

## **ECONOMIC AND SOCIAL RIGHTS**

**Prof. Philip Alston**

### **SEMINAR MATERIALS, SPRING 2006**

#### **Course materials**

No course book is required. The materials will be distributed to students at the beginning of the semester and will include suggestions for further reading.

#### **Attendance and participation**

All students are required to attend class regularly (there will be a sign-in sheet) and those who miss more than two sessions will not be able to satisfy the requirements. Students are expected to do the reading in advance of the session, and to participate actively. Two students will be asked to lead the discussion each week and this will require meeting with Prof Alston in advance in order to review the issues to be highlighted. Supplementary materials might also be suggested by those leading the discussion. Seminar participation will be taken into account in the final grade.

#### **Assessment**

There will be a 24 hour take-home exam based on the issues discussed and materials read in conjunction with the seminar. A student who wishes to write a paper instead will need the permission of the instructor and explicit approval of the topic by the end of the fifth week of the semester.

## **Outline of sessions**

### **Part I The Foundations of ESR**

- |                |  |
|----------------|--|
| <b>Jan. 9</b>  | <b>1. Introduction</b>   |
| <b>Jan. 23</b> | <b>2. Philosophical perspectives on economic and social rights</b> |
| <b>Jan. 30</b> | <b>3. The international ESR legal regime and its emergence</b>     |
| <b>Feb. 6</b>  | <b>4. The right to food</b>  |
| <b>Feb. 13</b> | <b>5. The economics of social rights</b>                           |

### **Part II: Justiciability: comparative national approaches to ESR**

- |                 |   |
|-----------------|---|
| <b>Feb. 21</b>  | <b>6. India: public interest litigation</b>                 |
| <b>Feb. 27</b>  | <b>7. South Africa: 'the' social rights constitution</b>    |
| <b>March 6</b>  | <b>8. The United States: the right to education</b>         |
| <b>March 20</b> | <b>9. Juristocracy and the constitutionalization of ESR</b> |
| <b>March 27</b> | <b>10. ESR and social change strategies</b>                 |

### **Part III: Some International dimensions of social rights**

- |                                  |   |
|----------------------------------|---|
| <b>April 3</b>                   | <b>11. International responsibilities for ESR</b>                       |
| <b>April 10</b><br><b>rights</b> | <b>12. International and domestic monitoring of economic and social</b> |
| <b>April 17</b>                  | <b>13. Complaints systems at the international level</b>                |
| <b>April 24</b>                  | <b>14. Strategies for the future</b>                                    |

## Part I The Foundations of ESR

### 1. Introduction

Primary materials:

Economic and social rights provisions of the Universal Declaration of Human Rights

UNDP, *Human Development Report 2005, International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (New York, 2005)

'The Politics of human rights', *The Economist*, August 16 2001

'Righting wrongs', *The Economist*, August 16 2001

'Guaranteed to disappoint: employing the Indian poor', *The Economist*, January 1 2005

Cass Sunstein and Randy Barnett, 'Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue', *53 Drake l. Rev* (2005) 205

Further reading:

Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need it More than Ever* (2004).

### 2. Philosophical perspectives on economic and social rights

Primary materials:

Aryeh Neier, *Taking Liberties: Four Decades in the Struggle for Rights* (2003)

David Kelley, *A Life of One's Own: Individual Rights and the Welfare State* (1998).

John Winfrey, 'A Social Ethics for Social Sciences', in *Social Issues: The Ethics and Economics of Taxes and Public Programs* (1998), Chap. 1.

Paul Kelly, 'Liberalism and Equality', in *Liberalism* (2005) Chap. 5.

Further reading:

Jeremy Waldron, 'A Rights-based Critique of Constitutional Rights', *13 Oxford J Legal Studies* (1993) 18.

Alan Gewirth, *The Community of Rights* (1996).

