

ECONOMIC POLICIES AND SOCIO-ECONOMIC CLAUSES IN THE SOUTH AFRICAN BILL OF RIGHTS.

The general (or “pre-institutional”) conception of HUMAN RIGHTS points to underlying *moral objectives*, like individual autonomy, self-sufficiency, equality, “creation of a community of equals”, and more.

RIGHTS IMPLEMENTATION requires policies dedicated to that purpose *plus* (in the case of economic & social rights) investment in resources, either accumulated by the right-holding person or received by transfer from others, in order to acquire the “social bases of self-respect” (Rawls), or “effective access to the social conditions of their [individual] freedom” (Anderson) [or other similar formulations].

Working DEFINITIONS:

[1] A *constitution* = “a statement of terms for living reasonably as citizens in a democracy” (Michelman 2000).

[2] A *constitutional right* is a contract between the individual, other individuals and the state that must be enforceable in a court of law in accordance with recognised criteria => thereby it creates legally binding obligations.

[3] A *justiciable right* = a claim amenable to legal consideration and enforcement.

[4] SA Bill of Rights' has an *inherent problem*, according to one informed observer = "[Its] haziness about the level & means [of meeting a right], eg. the right to have access to adequate housing...[implies] that if the level of definition is (by default or deliberately: who knows?) left at *policy judgemental level*, then you lose the definiteness and certainty that a Bill of Rights is intended to confer." (Michelman 2000, italics added)

SOCIAL & ECONOMIC RIGHTS (eg. in South African B of R) = land rights, right to housing, health care, food, water & social security, children's socio-economic

rights, educational rights, and socio-economic rights of detained & sentenced persons, and environmental rights.

**Claimed conceptual & practical
DISTINCTION in the literature =
"real/classic rights" (like right to vote,
habeas corpus & due process, freedoms
of association, belief, worship, etc)**

versus

"rights of access" (like certain socio-economic rights) => Former are claimed to be justiciable, the latter not.

Many pitfalls of interpretation remain here, and a powerful lobby of SA constitutional lawyers *reject* this distinction.

What role exists for economists in the pursuit of human rights goals?

Inter alia, these issues are: conceptual clarification; translation problems in turning statements of aspiration into allocative decisions; emphasising the distinction between constraints & objectives;

stressing the heterogeneity of rights as essential in an economic perspective, eg. setting “investment rights” in opposition to “consumption rights”.

***In sum*, showing the essential issues that inhere in their strategic implementation through policies.**

Recall that “[E]conomists...are the trustees, not of civilization, but of the possibility of civilization.” J.M. Keynes (1944), which is why Carlyle called us “dismal scientists” in the 1830s.

SCOPE of this presentation = what are the *probable* economic consequences of resources being allocated by privileged criteria (lifted out of competing with other uses) to fulfil the enunciated rights in constitutions?

- **Translation problems = abstract formulation of legal rights has to be *interpreted* in a form amenable to resource allocation decisions (formulated policies).**

- **Is there inherent conflict when certain choices are elevated by their status as rights (a rights-based approach) to be placed *beyond* the reach of optimising calculations (an economic approach)?**
- **Pursuing rights fulfilments in ways that provide mainly *consumption* entitlements – in contrast to fulfilling *investment* functions - can *retard* economic growth potential & therefore *decrease* the national capacity to devote resources to the meeting of *all* rights.**
- **This is a paradoxical possibility that stems from the conception & legal interpretation of all human rights that require resources for their attainment.**

MORAL FOUNDATIONS of human rights for an individual = autonomy, liberty, justice as fairness, equality, self-realisation, self-sufficiency, dignity, inviolability, mutuality, etc => there exists an entire *range* of possible formulations of *what it means to be human*.

In turn these entail the creation of conditions judged essential for *human flourishing* => all expressed on a highly *abstract plane*.

HUMAN RIGHTS = are both liberties to act *and* claims to be treated in certain ways by others => *social recognition* is essential otherwise rights remain mere aspirations.

HOMOGENEITY of rights => tease out the consequences of this characteristic for their achievement:

- ⇒ **equal *moral* importance of each & every right,**
- ⇒ **entails equal *political* importance,**
- ⇒ **entails *equal* importance in *economic* allocation,**
- ⇒ **entails implication that it is *NOT legitimate* to make optimising calculations (setting priorities & sequences) aimed at maximising community-wide welfare while relegating individual rights fulfilment to a secondary goal.**

If the starting premise above is disputed – that *not* all rights have equal moral weight – then on WHAT grounds are they to be ranked?

Philosophically puzzling.

“RIGHTS ARE TRUMPS” (Dworkin) = from the inference above it follows that individual rights *cannot* be traded off against the maximisation of community welfare.

=>

Classic formulation (by Rawls) = “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override...Therefore the rights secured by justice are not subject to political bargaining or to the calculus of social interests.” (1971)

Contrasting analyses of RIGHTS certainly exist:

[1] CONSTITUTIONAL formulation = *deontological* in their nature, emphasising duty & obligation by & between individuals;

[2] STRATEGIC/ECONOMIC conception = *consequentialist* or utilitarian, => merit of an action/outcome depends on its consequences for the sum total of human welfare or aggregate utility.

RHETORIC of rights generates *confusion* => because discussion wanders to and fro BETWEEN these two contexts or universes of discourse =>

- **deontological = demand for *recognition* (favoured by lawyers),**

whereas:

- **consequentialist = demand for *realisation* (favoured by policy-makers).**

ABSTRACT terminology of “moral personhood” perfectly valid => but it means an entire *range* of concrete interpretations are *equally* compatible => therefore in the *absence* of agreed meaning & translation *no* firm guidelines exist for implementing choices.

This is a serious challenge.

