THE ASPIRATIONAL NATURE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS; AN EXAMINATION OF AN UNSOUND CASE, THE LOGICAL AND FACTUAL MISCONCEPTION OF RIGHTS

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1.1 Introduction.

Hobbes said[1] that "*during the time [when] men live without a common power… they are in a condition which is called war*". Thus it is the duty of the state, to give societal protection to all citizens. The distinction often made between economic, social and cultural, and civil and political rights, is arbitrary. This essay is split in two parts. In part, I propose to examine the idealized and theoretical basis for the distinction, in the form of a rebuttal and an affirmation. In part II, I will look at the reality of domestic and international enforcement in the field with a view to concluding on the future justiciability of such rights.

Justiciability is, at least for the purposes of this essay, the ability of an individual to take a case against a state in breach of its obligations. Thus while the ECHR is justiciable, the ICESCR is not. While economic, social and cultural rights may be found in a vast array of international documents, from the International Labour Organization[2] to

[1] Hobbes, Thomas, "*Leviathan*", (1651), part 1, chapter 13.

[2] www.webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?lang=EN, Particularly Conv.s 87 and 98, establish justiciability for states, unions, and employer organizations. A further discussion of this and the European social charter can be found in Ewing's "*Social Rights and constitutional Law*." Public Law [1999], p104, at p108.

the Convention on Elimination of all forms of Discrimination Against Women[3], I will deal only with the main UN convention, the ICESCR, due to space constraints.

2.1 A Rebuttal.

There are essentially six arguments against socio-economic rights. Their goal is to devalue those rights, to imply a lack of parity with civil and political rights. I contend that such a devaluation is illogical and political.

2.2 Impossibility of Implementation, Enforcement and Equality?

Cranston says "*a right is like a duty, in that it must pass the test of practicality"*.[4] Let us assume that Communistic welfare and socially just measures could not be enforced in a liberal democracy. Both practice[5] and theory point to the fact that economic, social and cultural rights, given a liberal interpretation, can certainly be justiciable. There seems to be a presumption that because rights are constitutional they are necessarily very weighty. However there is nothing to suggest,[6] that such rights could not be incorporated into a liberal model. It is noteworthy that Locke and Mill saw a place for economic, social and cultural rights in their idealized model. Perhaps a softer line was taken by Mandler[7], who said economists *"are troubled by the power of rights to make uncompromising claims on resources, to set priorities for social expenditures and redistribution of goods, regardless of economic reality of scarcity"*. Gostin's[8] response to Mandler succinctly points to the fact that "*civil and political rights are as reckless (in economic terms) as social and*

[3] Art 10 (education), Art 11 (employment), Art 12 and CEDAW General Recommendation 24 (Doc A/54/38/Rev. 1, Chapter 1) (health).
[4] Cranston, Maurice, "*What Are Human Rights*", (The Bodley Head, (pub) England, 1973), p66.
[5] See 5.1, particularly the Olga Tellis v Bombay Municipal Corporation, [1986] AIR, 180.
[6] In fact quite the contrary, the ICESCR demands that states enshrine economic, social and cultural rights, but only requests that their implementation need be gradual, and based on the countries development.
[7] Harvard School of human Rights Program. "*Economic and Social Rights and the Right to health - An interdisciplinary discussion held at Harvard Law School in September 1993.*" (1995, Harvard), p7.

economic rights… if we appreciate the value of civil and political rights, we should recognize the potential utility of social and economic rights".

The Irish Constitutional Review Group[9] presumes that there would be difficulties in defining such concepts as poverty. They assert that "*it is not susceptible to objective determination"*. It would be up to judges to define, however we leave other rights up to the judiciary to define and implement. Surely the most subjective determination of the judiciary is that of justice, or perhaps of the "reasonable man", these decisions are left to judges everyday, yet they aren't capable of determining a level of unacceptable poverty? There is a double standard being applied, one for liberal concepts and one for social ones.

Ewing[10] highlights a common argument that the "*questions of enforcement would clearly be difficult*". However the right to life is very difficult to enforce[11], it is one of intense feeling and academic comment, yet we do not seek to remove it from the constitution. This is not an argument against postivising the right, but an acknowledgement of the difficult reality.

