BRIEFING PAPER

The War on Capitalism

Human rights, political bias

By Jacob Mchangama

Introduction

One of the characteristics of the mainstream human rights movement is the advancement of social rights under the mantra that these rights are "indivisible" from classic freedom rights. This reveals an ideological bias of the human rights movement with profound consequences for the advancement of human rights. When social rights are promoted as fundamental rights that trump competing interests they institutionalize a vision of society based on a specific political view, which *de facto* excludes alternative political views and policies. This development is a threat to political pluralism, the rule of law, the separation of powers and economic freedom. It also undermines the basic individual liberty secured to millions of people all over the world by freedom rights, which were often won after long and hard battles against oppression. Advocates of human rights – regardless of their political views – should focus their energy on freedom rights and abandon the advancement of social rights.

The political bias of the human rights movement

> *People are poor because of those who are not poor. The main obstacle facing the realization of economic, social and cultural rights is the accumulation of wealth in few hands and few countries, combined with their control over or dominance in the fields of technology, patents and communications... the neoliberalist ideology harnesses a set of assertions deployed to justify the priority of market principles over economic, and social human rights. This ideology includes some vague and unverifiable claims that it will ultimately, over a period of time, also benefit those who are presently poor. There is no empirical support for that proposition.*

The excerpt above is not from a rally of an extreme left-wing grassroots' organization. In fact it is taken from a chapter in a widely used textbook on economic, social and cultural rights written by a Norwegian human rights expert, professor and former UN Expert.[1] The excerpt is symptomatic of much of the prevalent thinking on human rights among leading academics, NGO's and even certain governments and international organizations. Many of the resources spent on the promotion and protection of human rights no longer center on the advancement of classic civil and political rights (freedom rights) such as freedom of expression, prohibition against torture and habeas corpus – rights that have helped secure the basic individual freedom of millions of people all over the world. Instead influential Western academics, NGOs and countries in the developing world have successfully shifted focus on to the advancement of social, economic, and cultural rights (social rights), such as the right to an adequate standard of living, the right to housing and the right to social security, as well as collective rights such as the right to development. These rights are advanced in order to counterbalance what is perceived as an unjust economic world order, which favors Western countries and transnational corporations at the expense of the poor, particularly in the developing world. The excerpts below are just a few examples that demonstrate how widespread this leftist ideological bias is in the human rights movement:

Amnesty International's website states that:

> *Billions of women, men and children face levels of deprivation that undermine the right to live with dignity. Hunger, homelessness and preventable disease are not inevitable social problems or simply the result of natural disasters – they are a human rights scandal…Violations of economic, social and cultural rights are not a matter of inadequate resources; they are a matter of justice.*[2]

At the recent UN Durban Review Conference on Racism and Xenophobia the President of the General Assembly subtly blamed capitalism for creating racism by stating that:

> *The most terrible experiences of racism, racial discrimination, xenophobia and related intolerance have their roots in models and projects of economic, social and political development that have imposed the anti-values of greed, selfishness and domination instead of the values of human rights, equality of persons, solidarity and justice.*[3]

In a report authored by the UN's special rapporteur on the right to food concluded that "neoliberalism" is to blame for world hunger and malnutrition:

> *Some Governments and intergovernmental organizations support the neoliberal theory, which does not recognize the existence of economic, social and cultural rights and claims that only political and civil rights are human rights. According to this theory, only a totally liberalized and privatized, unified world market can gradually eliminate hunger and malnutrition in the world. The evidence shows the contrary.*[4]

In a recent speech the former president of the Italian constitutional court, Professor Giovanni Maria Flick, talked about the "totalitarian logic of the market and profit" and the difficulties of reconciling the logic of the market with "equality and human dignity".[5]

Many textbooks on economic, social and cultural rights reveal the same ideological bias against free markets and privatization and in favour of public spending and state control of social and economic policy.[6]

The incompatibility of freedom and social rights

This development has serious and damning consequences for freedom rights and the individual freedom they secure. Freedom rights are incompatible with social rights if the latter are to be understood as individual rights that trump competing interests. This danger to individual freedom was clear even when the Universal Declaration of Human Rights (UDHR) was adopted in 1948. In 1945 a Committee under UNESCO said of the planned human rights declaration:

> *If the new declaration of the rights of man is to include provision for social services, for maintenance in childhood, in old age, in incapacity or in unemployment, it becomes clear that no society can guarantee the enjoyment of such rights unless it in turn has the right to call upon and direct the productive capacities of the individuals enjoying them.*[7]

The fundamental difference between freedom rights and social rights was one of the reasons that a number of Western states initially opposed efforts to include social rights in the UDHR and why the social rights and freedom rights were split into two different UN covenants in 1966.[8] Since the world conference on human rights in 1993 this difference between the two sets of rights has been downplayed under the mantra of "indivisibility", a mantra which claims that all human rights are equally important and similar in nature, and that the alleged differences are misconceptions based on outdated ideological battles between the West and the socialist countries during the Cold War era. However, the differences between social rights and freedom rights are real and cannot be explained away by empty slogans such as indivisibility.

