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## The Case for Social Rights

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# GEORGETOWN LAW

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### The Case for Social Rights

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### DEBATING SOCIAL RIGHTS

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# THE CASE FOR SOCIAL RIGHTS

Virginia Mantouvalou\*

## 1. Introduction

You and I might desire different things. We each have distinct purposes and choose a distinct way of living. I might enjoy travelling to exotic islands, or to remote countries to get to know new cultures; you might prefer to spend your life reading literature, going to artistic exhibitions or drinking in the pub with your friends. We probably cannot convince each other that this or that activity is more worthwhile to pursue, because we each have a different conception of what makes a life worthwhile. There are certain goods, though, which are necessary in order for *any* conception of the good life to succeed. What are these necessary goods? I shall try to identify some by using an example from real life, and I am sure that there are plenty of other examples that you could come up with.

Mr Limbuela from Angola, Mr Tesema from Ethiopia, and Mr Adam who claimed to be from Sudan, reached the United Kingdom to claim asylum. Having fled their countries, they hoped that they would at last be treated with respect. In the UK, though, while their asylum applications were pending, the Secretary of State decided to withdraw social support from them, for the reason that they did not apply for asylum as soon as reasonably practicable upon arrival to the country. Mr Limbuela had to sleep rough. He was frightened, he had no food, although he begged, and he was cold. Passers-by did not give him anything and the police refused to offer him a blanket. He was in pain because of ill-health. He was provided with shelter by a charity, but a few days later he was asked to leave. Mr Tesema was a bit more fortunate. Following the Home Secretary's decision to withdraw welfare support, he applied for, and obtained, interim relief having convinced a judge that he would suffer in destitution if evicted from his emergency accommodation. While waiting for his asylum claim to be decided, Mr Adam slept in a sleeping bag inside a car park. When it rained, he got wet, and on one occasion he was abused by a passer by. He was getting ill; he could not understand why he had to sleep in a car park. Although Mr Limbuela, Mr Tesema and Mr Adam were hopeful when they arrived in the UK to

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\* Senior Lecturer in Law, University of Leicester; Visiting Scholar, Georgetown University Law Center. This paper is part of the book *Debating Social Rights*, where I am making the case for social rights and Professor Conor Gearty (LSE) is making the case against social rights: <http://www.hartpub.co.uk/books/details.asp?isbn=9781849460231>. In the full version of the book there is further analysis of the issues discussed in this paper. It also includes sections on global justice and the duties of the affluent towards the needy foreigner, and on the horizontal application of rights, which do not appear in this draft.

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claim asylum, they found themselves destitute, vulnerable to physical violence and unable to satisfy their most basic needs. Their situation was desperate.

You and I are not in the position of Mr Limbuela, Mr Tesema and Mr Adam, but we would probably sympathise with them. We realise that living a life deprived of fundamental necessities, like shelter, food and basic healthcare, is a terrible plight. If we passed by and saw them begging, we might feel charitable and give them some food or some coins. Shelter, basic healthcare and nutrition are some of the material conditions that we need, the satisfaction of which many of us take for granted. But not everyone enjoys access to these goods, as the above example reminds us.

Situations like that faced by Mr Limbuela, Mr Tesema and Mr Adam, are commonly described nowadays as violations of human rights. Although the notion of a violation of rights is often used to describe an injustice, there is a big discrepancy in the legal protection of some of these rights, the so-called ‘social and economic rights’, such as the right to healthcare or the right to housing, as opposed to ‘civil and political rights’, such as the right to life or the right to privacy. It would not be an exaggeration to say that the most pressing questions surrounding the legal protection of civil and political rights – rights which have traditionally been seen by liberal scholars as essential for a state that respects its citizens – have been largely settled today. Issues of freedom of religion, the right to privacy or the prohibition of torture have been and continue to be widely debated in courts, in academic literature, in public and political debates. Theoretical disagreement might still exist as regards certain subtle aspects of their material scope (the right to private life covers our activities at home, but do we have a right to engage in private activities when we are in public, for instance?), and violations persist in the real world. Yet few would contest their universal importance, their weight for individual autonomy, the need to protect them in law and to fight to address their violations in practice. Governments that breach civil and political rights tend to hide their actions. They are aware that disrespect for civil and political rights is condemned by the international community; if asked, they deny that they engage in torture or that they do not respect freedom of speech.