The Constitutional Review Group[12] having said that economic, social and cultural rights definitely should not be in the constitution, goes on to say that they are and should be in the constitution through the right to life and bodily integrity! This clearly shows their misconceptions about the rights. They presume that such rights should necessarily be Communistic, when in fact, in the light of international practice, they can be defined in a liberal manner[13].

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[8] Above No.7, p7-8.
[9] Irish Constitutional Review Group, 1994, Argument 2, p235.
[10] Ewing, K. D, "*Social rights and Constitutional Law*", Public Law, [1999] 104, at p106.
[11] AG v X, [1992] 1 IR, p1.
[12] Above No. 9, Argument 6, p236.
[13] See Below 5.1.

Cranston says because they cannot be guaranteed equally by all states that they should not be international rights! However, as Alston highlighted[14], the committee of the ICESCR seeks only what is reasonable in the light of the country's circumstances. South Korea is a good example of the ICESCR "*sliding scale*". World Bank figures from 1991 showed the South spent 2% of its' GNP on health and 22.2% on defense. The figures show that they have the capacity, but not the willingness to put economic, social and cultural rights into action.

Civil and political rights cannot be guaranteed equally. It is glib to say that all have the right to free speech, while ignoring the harsh reality that rights may not be practiced equally. For instance when Tony O'Reilly came out in favor of the war in Iraq it was given substantial coverage, however my opposition to the same war has had no such coverage.

2.3 The Separation of Powers.

The essence of the separation of powers is that no one arm of the state should become too powerful. There is the danger of a dictatorship of the judiciary, or of the legislature. Within the doctrine, the economic distribution of the state's resources falls entirely to the elected representatives. Thus judicial infringements into this legislative field must be limited. No unelected and unremoveable body may supplant the legislature. By strictly applying this doctrine the courts will refuse to force the legislature to spend money, as to do so would be an infringement of the legislative sphere.

Anti-economic rights activists attempt to convince that it is an essential in a democracy, that the judiciary **don't** and **shouldn't** have any say in the economic matters

[14] Above No. 7, p35.

of the state. But instead of blindly accepting that this is the case, one must consider why! I contend the concept of the separation of powers acts to mystify the populace about the law, a means by which judges may disguise political decisions in legalism. In Sinnott[15] the Supreme Court silenced what many (both within and without the legal sphere) thought was a just case, with a separation of powers argument.

Judicial decisions require some form of legislative monetary action, whether it is prison places, fair trial, or education, yet when they want to make an unpopular political decision judges cite doctrine. This makes it is easier to devalue economic, social and cultural, and harder to convince of their parity with civil and political rights.

Under a strict separation of powers, most rights cannot be guaranteed (including civil rights like fair trial) as they require judicial examination of legislative spending. However we do implement rights judicially – the right to a fair trial. The separation of powers has been discarded for many civil and political rights, but not for socio-economic rights. The distinction between the two is arbitrary and political. Shrouding it in legalism does not justify it, but continues the illogical status quo.

It is this legalism that was argued successfully to the constitutional review group[16]. They found that the separation of powers was strict enough to prevent the enacting of socio-economic rights in the Irish constitution. They assert that to implement those rights would be to distort democracy, by taking away power from the Oireachtas. They ignore that a constitutional provision has the added democratic legitimacy of a direct vote by the people. On the other hand, government policy before and after the

[15] Sinnott v Minister for Education [2001] 2 IR 505.
[16] Above No. 9, p233.

election are very different animals. Ewing concludes, "*the silence of the reformers on the question of social rights* is *a reflection of a narrow and exclusive ideological agenda*"[17].

2.4 Conceptual Difficulties; Positive versus Negative Rights.

Toebes[18] points out that while it is traditionally thought that civil and political rights are negative obligations, and economic, social and cultural rights are positive, the situation can often be reversed! She says[19] "*civil and political rights can require states to act... [and] economic, social and cultural rights may just as well require states to refrain from activity".*

In the Indian Supreme Court case of Olga Tellis v Bombay Municipal Corporation[20], the right to housing was defined in terms of freedom from state interference. Thus the courts are capable of implementing economic, social and cultural rights in a negative manner. Similarly in the Airey Case[21] the state was required to expend money on free legal aid so as to protect the right to fair trial in civil cases. Thus both sets of rights may be defined in a positive or negative manner.

2.5 Muddling the Rights Debate.

Cranston[22] sees the debate over economic, social and cultural rights as muddling the debate on human rights (civil and political rights). However, his thesis has many logical flaws. First he states that those who wish to stop the implementation of civil and political rights make them out to be ludicrous. He implies this is an illogical and emotional tool.