While extreme poverty is a global problem of the highest order, it cannot be solved within the primarily legalistic framework of human rights. An approach based on fundamental rights is wholly unsuited to complex questions of social and economic policy, which involve a plethora of competing interests and possible solutions on which people may reasonably disagree depending on political persuasion. In this regard it is important to dismiss the often heard claim that free speech is worthless without food, shelter and clothing. Hunger and poverty cannot be explained by an absence of, nor secured by the introduction of, fundamental rights to these essential goods.[9] Their realization depends on a range of other factors that cannot be reduced to simplistic rights language. It is, for instance, clear that few if any Western countries with market economies have a right to food or clothing enshrined in their constitutions. Yet hunger and lack of clothing is a problem faced by few people in these countries.

Claiming that a certain way of addressing poverty is a human rights obligation simply serves to elevate such political views to moral and legal imperatives that trump competing views. On the other hand, in a liberal democracy political opponents from left and right (extremists excepted) will generally agree that is incompatible with basic human

rights to shut down newspapers critical of the government and to arbitrarily detain and torture political opponents.

Surely a legitimate and democratic government of a poor country should not be equated with a totalitarian government in a country where the population is less poor but brutally oppressed? And yet this is the consequence of insisting on the indivisibility of all human rights. The human rights movement's insistence on indivisibility is a form of schizophrenia. At one and the same time the human rights movement is adamant that freedom rights must protect us against the threat of state action *and* that the state be granted the means and power to be responsible for the economic and social well being of the individual by its obligations to "respect, protect and fulfill" social rights.

It is often argued that several freedom rights have been shown to include positive obligations in addition to the negative obligation for the state to refrain from certain acts, and that therefore the difference between freedom rights and social rights is illusory. This ignores the fact that the positive obligations "inherent" in freedom rights very often have basis in judicial activism rather than the wording and original understanding of human rights conventions such as the European Convention on Human Rights (ECHR). In fact, freedom rights become as meaningless and politicized as social rights when, for instance, the European Court of Human Rights (the European Court) interprets the right to life as including a positive obligation to prevent the deaths of patients at hospitals,[10] and the right to privacy as encompassing an obligation to minimize noise pollution from airports.[11] Such "dynamic" interpretation "according to present day conditions" seriously dilutes the all-important protection of freedom rights against oppressive and arbitrary government action – something an English judge at the European Court famously described as:

> *the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently.*[12]

The consequences for market based policies

However, the increasing focus on social rights also has detrimental consequences for economic freedom rights and market-based policy solutions since these risk running afoul of social rights and therefore being struck down by national and/or international courts. Such an approach has explicit support in the so-called general comments of the UN Committee on Economic, Social and Cultural Rights (the Committee), which interprets the UN Covenant on Economic, Social and Cultural Rights (the Covenant). The Committee has stated that the Covenant is ideologically neutral.[13] However, its many general comments on specific social rights reveal that the Covenant – according to the Committee – requires substantial redistribution and that a laisser-faire approach to economic and social policy is incompatible with the Covenant.[14] The Covenant mentions the right to "adequate housing" as part of the right to an adequate standard of living. The undefined right to housing has been interpreted as including a whole range of requirements including "cultural adequacy", none of which have any support in the wording of the Covenant.[15] In its general comment on the right to social security the Committee has stated that:

> *There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.*[16]

Accordingly the Committee's interpretation means that once a right related to social security has been introduced – which is an obligation in itself – the removal thereof or reduction therein will constitute a prima facie violation of the right to social security. It is therefore not surprising that developed countries such as Canada, Finland, Germany, the Netherlands, Switzerland and New Zealand have been criticized by the Committee for carrying out welfare reforms affecting social security.[17] One of the recommendations for Canada was to:

> *consider re-establishing a national programme with specific cash transfers for social assistance and social services that includes universal entitlements and national standards and lays down a legally enforceable right to adequate assistance for all persons in need.*[18]

This interpretation effectively rules out market based welfare reforms and therefore institutionalizes – at best –

Scandinavian-style welfare states or – at worst – centrally-planned socialist states. It should be obvious that such a de facto exclusion of conservative or classical liberal economic policies is impossible to reconcile with political pluralism and has no basis in the Covenant as it was meant to be understood by the (at least the Western) states that ratified it.