Illustration of such CONFUSION = a widely held contention by lawyers & philosophers = fulfilment of economic and social rights is asserted to be a *necessary precondition* for the achievement of political, civil & cultural rights (the so-called "indivisibility condition" = if you are poor these rights have lower value to you).

But at what *level* of discussion is this deemed true? Not in practical & historical terms. Eg. in democracies like India are political rights devalued by the prevailing poverty? Not? A little? A lot?

Two examples of obfuscatory rhetoric in the international literature =

[1] "It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity." Maastricht Guidelines on Violations of Economic, Social & Cultural Rights (1998).

[2] “Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be realized, the violation of some rights in favour of the realization of others can never be justified.” American Convention on Human Rights (1988)

=> Such statements are vacuous in *operational terms*. At face value they have meaning but provide *no* implementation guidance whatever.

INDETERMINACY of key formulations in the rights literature = “*progressive realisation*” of rights within the “*maximum*” of the state’s “*available resources*”, and provision of “*access to resources*” (intended to contrast with *immediate provision of resources* towards rights implementation).

Such phrases occur in the international ICESCR Covenant (1966), SA Bill of Rights (1996) & inter alia, the new East European constitutions.

What implications have these phrases for resource allocation decisions?

- ⇒ **First, “available resources” is *not* a constant or fact of nature. Their level at any moment results from a complex set of determinants of *economic growth* (inputs, institutions, policies) still under intensive research scrutiny by economists.**

- ⇒ **Second, past decisions by individuals & the state govern the present availability of resources. Are such past decision variables simply *given* (treated as constraints), bearing no relation to current allocative decisions, eg. *how much* to spend on rights fulfilment *now*?**

⇒ **Third, it follows there is a danger of *circularity* in using “available resources” as governing – setting a minimum as well as maximum limit – of what can or *should be* legitimately spent on rights fulfilment by the current state (enforced by some constitutional watch-dog body).**

OPPORTUNITY COST considerations play no role => in 1996 & before, no serious attempt was made to estimate the cost in foregone alternatives to rights fulfilment *before* their constitutional entrenchment in South Africa => major surprise to some observers, but apparently not to constitutional lawyers, politicians & rights pressure groups?

So this is a further serious & intractable problem. But should we now go back to estimate the cost?

WELFARE STATE experience elsewhere of redistribution policies *cannot* be called upon for support as setting precedents for meeting South Africa’s socio-economic rights.

=>

This is because representative industrial (welfare state) & developing economies (like SA) contain major structural *differences* in sectoral contributions to aggregate output, technology bias & labour intensity, per capita income level differences (by a factor of 10 or more), internal integration, foreign trade & capital flows, as well as in enterprise governance, redistributive institutions, accountability, transparency, access to information & so on.

This listing is familiar to economists.

STATE BUDGETs are treated by rights advocates as a biblical *widow's cruse* [a container which cannot be emptied] out of which all the resources necessary to meet the moral objectives of human rights can be drawn without exhausting it; that is, *without* negative long-term consequences for the economy, if given enough political will to enforce *all* the enumerated rights.

**A fundamental DISTINCTION is essential from an economic perspective between *kinds* of rights by economic function:
=> [1] rights that are *investment* in purpose, in contrast with
=> [2] *consumption* or entitlement rights.**

A broad conception of personal/self investment is necessary here => generic human capital to build up individual *capability* = education, skills, health, command of productive assets => to create *raised capability in economic and social life* for the individual.

[Example from a philosopher = "A person's capabilities consist of the sets of functionings she can achieve, given the personal, material, and social resources available to her." Anderson 1999, following Sen]

Redistribution strategies viewed in such a rights perspective ["investment rights" when distinguished from "consumption rights"] => suggest the KEY QUESTION

= Will income transfers and merit goods aimed at rights fulfilment *by themselves* perform the strategic function of *raising* the level of investment in human & physical capital *disproportionately* in poor individuals & thereby meet the *moral* goals underlying our Bill of Rights?

With the foregoing in mind, to return to the philosophical basis of socio-economic rights => the following *characterisation* of the SA Bill of Rights is tempting.

Peter drunk on democratic euphoria yesterday has bound sober Peter today to a series of economic & social commitments he finds highly problematic to realize.

These problems are not unique to South Africa.

"The majority of contemporary rights advocates accept the view that the concept of rights should extend to economic and social rights..."

[but] the rights movement's commitment...is to a large extent rhetorical. It is possible that proponents of such rights will in time discover new means to enforce them and that jurisprudence will evolve more effective ways to promote such rights through litigation. A dwindling minority of rights proponents are sceptical...and an even smaller number – which includes the present author – doubt that it is desirable. ” (Neier 2012: 92)

CONCLUSION = Neier may be right, but this presentation has raised a set of *troubling possibilities* more than firm judgements about the SA dilemmas.

These have concerned:

[1] Problems in the *operational interpretation* of social & economic rights in the SA Constitution.

[2] The uncertain nature of redistribution strategies when viewed in a rights perspective.

[3] The lack of integration between conceptual frameworks employed in the contrasting disciplines of law & economics.

[4] Meeting economic & social rights does not put in place a process for generating additional resources (under conceivable circumstances it may even slow down economic growth).

Together these make up a range of economic policy challenges that merit (but do not yet receive) the needed *research effort*.

One might say there is too much unanimity of thought in the human rights movement in South Africa.

We need more sceptics if we are to avoid rising cynicism – as well as confusion - amongst all groups about human rights implementation, despite the admiration widespread in the world for our Constitution.

“What is the use of discussing a man’s abstract right to food or medicine? The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician rather than the professor of metaphysics.”

(Edmund Burke, *Reflections on the revolution in France*, 1790)

[Sean Archer, ERSA Conference, Pretoria, 16-17 May 2013]