In contrast to debates about civil and political rights, debates about social and economic rights are far from settled. The practical implementation of social rights in particular remains deeply controversial amongst activists, academic scholars, lawyers and judges alike. Some activists view social rights as worth fighting for, and employ the language of rights and their alleged violation as an all-encompassing rhetorical device to advance claims on injustice stemming from economic need. Other activists hold the view that there is little chance that social change will come about through ‘rights talk’; what we really need is action, not ‘vacuous rhetoric’.

Certain academic scholars are passionate about the importance and necessity of understanding the interests grounding social rights and to explore their protection through law. Others accept that the right to housing, the right to decent working conditions or the right to healthcare, are weighty moral and political considerations, but dispute their suitability for legal enforcement. Some view them as valid concerns, which should be left to philanthropy. Others believe that the idea that there are social rights is flawed by definition, because there is no such thing as an entitlement to resources. Finally, there are those who dislike the words ‘human rights’ altogether, both civil and political, and socio-economic; for they think that it is overly

individualistic, it depoliticises crucial political questions, distracts from political struggles and ultimately fails to address injustice.

In this paper, I argue that social rights are ‘constitutional essentials’<sup>1</sup> at domestic level, and claims of the highest priority in inter-state relations. Guaranteeing social rights through law is the best expression of how serious we are about our commitment to these claims. Our courts and elected representatives should endorse social rights, for a commitment to these claims shows that we care for the well-being of all, including the weakest and most vulnerable members of our societies.

The first part of the paper explores the meaning of socio-economic rights and contains a brief presentation of their inclusion in legal documents. It finds that there is a discrepancy in the attention that the international community and several governments have paid to social rights when compared to their civil and political counterparts. The second section argues that this situation is unsatisfactory, because the moral weight and significance of social rights is as critical as that of civil and political rights, with which they bear close links and resemblance in any case. The third part turns to the law in more detail. My argument will be motivated by the belief that if we are committed to the values promoted by social rights, we need to make them enforceable. This part is divided in two sections. It first, explores the justiciability of social rights and the right of individual petition. This part suggests that social rights and their judicial protection may contribute in our quest for social justice, and that they may promote democracy, rather than undermine it. Yet the second section emphasises that we should not focus all our efforts on justiciability alone. It is crucial to realise that our legislators also have duties to legislate in a manner that will secure access to basic material conditions for the poor and vulnerable. The final part of the essay examines the content of social rights. It suggests that the endeavour to construe this content faces different challenges when examining the role of legislatures than when examining the role of courts, and explores some possibilities in rendering concrete the correlative duties of social rights.

## 2. What Are Social Rights?

Social rights are conventionally understood as rights to the meeting of basic needs that are essential for human welfare.<sup>2</sup> Although we need to deepen our understanding of the justification for social rights, this definition serves to highlight the point that social rights are entitlements to the avoidance of severe deprivation, not rights to the satisfaction of individual preferences more generally. They incorporate a safeguard against poverty, not the provision of a life in luxury. They are claims with some

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<sup>1</sup> I am borrowing the term ‘constitutional essentials’ from John Rawls, *Political Liberalism* (New York, Columbia University Press, 2005, 3<sup>rd</sup> edition) p. 227. Rawls did not include social rights in the constitutional essentials. For an argument that welfare rights are constitutional essentials, see L Sager, ‘The Why of Constitutional Essentials’, (2003-2004) 72 *Fordham Law Review* 1421.

