

Economic and Social Rights and Liberal Democracy: Challenging the 'Symbiotic' Relationship

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Conventional approaches to human rights law, especially where economic and social rights are concerned, have not been effective. In light of the overlapping crises facing the world today in the form of environmental damage, geopolitical instability, pandemics, and the like, there seems to be ample opportunity to rethink the theoretical justifications for human rights and their expression in law. Failing to ground human rights law theoretically risks abandoning its rhetoric to those who may seek to use it for other purposes, like the legitimization of certain regimes in opposition to political rivals. Today, rights seem at risk of being emptied of their content and engulfed in geopolitics and therefore confined to use as a stick with which to beat unfriendly nation-states. There may also be an opportunity to rethink liberal democracy, which is often suggested to enjoy a symbiotic, 'mutually-reinforcing' relationship¹ with human rights.

The Universal Declaration of Human Rights (UDHR),² passed by the United Nations in 1948 after the Second World War, contained broad references to a wide range of human rights, but since then, human rights have been divided into two categories or generations: civil and political rights (sometimes referred to as first generation rights) and economic and social rights (second generation rights).³ The distinction has not been merely ornamental: economic and social rights are widely recognised as lesser human rights,⁴ and they have mostly not been implemented in domestic jurisdictions as legal rights, especially in comparison with civil and political rights.⁵

¹ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights : A Legal Resource Guide* (University of Pennsylvania Press 2006) 410.

² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

³ Karel Vasak, 'A 30-year struggle: The Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights' (1977) 11 UNESCO Courier 29, 29.

⁴ Henry J Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context* (3rd edition, Oxford University Press 2008), 263-264.

⁵ Wade M Cole, 'Strong Walk and Cheap Talk: The Effect of the International Covenant of Economic, Social, and Cultural Rights on Policies and Practices' (2013) 92(1) Social Forces 165, 182.

Liberal democracy, meanwhile, has (arguably) crystalised into a norm of international law, a theory advanced by Thomas Franck in 1992⁶ and mostly confirmed, if not. Liberal democracy has spread across the world, especially after the collapse of the Soviet Union, in a time period referred to by Francis Fukuyama as the 'End of History',⁷ a time in which all arguments over political and economic systems were thought to have been resolved in favour of liberal democracy and capitalism. Liberal democracy supposedly will lead to human rights to be respected and fulfilled due to democracy's enhancement of society,⁸ with democracy itself striking a balance between economic and social and civil and political rights.⁹ This is a highly dubious idea, especially where economic and social rights are concerned,¹⁰ largely due to the abstraction of liberal democracy from its historically contingent relationship with capitalism, which has also spread across the world. The development of capitalism, especially the establishment of private property, has created a distinction between the public sphere of the state and the private sphere of civil society.¹¹ As democracy tends to remain confined to the public sphere, this means that the private sphere, where economic exchange takes place, remains mostly untouched by democratic pressure.

Human rights enjoy a complicated relationship with the state. On the one hand, the tension within liberalism between individual liberty¹² and society¹³ a tension that manifests in liberal democratic theory as one between the collective common good and individual liberty,¹⁴ leads to an overly negative view of the state that matches the negativity of civil and political rights but not the action required to fulfil economic and social rights. On the other hand, insufficient theorisation about the state's historical development and "relative" autonomy can lead to the mistaken belief that it is an independent "subject" that is capable of acting like a referee between sections of

⁶ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46.

⁷ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992).

⁸ Amartya Sen, 'Democracy as a Universal Value' (1999) 10(3) Journal of Democracy 3, 10-11.

⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cambridge University Press 2013), 233.

¹⁰ Tony Evans, 'If Democracy, then Human Rights?' (2001) 22(4) Third World Quarterly 623, 639-640.

¹¹ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 125.

¹² John Stuart Mill, *On Liberty* (originally published 1859, Penguin Books 1976), 68.

¹³ Mill (n13) 62-63.

¹⁴ Evans (n10) 625.

society or a passive “thing” that can easily be wielded to achieve a certain goal.¹⁵ A more nuanced conception of the state clarifies that whilst it remains a powerful actor, it also faces significant constraints based upon conflict between social classes and the independent, private power of capital. This also has democratic implications: elections are fought over control of the state, and the idea of change being accomplished at the ballot box is premised upon the idea that the state can be wielded for progressive change. This may not be the case.

At the international level, as mentioned, democracy has become widespread across the world, supported by international law, but this has not led to a global environment more conducive to economic and social human rights. This is due to changes to the structures of capitalism, attributed to globalisation but better known as neoliberalism, that have reduced the scope of economic sovereignty. This included the increased mobility of transnational capital,¹⁶ the use of global governance institutions by powerful Western countries (like the United States) to force economic policies upon countries in the Global South,¹⁷ and a “judicialization” of the global economy¹⁸ in order to entrench and protect private property internationally. All of these changes were backstopped by the United States’ immense military power.¹⁹

Liberal democracy also serves as the legal order around which dominant conceptions of human rights have been developed. The UDHR,²⁰ the International Covenant on Economic, Social, and Cultural Rights,²¹ and the European Social Charter²² all instruct states to implement rights into domestic law, which, as mentioned, states have been reluctant to do. However, even if this were not the case, there would be significant challenges to fulfilling economic and social rights in liberal democratic capitalist society. First, the social power of capital, which is dominant if not totalising in such societies²³ tends to push all economic activity towards the production of profit, which

¹⁵ Nicos Poulantzas, ‘The Capitalist State: A Reply to Miliband and Laclau’ (1976) 95 *New Left Review* 63, 74.

¹⁶ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 92.

¹⁷ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 163-164.

¹⁸ Andrew TF Lang, ‘World Trade Law After Neo-Liberalism’ (2014) 23(3) *Social & Legal Studies* 408, 417.

¹⁹ David Harvey, ‘The “New” Imperialism: Accumulation by Dispossession’ (2004) 40 *Socialist Register* 63, 72.

²⁰ UDHR (n2) art 8.

²¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, art 2(1).

²² Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, art I 1(a).

²³ Karl Marx, *Capital* (first published 1867, International Publishers 1974), 515.

has an uncomfortable relationship with universal economic and social rights. Second, the individual liberty at the heart of liberal democracy, which has an economic counterpart in private property, has shaped the development of law in liberal societies: it tends to treat individuals as abstract, formally equal subjects.²⁴ This leaves the law unable to reckon with underlying economic inequalities that give rise to the need for economic and social rights.

Therefore, a challenge must be issued to idea that there is necessarily a supportive, symbiotic relationship between democracy and human rights. Human rights, especially economic and social rights, must be re-examined, clarifying that these rights are wrongly seen as subordinate to civil and political rights. Liberal democracy should also be reassessed: its status as the world's dominant governmental and social system is problematic due to its limits and drawbacks, all of which are constituent parts of liberal democracy itself. The way that the international legal and economic order has developed into one that is unfriendly to both human rights and democracy, especially over the past four decades, must be highlighted. Finally, the inadequacy of current legal approaches must be interrogated for the purposes of advancing alternatives.

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²⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 113.

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