

Taking Economic, Social and Cultural Rights Seriously

By

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A few years ago I gave a talk in Ireland on economic, social and cultural rights. I explained that these fundamental human rights place binding legal obligations on the Irish Government. At the end of my remarks, we had comments and questions. The first speaker said that she was very surprised -- never before had she heard about these binding economic, social and cultural rights. They must be, she said, “the best kept secret in Ireland.”

Perhaps they are the best kept secret in Japan, too, I am not sure.

In any event, I welcome the opportunity to make a few introductory remarks about these issues here today. I warmly thank the organisers for inviting me here. And I warmly congratulate the non-governmental organisation – Human Rights Now – for taking a leadership role on human rights in Japan, and for including economic, social and cultural rights in its activities.

The last few years have seen some remarkable developments in the field of international human rights. For some decades, the international community focussed on classic civil and political rights – the prohibition against inhumane treatment, the right to a fair trial, freedom of speech, and so on. But, since the late 1990s, the international community has begun to devote more attention to economic, social and cultural rights – the rights to education, food and shelter, as well as the right to the highest attainable standard of physical and mental health.¹

Later, if you wish, we can discuss why this change took place when it did.

¹ The literature is now voluminous. A good place to start is A. Eide et al (eds.), *Economic, Social and Cultural Rights*, 2nd ed., Kluwer, 2001.

In the 1990s, for example, the Council of Europe established a complaints process for economic, social and cultural rights that is beginning to generate some interesting jurisprudence.² The first case led to a finding that Portugal was taking inadequate measures to combat child labour.³

The human rights system that covers the Americas is also taking economic, social and cultural rights more seriously. In a recent case, the Inter-American Commission on Human Rights – which is based in Washington DC – held that El Salvador was obliged to provide antiretroviral medication to a group of petitioners with HIV/AIDS.⁴

The same trend is apparent in the African regional human rights system. For example, the African Commission on Human and Peoples' Rights found a breach of the right to health and a safe environment where the extraction of oil reserves had contaminated the environment damaging the health of local communities.⁵

This renewed attention to economic, social and cultural rights is not confined to regional human rights systems, it also extends to the human rights system of the United Nations. For example, the UN has recently appointed a number of independent experts - Special Rapporteurs - on the rights to education, housing, food and health, to help States better promote and protect these rights.⁶ Before 1998, there were numerous Special Rapporteurs on civil and political rights - but not one on an economic, social or cultural right.

Moreover, this trend is not confined to the regional and UN human rights systems – it encompasses some national jurisdictions, too.

² The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Council of Europe, 1995.

³ *International Commission of Jurists v Portugal*, Complaint No. 1/1998, European Committee of Social Rights (date of report to Committee of Ministers, 9 September 1999).

⁴ *Jorge Odir Miranda Cortez et al v El Salvador*, Report No. 29/01, Inter-American Commission on Human Rights, 7 March 2001.

⁵ *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96 (2001).

⁶ All have produced a number of UN reports that endeavour to deepen understanding of the rights within their mandates. My reports, press statements and various presentations can be found at http://www2.essex.ac.uk/human_rights_centre/rth/

A couple of years ago, Norway incorporated into its domestic law the UN's main treaty on economic, social and cultural rights. South Africa has placed economic, social and cultural rights in its Constitution and rendered them justiciable, generating some important case law on the rights to shelter and health.⁷ The Indian courts continue to adjudicate on economic, social and cultural rights by reading them into classic civil and political rights.⁸ Finland recently adopted an interesting approach: it constitutionalised some economic, social and cultural rights in brief one-sentence formulations with the explicit intention of elaborating these rights in more detailed legislation.⁹ In the United Kingdom, some judges are beginning to interpret the new Human Rights Act - which is a classic catalogue of civil and political rights - in such a way that they tend to reinforce elements of economic, social and cultural rights.¹⁰

There are an especially large number of cases on economic, social and cultural rights being decided by national courts in Latin America. Just to give one example, a few months ago the Constitutional Court of Colombia ordered that the country's health system be restructured by way of a transparent, participatory process based on up-to-date health information. The court's judgement is about 400 pages long. Much of it is based on the right to health.

Civil society is also giving more attention than ever before to economic, social and cultural rights.

