LSE LAWYERS WITHOUT BORDERS
Rule of Law Journal

Tan, J. (2020) 'Ending Exceptionalism: A Justiciable Right to Socio-Economic Security', *Rule of Law Journal*, 1, pp. 35-45.

Ending Exceptionalism: A Justiciable Right to Socio-Economic Security

Johnny Tan

Introduction

The Universal Declaration of Human Rights ("UDHR") emphasises the equal importance of economic, social and cultural ("socio-economic") rights and civil and political entitlements, envisioning 'the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want' (UN, 1948). Socio-economic rights relate to an individual's economic, social and cultural entitlements, delineating the responsibilities of government to ensure that everyone can live a decent life in dignity. These rights – that are most closely linked to human survival, development and flourishing – are enshrined in the International Covenant on Economic, Social and Cultural Rights ("ICESCR") (OHCHR, 1966), including the right to work, housing, and social security, etc. In 1962, the UK became the first country to ratify it.

However, unlike most countries (over 90% of the world's constitutions recognise at least one socio-economic right (Jung, Hirschl and Rosevear, 2014)), the UK has not incorporated the ICESCR into domestic law,

rendering its provisions unenforceable in domestic courts. The current non-justiciability of socio-economic rights has no doubt contributed to issues such as rising inequality, homelessness and poverty.

This article will argue for an end to British exceptionalism; perhaps in the form of a Socio-Economic Rights Bill, modelled after the Human Rights Act 1998 ("HRA"). This necessitates a greater role of the judiciary in fulfilling such rights. Indeed, a 2010 Green Paper from the Ministry of Justice argued that socio-economic rights 'could merit constitutional recognition in a Bill or Rights and Responsibilities to signal their enduring place in the life of (the) nation' (Ministry of Justice, 2009).

In light of recent calls for a British Bill of Rights and Prime Minister Boris Johnson's commitment to 'levelling up' and reducing regional inequalities, the time is ripe for robust legislative reform; for too long have socio-economic rights lacked substantive protection. We cannot afford to wait any longer.

International Obligations to Protect Socio-Economic Rights

The Progressive Obligation

By ratifying the ICESCR, the UK is bound by international law to carry out its obligations under the treaties. Article 2(1) provides that

> *'Each State Party to the present Covenant undertakes to take steps…to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures' (OHCHR, 1966).*

It must be emphasised that progressive realisation requires states to move as 'expeditiously and effectively' as possible towards achieving complete realisation of socio-economic rights.

Immediate Obligations

While the emphasis in Article 2(1) is on progressive realisation, states must also adhere to several immediate obligations. For instance, Article 2(2) dictates that states must ensure Covenant rights without discrimination on the basis of a wide range of factors including sex, disability, gender identity and race. Moreover, state failures to protect socio-economic rights are not immediately excusable on the basis of inadequate resources. For instance, the duty of states to not interfere with the existing enjoyment of rights (by adopting retrogressive measures – e.g. forcibly evicting people) is not dependent on the availability of resources.

The Status of Socio-Economic Rights Protection in the UK

The government has not incorporated the ICESCR into domestic law, meaning that neither its general principles nor its substantive provisions can be enforced by national courts. Instead, the UK has introduced various policies and legislations (piecemeal; ad hoc solutions) which do not fully comply with the ICESCR. Through giving effect to the European Convention on Human Rights, the HRA has led many to believe that the UK protects all human rights, whether civil and political or socio-economic. However, the socio-economic rights protected by this instrument are narrow in scope and lack coverage of the wider range of obligations set out in ICESCR.

Moreover, although on the international level, rights are now recognised as equal and indivisible, the UK government adheres tenaciously to the

distinction between socio-economic and civil and political rights. The election of David Cameron's Conservatives in 2010 ushered in the era of austerity, resulting in a drastic withdrawal of welfare entitlements, including social security and legal aid cuts, deteriorating work conditions and increasing homelessness. Such cuts have disproportionately harmed the most vulnerable in society – typically children, disabled people, single parents and ethnic minorities (Sandner, 2018) – who are now forced to face the precarious living conditions prompted by a shift towards neoliberalism: increased inequality, inadequate access to justice, lost livelihoods and exploitation, following the rise of the unprotected gig economy (Koch and James, 2020).

In 2018, a United Nations ("UN") expert argued that state spending decreases were 'entrenching high levels of poverty and inflicting unnecessary misery in one of the richest countries in the world' (Mueller, 2019). Families that receive benefits are thousands of dollars worse off every year (Mueller, 2019), payment periods are lengthy and the number of children living in poverty has increased by about 600,000 since 2012 (Mueller, 2019). UN data estimates that in the UK about 8.4 million people live in food insecure homes (Van Bueren QC, 2020), and the use of food banks almost doubled between 2013 and 2017 (The Trussell Trust, 2019).