James Griffin, 'The Presidential Address: Discrepancies Between The Best Philosophical Account Of Human Rights And The International Law Of Human Rights', *101 Proceedings of the Aristotelian Society* (2000) 1-28.

James Nickel, 'Poverty and Rights', *55 The Philosophical Quarterly* (2005) 385.

Carol Gould, 'The global democratic deficit and economic human rights', in *Globalizing Democracy and Human Rights* (2004).

Ivan Hare, 'Social rights as Fundamental Human Rights', in Bob Hepple (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (2002).

Raymond Plant, 'Social and Economic Rights Revisited', 14 *King's College Law Journal* (2003) 1, available at [http://www.hartjournals.co.uk/pdf/kclj\\_141\\_plant\\_1to20.pdf](http://www.hartjournals.co.uk/pdf/kclj_141_plant_1to20.pdf)

### 3. The international ESR legal regime and its emergence

Primary materials:

Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999), pp. 88-91 and Chap. 6.

International Covenant on Economic, Social and Cultural Rights, General Assembly res 2200 A (XXI) (1996), entered into force 3 January 1976

UN Committee on Economic, Social and Cultural Rights, General comment No. 3, 1990, The nature of States parties' obligations (art. 2, para. 1, of the Covenant)

ESR as customary law: *Flores v. Southern Peru Copper Corp.*, 406 F.3d 65 (2003)

Further reading:

Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002).

Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003).

### 4. The right to food

Primary materials:

Amartya Sen, Public Action to Remedy Hunger, Tanco Lecture, London 2 Aug. 1990, available at <http://www.thp.org/reports/sen/sen890.htm>

Michael Massing, 'Does Democracy Avert Famine?', *New York Times*, March 1, 2003.

'Food for Thought', *The Economist*, July 31, 2004, p. 63

Jean Drèze, 'Democracy and the Right to Food', in Philip Alston and Mary Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (2005) 45.

UN Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), The Right to Food

Food and Agriculture Organization, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, 24 Nov. 2004, available at <http://www.fao.org/righttofood/en/>

UN Watch, Jean Ziegler's Campaign Against America: A Study of the Anti-American Bias of the U.N. Special Rapporteur on the Right to Food (Geneva, 27 Oct. 2005)

Further reading:

'Food', in Susan Marks & Andrew Clapham, *International Human Rights Lexicon* (2005) 163-78.

## **5. The economics of social rights**

Primary materials:

'Burundians Flock to Free Schools', BBC News, 19 Sept 2005

Human Rights Watch, *Failing our Children: Barriers to the Right to Education* (2005), Part II, School Fees

Varun Gauri "Social Rights and Economics: Claims to Health Care and Education in Developing Countries," in Philip Alston and Mary Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005) 65.

Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (2002), Chapters 4, 8 & 9.

Further reading:

Katarina Tomasevski, 'Globalizing What: Education as a Human Right or as a Traded Service?', 12 *Indiana Journal of Global Legal Studies* (2005)

Winfrey (above), Chapter 3: Taxes, the Budget and Welfare Reform

Holmes and Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999)

John Winfrey, 'Social Issues: Some Analytical Perspectives from Economics and Political Theory', in *Social Issues: The Ethics and Economics of Taxes and Public Programs* (1998), Chapter 2.

## **Part II: Justiciability: comparative national approaches to ESR**

### **6. India: public interest litigation**

Primary materials:

Committee on Economic, Social and Cultural Rights, General Comment No. 9 (1998) UN Doc. E/1999/22, Annex IV

Cecile Fabre, "Constitutionalising Social Rights," 6 *J. Polit. Phil.* 263 (1998), pp. 280-83

Comment on India and 'Directive Principles'

Upendra Baxi, "Judicial Discourses: The Dialectics of the Face and the Mask," 35 *J. of the Indian Law Institute* 1 (1993), p. 7

*Olga Tellis v. Bombay Municipal Corporation*, Supreme Court of India, 1985, AIR 1986 Supreme Court 18