<sup>2</sup> F Michelman, ‘On Protecting the Poor through the Fourteenth Amendment’, (1969-1970) 83 *Harvard Law Review* 7. On the role of needs for political morality see D Wiggins, *Needs, Values, Truth*, (Oxford, OUP, 1987) Chapter 1. The terms ‘social’ or ‘social and economic’ rights will be used interchangeably in this paper to refer to this type of claims. Cultural rights, which are often grouped together with economic and social rights, are beyond the scope of this essay.

urgency representing vital interests of the individual to avoid harm. They do not guarantee access to the goods that we each might desire to possess, so as to live a fulfilling life; they are preconditions for the pursuance of a good life.

Which social rights should our list include? What amounts to a basic need is not self-evident. As a starting point, a list of social rights could be drawn by reference to legal documents that reflect the perceived basic needs mostly perhaps in developed industrialised countries. This could contain the following entitlements:

- a) a right to housing;
- b) a right to basic nutrition, including a right to water;
- c) a right to basic healthcare, because ill-health can lead to severe human suffering;
- d) a right to education;
- e) a right to social security and social assistance;
- f) a right to work and decent working conditions;
- g) a right to form and join a trade union, including a right to collective bargaining and a right to strike.

Social rights are haunted by Cold War ideologies. The international community did not distinguish between civil, political and socio-economic rights in one of its most influential texts, the Universal Declaration of Human Rights (UDHR), adopted under the auspices of the United Nations in the aftermath of the Second World War. The first provisions of the Declaration incorporate rights such as freedom of religion, freedom of expression and the prohibition of torture. From article 22 onwards we find social rights, such as the right to social security, to work, to an adequate standard of living, to rest and leisure, including holidays with pay.

‘What the modern communists have done is to appropriate the word “rights” for the principles that *they* believe in’,<sup>3</sup> declared Maurice Cranston, one of the staunchest opponents of social rights, referring to their inclusion in the UDHR. Cranston’s statement encapsulates well the climate of the Cold War that haunts social rights to date. Yet the ‘modern communists’ failed later on. When the international community had to consider whether to make the UDHR legally enforceable, human rights were split into two United Nations Covenants, which were adopted in 1961 and entered into force in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Rights such as freedom of religion and the right to life were incorporated in the ICCPR. The ICESCR, on the other hand, included rights such as the right to shelter and the right to healthcare. In a way that mirrors the separation of human rights into the two UN Covenants, at a regional level the Council of Europe and the Organisation of American States, separated civil and political rights and economic and social rights in two documents: the European Convention on Human Rights (1950) and the European Social Charter (1961), and the American Convention on Human Rights (1978) – containing some more extensive socio-economic guaranties than its

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<sup>3</sup> M Cranston, *Human Rights To-day* (London, Ampersand, 1962) pp. 38-39.

European counterpart - and the San Salvador Additional Protocol in the Area of Economic, Social and Cultural Rights (1999). From the general regional instruments, the African Charter of Human and People's Rights (1981) opted for the model of the UDHR, and included social rights alongside civil and political rights.

The division of human rights in most international human rights treaties was coupled by striking differences in their wording and monitoring. Civil and political rights were drafted in an imperative manner: they could and should be immediately protected. Socio-economic rights appeared in a language that was far less imperative and far more conditional: they cannot be realised immediately, they require resources and states have discretion as to the steps that they will take to provide them. At the same time, and as if the separation of human rights in two documents was not an adequate statement of the inferior status that the international community decided to afford to social rights, the drafters of the European Social Charter (ESC) took a step further. They differentiated socio-economic from civil and political rights by opting for a peculiar *a la carte* formulation. States that decided to sign up to this treaty would not have to comply with all its provisions. They could choose some of them with which to abide, ignoring the rest.<sup>4</sup>