In its recent concluding observations and recommendations on the United Kingdom from 22 May 2009, the Committee raises 25 points of concern. Among them are: the "substantial number of persons unemployed, in particular the most disadvantaged and marginalized individuals and groups"; that "pension entitlements do not provide the most disadvantaged and marginalized individuals and groups, including women, persons with disabilities and ethnic minorities, with an adequate standard of living"; that " poverty and fuel poverty, especially among children, remain wide-spread"; and "the chronic shortage of housing, in particular social housing, for the most disadvantaged and marginalized individuals and groups".[19]

Based on the Committee's extreme and activist interpretation, several of the policies adopted by successive British governments since the Thatcher years would presumably have been in violation of the Covenant had it been part of and justiciable under domestic English law.[20] The Committee's interpretation of the Covenant and indeed the whole concept of indivisibility has very little basis in international law and the United Kingdom's delegation in Geneva was right to press upon the Committee the view that:

> *economic, social and cultural rights are mere principles and values and that most of the rights contained in the Covenant are not justiciable.*[21]

In September 2009 an optional protocol to the Covenant will open for signature and subsequent ratification. Accordingly, state parties to the Covenant (like the UK) will be able to accept individual complaints under the Covenant, allowing persons within the UK's jurisdiction to complain that their social rights have been violated. These complaints will then be decided by the Committee.[22] It would be tragic if the country which gave birth to the Magna Carta should recognize social rights as being basic rights on the same footing as the traditional freedoms and civil liberties enjoyed by the English for centuries.

It is worth noting that national courts in several countries such as Portugal, Hungary, India, Venezuela and South Africa have already issued judgements in which governments have been found in violation of social rights for certain acts or omissions related to social policy.[23] Such judicial interventions by unelected judges with no relevant expertise in economic and social policy matters, which are normally decided by governments and parliaments, is a clear threat to political pluralism, the rule of law and the separation of powers. But it also undermines policy options based on the extension of economic freedom, which many studies suggest is more effective at reducing poverty than the redistributionist policies inherent in the politicized language and philosophy of social rights.[24]

A good example of this is the right to property. Under the ECHR this right only offers very limited protection against expropriation and even less protection against control on use. Yet the European Court has interpreted it to include certain social security entitlements.[25] This is very much in line with the human rights movement's approach to the essential right of property, which has formed the basis of Western civil liberties and fundamental freedoms for centuries, and which is instrumental to the economic well being of states and their citizens.[26] It is very rare that human rights activists protest against government interferences with private property in the form of expropriations or the control on use. Instead human rights activists have sought to redefine the right to private property so that it no longer constitutes an impediment to redistribution and centralization of essential parts of the economy. The following quote is a good illustration of this approach:

> *The obligation to fulfill the right to property would seem to move beyond […] rights of property, toward a real right to property. In order for the right to property to be fulfilled and for everyone to really enjoy the right to property, every individual should enjoy a certain minimum of property needed for living a life in dignity, including social security and social assistance. If […] property rights only entail a right to own property for those who are in the position to acquire property and a protection against arbitrary interferences in these existing property rights, it is difficult at least morally to justify the right to property.*[27]

The absurdity of the idea that a right to property can only be achieved by systematic interference with the right of private property by way of redistribution, and that therefore a right to property is a right to the fruits of others' labour, seems entirely lost on the author and – more worryingly – also on the European Court.

Conclusion

The ideological bias in favour of central planning and against capitalism of much of the human rights movement is a serious impediment to the effective promotion and implementation of human rights. If human rights become part of partisan politics they lose their moral power as generally recognized norms, which serve to restrain governments from arbitrary and authoritarian practices and to shame governments that engage in such actions. That is precisely the function of freedom rights and is what makes these rights capable of judicial and universal application regardless of whether political power is held by social democrats or classical liberals.

Social rights, on the other hand, institutionalize a vision of society based on a specific political agenda, which excludes political pluralism and undermines the rule of law and separation of powers. Moreover, rather than restraining government action, social rights require governments to take prime responsibility for large parts of human life that would otherwise be left to the individual. Ultimately, therefore, social rights endanger the freedom secured by freedom rights. Such a development is unacceptable and represents a huge step backwards from the hard-won liberty enjoyed by many people all over the world. It is therefore high time that advocates of human rights resist their politicization and focus their energy on fighting for the right of everyone to live in freedom. To that end, freedom rights should be embraced and social rights rejected.

