Courts and the Making of Public Policy
***and* The Social Contract Revisited**

A Social Contract for the Twenty-first Century

Socio-Economic Rights and Wealthier Democracies

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Executive Summary

- With the reluctance by many in the Anglo-American world to countenance an incorporation of socio-economic rights into justiciable Bills of Rights, this policy brief explores the potential of the social contract as a complementary approach to the positivist arguments of international human rights law. Social contract theory has evolved in the twenty-first century into a progressive theory that encompasses socio-economic rights.

- Enabling these rights to be domestically justiciable is an essential component of the social contract, but courts have to respond to the challenge by moving beyond traditional approaches of judicial resolution and drawing on other legal cultures, particularly from the legal cultures of the democratic South.

- International human rights law is relevant to the social contract in assisting in the translation of moral and social demands into legal entitlements; it also relocates socio-economic rights from the vagaries of political discretion to a more transparent and accountable process, where decisions must be justified in an acceptable legal language and according to its concepts.

- International human rights law transforms the social contract approach by recognizing that in incorporating socio-economic rights, the social contract can assist in overcoming some of the justifiable objections of disadvantaged groups to a social contract. Unlike the historical social contract, through the involvement of civil society in the previously exclusive state arena of drafting international, regional, and national Bills of Rights, the voices of those marginalized groups are heard.

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Introduction

International human rights law correctly regards the move from government treaty ratification and acceptance of obligations on the international level to government incorporation into the domestic level in some form, as desirable, important, and often inevitable. However, this has not occurred in a number of Western states with socio-economic rights despite the increasing number of democratic jurisdictions in Europe, Latin America, Africa, and Asia where courts conceptualize socio-economic rights as essential to underpin democracy. With the reluctance and sometimes hostility of many in the Anglo-American world to countenance an incorporation of socio-economic rights into justiciable Bills of Rights, this policy brief considers an approach which complements that of classical international human rights law, and offers an evolutionary historical basis for socio-economic rights, rather than the common political approach. Social contract theory provides additional support for the incorporation of socio-economic rights, locating the argument within a theoretical and historical context. This may prove more fruitful than the familiar arguments that the United Kingdom, for example, is party to socio-economic rights treaties and that they ought to be incorporated into domestic law.

Social contract theory has evolved in the twenty-first century into a progressive theory that encompasses socio-economic rights. Enabling such rights to be justiciable domestically is an essential component of the social contract, but courts have to respond by moving beyond traditional approaches of judicial resolution and adopting successful approaches drawn from other legal cultures, particularly from the legal cultures of the democratic South.

The impact of international human rights law on social contract theory

The emergence of the social contract was possible because of the decline in religious authority for secular government. However, for the three centuries from the seventeenth until the nineteenth century, the terms of the social contract included the implementation of only civil and political rights.

Although it may at first appear strange to apply a theory which has been described as nonfactual, and an intellectual experiment rather than historical event, social contract theory is, as Lessnoff argues, 'intuitively attractive', holding the promise of equal protection to the conflicting interests of all and, therefore, it ought to be of universal application. This author maintains that it is the inclusion of international human rights law that transforms social contract theory into a theory of universal application. International human rights treaties are politically neutral but not morally neutral. The values incorporated in the treaties can be applied to a range of political parties and political philosophies, both secular and religious.

International human rights law transforms the social contract approach by recognizing that in incorporating socio-economic rights, the social contract can assist in overcoming some of the justifiable objections of disadvantaged and formerly disadvantaged groups to a social contract.[1] Through the involvement of civil society in the drafting of international, regional, and national Bills of Rights, the voices of those marginalized groups are heard. In fact, socio-economic rights describe the

1. See for example Pateman, who persuasively argues that contemporary subordination is created through contract. Pateman, C. (1988) *The Sexual Contract.* Cambridge: Polity Press.

protection of individual rights within the community; socio-economic rights litigation is rarely initiated by isolated individuals but more frequently by group actions that benefit both individuals and the community as a whole. This replaces the outdated emphasis on rights based upon separateness and opposition. Socio-economic rights themselves are of little value if the exercise of rights is ineffective due to an absence or imbalance of autonomy and power stemming from a lack of access to resources. The new social contract, by acknowledging the social context, includes poorer members of the community who suffer from these power imbalances.