The division of human rights into two categories should not bother us, unless it has practical consequences. And it does. In the context of the UN, the ICCPR, from early on in its history, recognised a right to individual petition before the Human Rights Committee in an additional protocol. Everyone within the contracting states' jurisdiction has a right to bring a complaint for an alleged violation of the Covenant; the Committee examines it and adopts a Communication establishing whether there has been a breach of the ICCPR. The ICESCR, on the other hand, is only monitored through reporting procedures. States undertake an obligation to submit periodic reports to the Committee on Economic Social and Cultural Rights regarding compliance with the ICESCR, which then issues Concluding Observations. It was not until 2008, after lengthy, heated debates, that an optional protocol on individual petition for violations of social rights came into force. At regional level, the European and American systems have opted for a model similar to the UN. The European Convention on Human Rights (ECHR) provides for a right to individual application before the European Court of Human Rights (ECtHR). The European Social Charter, has a reporting procedure before the European Committee of Social Rights, and since 1996 a Protocol that recognises a right of collective complaint to certain non-governmental organisations, trade unions and other groups. The American Convention on Human Rights, in a similar vein, is monitored by the Inter-American Court of Human Rights, where individuals can lodge an application for an alleged violation of the rights under the Convention, while the San Salvador Protocol in the Area of Economic, Social and Cultural rights is still ineffective.

The disparity in the protection of social rights at an international level has been mirrored at a domestic level. The debate over whether social rights should be enforceable through law is in some countries more advanced and more settled than in others.<sup>5</sup> Social rights are a neglected aspect of the US Constitution, which only contains an equality clause that has traditionally been interpreted narrowly by the US

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<sup>4</sup> European Social Charter, article 20.

<sup>5</sup> For a general overview of the key issues in several jurisdictions see M Langford (ed.), *Social Rights Jurisprudence* (Cambridge, CUP, 2008).

Supreme Court as a prohibition of discrimination. The Canadian Charter of Rights and Freedoms only protects civil and political rights in a manner similar to the ECHR. In Europe, the 1998 UK Human Rights Act incorporated most rights of the ECHR into domestic law, without incorporating the provisions of the European Social Charter. In several other countries, such as Greece, Spain and Norway, there is a list of socio-economic entitlements in the Constitutions. Yet often in these examples, social rights are not afforded equal status to civil and political rights. They are drafted in weaker terms, and sometimes also included under the heading 'directive principles of policy'. The same can be observed in other jurisdictions such as India, Argentina, Japan and Colombia. There are, finally, few examples where social rights are fully justiciable, like South Africa and Brazil.

The disparity in the constitutional protection afforded to social rights from one country to the other is enormous, but what emerges is that most of the times, even if social rights figure in a legally enforceable document of a higher status than ordinary legislation, they seem to assume a somewhat secondary role to civil and political rights. At the risk of over-simplification and over-generalisation, it can fairly be said that, overall, there is a significant discrepancy in the constitutional protection of social rights, when compared to that of civil and political rights. The latter group of entitlements is usually set out in Bills of Rights, which are sometimes entrenched, meaning that they are given a higher status than ordinary law and can be modified or repealed only through special procedures. As social rights are most often not protected in Bills of Rights, legislation or other state action that breaches, say, the right to housing or the right to work, is at best susceptible to a lower degree of scrutiny than civil rights. In the few examples, such as South Africa or Brazil, where social rights are set out in the Constitution side by side with civil and political rights, the possibility of asserting them judicially through individual petition exists in a manner similar to civil and political rights. Finally, in countries where social rights are drafted as directive principles of social policy and contain an express clause on non-justiciability, such as India, courts have sometimes examined social rights in the context of other directly justiciable civil and political rights.

Of course, some of the countries that do not protect social rights in their Constitutions might grant welfare protection to their citizens through ordinary legislation. Sweden is a good example of a country with a very strong tradition in social legislation. The concern is that in these cases the protection of social rights is vulnerable to change: in practice, little can stop a conservative government from repealing this legislation if the economic or social circumstances change (or if otherwise so minded), unless social entitlements are constitutionalised or protected in international law through a supervisory machinery. At the same time, if civil and political rights are constitutionally entrenched while social rights are protected only by ordinary legislation, there is an imbalance in the commitment to a higher status that a legal system undertakes, which, as it will be argued, is hard to justify.