Today, in every region of the world, including in the United States, civil society groups are organising around economic, social and cultural rights. They have understood that all human rights - civil, political, economic, social and cultural - are tools for tackling unfairness and disadvantage. Long-established international human rights organisations, like Amnesty International and Human Rights Watch, which have historically focussed on civil and political rights, have recently added some elements of economic, social and cultural rights to their agendas. This year, for the

⁷ For example, *Minister of Health and others v Treatment Action Campaign and others*, (2002) 5 SA 721.

⁸ For example, *Paschim Banga Khet Samity v State of West Bengal*, (1996) 4 SCC 37.

⁹ See Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, Dartmouth, 1996, pp 30 and 51.

¹⁰ For example, *R v Secretary of State for the Home Department ex parte Adam*, (2005) UKHL 66 (entitled *R on the application of Limbuela* before the Court of Appeal).

first time, Amnesty will launch a global campaign on maternal mortality as a human rights issue.

On my visits overseas, I am sometimes astonished by a civil society's fluency and familiarity with economic, social and cultural rights. In some countries, civil society groups actively organise around these human rights. In Peru, they recently demonstrated in the streets demanding that the trade agreement with the United States must not jeopardise access to essential medicines for those living in poverty. Access to essential drugs became a significant issue in the last presidential elections in Peru. A British non-governmental organisation has recently published the first book-length audit of economic and social rights in the United Kingdom.

Of course this trend - the trend to take economic, social and cultural rights more seriously - is contested and uneven. But in my view the general trend is unmistakeable. Economic, social and cultural rights are on a rising tide.

So Human Rights Now is in good, global company.

A few years ago, I spent quite a bit of time arguing that economic, social and cultural rights are indeed fundamental human rights.

I used to point out that these rights are recognised as fundamental human rights in a host of binding international treaties – and that the rights to basic shelter and health protection are just as important to our well-being and dignity as the rights to freedom of assembly and expression – and that all these human rights are actually interlocking and mutually reinforcing.

Today, I rarely have to use those arguments.

A few years ago I also spent quite a bit of time arguing that there is nothing intrinsically non-justiciable about economic, social and cultural rights. A society is free to decide what it wants its courts to adjudicate upon. If a society wishes its courts to adjudicate upon issues of detention, expression, privacy, shelter and the adequacy of health services – there is no jurisprudential reason why it should not. It might not

wish, for *political* reasons, to give some of those tasks to the courts – but that is entirely different from saying that those issues are somehow incapable of judicial determination.

Today, these arguments need less attention - mainly because so many reputable tribunals in so many jurisdictions adjudicate, on a regular basis, across the whole range of human rights, including economic, social and cultural rights. The record speaks for itself.

Can I briefly mention one sleight of hand - one trick - that is sometimes used when discussing these issues?

The argument goes – it is appropriate for a court to adjudicate on, say, inhumane treatment because it can simply tell those responsible to stop the abusive treatment.

And the argument continues – it is inappropriate for a court to adjudicate on, say, shelter because this may require the court to make an order that has budgetary implications and that is the job of the legislature, not the judiciary.

In my view, this argument is misleading.

It is true, inhumane treatment sometimes requires a court to simply say – ‘no, stop that mistreatment’. But it also sometimes requires a court to make an order that has budgetary implications – the court may order, for example, that conditions of detention be improved, and that can be a costly business.

As for shelter, sometimes it *also* requires a court to simply say – ‘no, you cannot evict that tenant’, or ‘stop that harassment’. And sometimes it will also require a court to make an order that has budgetary implications – it may order, for example, that a homeless person is offered a bed in a shelter.

Crucially, both the prohibition against inhumane treatment and the right to adequate shelter consist of *various* elements – some of which have budgetary implications and some do not.

The sleight of hand - the trick - takes place when one element of one right is compared with a *different* element of the other right.

In other words, the element of inhumane treatment that does *not* have budgetary implications is compared with the element of shelter that *has* budgetary implications. And then the conclusion is erroneously reached that inhumane treatment is suitable for judicial scrutiny, while shelter is not. And this conclusion is then generalised from inhumane treatment to *all* civil and political rights – and from shelter to *all* economic, social and cultural rights.

Clearly, this logic is flawed.

So my plea is simple: compare like with like. Not apples with oranges. And not one element of a civil and political right with a *different* element of an economic, social and cultural right.

However, I think it is also unhelpful and misleading when some advocates of economic, social and cultural rights argue that economic, social and cultural rights and civil and political rights are identical and should be approached in precisely the same way. It seems to me that is too simplistic.