Placed within its context, a social contract approach can strengthen the moral basis for enforcement of rights, since it provides the parties with a 'special source of reassurance that obligations owed to them will be discharged'.[2] Similarly, international human rights law serves to translate moral and social demands into legal entitlements and relocates socio-economic rights from the vagaries of political discretion to a transparent and accountable process, where decisions must be justified in an acceptable legal language and weighting.

This is why progress in socio-economic jurisprudence, despite its infancy, has been so swift. In the latter half of the twentieth century, we have seen the traditional liberties, long regarded as being negative, recast as rights which impose positive obligations on a state. This in turn has advanced the recognition of socio-economic rights, which in the main are largely positive, although not exclusively so.

In less than a quarter of a century, on the international, regional, and national level there has been extraordinary progress in socio-economic jurisprudence. At the global level, under the International Covenant on Economic, Social and Cultural Rights 1966, a substantive body of General Comments has emerged, setting out for courts and governments the ambit of governmental obligations on socio-economic rights. An Optional Protocol to the United Nations Covenant on Economic, Social and Cultural Rights has recently been adopted, which creates a complaints mechanism for socio-economic violations by governments. This has already occurred with the adoption of the Optional Protocol to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, allowing both girls and women to petition, *inter alia*, to protect against violations of their socio-economic rights.

At the regional level we have witnessed the revision and improvement, substantively and procedurally, of the Council of Europe's Social Charter 1996, the adoption of the African Charter on the Rights and Welfare of the Child 1990 (enabling children to petition on socio-economic rights and extending the ambit of socio-economic protection from times of peace to situations of armed conflict), and the adoption of the Protocol of San Salvador 1988, which is an additional Protocol to the American Convention on Human Rights. The extent of the acceptance that socio-economic rights are an essential component of contemporary democracies governed by the rule of law is evidenced by their inclusion in the Charter of Fundamental Rights of the European Union 2007.

Nationally, many of these standards have become justiciable by different methods in states ranging from Argentina to Venezuela and from India to South Africa. States which have incorporated socio-economic rights regard them as rights in their own terms, and not solely as instrumental to the achievement of civil and political rights. The impact of international human rights law upon social contract theory is that democratic states with Bills of Rights which incorporate socio-economic rights are conceptualized by the legislature, the executive, and the courts as potential sources of freedom and anti-authoritarian in nature, rather than, as in former times, as a threat to freedom. This has been reinforced by the expansion of the social contract as a national theory into one capable of global application.

2. Kimel, D. (2003) *From Promise to Contract: Towards a Liberal Theory of Contract*. Portland: Hart Publishing, p. 57.

The evolution of a social contract for the twenty-first century

'Classical social contract thinking was at its most influential arguably just at the point when the modern nation state was emerging.'[3] Kant, however, sought to conceive of the idea of the social contract at an international level, but in a very limited way through a loose international alliance to protect from attacks outside of the state, which could be 'renounced at any time'.[4] A treaty is an international contract between states, and the founding treaty of the League of Nations was focused solely on states and governments. The emphasis has, however, changed from the League of Nations to the United Nations. In sharp contrast, the United Nations Charter begins with the proclamation of 'We the peoples'. The powerful opening words of the Preamble were initially proposed by the United States, and the purpose was to emphasize that the Charter was 'an expression of the wills of the peoples of the world'; thus advancing the Charter beyond the exclusive bilateral relationships of states and towards the obligations and entitlements of peoples in general. 'We the peoples' is clearly a direct echo of the one-time revolutionary cry of the Constitution of the United States: 'We the People'. It is a symbol of the birth of a contract directly between the peoples and the United Nations, although signed by states.

There is, however, a fundamental distinction between an international social promise and an international social contract, and it is not only in the Preamble that people emerge as parties to the international social contract. The United Nations Charter recognizes the importance of the democratic participation of civil society and nongovernmental organizations and the necessity of human rights protection. This is reinforced by articles 55 and 56 of the United Nations Charter, and by the human rights treaties negotiated in accordance with these provisions.

Although international human rights law emerged from the context of public international law, and was for too long constrained by all of its theories, the declaratory words of the United Nations Charter were followed through in articles 55, 56, and 71, creating the necessary space for the Universal Declaration of Human Rights and a series of human rights treaties. It is under the umbrella of the United Nations Charter that the universal human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, have been negotiated. The Universal Declaration and the treaties have been incorporated into modern progressive democratic constitutions. It is clear that economic and social entitlement is part of this new contract, because the Preamble to the United Nations Charter calls for the employment of international machinery for the promotion of the economic and social advancement of all peoples and, 'All Members pledge themselves to take joint and separate action in co-operation' (Article 56). All people are entitled to rights proclaimed by the United Nations not because they are members of particular state-based communities, but because they are human: respect for dignity is the fundamental criterion.