Since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid – access to judicial remedies is an essential element of the ICESCR – has been severely curtailed, with the state no longer covering several areas of social welfare law (Amnesty 2016). Consequently, 'legal aid deserts' (Law Society, 2020) have proliferated in large parts of the UK, and the courts and tribunals are seeing a striking rise in litigants-in-person (Amnesty, 2016), making it even more difficult for claimants to enforce their socio-economic rights.

A False Dichotomy

Underlying the UK's refusal to substantively protect social and economic obligations, is the assumption of a clear-cut distinction between socio-economic rights and civil and political rights. The former are said to be resource-intensive, while the latter are cost-free. Civil and and political rights are determinate while socio-economic rights are vague, involving complex, polycentric interests which should be left to the executive or to elected parliamentarians. In *R* v *Cambridge Health Authority ex parte B* (1995), Lord Bingham aptly summarised this position, stating that 'difficult judgements on how a limited budget is best allocated to the maximum advantage of the maximum number … is not a judgment a court can make'.

However, on closer inspection, it is evident that both sets of rights give rise to similar obligations on the state, namely obligations to respect, protect, promote and fulfil (South African Gov, 1996). Duties of respect require the state to refrain from interfering with rights. Duties to protect entail the active protection of rights; and duties to promote and fulfil require the state to facilitate the enjoyment of rights. For example, civil and political rights, such as the Article 2 (right to life) orders the state to both refrain from killing and to protect the lives of its citizens; and Article 6 (right to a fair trial) requires the state to spend resources in the expedited prosecution (and possibly defence) of its people.

Furthermore, socio-economic rights are often essential preconditions to the enjoyment of civil liberties. As Demola Okeowo succinctly observes: 'Of what use will the right to free speech be to a hungry man?' (Okeowo, 2008). It is difficult to speak meaningfully of the right to life or liberty if those entitlements are severely curtailed through poverty and squalor. The House of Lords recognised this in *Limbuela* (2005), ruling that the withdrawal of social support for the applicants – and the extreme socio-

economic deprivation that resulted – breached the Article 3 prohibition on inhuman or degrading treatment.

Indeed, the protection of both sets of rights finds precedent in English legal history (Van Bueren QC, 2013). The Magna Carta of 1215 established rights of access to essential resources, including food, wood, water and even medicine. It also served as one of the earliest forms of legislative protection for women, guaranteeing the economic rights of widows. Its sister Carta, the Charter of the Forest 1217, extended these rights to a wider range of the population, not just bishops and the nobility. Referred to as "Chartae Libertatum Angliae" (the great English Charters) by Edward Coke (Holt, Garnett and Hudson, 2015), the two were printed together, forming the opening of the English Statutes-at-Large in 1369 (Linebaugh, 2009). This early medieval approach therefore provides a source for the complementarity of civil and socio-economic liberties in the UK.

Adjudicating Positive Duties

However, would the justiciability of socio-economic rights entail a corrosive 'juridifcation' of the constitution? (Masterman, 2009). Partisan political constitutionalists have often recast Britain's constitutional order in radically normative terms, celebrating the virtues of parliamentary democracy while decrying the follies of judicial overreach. This article rejects such claims for three important reasons.

Firstly, policy decisions do not automatically render an issue non-justiciable. Giving the majority judgement in *Miller (no. 2)* (2019), Lady Hale and Lord Reed noted that 'almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries.' The courts have been willing to intervene even in cases of

national security – notably the *Belmarsh* (2004) decision – which arguably involve far greater political and executive complexities than issues of redistributive justice.

Secondly, rather than viewing the protection of rights as an unwelcome intrusion on the domain of policy-making, incorporation of the ICESCR and other socio-economic measures could facilitate greater constitutional dialogue and an 'effective synthesis of parliamentary democracy and human rights' (Hickman and Craig, 2010) by forging greater cooperation between the various branches of government. As John Griffith rightly observed: 'It is the complexity of powers and relationships which together make the machinery of the state' (Griffith, 1979). Judicial decisions play an important role in influencing discussions between the government and Parliament about sensitive policy issues.

Lastly, fears that justiciable socio-economic rights will override Parliamentary authority are, as the HRA demonstrates, overblown. Parliamentary accountability techniques are far more extensive in scope than legal ones (Kavanagh, 2019). Whereas Parliament can hold the government to account for almost anything it wishes, including the merits of the policies proposed, judicial accountability is far more limited, namely, to ensure the government complies with the law. The multi-institutional reality of human rights adjudication is far too complex to be reduced to a zero-sum struggle between legal and political constitutionalism.

A Potential Way Forward

This all suggests the need to establish a form of human rights adjudication which can encompass both socio-economic and civil and political rights. One such draft bill – published for consultation by Newcastle University (Van Bueren QC, Byrne and Casla, 2019) – would

give further effect to the ICESCR by adopting the approach taken in the HRA. This Act would extend the range of scope of socio-economic rights currently protected, while requiring public officials to adopt policies in accordance with the ICESCR. Crucially, courts would also have access to a wider range of enforcement mechanisms, as compared to the current piecemeal regime: Stringent pre-legislative scrutiny; declarations of incompatibility; and the proportionality test for judicial review, etc. This Socio-Economic Rights Bill will not be a panacea. Rather, the UK will be taking progressive and efficacious steps towards fulfilling its obligations under international law. Perhaps more importantly, the implementation of the Act will go a long way towards improving the livelihoods, health and material welfare of people in the UK.