We must recognise one inescapable difference between these two sets of rights. Over centuries, civil and political rights have generated a deep and dense jurisprudence. The same cannot be said for economic, social and cultural rights. Yes, they too derive from the inherent well-being and dignity of our shared humanity. Yes, they too are enshrined in legally binding international treaties. Yes, they too are justiciable. But it seems to me we have to recognise that their jurisprudence is shallower than that of civil and political rights – and very naturally this may lead to legitimate questions and doubts that should not be brushed aside, but taken seriously.

As I argued earlier, the jurisprudence of economic, social and cultural rights is deepening by the year – but it remains shallower than that of civil and political rights.

There are other challenges, too.

Broadly speaking, there are two ways of advancing human rights, including economic, social and cultural rights.

One way is via the courts and tribunals (the ‘judicial’ approach). Another approach is by bringing human rights to bear upon policy-making processes so that policies are put in place that promote and protect human rights (the ‘policy’ approach). Of course, the two approaches are intimately related and mutually reinforcing. Nonetheless, the distinction between them is important because the ‘policy’ approach opens up challenging new possibilities for the realisation of human rights.

Lawyers have played an indispensable role in developing the standards that today constitute international human rights law. Naturally, when it comes to the ‘judicial’ and ‘policy’ approaches, some lawyers are professionally drawn to the ‘judicial’ approach. And, of course, this approach has a vital role to play.

In addition to the ‘judicial’ approach, however, it is also vital that human rights are brought to bear upon all relevant policy-making processes, including those for the reduction and elimination of poverty.

Significantly, the ‘policy’ approach depends upon techniques and tools that are not usually in a lawyer’s brief case or repertoire. Also, it demands close cooperation amongst a range of disciplines and policy experts. Also, the ‘policy’ approach demands vigilant monitoring and accountability, but the accountability does not have to be judicial. It could, for example, take the form of publicly available rigorous human rights impact assessments that check whether or not the relevant policy has delivered positive human rights outcomes consistent with the state’s legal commitments.

What are the implications of a policy approach?

If you go to a Minister of Health and urge him or her to introduce policies that reflect the Government’s international right to health obligations and the Minister asks how

that is to be done – if your reply only draws upon the traditional human rights skills and techniques, such as ‘naming and shaming’, letter writing campaigns, threatening the Government with test cases, and uttering slogans – frankly, the Minister will show you the door, and rightly so.

The judicial approach and the policy approach are both vital – but the policy approach demands new human rights skills, techniques and approaches that will enable us to engage with local, national and international policy makers. For example, if we are serious about monitoring the progressive realisation of economic, social and cultural rights, we have no alternative but to get to grips with indicators and benchmarks.¹¹ If we are serious about integrating human rights into policy making, sooner or later we will have to devise a methodology for human rights impact assessments, namely a tool that enables a government to assess the likely impact of a proposed policy on the enjoyment of (say) the right to health, especially for those who are living in poverty.¹²

We should not be discouraged by this but take heart because it is a sign that the human rights movement continues to develop and mature.

Let’s briefly consider two of these new skills, techniques or tools.

First, indicators and benchmarks.

The right to health is subject to progressive realization – a State is not expected to wave a magic wand and deliver, say, the right to health for everyone, immediately, overnight.

Sexual and reproductive health are integral elements of the right to health. So we need a way of measuring whether or not a State is progressively realizing the right to health, including sexual and reproductive health. There are many relevant indicators of sexual and reproductive health, including the proportion of births attended by skilled health

¹¹ For example, see my report to the UN Commission on Human Rights setting out a human rights based approach to health indicators, E/CN.4/2006/48, 3 March 2006.

¹² See Paul Hunt and Gillian MacNaughton, *Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health*, 2006.

personnel. So we could select this indicator as one to measure the progressive realization of sexual and reproductive health rights.

Let's assume that in a particular country the national data show that the proportion of births attended by skilled health personnel is 60 per cent. When disaggregated on the basis of rural/urban, data may reveal that the proportion is 70 per cent in urban centres, but only 50 per cent in rural areas.

When further disaggregated on the basis of ethnicity, data may also show that coverage in the rural areas is uneven: the dominant ethnic group enjoys a coverage of 70 per cent but the minority ethnic group only 40 per cent. This highlights the crucial importance of disaggregating data as a means of identifying de facto discrimination. When disaggregated, the indicator confirms that women members of the ethnic minority in rural areas are especially disadvantaged and require particular attention.