Kamayani Bali Mahabal, 'Enforcing the right to food in India - The impact of social activism', in *ESR Review*, available at [http://www.communitylawcentre.org.za/ser/esr2004/2004march\\_india.php](http://www.communitylawcentre.org.za/ser/esr2004/2004march_india.php)

People's Union for Civil Liberties v Union of India & Ors, Supreme Court of India, May 2003, Interim Order

Balakrishnan Rajagopal, Socio-economic rights and the Indian Supreme Court: Reflections from a Social Movement Perspective, (Draft, Aug 2004)

Philip Alston and Nehal Bhuta, 'Human Rights and Public Goods: Education as a Fundamental Right in India', in Philip Alston and Mary Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (2005) 242.

#### Further reading:

Pooja Ahluwalia, The Implementation of the Right to Food at the National Level: A Critical Examination of the Indian Campaign on the Right to Food as an Effective Operationalization of Article 11 of the ICESCR, NYU Center for Human Rights and Global Justice Working Paper No. 08, 2004.

S. Muralidhar, "Economic, Social & Cultural Rights: An Indian Response to the Justiciability Debate," in Ghai & Cottrell (eds.), *Economic, Social and Cultural Rights in Practice*, London, Interights, 2004, p. 23

Frank Michelman, 'The Constitution, Social Rights, and Liberal Political Justification', 1 *International Journal of Constitutional Law* (2003) 13.

S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2002).

## 7. South Africa: 'the' social rights constitution

### Primary materials:

The South African Constitution and ESCR

*Certification of the Constitution of the Republic of South Africa*, Constitutional Court of South Africa, Case CCT 23/96 (1996)

'The Origins of South Africa's Constitutional Revolution', in Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004), 89-97.

*Soobramoney v. Minister of Health (Kwazulu-Natal)*, Constitutional Court of South Africa, Case CCT 32/97, 27 November 1997

*Government of South Africa v. Grootboom*, Constitutional Court of South Africa, Case CCT 11/00, 4 October 2000

([www.concourt.gov.za/judgments/2000/grootboom1.pdf](http://www.concourt.gov.za/judgments/2000/grootboom1.pdf))

*Minister of Health v. Treatment Action Campaign*, Constitutional Court of South Africa, Case CCT 8/02, 5 July 2002  
([www.concourt.gov.za/judgments/2002/tac.pdf](http://www.concourt.gov.za/judgments/2002/tac.pdf))

Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, NYU Center for Human Rights and Global Justice Working Paper No. 08, 2005

Further reading:

Elisabeth Wickeri, *Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa*, NYU Center for Human Rights and Global Justice Working Paper No. 05, 2004.

Aarathi Belani, *The South African Constitutional Court's Decision in TAC: A "Reasonable" Choice?*, NYU Center for Human Rights and Global Justice Working Paper No. 07, 2004.

Danie Brand and Christof Heyns (eds.), *Socio-Economic Rights in South Africa* (2005)

## **8. The United States: the right to education**

Primary materials:

Supreme Court of the United States, *San Antonio Independent School District v. Rodriguez*, No. 71-1332. Argued October 12, 1972 Decided March 21, 1973 11 U.S. 1

The right to education in U.S. state constitutions, excerpts from Jeanne Woods and Hope Lewis, *Human Rights and the Global Marketplace: Economic, Social and Cultural Dimensions* (2005) pp. 901-11.

“Who needs a bad teacher when you can get a worse judge? The courts are making a mess of America’s schools,” *The Economist*, November 27, 2004, p. 45  
*Campaign for Fiscal Equity v State of New York*, Brief for Plaintiffs-Respondents, Sept. 7, 2005 and Brief for Defendants-Appellants, Aug. 5, 2005

Further reading:

James S. Liebman and Charles F. Sabel, “A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform”, 28 *NYU Rev. Law & Social Change* (2003) 183. And see the various commentaries in the symposium that follows that paper.