Conclusion

As human beings, we share certain fundamental necessities, that of nutrition, housing, work, healthcare and others. A significant proportion of neoliberal Britain's population have had these rights neglected, resulting in an increase in destitution and populist responses, including those on the far right. The Covid-19 pandemic has further exposed the striking inequalities in British society, with research finding that minority groups and those with fewer qualifications, were hit the hardest by job losses (Schomberg, 2020). What has been achieved so far in terms of protecting civil liberties should not be underestimated. However, the moral and (international) legal imperatives for fulfilling socio-economic rights in the UK can no longer be ignored. Reflection on how this can be achieved is a pertinent challenge for each one of us passionate about building a more equitable society.

References

Amnesty. (2016) 'Cuts That Hurt - The Impact Of Legal Aid Cuts In England On Access To Justice'. Available at: https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf.

Griffith, J.A.G. (1979) 'The Political Constitution', *The Modern Law Review,* 42(1), pp.1–21.

Hickman, T. and Craig, P.P. (2010) *Public law after the Human Rights Act*. Oxford: Portland.

Holt, J.C., Garnett, G. and Hudson, J. (2015) *Magna Carta*. Cambridge: Cambridge University Press.

Jung, C., Hirschl, R. and Rosevear, E. (2014) 'Economic and Social Rights In National Constitutions', *American Journal of Comparative Law*, 62(4), pp. 1043-1093.

Kavanagh, A. (2019) 'Recasting the Political Constitution: From Rivals to Relationships', *King's Law Journal*, 30(1), pp.43–73.

Koch, I. and James, D. (2020) 'The State of The Welfare State: Advice, Governance And Care In Settings Of Austerity', *Ethnos*, pp. 1-21.

Law Society. (2020) 'Legal Aid Deserts'. Available at: https://www.lawsociety.org.uk/campaigns/legal-aid-deserts.

Linebaugh, P. (2009) *The Magna Carta Manifesto: Liberties and Commons for All*. London: University of California Press.

Masterman, R. (2009). 'Labour's 'Juridification' of the Constitution', *Parliamentary Affairs*, 62(3), pp. 476-492.

Ministry of Justice. (2009) 'Rights and Responsibilities: Developing Our Constitutional Framework'. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228938/7577.pdf.

Mueller, B. (2019) 'What Is Austerity and How Has It Affected British Society?', *The New York Times*. Available at: https://www.nytimes.com/2019/02/24/world/europe/britain-austerity-may-budget.html.

OHCHR. (1966) 'International Covenant on Economic, Social And Cultural Rights'. Available at: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

Okeowo, D. (2008) 'Economic, Social and Cultural Rights: Rights Or Privileges?', *SSRN Electronic Journal*. Available at: https://www.ssrn.com/abstract=1320204#:~:text=Demola%20Okeowo,-Peter%20A.&text=Several%20reasons%20have%20been%20given,as%20per%20its%20available%20resources.

Sandner, M. (2018) Progress On Socio-Economic Rights: Why Are We Waiting?', *Equality and Human Rights Commission*. Available at: https://www.equalityhumanrights.com/en/our-work/blogs/progress-socio-economic-rights-why-are-we-waiting.

Schomberg, W. (2020) 'COVID Crisis Could Worsen Existing UK Inequality, Think Tank Says', *Reuters*. Available at: https://www.reuters.com/article/us-health-coronavirus-britain-inequaliti/covid-crisis-could-worsen-existing-uk-inequality-think-tank-says-idUSKBN23H3JS.

South African Gov. (1996) 'Constitution of The Republic Of South Africa, 1996'. Available at: https://www.gov.za/sites/default/files/images/a108-96.pdf.

The Trussell Trust. (2019) 'The Trussell Trust - Mid Year Stats'. Available at: https://www.trusselltrust.org/news-and-blog/latest-stats/mid-year-stats/ (Accessed: 5 September 2020).

United Nations. (1948) 'Universal Declaration of Human Rights'. Available at: https://www.un.org/en/universal-declaration-human-rights/.

Van Bueren QC, G. (2013) 'Socio-Economic Rights and A Bill Of Rights - An Overlooked British Tradition', 4, *Public Law*, pp. 821-837.

Van Bueren QC, G. (2020) 'A Justiciable Right To Food - A Possibility For The United Kingdom?', *Public Law*, pp. 146-165.

Van Bueren QC, G., Byrne, I. and Casla, D.K. (2019). 'Towards an Economic, Social and Cultural Rights Bill', *Newcastle University*. Available at: https://research.ncl.ac.uk/article22/consultation/1%20Consultation%20document.pdf.