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SECOND GENERATION HUMAN RIGHTS

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1) Inasmuch as I adopt a somewhat austere approach to the constitutional recognition of certain "second generation" human rights I feel it essential to explain my point of departure concerning human rights generally.

2) I view them in an extensive, cohesive and inclusive context as a body of rights designed to protect and enhance, as fully as possible, the dignity of all human beings in their relationships to the state. Human dignity needs to be seen as broadly as possible so as to encompass three main features.

(a) Human worth in its fullest Kantian sense;

(b) Freedom;

(c) Equality.

3) I would agree with President Rooseveldt's comment that a necessitous person is not a free person. I also share the view that the idea of equality and freedom means very little if it does no more than ensure that rich and poor alike are free to sleep on park benches.

4) I continue to be attracted to the definition of human rights advanced by Jürgen Moltman, the German Theologian, as being:

> "those rights and duties which belong essentially to what it means to be truly human, because without their being fully acknowledge and exercised human beings cannot fulfill their original destiny of having been created in the image of God".

A secular adaptation of the above would refer to humans being unable (without such rights) to fulfill themselves as pricelessly unique creatures.

This clearly implies the right of access, equality of access, to material resources without which full human self-realisation is not possible.

These are valid claims, but in what sort of order or moral system? Are all second-generation human rights legal rights or are they moral rights, or are some legal and some moral or may there even be a third category of rights?

At this stage of the debate it is fair (if not essential) to disclose one's own scientific methodology and particularly one's preferred methodology for bringing about social change, before turning to a discussion of second generation rights. I like to categorise myself as a critical rationalist who does not believe that scientific knowledge can be advanced by means of empirical verification but only by hypothesis formation followed by attempts to critically falsify such hypothesis. I am an idealist but not a utopianist. I believe in state economic intervention, but because all State intervention is potentially very dangerous I believe it should be carefully monitored. I am an

indeterminist. I do not believe that history can be scientifically predicted. I accept piece-meal, critically monitored, social engineering but reject vigorously large scale social engineering.

Having said all this may I try to get nearer to the heart of the problem by pointing out that there is a close unifying aeteological link between civil and political rights on the one hand and economic and social rights on the other. They are both responses to the paradox of unlimited freedom. The state was obliged to intervene, and recognise civil and political rights in order to protect the physically and politically weak from being bullied by the physically and politically stronger. Similarly the state is obliged to intervene, and recognise economic and social rights, in order to protect the economically weak from being bullied by the economically stronger. But how far can one press these latter rights as legal or constitutional rights?

In Minister of the Interior & Another v. Harris 1952(4) SA 769(A) (the "second" Harris case, also known as the "High Court of Parliament Case") it was pointed out by Centlivres C.J. that the authors of the constitution "could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. Ubi jus, ibi remedium".

The importance of this maxim has been brought home to us forceably and painfully over the past decades. Very great strains have been placed on the legitimacy of the legal system because, in consequence of states of emergency (real or *quasi*) and a general lack of procedural access to justice, people have

not been able or allowed to enforce their rights. It is a situation fraught with great danger when peoples rights are enfringed but they are left without, or prevented from exercising, a remedy. The remedy is indeed part and parcel of the right. If a remedy is not seen to be exercised for a sufficiently long period of time, the public will inevitably start coming to the conclusion that the right itself has been taken away, with potentially grave consequences for the legal system.

It is unfortunate that we have slipped into the habit of talking about "first" and "second" generation rights, thereby tending to drive a neat conceptual and hierarchical wedge between civil and political rights on the one hand and economic and social rights on the other. It is even suggested that there is a fundamental difference between all rights allocated to the one and the other generation, it being contended that all first generation rights are capable of negative enforcement against the state ("thou shalt not infringe or interfere") whereas all second generation rights can only be enforced through positive, financial intervention by the state. This is simply not true.

The "due process of law" rights, by way of example, are some of the oldest first generation rights. In modern times the content of these due process rights demand more than mere negative enforcement. Article 14.1 of the ICCP refers, in relation to criminal matters, to an entitlement to

> "a fair and public hearing by a competent, independent and impartial tribunal established by law".

A competent tribunal implies a skilled and trained tribunal which in turn requires financial commitment. Article 14.3.d goes much further when it entiles everyone faced with a criminal charge

> "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

The positive economic obligations that this could place on a state might be extensive. I would suggest that it was precisely these economic implications which prompted the US Supreme Court to move cautiously, over a decade, from its decision in Gideon v. Wainwright (1963) enunciating a constitutional requirement that counsel should be appointed in all felony cases to Argesinger v. Hamlyn (1973) where this was extended to the appointment of counsel in all trials where the charges were such that imprisonment was a competent verdict.