The State may decide to aim for a uniform national coverage of 70 per cent, in both the urban and rural areas and for all ethnic groups, in five years' time. So the indicator is the proportion of births attended by skilled health personnel and the benchmark or target is 70 per cent. The State has to formulate and implement policies and programmes that are designed to reach the benchmark of 70 per cent in five years. The data show that the policies and programmes will have to be specially designed to reach the minority ethnic group living in the rural areas.

Annual progress towards the benchmark or target should be monitored, in light of which annual policy adjustments might be required. At the end of the five-year period, a monitoring and accountability mechanism will have to ascertain whether or not the 70 per cent benchmark has been reached in urban and rural areas and for all ethnic groups. If it has, the State will set a more ambitious benchmark for the next five-year period, consistent with its obligation to realize progressively the right to health. But if the 70 per cent benchmark for all has not been reached then the reasons should be identified and remedial action taken.

Importantly, a failure to reach a benchmark does not necessarily mean that the State is in breach of its international right to health obligations. The State might have fallen

short of its benchmark for reasons beyond its control. However, if the monitoring and accountability mechanism reveals that the 70 per cent benchmark was not reached because of, for example, corruption in the health sector, then it will probably follow that the State has failed to comply with its international right to health obligations.

International assistance and cooperation is an important element of the right to health. Donors have a responsibility to provide financial and other support for the policies and programmes of developing countries regarding, for example, sexual and reproductive health. Also, donors should be held to account in relation to the discharge of their responsibility. So, in relation to the example I have just sketched, indicators are needed to measure what donors have done to help the State deliver sound sexual and reproductive health policies. Also, a monitoring and accountability mechanism is needed to address the question: has the donor community done all it reasonably can to help the State deliver sound sexual and reproductive health policies, enabling it to reach its benchmark of 70 per cent?

Of course, these issues - indicators and accountability mechanisms for the donor community - raise challenging questions. Nonetheless, indicators and accountability mechanisms that focus exclusively on the responsibilities of developing countries and do not also include the responsibilities of the donor community are unfair, flawed and lack credibility.

In summary, a disaggregated indicator, such as the proportion of births attended by skilled health personnel, when used with benchmarks, can help us identify which policies are working and which are not. Moreover, it can also help to hold a State to account in relation to its responsibilities arising from the right to health. Of course, one indicator, even when disaggregated, cannot possibly capture all the dimensions that are important from the right to health perspective. For this, other indicators are needed. Nonetheless, this illustration shows how a disaggregated indicator, when used with a benchmark, can provide some useful information about the progressive realization of the right to the highest attainable standard of health.

Very much more briefly, let's look at one other new skill, technique or tool that we need if we are to advance economic, social and cultural rights.

Before a State introduces a new proposal it must ensure that the initiative is consistent with its existing national and international legal obligations, including those relating to human rights.

In these circumstances, there is a growing demand for governments to carry out human rights impact assessments prior to adopting and implementing new policies, programmes and projects. To date, however, relatively little work has been done to develop methodologies and tools to help governments undertake human rights impact assessments.

Very briefly, human rights impact assessment is the process of predicting the potential consequences of a proposed policy, program or project on the enjoyment of human rights. The objective of the assessment is to inform decision-makers and the people likely to be affected so that they can improve the proposal to reduce potential negative effects and increase positive ones. Although human rights impact assessment is a relatively recent concept, other forms of impact assessment – such as environmental impact assessments and social impact assessments – are now well-established and routinely undertaken in many countries to evaluate proposed policies, programs and projects. Similarly, such initiatives, prior to being adopted and implemented, should be assessed for their impact on human rights.

Human rights impact assessments are an aid to equitable, inclusive, robust and sustainable policy making. They are one way of ensuring that - for example - the right to health - especially of marginalized groups, including the poor – is given due weight in all national and international policy-making processes. From the right to health perspective, an impact assessment methodology is a key feature of a health system. Without such a methodology, how will a government know whether or not its proposed policies, programs and projects are on target to progressively realise the right to the highest attainable standard of health, as required by international human rights law?

A colleague and I have tried to develop a human rights impact assessment methodology. Others are also working in this area. More thought has to be given to

this new tool – a tool that is needed if we are to defend human rights, including economic, social and cultural rights.

Again, I thank the organisers of this meeting. Human Rights Now is providing an invaluable environment for learning about international human rights law and practice, as well as the experiences of other national jurisdictions. It embraces all human rights – civil, political, economic, social and cultural rights. An organisation of the future, Human Rights Now richly deserves our sustained support.
