatory on grounds of sex because it has a disproportionate impact on child-bearing women, this may exclude poor men with responsibility for children or the elderly. However, in practice, if a rule or practice with a disproportionate impact on poor women is declared to be unlawful, that rule or practice will have to be scrapped or modified and this is likely to benefit poor men as well. The principle of equality may have a “ratchet effect”, once minimum standards of rights has been achieved for one disadvantaged group, the state must apply this on a non-discriminatory basis (for example, Article 14 of the ECHR).

The Trust’s Guide argues that “equality is at the heart of ESRs. It is the historically and socio-economically most disadvantaged groups who do not enjoy ESRs.”²⁴ The equality law approach advocated in the Guide, provides us with a way to outmanoeuvre the traditional objections to the judicial enforcement of ESRs, whether political, philosophic, ideological, market-based or institutional. It calls in aid a principle that is the foundation stone of human rights proclaimed 66 years ago today in the UDHR. That is a principle to which all democratic states play at least lip-service. Our task is to use that principle as part of a more general political and legal strategy, to counteract the widening inequality and growing inequality in modern societies.

Joanna Whiteman who drafted the Guide under the guidance of Virginia Mantouvalou and Dimitrina Petrova, and with advice from a group of experts, is to be congratulated for producing an excellent guide for litigators in this exciting and promising field.

24 See above, note 16, p. 117.