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[17] Above No. 10.
[18] Toebes, Brigit C.A, "*The Right to Health as a Human Right in International Law*", (Intersentia (pubs), Netherlands, 1999), p7.
[19] Above No. 17, p7.
[20] AIR (1986) SC p180.
[21] Airey v Ireland (1979) 2 E.H.R.R. 305.
[22] Above No. 4, p65

However, he later makes economic, social and cultural rights seem ludicrous by highlighting just one sub-clause of the ICESCR over and over[23]!

Davidson[24] states "*if we descend to the level of pragmatism, it… becomes clear that alleged distinctions between the two categories of rights often verges on the arbitrary*". Gostin[25] states that "*there is no difference between civil and political and social and economic rights.*" However Cranston classes economic, social and cultural discourse as that of "*socialization*", a language which is not suitable for the laudable cause of serious rights (i.e. The ICCPR).[26] It is an argument that has faded out as countries begin to seriously implement economic rights.

2.6 De Facto Versus De Jure Rights.

There is a de facto right to many socio-economic rights in western Europe. Social welfare, social housing, emergency health care have been largely implemented, but they are generally not justiciable. Some argue that the de facto existence of such rights is sufficient.

The Irish Commission for justice and peace[27] highlighted that economic, social and cultural rights are "*most denied to the poorest and least powerful in society*". These are precisely the people that need such rights most. The result of making them justiciable will be to protect all people. Surely the protection of life and wellbeing is the primary aim

[23] The right to holidays with pay, Article 7(d). Possibly the least significant measure. Above No. 4. p66
[24] Davidson, Scott, "*Human Rights*", (Open University Press, Philadelphia, USA, 1993)
[25] Above No. 7, p10.
[26] Above No. 4, p70
[27] A commission of the Irish Catholic Bishops Conference, September 1998, "*Re-righting the constitution-A Case for New Social and Economic Rights: Housing, Health, Nutrition, Adequate Standard of Living*" (Irish Commission for Justice and Peace, pub, 1998, Dublin)

of rights. Given the interrelated status of the ICCPR, and the ICESCR,[28] it is essential that both are implemented de jure to protect all in society.

2.7 The Distinction Between Law and Morals.

Cranston draws the classical positivist distinction between a moral and a positive right[29]. He contends that moral rights are unenforceable, and positively enshrined rights are the only source of law. While we can accept that law should not be confused with morals, We must also accept civil and political rights are enforced exactly because we think it is moral and just to do so. He claims that economic rights are moral requirements not positive obligations. Civil and political rights were also moral obligations, before they were positivised. It follows that if economic, social and cultural rights are moral obligations we should implement them too. There is little distinction between the right to life and the right to health: the right to free association is meaningless without the right to join a union. All rights are moral imperatives, the rights movement seeks to make them positive obligations on states.

3.1 An Affirmation.

A rebuttal alone of anti-rights theory is not sufficient for change. It is not enough to say the present regime is wrong, it is necessary to show why a change is important, and logical.

[28] UN World Conference on Human Rights, "*Vienna Declaration and Program of action*", UN Doc. A/CONF. 157/23, 12 July 1993, Para 5; asserts the interdependent, interrelated and equal nature of Civil and Political Rights and Economic Social and Cultural rights.
[29] Above No. 4, p5

3.2 It is a Good in Itself That People Should Have All Rights.

Kant's categorical imperative states[30] "*treat humanity… in every case as an end withal, never as means only.*" Thus human beings are a good in themselves, and it is right to treat them well. It is good that every person has a minimum level of all rights below which they cannot fall. Justiciability is the only way that it can be implemented. Hobbes[31] said the state's duty was to protect the individual from the harsh nature of a world without society. I contend that his central tenet of societal protection still holds.

Ideally everyone should exercise all of their rights, without having to go to the courts to have them enforced against the state. However the reality is that politicians are more interested in rewarding the monied classes, instead of addressing the critical issue of social exclusion and poverty.

I reject in its entirety the neo-liberal notion that people who can't "*hack it*"[32] in the economy must be left without a safety net. I contend that such a view is incorrect in that it looks only to one narrow interpretation of society, that is as a means of regulating an economy. For instance many believe that universal state guaranteed welfare and health rights encourage people to stay out of the employment market. If this were true, how could successes in France, Germany and indeed Britain be explained. Economic, social and cultural rights serve a far greater utility than the two-cent psychology of the neo-liberals. The absence of rights cheapens a society, and encourages the view that people are a means not an end.

