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Social and Economic Rights: A Critique

by Aryeh Neier

BY WAY OF INTRODUCTION, let me first make clear that I favor a fairer distribution of the world's resources; however, I believe that the effort to achieve fairer distribution has to take place through the political process. For the most part, although there may be some small exceptions, it cannot take place through the assertion of rights. I do not think that rights are an abstract concept. I think they are a contract between a citizen and a state, or a citizen and her community, and that a citizen has to be able to enforce her side of that contract. Rights only have meaning if it is possible to enforce them. But there has to be some mechanism for that enforcement, and adjudication seems to be the mechanism that we have chosen. Therefore, from my standpoint, if one is to talk meaningfully of rights, one has to discuss what can be enforced through the judicial process.

I will readily concede that the enforcement of certain civil and political rights has economic ramifications. That is, if one believes in a person's right to a fair trial, and that person is to have counsel, there is going to be a cost in providing counsel for those who cannot afford it. Similarly, if one believes that it is cruel and unusual punishment to place people in prisons that are overcrowded and filthy, there is going to be an economic cost in providing decent prisons. But although there certainly will be economic ramifications of efforts to enforce such rights, they do not involve a broad redistribution of society's resources or its economic burdens. Therefore, I would distinguish the incidental costs of protecting civil and political rights from the much more substantial costs of economic redistribution.

Furthermore, there will always be, in unfair economic distribution, elements of invidious discrimination, discrimination on grounds of race or gender, or denials of due process. In these circumstances, I believe it is appropriate to invoke rights. For example, if a town provides roads and sewage collection, or water and electricity, to people of one race and not to those of another, obviously it is appropriate to invoke discrimination on grounds of race to challenge that kind of injustice. Indeed, that sort of challenge has been made in a number of important cases. But I think of these matters in terms of race discrimination, which involves a denial of civil and political rights, and not economic redistribution.

Finally, I want to make it clear that certain constitutions incorporate some things that could be called economic and social rights with a certain degree of legislative specificity. For example, a constitution may provide that every child shall be entitled to a free primary school or a free secondary school education. When a constitution provides that level of legislative specificity, I think it is certainly appropriate to use the judicial mechanism to enforce one's rights accordingly.

SOCIAL/ECONOMIC RIGHTS AND THE DEMOCRATIC PROCESS

THE CONCERN I HAVE WITH ECONOMIC and social rights is when there are broad assertions of the sort that appear in the Universal

Declaration of Human Rights or that appear in the South African Constitution, which speak broadly of a right to shelter or housing, a right to education, a right to social security, a right to a job, and a right to health care. There, I think, we get into territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail.

In my view, the purpose of the democratic process is essentially to deal with two questions: public safety and the development and allocation of a society's resources. Alexander Hamilton, writing in *The Federalist Papers*, called the judiciary "the least dangerous" branch of government because it has neither the power of the purse nor the power of the sword.¹ Economic and security matters ought to be questions of public debate. To withdraw either of them from

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the democratic process is to carve the heart out of that process. Everybody has an opinion on what should be done to protect the public's safety, and everybody has a view as to what is appropriate in the allocation of a society's resources and its economic burdens. Therefore, everybody ought to be able to take part in the discussion. It should not be settled by some person exercising superior wisdom, who comes along as a sort of Platonic guardian and decides this is the way it ought to be. These issues ought to be debated by everyone in the democratic process, with the legislature representing the public and with the public influencing the legislature in turn. To suggest otherwise undermines the very concept of democracy by stripping from it an essential part of its role.

Indeed, whenever you get to these broad assertions of shelter or housing or other economic resources, the question becomes: What shelter, employment, security, or level of education and health care is the person entitled to? It is only possible to deal with this question through the process of negotiation and compromise. Not everybody can have everything. There have to be certain decisions and choices that are made when one comes to the question of benefits, and a court is not the place where it is possible to engage in that sort of negotiation and compromise. It is not the place where different individuals come forward and declare their interests and what they are willing to sacrifice for those interests.

“Putting economic and social rights on the same plane as civil and political rights implicitly takes an area where compromise is essential and brings that into the process of rights adjudication.”

That is the heart of the political process; only the political process can handle those questions.

Consider the question of health care. One person needs a kidney transplant to save her life, another needs a heart-bypass operation, and still another needs life-long anti-retroviral therapy. All of these are life-saving measures, but they are expensive. Then there is the concern about primary health care for everyone. If you are allocating the resources of a society, how do you deal with the person who says they need that kidney transplant or that bypass or those anti-retroviral drugs to save their life when the cost of these procedures may be equivalent to providing primary health care for a thousand children? Do you say the greater good for the greater number, a utilitarian principle, and exclude the person whose life is at stake if they do not get the health care that they require? I do

not believe that is the kind of thing a court should do. Rather, I think that many different considerations need to be taken into account, and that only through a process of negotiation can an outcome be reached that, although it might not satisfy everybody, allows society to grapple with questions that affect a whole community of people.