National Law Center on Homelessness and Poverty, *Homelessness in the United States and the Right to Housing*, Jan. 14, 2004

## **9. Juristocracy and the constitutionalization of ESR**

Primary materials:

Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004), excerpts from Introduction, Chap. 5, & Conclusion.

Further reading:

Terence Daintith, 'The Constitutional Protection of Economic Rights', 2 *International Journal of Constitutional Law* (2004) 56.

Frank Michelman, 'The Protective Function of the State in the United States and Europe: The Constitutional Question', in G. Nolte (ed.), *European and US Constitutionalism* (2005) 156.

## **10. ESR and social change strategies**

Primary materials:

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (1991) Introduction & Chap. 1.

Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994) Introduction & Chap. 8.

Charles F. Sabel and William H. Simon, 'Destabilization Rights: How Public Law Litigation Succeeds', 117 *Harv. L. Rev.* (2004) 1015

Further reading:

Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, NYU Center for Human Rights and Global Justice Working Paper No. 08, 2005

Victor Abramovich, 'Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies', 2 *Sur International Journal on Human Rights* (2005) 181.

## **Part III: Some International dimensions of social rights**

### **11. International responsibilities for ESR**

Primary materials:

Celia Dugger, 'Senate Rejects Bush Bid to Ease Delivery of Food To Poor Nations', *New York Times*, Sept. 23, 2005, p. 9.

Thomas Pogge, 'Responsibilities for Poverty-related Ill Health', 16 *Ethics & International Affairs* (2002) 71.

Iris Marion Young, 'Responsibility and Global Labour Justice', 12 *The Journal of Political Philosophy* (2004) 365.

Further reading:

T. Pogge, *World Poverty and Human Rights*, 2002

Seyla Benhabib, "The Law of Peoples: The Law of Peoples, Distributive Justice and Migrations," 72 *Fordham L. Rev.* (2004) 1761

Patricia Smith, "The Duty of Charity and the Equivalence Thesis," in *Liberalism and Affirmative Obligation* (1998).

Brigit Toebes, *The Right to Health as a Human Right in International Law* (1999).

## **12. International and domestic monitoring of economic and social rights**

Primary materials:

Concluding observations of the Committee on Economic, Social and Cultural Rights on Uzbekistan, UN doc. E/C.12/UZB/CO/1, 25 November 2005.

House of Lords and House of Commons, Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights*, Twenty-first Report of Session, 2003–04, HL Paper 183, HC 1188, Published on 2 November 2004.

Katarina Tomasevski, 'Has the Right to Education a Future within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004', 5 *Human Rights Law Review* (2005) 205.

Further reading:

## **13. Complaints systems at the international level**

Primary materials:

Michael J. Dennis and David P. Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', 98 *A.J.I.L.* 462 (2004)

Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights: Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque, UN doc. E/CN.4/2006/WG.23/2, 21 Nov. 2005.

Note on the European Social Charter

*Autism – Europe v. France*, Decision by the European Committee of Social Rights, Complaint No. 13/2002

Further reading:

James L. Cavallaro & Emily J. Schaffer, 'Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas', 56 *Hastings L.J.* 217 (2004)

## 14. Strategies for the future

### Primary materials:

Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization', 26 *Human Rights Quarterly* (2004) 63-73.

Amnesty International, *Where are we on ESC Rights?: Evaluating first steps and laying the foundations for future campaigning*, 25 Feb. 2005

Grainne McKeever and Fionnuala Ni Aolain, 'Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland', *European Human Rights Law Review*, 2004, pp. 158-180.

### Further reading:

Alicia Ely Yamin, 'The Future in the Mirror: Incorporating Strategies for the Defence and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda', 27 *Human Rights Quarterly* (2005) 1200.

## Documents Annex

European Social Charter 1961

European Social Charter (Revised) 1996

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol Of San Salvador'), 1988.

African Charter On Human And Peoples' Rights, 1979.

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 1997.

Montréal Principles on Women's Economic, Social and Cultural Rights, 2002