Today, several decades after the end of the Cold War, social rights are still the Cinderella of human rights law. Their weaker protection as compared to civil and political rights seems troubling. It suggests that having the right to express ourselves freely or to enjoy privacy are weightier or fundamentally different considerations than having a shelter and a job, water and food. Is this correct?



### **3. Common Foundations and Common Misconceptions**

The international community and liberal governments the world over have drawn a sharp line between civil and political rights, on the one hand, and socio-economic rights, on the other. The discrepancy in the protection between the two reflects a failure to capture the vital interests underlying the former, and a failure to mark the urgency of the requirement that they be recognised as principles of a higher status, standards towards which state action should strive and against which it should be measured.

There are many ways in which someone can argue for the importance of socio-economic rights but here two key ideas will be used to challenge the traditional dichotomy, both involving the relationship between social rights, on the one hand, and civil and political rights, on the other. The first section suggests that social rights have shared foundations with civil and political rights. The second section argues that the supposed conceptual differences between the two groups of entitlements are much more limited than it was once thought.

#### **Dignity, Liberty, Citizenship**

The conceptualisation of the person in many Constitutions and treaties is wanting, because it prioritises some essential conditions of our well-being, while neglecting others. All human rights – civil, political, economic and social – can be based on a plurality of foundations.<sup>6</sup> Yet the neglect of social rights strikes at the heart of our dignity, liberty and the sense of belonging to our community: the very same values that ground civil and political rights.

#### **Dignity**

Severe poverty can lead to a variety of adverse predicaments that can be an affront to our being. It might bring inability to access medication in case of illness, no money for food, no housing or no education. A life in desperate need is a life in which a person lacks the essentials to live in dignity. A person's dignity is respected when her life and agency are protected, and when others are not permitted to treat her in a degrading and unfair manner.<sup>7</sup> Dignity is also closely connected to the idea of self-respect and the respect of the others. It has to do with how we view ourselves, which also depends on how those that are around us regard us. Dignity lies in the heart of our humanity and grounds the most fundamental elements that are essential for the human condition. It is commonly said that dignity is the most appropriate and least controversial basis for human rights, for it appertains to everyone simply by virtue of being human. For this reason, it is also pronounced in several Constitutions and other human rights documents. Extreme socio-economic need deprives a person of the ability to live and of her agency. It also leads to degrading life conditions. One

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<sup>6</sup> J Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps', (2002) 10 *European Journal of Philosophy* 79 at 95 and J Nickel, *Making Sense of Human Rights*, (Oxford, Wiley-Blackwell, 2<sup>nd</sup> edition, 2007) Chapter 4.

<sup>7</sup> J Nickel, as above, p. 66.

examples of extreme poverty can help us realise its catastrophic effect on human dignity.

Drinking water when we are thirsty or to get our 1.5 litres of recommended daily intake, basic sanitation or a relaxing foam bath, making a soup when we are hungry, a coffee or tea when we are sleepy or cold, are all activities that many of us take for granted. Lack of water brings thirst and hunger, inadequate personal hygiene, illness and may lead to death. Life without water, insofar as someone survives, is an undignified life, because water is a necessary condition for meeting some of the most basic requirements of a decent life. Water is not a luxury, then, unlike a fizzy drink or a beer. It is a basic necessity. For Ms Mazibuko,<sup>8</sup> though, and many others, access to water became a luxury. This occurred when the municipality of Phiri decided to install pre-payment meters in their dwellings, and to stop providing water, unless it had been paid for in advance. This policy was not followed in other richer neighbourhoods of Johannesburg. The effect of the measure was that the inhabitants of Phiri, who were extremely poor and could not afford to pay, lived in appalling conditions.