About the author

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Endnotes

1 Asbjorn Eide, Obstacles and goals to be pursued, chapter 31, in Eide et al (eds.) Economic, Social and Cultural Rights A Textbook, Second Revised Edition (2001).
2 http://www.amnesty.org/en/economic-social-and-cultural-rights
3 http://www.un.org/ga/president/63/statements/durbanreview200409.shtml
4 Report of the Special Rapporteur on the right to food, Jean Ziegler 10 January 2008 available at http://daccessdds.un.org/doc/UNDOC/GEN/G08/100/98/PDF/G0810098.pdf?OpenElement
5 Speech on "Equal social dignity" and human rights delivered by Professor Giovanni Maria Flick President Emeritus of the Italian Constitutional Court at the University of Copenhagen on 27 May 2009.
6 Malcolm Langford (ed.)Social Rights Jurisprudence, Emerging Trends in International and Comparative Law p. 207-208, Eide et al (eds.) Economic, Social and Cultural Rights A Textbook, Second Revised Edition (2001)
7 Unesco, Human Rights Comments and Interpretations, 1945, Appendix. Some may protest and point to the fact that the UNESCO statement is from 1945 and thus question its relevance today. Yet the statement pertains to the UDHR adopted only three years later and to which ESR proponents continuously refer in order to emphasize the indivisibility of all human rights see for instance Asbjorn Eide, Economic, Social and Cultural Rights as Human Rights, p.16, in Eide et al, op.cit., pp.9-29.
8 For more on the drafting history of the UDHR see Johannes Morsink The Universal Declaration of Human Rights Origing, Drafting & Intent (1999).
9 See for instance Johannes Morsink: The Universal Declaration of Human Rights Origin, Drafting & Intent (1999) p. 192.
10 Calvelli and Ciglio v. Italy judgement of 17 January 2002 from European Court of Human Rights.
11 Hatton and others v. United Kingdom judgement of 8 July 2003 from the European Court of Human Rights.
12 Dissenting opinion of Sir Gerald Fitzmaurice in Marckx v. Belgium judgement of 13 June 1979.
13 The nature of States parties obligations (Art. 2, par.1) :CESCR General Comment 3, 14 December 1990 para. 8.
14 The right to adequate housing (Art.11 (1)), CESCR General Comment 4, 13 December 1991 and General Comment No. 19 The right to social security (art. 9), paragraph 42, 4 February 2008.
15 CESCR General comment 4. (General Comments) The right to adequate housing (Art.11 (1) 13 December 1991.
16 General Comment No. 19 The right to social security (art. 9), 4 February 2008.
17 Conclusions and recommendation on Economic, Social and Cultural Rights, Finland, U.N. Doc E/C.12/1Add.8 (1996) para. 21, Conclusions and recommendation on Economic, Social and Cultural Rights, Germany U.N. Doc. E/C/Add.68 (2001) paras. 23 and 41, Conclusions and recommendation on Economic, Social and Cultural Rights, The Netherlands, U.N. Doc E/C.12/1Add 25 (1998) paras.10, 16 and 25. Conclusions and recommendation on Economic, Social and Cultural Rights, Switzerland, U.N. Doc E/C.12/1Add 30 (1998) para.23., Concluding observation of the Committee on Economic, Social and Cultural Rights, New Zealand E/C.12/1993/13, 4 (1994), paras.11, 13 and 18, Conclusions and recommendations on Economic, Social and Cultural Rights, Canada, U.N. Doc E/C.12/1Add 31 (1998) paras. 40 and U.N. Doc E/C.12/CAN/CO/5 (2006) para. 52.
18 Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Canada, U.N. Doc. E/C.12/1/Add.31 (1998) para. 40.
19 Concluding Observations of the Committee on Economic, Social and Cultural Rights United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories E/C.12/GBR/CO/5 (22 May 2009).
20 Even if the United Kingdom has several reservations to the Covenant.
21 Concluding Observations of the Committee on Economic, Social and Cultural Rights United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories E/C.12/GBR/CO/5 (22 May 2009).
22 The decisions of the Committee are not strictly legally binding however Western states often follow the decisions made by independent complaint mechanisms in cases of individual complaints under the UN system. It should be noted that all domestic remedies must be exhausted before a complaint is admissible.
23 Malcolm Langford (ed.)Social Rights Jurisprudence, Emerging Trends in International and Comparative Law, chapter 1.
24 See for instance Economic Freedom of the World 2008 report at http://www.freetheworld.com/2008/EconomicFreedomoftheWorld2008.pdf
25 Stec and others v. United Kingdom judgement of 12 April 2006 from the European Court of Human Rights.
26 International Property Rights Index 2009 Report available at: http://www.internationalpropertyrightsindex.org/atr_Final1.pdf.
27 Catarina Krause in Asbjørn Eide et al (eds.) Economic, Social and Cultural Rights A Textbook, Second Revised Edition (2001) p. 209.