The international human rights law conception of socio-economic rights as recognized by states is a far cry from the Rawlsian approach of a person choosing terms of cooperation from behind a veil of ignorance detached from all knowledge of the specific characteristics and situations. According to Rawls, the question the social contract asks is what would be agreed by rational self-interested individuals behind a veil of ignorance. States at the United Nations or in regional intergovernmental organizations, when drafting international and regional human rights instruments, are clearly guided by both state self-interest and a more general global compassion. Arguably, the only international instrument which comes close to Rawls' veil of

3. Williams, H. (1994) 'Kant on the Social Contract'. In: D. Boucher and P. Kelly (eds), *The Social Contract from Hobbes to Rawls*. New York: Routledge, p. 135.

4. Gregor, M. J. (ed.) (1992) *Kant: The Metaphysics of Morals (Cambridge Texts in the History of Philosophy)*. Cambridge: Cambridge University Press, p. 151.

ignorance is the Universal Declaration of Human Rights 1948, but perhaps this was because, in part, the Declaration was originally conceived as enshrining only nonbinding goals rather than binding legal entitlements.

The Charter of the United Nations and later human rights treaties are important, because in the development of globalization, the provisions of human rights treaties have become part of the terms of the new social contract. The two international covenants, the International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966, together form the terms of the new international social contract.

The application of socio-economic rights to wealthier democracies

Historically the essence of the social contract was based on a recognition of the inherent dignity of 'man' or more accurately of 'some men', and was unacceptably limited. Social contract theory was an attempt to enshrine the concept of equality, which contrasts with the earlier approaches based on the divinity of monarchs and the feudal view of humanity as chattels.

The terms 'poverty' or 'the state of being poor' are not found in the English language versions of the major global human rights treaties, although it is clearly implied, and to attempt an interpretation that would place poverty beyond the scope of international human rights law would be to ignore the teleological dynamic of human rights. However, the United Nations does distinguish between poverty and extreme poverty, and it is a distinction which, although understandable, may unwittingly have contributed to the downgrading of the poverty experienced by those living in wealthier states.

The concept of class is conspicuous by its absence in international human rights instruments and studies. Status and class do play an important role in the right to life, as Marmot's longitudinal studies demonstrate. Those who are at the lower ends of the social scale, whose sense of security depends upon the wills of others, generally die or become ill earlier. In the United Kingdom it is foreseeable that, 'the lower the ranking in society' the higher the probability of suffering ill-health. Autonomy or lack of it has clear implications for health and the right to life in Britain.[5]

The United Kingdom courts followed the lead of the European Court of Human Rights in *D. v. United Kingdom*, which held that it would amount to inhuman treatment to return a person suffering from AIDS to be deported to St Kitts, a country which lacked specialized treatment and where he lacked the support of family and friends. This has created a keyhole through which only specific groups of the most vulnerable and the poorest can claim the protection of article 3. In *R. v. Secretary of State for Social Security Ex p Joint Council for the Welfare of Immigrants*; *R. v. Secretary of State for Social Security ex p B*, Simon Brown LJ found for the majority that the regulations 'contemplate for some a life so destitute that to my mind no civilised nation can tolerate it.'[6] However, limiting the protection of the state to only particular groups for which the state has particular legislative obligations (such as prisoners, asylum seekers, and refugees), whilst ignoring other groups who also lack necessary resources, raises significant questions as to the role of law in a compassionate democracy. Relying upon articles 3, 6, and 8 of the European Convention on Human Rights implies that socio-economic rights are not conceptualized as rights in themselves and that poverty is therefore perceived only as an indirect violation of civil rights.

It is clear that article 3 was never intended to be a general anti-poverty umbrella, and the European Court of Human Rights and courts in the United Kingdom have been reluctant to develop the right to

5. Marmot, M. (2005) *The Status Syndrome: How Social Standing Affects Our Health and Longevity.* New York: Henry Holt and Co.
6. [1997] 1 W.L.R. 275 at 292. See also *R. v. Secretary of State for the Home Department ex p Q* [2003] EWCA Civ 364.

life in a manner which considers the right to life from a social status and life expectancy perspective, or builds upon the jurisprudence of the Indian Supreme Court.