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[30] Kant, Immanuel, "*Fundamental Principles of the Metaphysics of Ethics*" (1785), Section 2, (translated by T.K. Abbott). "*handle so, dass du die Menschheit, so wohl in deiner Person, als in der Person eines jeden andern, jederzeit zugleich als Zweck, niemals bloss als Mittle brauchest.*"

[31] Above No. 1.

[32] Ginsberg and Lesser, "*Current Developments in Economic and Social Rights: A United States Perspective*", HRLJ, [1981], Vol. 2, No. 3-4. p239.

3.3 Exercise of Other Rights is Reliant on Socio-Economic Rights.

The second reason for implementing economic, social and cultural rights is that they are absolutely necessary for the full exercise of civil and political rights. Dahrendorf[33] recognizes that social security is a precondition of legal and political liberty, if constitutional rights are not to be "*empty promises*"[34]. Similarly Rawls[35] stated that "*below a certain level of material and social well-being, and of training and of education, people simply cannot take part as citizens*". Waldron[36] highlights that those without an income, without a home, without health, can hardly be expected to take an interest in the exercise of their civil and political rights, while "*completely unsure about the food and shelter in the coming days for them and their families*". The fact is a political community needs an educated, healthy electorate. It is often highlighted as one of the reasons for the flourish of politics in the Platonic and Aristotelian Athens, that the citizens had little else to do.

4.1 The International Convention.

Internationally economic, social and cultural rights are not justiciable in the way that civil and political rights are. The ICESCR does not allow for individual petitions[37] and state complaints[38]. Alston[39] highlights "*the principle stumbling block to the realization of the covenant [ICESCR]... has always been the debate over state obligations. In the case of civil and political rights, it is assumed that these obligations are absolute and*

[33] Dahrendorf, R, "*Citizenship and Social Class*", in Bulmer and Rees (eds), "*Citizenship today: The contemporary relevance of T. H. Marshall*" (1996), p41
[34] Above No. 33, p39.
[35] Rawls, J, "*Political Liberalism*" (1993), p166.
[36] Waldron, J, "*Liberal Rights*", (1993), p287.
[37] As in the first optional protocol to the ICCPR.
[38] Though as this has never been used under the ICCPR it is possibly no great loss.
[39] Above No. 7, p35

immediate." The requirement in article 2(1) of the ICESCR ensures that states need only "take steps" to achieve the goals, unlike the ICCPR which binds parties to "respect and ensure". Thus before the rights can even be addressed on a conceptual basis they are being undermined.

4.2 Failure of Enforcement.

The attitude of states can clearly be seen in the run up to the creation of the European Economic and Social Charter. While the Council of Ministers[40], drew up a declaratory document, the Council of Europe assembly was in favor of a mandatory document. It is this state attitude that prevents implementation of the rights. It is clear that while states don't mind subjecting themselves to the rigors of international economic law when the purpose is capitalist (the WTO for instance), when it is a socially just purpose, there are far fewer states willing to sign up, and when they do the implementation is put on the long finger!

While Rehman[41] is very positive about the reporting procedure, citing the advances made by the committee to improve the efficiency of the process, his view is sharply contrasted by the committee's special rapporteur Philip Alston[42] who stated "*the UN committee… was established in 1987 on the implicit condition that it be ineffective and inactive*".

The Democratic People's Republic of Korea (North Korea) submission to the ESCR committee[43] in 1986, shows exactly how states attempt to pull the wool over the committees eyes. It is an example of the failure of the constructive dialogue process,

[40] Representing the various governments.
[41] Rehman, J, "*International Human Rights Law, A Practical Approach*" (2003, Longmans, England) p125.
[42] Above No. 7.

when state pride comes in the way of their reporting, and no help can be given by the committee. Furthermore, Alston cites the lack of expertise and the membership of attorneys general, ministers for justice and diplomats.[44] He goes on to assess the three methods of enforcement. He says the state reporting is a failure due to the lack of full, informed reports. The day of discussion failed due to lack of economic and physical support. Finally he says the general comment is the only slight success. Economic social and cultural rights have been sidelined[45].