The example of Ms Mazibuko reminds us that such appalling conditions affect deeply the ability to pursue worthwhile goals; they also probably have an impact on the sense of self-respect and the respect of the others that are in the heart of the notion of human dignity. There are two further values that can shed light on the foundations of social rights: freedom and citizenship.

## **Liberty**

Freedom is cherished in liberal societies, and for many it is the value that grounds civil rights. Arbitrary detention, restriction of the right to express ourselves or infringement of our privacy, seem incongruous with the belief in freedom, and the primacy often afforded to the protection of civil and political rights in international human rights law and in several national legal systems partly expresses this. When it comes to economic need, people are reluctant to present it as lack of freedom. In the best case, it is presented as lack of *ability* to pursue certain activities, because of scarce resources.

When thinking of the individual in relation to the state, freedom is usually seen as imposing restraints on governmental power. We have a right to life, religion, expression – these are our liberties – and the correlative duty of the authorities is to abstain from interference with these liberties. The poor and needy are certainly unfortunate. Yet their plight does not constitute a violation of their freedom. They are equally well-placed as the rest of us to pursue various goals, and state authorities do not impose any restrictions on them. Insofar as the government does not act, insofar as it does not take positive steps to interfere with certain liberties, it cannot be blamed for making us unfree, so the libertarian argument goes. The view of some libertarians that freedom is simply a negative concept rests on the premise that the distribution of resources is fair, insofar as it is a result of the market. Yet this misses the point that even if we assume that at some hypothetical point in history resources were fairly

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<sup>8</sup> *Mazibuko and Others v City of Johannesburg and Others*, Case CCT 39/09, 2009 ZACC 28.

distributed among individuals or gained through desert, there are many reasons (including power relations, such as exploitation of workers by employers, or other state action, such as inheritance legislation) that may have rendered the allocation of resources unfair.

There is a different, more appealing approach to state duties, which rests on a richer understanding of the freedom of the individual. This was captured by Roosevelt in his proclamation that ‘true individual freedom cannot exist without economic security and independence. Necessitous men are not free men’.<sup>9</sup> It was also expressed with passion by one of the delegates during the drafting of the ECHR: ‘What indeed does freedom mean?’ it was asked, ‘[w]hat does the inviolability of the home mean for the man who has got no home? What is the value of sacred family rights and family liberties for the father who is permanently haunted by the spectre of unemployment?’.<sup>10</sup>

Freedom and resources are inextricably linked, because our rules that regulate property impose normative constraints on the liberty of others. The impact of economic need on freedom was analysed by G.A. Cohen in his essay ‘Freedom and Money’,<sup>11</sup> which argued that lack of money does not only restrict our ability to act, but also our freedom. An example that Cohen uses to illustrate the links between freedom and resources is that of a woman who wants to go to Glasgow to visit her family, but has no money to pay her train fare. To the statement that she is still free to travel, we would respond that this understanding of freedom is too narrow, because as soon as this woman gets on a train without a ticket, she will be asked to get off. The plight of homelessness, to give another example, involves the restriction of numerous freedoms. The freedom of the homeless to act is too limited. In order to be free to do something, as Waldron put it, we need to be able to do it somewhere.<sup>12</sup> The homeless person, though, has nowhere to go, other than sleep rough in the street or under bridges. How can we say that people are free, then, if the options that are open to them are extremely limited (if they have any at all), because of the constraints that our property rules impose? People are not free if they do not have at least some valuable choices; people are completely unfree if they have no choice at all. Given that societies are organized by some form of market economy, choice and resources are inextricably linked.

That freedom is not merely a negative concept is also evident when thinking about the relationship between civil and political rights, on the one hand, and socio-economic rights, on the other. The division between civil liberties and socio-economic rights is far from sharp, and the two groups of rights may lend support to each other. In 1993, for instance, the World Conference on Human Rights adopted the Vienna Declaration and Programme for Action that stated that ‘all human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the

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<sup>9</sup> FD Roosevelt, Address Before the Democratic National Convention, 1936.