For states that do not divide Bills of Rights into the justiciable and nonjusticiable, the approach of the Indian judiciary, although constructive within India, is not necessarily desirable, as relying on the positive obligations of civil and political rights would mean that potential litigants lacked a degree of certainty as to the parameters of the right to life, security, and the prohibition on degradation. It would also fail to secure the support of those antagonistic to a more active judiciary. Furthermore, exclusive reliance upon the positive obligations of civil and political rights would not help build a culture of socio-economic entitlement and obligation for policymakers outside of the law in such essential areas as the health service.

To argue that the evolution of the social contract requires justiciable socio-economic rights may seem a big step to take. Yet, if it is accepted that socio-economic rights are part of the new social contract and that international human rights law is holistic and indivisible, then the same tools are required to enforce such rights as the right to life, liberty, and property. In the United Kingdom, this would require the enactment of a Socio-Economic Rights Act. Such an Act would enshrine provisions, which as White recognizes can be understood as 'an unconditional right of reasonable access to a given resource, rather than as a right to be given the same resource unconditionally....welfare contractualism does seem incompatible with a social right of the first kind...'[7].

Judicial form follows function

It is not the contention of this policy brief that the combating of poverty ought to be conducted exclusively through the courts, but rather that the courts can act as a constitutional safety net when legislation, policy, revenue incentives, and other political and fiscal aspects of the welfare state have failed specific groups in the community. Whelan and Donnelly, however, argue that justiciability is not evidence of a higher value, as access to courts is a 'poor even perverse, measure of social (recognition of) value', although they do concede that judicial remedies do enhance the value of a right to a rights holder.[8] They have not made the same criticism of civil and political rights.

Socio-economic rights jurisprudence opens up the courts to a more participatory form of justice. In *Occupiers of 51 Olivia Road, Berea Township and Another v. City of Johannesburg and Others* the Constitutional Court ordered the parties to address the possibilities of short-term steps to improve the living conditions and the alternative accommodation for those who would be rendered homeless. The parties reached consensus that the City would not eject the occupiers, that it would upgrade the buildings, and that it would provide temporary accommodation. In addition, the parties agreed to meet and discuss permanent housing solutions. An agreement was reached by the parties and an order made by the Court.[9] Such an approach is consistent with 'deliberative democracy' and with Habermas's call for a renewed democratization of public institutions and spaces.[10] However, Habermas's approach is consistent with traditional African communal dispute resolution and its established oral traditions based upon consensus building. It is a development of institutional conversations, being not only conversations between the courts and the government, but in the nature of the evolution of

7. He also adds that it is by no means necessarily incompatible with a social right of the second kind. White, S. (2000) 'Social Rights and the Social Contract: Political Theory and the New Welfare Politics', *British Journal of Political Science*, 30: 509.

8. Whelan, D. J. and Donnelly, J. (2007) 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight', *Human Rights Quarterly*, 29(4): 933.

9. Case CCT 24/07 Judgement of the Constitutional Court of South Africa, 19 February 2008.

10. Habermas, J. (1991) *The Structural Transformation of the Public Sphere*. Cambridge, MA: MIT Press.

the social contract, of a genuine participatory conversation between government, the courts, and the people.

It is through the participatory nature of the twenty-first century social contract that the issues surrounding polycentricity no longer require centre stage. The approach of the Constitutional Court avoids Fuller's concerns that polycentric issues would give rise to unintended consequences and would encourage the judiciary to consult with nonrepresented parties and guess at facts, etc. Critics of socio-economic jurisprudence sometimes confuse polycentricity with complexity. Socio-economic jurisprudence is complex, but no more complex than civil and political rights jurisprudence. The American architect Louis Sullivan's recognition that 'form ever follows function' is as applicable to judicial form and procedure as it is to architecture.

Conclusion

The evolution of the narrow social contract into the universal twenty-first century social contract through the incorporation of international human rights law is a facet of globalization with a human face. The theory had its classical roots in North America and Europe and has been expanded and improved both within Europe, and by Africa, Asia, and Latin America. It is bitterly ironic that the constitutional settlement of the United Kingdom and the Constitution of the United States, which in the seventeenth and eighteenth centuries were symbolic of the most progressive systems of government and law, have now fallen behind.

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