Conversely, many important social and economic rights are capable of negative enforcement without necessarily requiring financial commitment from the state. For example;

a) "the right to work" (ECOSEC 6.1)

b) "equal remuneration for work of equal value" (ECOSEC 7(a)(i)

c) "safe and healthy working conditions" (ECOSEC 7b)

d) the right to reasonable limitation of working hours and periodic holidays with pay (ECOSEC 7d)

e) the right to form and join trade unions and trade union activities generally (ECOSEC 8)

f) the restriction and limitation of child labour (ECOSEC 10.3)

At the same time we would be guilty of a culpable disservice to the public at large if we glossed over the significant differences, both conceptually and in regard to their implementation, between many of the first and second generation rights.

This difference is well illustrated by comparing article 2(3)(a) and (b) of the ICCP with Article 2.1 of ECOSEC. Article 2(3)(a) of the ICCP makes provision, *inter alia*, that

> "any person whose rights or freedoms as herein recognised are violated shall have an effective remedy"

and

Article 2(3) provides that

> "any person claiming such a remedy shall have his right thereto determined by competetent judicial, administrative or legislative authorities" with the further obligation on every State Party "to develop the possibilities of judicial remedy".

As far as ECOSEC is concerned, not only is there an absence of any provision for the domestic enforcement of the social

economic and cultural rights embodied in the covenant (i.e. for enforcement in their own countries by the state parties to the Covenant) but all the rights are heavily qualified by Article 2.1 which provides, *inter alia*, that

> "Each State Pauty ..... undertakes to take steps - to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant".

No doubt an obligation of sorts is placed on each State which is "enforceable" through the Economic and Social Council of the UN in the vary tenuous and indirect manner outlined in articles 16-24, but it is an obligation which differs materially from legal obligations as we know then in domestic, even domestic constitutional law:

(a) No provision is made nor required for direct domestic enforcement;

(b) The State Party has to take steps (only steps) towards fulfilling these obligations; and the obligation only have to be progressively discharged.

(c) There is the major qualification, which limits the entire obligation, that the undertaking is limited by the State Party's

> "available resources".

The question which I would pose is whether such obligations, qualified as they are in terms of "available resources", "steps",

"progressive achievement" etc., are obligations which courts of law are ecquipped to interpret, let alone enforce. The question may even be asked whether it is desirable for courts to attempt to do so.

1. Is it for a domestic Court to hold that a state is not using its maximum available resources to provide housing, clothing, energy and food to everyone because it is following the wrong economic policy? Is the Court to sit as a super legislative or executive body? I would have thought that elementary principles of representative democracy would militate against this.

2. What does a Court do if the available money has been spent on food and a claimant before it demands housing, or health care?

3. What is a Court to do in a stagnant economy where the GDP is insufficient, for example, even to meet the claims for food. Are all state funds to be devoted to food, or are they to be equally distributed amongst the competing economic rights or do certain rights have higher claims and, if so, to what degree and in what proportion?

One thing is clear; these types of economic rights cannot be formulated without qualification and without making them dependent, somehow, on available material resources.

One answer to the above objection might be that economic claims ought not to be adjudicated on by courts at all, but by other

legislative or administrative bodies. There are even greater objections to such a procedure.

1) It really amounts to an abrogation of the rule of law;

2) It flies in the face of the ever growing constitutional tradition that constitutional rights should be adjudicated upon by independent judicial tribunals.

3) It leaves the individual with a conflicting fundamental economic claim powerless and impotent in the hands of a burocracy with a different view on economic priorities.

4) It will inevitably lead to conflict with other constitutional rights and if the latter rights are infringed, which is an ever present possibility, where has constitutional litigation landed?

5) The greatest danger is that such a solution would really open the door to uncontrollable state intervention, the dangers whereof I need hardly spell out in 1992.

I would argue that economic and social rights are best protected and enforced constitutionally along three avenues:

a) By carefully analysing which of these rights are capable of negative enforcement and embodying them in the constitution;

b) By considering which economic rights, though conventionally formulated in a way which requires positive state intervention, are capable of formulation (even if only incompletely) in a manner which makes them amenable to negative enforcement;

c) By rigorous enforcement, subject of course to the affirmative action safeguards, of the equal protection rule.

It may not be possible to force a government constitutionally to spend R1 billion on health care or primary education. Where, however, a government decides to do so, it can be compelled to spend the money equally on all its citizens.

I conclude with a quotation from a recent article "Why have a Bill of Rights" by Justice *William J. Brennan* (Jnr), who graced the liberal wing of the US Supreme Court for some 35 years;

> "Another assumption I shall make is that the civil liberties and basic procedural safeguards contained in a bill of rights are enforceable.
>
> .....
>
> Without some effective means of vindication, legal rights are apt to become little more than moral claims, readily ignored when the forces of government find it convenient to do so. Paper promises whose enforcement depends wholly on the promissor's goodwill have rarely been worth the parchment on which they were inked".

He also expressed a clear preference for a bill of rights

> "painted with a flat brush rather than etched with a jeweler's pin".

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