<sup>10</sup> European Convention on Human Rights, *Travaux Préparatoires*, (Leiden, Martinus Nijhoff, 1985) Vol. I, p. 42.

<sup>11</sup> GA Cohen, ‘Freedom and Money’, available at <http://www.howardism.org/appendix/Cohen.pdf>

<sup>12</sup> J Waldron, ‘Homelessness and the Issue of Freedom’, in *Liberal Rights* (Cambridge, CUP, 1993), Chapter 13.

same emphasis'.<sup>13</sup> Numerous declarations of the international community repeated that all human rights are closely linked, and this same position was advanced in the preambles of several treaties. The ideas of indivisibility and interdependence, which are not deeply analysed in these statements and declarations, have been examined insightfully by James Nickel. Nickel suggested that there may be various degrees of supporting relations between rights, some of which are stronger than others, and that the higher the level of protection of rights in a country, the stronger the claim of indivisibility is rendered.<sup>14</sup>

The truth is that the plight of destitution can be seen as affecting many aspects of the freedom of the person: the freedom to act, the freedom to think and the freedom to pursue happiness. The only sense in which the desperate destitute is free is that whatever she does, she has not much to lose. This cannot be what we have in mind, though, when we refer to the sanctity of liberty.

### **Citizenship: Rights and Belonging**

There is a further idea that needs to be developed here, so as to bring into the debate on social rights the notion of collective. This is the dignity involved in being a member of a community or society. The relationship between individual rights and belonging to a community is best captured by the idea of citizenship. Citizenship bridges the gap between liberalism that places its main attention on the value of the person, and communitarianism that focuses on the importance of the community. The *locus classicus* on rights of citizenship is the theory of the British sociologist T.H. Marshall. In his influential essay 'Citizenship and Social Class', Marshall defined citizenship as 'a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed'.<sup>15</sup> Crucially, equal community membership has come to enshrine a wealth of rights. It has three elements: the civil, the political and the social. Citizenship has evolved to include a social element, which is not a matter of charity with the stigma attached to it that distinguishes between citizens and poor outsiders. Social rights are as essential as their civil and political counterparts for a feeling of membership of the individual, who will otherwise feel excluded and isolated.

Citizenship is not a synonym for nationality in this context. Like equality, for example, it is a normative concept both in its material and in its personal scope.<sup>16</sup> It means that everyone *should* be the subject of all groups of rights, because those who are excluded from rights of citizenship will feel isolated. They might even seek to subvert the society that does not treat them as members. It also means that *everyone* should be the subject of these rights. It entails a universalist ideal. The aim of the inclusive society is to treat all persons as equal members; the

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<sup>13</sup> Vienna Declaration and Programme for Action, A/CONF.157/23, 12 July 1993, para. 5.

<sup>14</sup> J Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights', (2008) 30 *Human Rights Quarterly* 984.

<sup>15</sup> TH Marshall, 'Citizenship and Social Class' in R Goodin and P Pettit (eds.), *Contemporary Political Philosophy – An Anthology* (Cambridge, Blackwell, 1997) p 291 at 300. The essay was originally published in 1949.

<sup>16</sup> J Waldron, 'Social Citizenship and the Defence of Welfare Provision', in *Liberal Rights* (Cambridge, CUP, 1993), p 271.

restriction of basic social rights on the grounds of nationality should require special justification. Social or political rights should not be foreclosed, for instance, at least to those that are permanent residents, employed and taxed in a country, who contribute to the system as much as nationals do.

A minimum level of social provision is an essential condition of membership to a society that values inclusion, and adds an important dimension to the discussion on social rights. It suggests, first, that stability requires treating the members of the community with respect, and second that social rights are an essential element for a feeling of membership. Social rights and membership are inextricably linked. The idea of citizenship enriches our understanding of social rights by focusing on the role of membership in society as one of their foundations, while accepting the importance of the person's individuality through the recognition of rights.