When the HRC devotes only five per cent of its' time to the rights, the enforcement committee lacks support and the conceptual difficulties are great, it is little wonder that the level of fulfillment of obligations has been so much less than under the ICCPR.

5.1 Limited Success of Domestic Enforcement.

In many domestic jurisdictions economic, social and cultural rights are justiciable. The emerging post-communist Eastern European States,[46] South Africa[47], India[48], Ireland (education[49], possibly even health care[50]), Italy (health care), Finland (health care[51]), etc, have implemented either some or all of the rights enshrined in the ICESCR. The practice

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[43] UN Doc, E/1986/3/Add.5, para 1.
[44] Elected "through the spoils system".
[45] Above, No. 7, p36-37.
[46] Above No. 17, and Sadurski, Wojciech, "*Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*", Law and Contemporary Problems, [2002], Vol. 65, No.2, p223.
[47] Above No. 7, p43, and O'Regan, Kate, "*Cultivating a Constitution: Challenges Facing the Constitutional Court in South Africa*", DULJ, [2000], Vol. 22. p1.
[48] Due to the judicial activism around the right to life, many economic, social and cultural rights are now incorporated into the Indian Constitution. Note for example, the Olga Tellis Decision, Above No. 17.
[49] Bunreacht Na hEireann, The constitution of Ireland, Article 42.
[50] 25th June, 2001, Irish Times, The High Court granted locus standii to Ms. Byrne, who was suffering from a life threatening illness. She sought an order for the health board to provide the necessary treatment. However on the 28th June, 2001, there was a further article stating that she had been provided with a bed.

of these states has cleared up many of the anti-rights arguments, previously only challenged by reason.

Cranston[52] asserted that the government of India could not command resources that would guarantee five hundred million "*a standard of living adequate for the health and well being of himself [a citizen] and his family*", however ironically just twelve years later the courts of India implemented such a right in the Olga Tellis v Bombay Municipal Corporation decision.[53] Even in such countries as the UK[54] and the US[55], the ultimate liberal legal systems, certain economic, social and cultural rights are recognized as "*fundamental*".

Simply put the argument that economic, social and cultural rights are unworkable on a judicial and constitutional footing, are false. There is an essential balancing to be done. Does the state wish to ensure protection of a society's poorest and least well off, or do they wish to adhere blindly to the strict liberal separation of powers, despite major logical inconsistencies in the doctrine[56].

6.1 Conclusion

Internationally economic, social and cultural rights are not justiciable. The means of enforcing the ICESCR is, as admitted freely by Philip Alston[57], weak at best, and at worst insignificant. The moral imperative utilized so readily by the UN in human rights matters

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[51] S.15, Finnish Constitutional Act (Amendment of 1995), "*Public authorities shall in the manner stipulated in greater detail by act of parliament, secure for everyone adequate social welfare and health services and shall promote the health of the population*"
[52] Above No. 4, p67
[53] Olga Tellis Case, Citation above No. 17.
[54] London Underground Ltd. v RMT [1995] IRLR 636, at p641.(Millet LJ, recognized the right to strike, as a "*fundamental human right*").
[55] In Tucker v Toia (43 NY 2d (1977) p728, at p730-731), under the New York state constitution, welfare programs were sustained from attack, and "*the existence of a positive duty upon the state to aid the needy*".
[56] Above para 2.2
[57] The ex-chair of that committee, Above No. 7, p36.

has not worked in economic, social and cultural matters, due to the lack of backing from states, the HRC, but most importantly by the UN.

This essay seeks to show that while economic, social and cultural rights are not internationally justiciable, they should be. The arguments of scholars and politicians for the lack of judicial enforcement are either illogical or factually incorrect. The language of mystification and legalism is a cloak for the exposure to the brutality of the "exploitative market economy" [58]. The use of liberal legalism is an attempt to mystify the public into not asserting their right to such basics as food, shelter, and health. While it may be "*dulce et decorum est, pro patria mori*" [59] it is not right or just that your country should allow you to die.

[58] Quinn, Dr Gerard, "*The Nature and significance of Critical Legal Studies*", ILT, Nov, 1989, p284.
[59] Horace (Quintus Horatius Flaccus; 65 - 8 B.C.) "*It is sweet and honorable to die **for** one's country*", Odes book 3, No. 2, 1. 13. (referred to as "*The Old Lie*" by Wilfred Owen)

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