Consider next the question of education. What if a constitution talks about a right to an education but is silent as to the type of education people should be entitled to? A society may say that it needs a certain elite — scientists, engineers, and brain surgeons — as well as people who are going to be able to work effectively in factories and serv-



Aryeh Neier and Herman Schwartz discuss social and economic rights.

ice jobs. Does someone have a right to say they are entitled to an elite education, that they should have the benefit of a particular education over another? Can you deal with these questions through the adjudicatory process? Again, I do not believe it is possible.

Finally, consider the question of jobs. Suppose that a decision is made through the legislative process that we have to spend a certain amount on building roads because we want peasants to be able to take their goods to market for sale. Suppose further that we have to build a port to export those goods. Again, can you deal with a society's decision to spend some of its resources on these matters rather than provide jobs at a certain level for every single person? Can the judicial process deal with the question of the short-term need for jobs and social security as opposed to that of long-term socio-economic growth? The same policies are not going to be appropriate to deal with short-term needs and long-term economic interests. It is the political process that has to strike the appropriate balance on such questions.

CIVIL AND POLITICAL RIGHTS

PART OF MY CONCERN WITH THIS question of so-called economic and social rights is that I am a believer in very strong civil and political rights: the right to free speech, the right to assemble, the right not to be tortured, etc. Those rights have to mean exactly the same thing every place in the world. With social and economic “rights,” however, it is inevitable that they are going to be applied differently in different places. That is, if you are talking about one country with extensive resources and one that is very poor, there is not going to be the same right to shelter or to health care. Resource allocation has to come into

play in determining what is going to be provided, and it is appropriate that countries should deal with these matters in different ways depending upon their resources.

But suppose that one takes that same idea — that different stages of development mean different things for each country — and applies it to the concept of civil and political rights. Suppose China or Zimbabwe says it is not a developed country and therefore cannot provide the same civil and political rights as a developed country. If you introduce the idea that different stages of development mean different things as far as rights are concerned, it is not going to be possible to prevent that from carrying over into the realm of civil and political rights. Therefore, I think it is dangerous to allow this idea of social and economic rights to flourish, particularly because there will always be different stages of development and different resources to consider in determining benefits.

Another way in which the idea of social and economic rights is dangerous is that you can only address economic and social distribution through compromise, but compromise should not enter into the adjudication of civil and political rights. I do not want a society to say that it cannot afford to give individuals the right to speak or publish freely, or the right not to be tortured. Instead, I want to be able to argue as strenuously as possible for these rights and say it does not matter what your other concerns are. Everybody is entitled to speak. No one may be tortured, no matter the situation. We know that there are many people who argue that there are considerations that ought to allow governments to torture somebody because of “exigent circumstances.” But I do not want to legitimize compromises as far as civil and political rights are concerned. Putting economic and social rights on the same plane as civil and political rights implicitly takes an area where compromise is essential and brings that into the process of rights adjudication.

Then of course there is the way in which economic and social rights were dealt with by the Soviet Bloc countries (when there was

a Soviet Bloc), and the way that China deals with such questions today. Such governments claim that they balance economic and social rights against civil and political rights. In fact, the Soviet Bloc did not provide fair distribution of economic and social resources, but it argued that although it might not have been adequately protecting free speech it was providing the right to social security. It balanced one set of rights against another. I think such a balancing approach is very dangerous to civil and political rights.

Finally, I would say that it is important to recognize how significant civil and political rights are in dealing with economic and social inequities. Probably the best-known work on this subject is Amartya Sen’s research on famine, in which he persuasively demonstrated that no famine has occurred since the end of the Second World War in countries where there was democratic accountability and the ability to communicate freely.² Civil and political rights can be tremendously significant, not only in the area of famine, and often are crucial when dealing with economic and social inequities. Accordingly, I believe it is important to ensure that civil and political rights are as strong as possible. This is not only because of their intrinsic significance, and not only because of their essential role in making the democratic process possible, but because civil and political rights, although not an ultimate solution to the unfair distribution of resources, are among the most effective ways to address social and economic injustice.

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ENDNOTES: Social and Economic Rights

¹ The Federalist No. 78 (Alexander Hamilton).

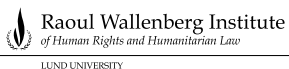
² See Amartya Sen, *Development As Freedom* (Anchor 2000); *Hunger and Entitlements* (World Institute for Development Economics Research 1987); *Poverty and Famines* (Clarendon Press 1981).



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