

THE LACK OF JUSTICIABILITY AS A PROBLEM IN RECOGNIZING POSITIVE SOCIAL AND ECONOMIC RIGHTS

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OUTLINE

I - INTRODUCTORY PREMISES

A - The Judicial Function

- 1 - Core : to apply existing law, not to create new law.
- 2 - But process not entirely mechanical : courts "interpret" the law, finding or establishing true meaning and generating or deriving more concrete norms on the path to individualized application ; also fill gaps within a general framework.
- 3 - The more general or vague the legal provisions, especially when they consist of principles, standards or policies which compete for recognition rather than of specific rules which apply on an all-or-nothing basis, the more creative the guided discretion of judges.
- 4 - Courts typically address issues that are "justiciable" not only in the sense of not being committed to other branches of the government (e.g., political question-separation of powers) but also of being amenable to adjudication (in a setting where both the law and the relevant facts are determinable) and capable of resolution by court order or decree. These requirements do not apply only in the private law sphere, where damages or specific performance is the normal remedy, but also in public law where the powers of the government are defined and the fundamental rights of the citizen are protected.

B - Rights and Claims Before the Courts

- 1 - Terminology not always clear and consistent but right plus remedy (normally a judicial one) equals claim.

2 - In the liberal, democratic tradition, the fundamental rights or claims are typically "negative", or trumps against governmental action limiting the personal freedoms, e. g., of expression. Even the right or equality may be expressed in negative terms as freedom from discrimination.

3 - Typically, these trumps are also enforceable by negative court orders, either invalidating specific governmental action or enjoining the government from taking certain action. Even in enforcing equality, the most common remedy is negative, i.e., invalidation rather than extension of the preference.

4 - This method of enforcement makes the related claims "justicialbe" in the sense that the court deals with a determinable and limited universe of legal norms, even where stated in general and vague terms because they contain their own paths of concretization, a manageable universe of relevant facts and a narrow particular situation where a specific solution is possible.

5 - In the fundamental rights field, positive entitlements present special difficulties of recognition and enforcement. While actions against governmental "inaction" are non unknown in administrative law, the right to be enforced must be clear and individualized ; therefore, this approach is not easily transferrable to a generalized affirmative protection of fundamental entitlements.

6 - In the rest of this outline, the focus will be on the problems of justiciability raised by positive social and economic rights.

II - THE RIGHT TO WORK AND THE RIGHT TO EDUCATION : HOW JUSTICIALBE ?

A - Definitions

1 - The right to work and to education have been included in many post-W.W.II European constitutions and in international texts such as the U.N. Universal Declaration of Human Rights and the related U.N. Covenant. They also dominated the former socialist-communist constitutions.

2 - Typically, these rights are merely stated in general terms and not defined or qualified in any way. In some texts, there is reference to "suitability" for the work and to "free public" education. Furthermore, no special institutional structure or procedure is set up for their recognition and enforcement.

3 - The value of such rights as programmatic declaration of good intentions and even as guides and justifications for legislative action is not at issue here. The question is whether these rights are stated in terms that make them judicially cognizable.

B - The Problem of Justiciability

1 - The mere fact that these rights are articulated in general language does not make them non-justiciable. For example, nothing could be more vague than the right to freedom of expression.

2 - However, the additional fact that they constitute positive entitlements rather than negative freedoms complicates matters.

3 - Incidentally, it is possible to derive some negative commands from these rights. For example, the right to work may be interpreted to prohibit discharge without cause by public or even private employers unless a new job is provided ; and the right to free public education may perhaps support an order forbidding the licensing of private schools. Such clumsy concretisation, however, not only creates a tight straight-jacket which both overkills and underprotects but severely limits

private economic freedom which is clearly not consistent with the nature of these rights as public entitlements. Thus, the rights to work and to education should remain basically classified as positive claims against the government rather than as limitations on the actions of other citizens.

4 - The justiciability complication arises not so much in the realm of the values underlying these rights as in the methods for their recognition and in the processes for their implementation.

5 - Focusing on the public entitlement basic feature of these rights, first it is not disputed that they are subject to a general reservation of the availability of public funds and of some form of prioritization among the various public needs. These economic considerations are not only extremely complex and variable in time and place but require making choices of political and social policy not normally within the judicial function. In addition, the courts are incapable and even constitutionally prohibited from forcing the government to impose or raise taxes or other forms of public revenue.

6 - Second, even if these obstacles were somehow overcome, the suitability of a particular job or of a particular kind of education to a particular person at a particular time and place is subject to so many variables and to such an ongoing evaluation of economic circumstances that the judicial resources of fact finding and individualization will be stretched beyond any reasonable limit. This is not meant to argue that all economic notions such as harm, market power, reduction of competition, etc., are not amenable to judicial measurement. But it does suggest the non-justiciability of broad matters of economic policy and structure, especially when the availability of financial resources and the suitability of particular means and measures are at issue.

7 - Third, a related problem is the difficulty of devising a definitive remedy, given the fact that the suitability of a job and of an education plan changes prospectively over time and place. Judicial remedies are typically backward looking, redressing a wrong committed in the past and capable of being currently complied with without further judicial participation. Courts are not well equipped to undertake continuous, variable administrative duties of overseeing future developments as the U.S. school desegregation cases have demonstrated.

8 - A possible crude monetary remedy judicially fashioned under these rights, a social salary for unemployment, e.g., of \$ 1,000 a month or a school voucher of \$ 8,000 a year may be viewed as a solution of last resort but it is not free of serious deficiencies. Not only is the fit quite questionable but also the conditions of entitlement are too complex and difficult to assess. Indeed, the enormous financial burden that such remedies would impose and the inevitable tax implications call for legislative rather than judicial evaluation.

III - CONCLUSION

The positive economic and social rights incorporated in some recent legal texts may express desirable policies and, as declarations, may empower government to take implementing action or may serve as aids interpreting other ambiguous texts. However, they do not meet the criteria of adequate justiciability or other form of crystallization or concretization without legislative or rule-making intervention. Calling them "rights" is not only confusing and misleading but may detract from the righthood of the traditional negative fundamental civil and political rights recognized in liberal democratic constitutions.