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SYMPOSIUM, CYNICAL INTERNATIONAL LAW

In international law we (do not) trust

The persistent rejection
of economic and social
rights as a manifestation
of cynicism

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Economic and Social Rights (ESRs) are the unloved and unwanted last born child of the human rights family. Despite a promising start in the Universal Declaration of Human Rights (the UDHR), ESRs still retain a second class status in most national jurisdictions. What explains this cynicism with which ESRs are (still) regarded? This blogpost analyzes how the skeptical gaze through which ESRs are often viewed legitimizes (or attempts) to legitimize government failures to provide for those members of their populace who are in most desperate need, and (unsuccessfully) masks the self-interest that pervades most of international law.

At the time of the adoption of the UDHR in 1948, no distinction was made between civil and political rights (CPRs), on the one hand, and ESRs, on the other.

Unfortunately, however, within the so called International Bill of Human Rights, the content of the UDHR was divided in two separate covenants, the International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR). This artificial division resulted in the creation of a hierarchy that for a large part of the human rights movement's life unfairly privileged CPRs at the expense of ESRs. To date, despite "a degree of optimism generated in recent years" about the interdependence and invisibility of all human rights, and by the constitutional entrenchment and subsequent adjudication of ESRs in various national jurisdictions, ESRs have not yet fully come of age.

While some concerns raised about ESRs may be valid, I argue that this chronic and sustained rejection of ESRs can in some instances be seen as a manifestation of the cynicism with which certain governments regard international law generally and ESRs specifically. Cynicism in this context can be conceptualized as and is characterized by a general distrust of the motives which accompany state actions (or inactions as the case may be) within the context of failures to recognize and implement ESRs. There is more than

what meets the eye when states reject ESRs (whether formally or substantively). These underlying reasons for the rejection of ESRs, that sometimes have nothing to do with the rights themselves or with their ability to be implemented, form the foundation of cynicism as understood here.

I would say that cynicism is used as both a sword and a shield in the area of ESRs in order to accomplish two distinct but interconnected purposes. As a sword, cynicism forms the foundation of the critiques deployed to object to recognition of ESRs as real human rights (in comparison to CPRs) and to deny them a seat at the table of international legal norms that ought to be legally binding. As a shield cynicism is relied upon in order to allow minimalist implementation of ESRs obligations to defend errant states against assertions (whether before national courts or regional and international treaty bodies) to the effect that they are failing to meet their obligations to fully (albeit progressively) realize ESRs. In both instances cynicism highlights a measure of self-interest on the part of the states in question. Self-interest because the reasons advanced by the states for failing to respect and implement ESRs are not always genuine. Rather, they camouflage a range of ulterior motives ranging from states not wanting to be told how to make resource allocation decisions to states only ratifying international treaties such as the

ICESCR because of political pressure with no real intention of following through. In these instances self-interest comes at the expense of full realization of all ESRs as stipulated by the requirements of article 2(1) of the ICESCR.

Flowing from the above, I analyze Cynicism in the area of ESRs with a two-fold intention. First, in order to outline how cynical legal arguments have been deployed against the implementation of ESRs at both the international and national level in order to relegate these rights to an inferior status in comparison to their CPRs counterparts, with the consequence that violations of ESRs are not considered to be “that bad”, and second, to illustrate how even in situations where ESRs are afforded recognition either through ratification of regional and international treaties, or in national jurisdictions (sometimes through constitutional entrenchment of said rights) legal arguments founded on both international and domestic law norms are relied upon in a cynical manner to allow state parties to justify the circumvention of their legal obligations under the ICESCR. This skeptical gaze through which ESRs are often viewed (un)intentionally results in government failures on a national level to provide for those members of their populace who are in most desperate need.

I propose a tripartite analysis of cynicism in the area of ESRs. Firstly, I undertake a

historical analysis of the ideological, philosophical and legal arguments lobbied against ESRs in the incipient years of the ICESCR with the intention of illustrating that most of the common objections raised against the justiciability of ESRs were/are not insurmountable but rather were/are a manifestation of the cynicism that plagues certain areas of International Law. For instance, I argue that during the Cold War there was an intensification of the ideological controversy which pitted socialist countries against some western societies with the former championing ESRs while the latter overstated the priority given to CPRs instead. However, these differences in States' ideological backgrounds impacted how the states in question received ESRs and contributed to cynicism in some instances. The rejection of ESRs under these conditions, therefore, may have had more to do with defending a particular economic system that the state in question subscribed to, and less to do with the nature of the rights themselves.

Secondly, I further posit that national and international law norms have been used cynically by various governments in order to (attempt to) justify current failures to realize ESRs. For instance, chronic reliance by a number of domestic constitutional settings such as Ireland on the 'supremacy of the Constitution' arguments in order to forestall the application of international ESRs norms. Furthermore, there is also

cynicism inherent in the wording of the ICESCR itself which has in turn perpetuated further cynicism in its implementation. International law is perhaps more cynical than other areas of law because it is premised on state consent. Consensus is the soft underbelly of international law. Without it, international law as we know it, would crumble. In crafting international law rules cynicism manifests itself in international law's self-interested attempts to secure states' compliance with its prescriptions. This evinces cynicism because the underlying assumption is that states will not observe the rules of international law because it is just and right to do so, rather they will do so because they have been coerced into such observance using either a "stick or a carrot" approach. This cynicism begets cynicism. Thus, in the area of ESRs the inclusion of the requirement of "progressive realization" in the wording of the ICESCR deliberately and rather cynically manifests this self-interest by setting the stage for states to agree to be bound by the covenant by making it (appear to be) easier to justify non-fulfilment of the obligations under the covenant.

Lastly, and on a more optimistic note, while a certain amount of cynicism is inherent in the history of ESRs and how they advanced through the ages, a silver lining exists because recent developments point to less

rather than more cynicism in the area of ESRs in today's world. As Kathryn Young argues in her latest book, "the future of ESRs is unlikely to resemble its past". Despite their initial neglect in the human rights movement, and avoidance by (some) courts, ESRs are now increasingly at the top of the human rights agenda. Even more optimistically, Young posits that a rights revolution appears to be taking place.

While concerns have long been harboured about the tokenistic nature of ESRs and the cynical tendencies of states to obscure infringement of rights by hiding behind sham constitutional texts and insincere treaty ratifications, I caution against throwing the baby out with the bathwater. A certain amount of cynicism will always be a part of the ESRs story, given how these rights were birthed. However, as ESRs continue to positively change the lives of millions of rights holders in the world it is apparent that sometimes more rights mean more victories for right-holders and in turn less cynicism about rights. We must conquer our own cynicism! Today, the true promise of ESRs lies as yet unfulfilled. We are lucky enough, at the very least, to live in a time when there is more rather than less ESRs and (hopefully) less rather than more cynicism.

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