Like civil and political rights, social rights are essential for dignity, liberty and citizenship, for the person alone and in a society with others. Why, then, did so many constitutional traditions and the international community too, decide to treat them as subordinate? Are social entitlements distinct in other ways that might perhaps explain the current position of the law?

### **Common Misconceptions**

The discrepancy in the protection of rights to basic material conditions was in the past explained by reasons that were primarily conceptual, although we can probably identify their normative underpinnings. The discussion was mainly inspired by debates on whether social rights should be made justiciable through courts, and its deeper reasons involved the question of judges' legitimacy to adjudicate on social rights. The conceptual division between civil and social rights reflected a poor understanding of social entitlements, which was particularly prevalent in the second half of the twentieth century, but has some supporters even today. It is important to challenge the supposed conceptual division between the two types of entitlements before moving on, so as to see whether the actual objections against the legal protection of social rights could be seen as objections towards the legal protection of aspects of civil and political rights too. The examination of the supposed conceptual differences between the two groups of rights will also help us shed light on the appropriate legal enforcement of social rights in the sections that follow.

On one view, social rights are conceptually different to civil and political rights in three respects: first, social rights are positive and require government action; second, they are costly, demanding state expenditure; third, they are vague. All these characteristics bring them into a supposed sharp contrast to civil and political rights that entail concrete content, are negative and also cost-free. The statement that the various groups of rights differ conceptually is exaggerated and fails after closer inspection. Several examples can be used to demonstrate this: having a right to a fair trial requires an independent judiciary, which can be expensive to maintain (a civil right that is costly); the right to housing might simply require state authorities to stay a person's eviction from her home (a social right that is cost-free); the prohibition of torture demands a well-trained police force that will not take advantage of its position of power to abuse individuals (a civil right that requires state action).

## Positive Rights

In some jurisdictions, like the US, courts insist that the Constitution only imposes negative duties. In the case *Deshaney v Winnebago County Social Services Department*,<sup>17</sup> for instance, the Supreme Court held that no constitutional duty was breached by the authorities' failure to protect a mentally challenged boy who was badly abused by his father. Yet most other jurisdictions provide ample recognition of the wide variety of duties that human rights law can impose, showing that civil rights can be positive. In Europe, in *Oneriyildiz v Turkey*,<sup>18</sup> the ECtHR examined whether Turkish authorities violated the right to life by not taking the necessary measures to protect the applicants' relatives, who used to live in extremely poor conditions in a site used as a rubbish tip. Following an explosion and a landslide that engulfed some slum dwellings, thirty-nine people died. The Court held that Turkey violated the right to life by not having taken the necessary positive action to protect human life. The fact that the area was dangerous and that the authorities knew or ought to have known of the danger constituted particularly weighty considerations in the reasoning. Examples of positive duties on state actors, perhaps not cast in terms of social or human rights, are to be found in other areas of domestic law too, when looking at ordinary legislation.

Social rights are not always positive; they also give rise to negative duties. This has been exemplified in case-law from South Africa and the ICESCR. The right to housing might impose a duty to stay evictions, as the South African Constitutional Court held in *Grootboom*<sup>19</sup> and in *Port Elizabeth Municipality*.<sup>20</sup> Similarly, when the CESCR found a country to be in violation of the ICESCR for the first time, it was with respect to the right to housing and concerned massive expulsions of about 15,000 families in the Dominican Republic,<sup>21</sup> while in another case it emphasised that 'evictions carried out in this way not only infringe upon the right to adequate housing but also on the inhabitants' rights to privacy and security of the home'.<sup>22</sup>

Henry Shue analysed rights to subsistence and security in his influential book *Basic Rights*, where he claimed that these are basic in the sense that they are essential for the enjoyment of all other rights. In order to rebut the positive/negative division between subsistence and security rights, Shue argued that what is negative or positive is not the right itself, but the duties that correspond to it. He found that duties that are co-relative to rights are threefold: 'i. Duties to avoid depriving. ii. Duties to protect from deprivation. iii. Duties to aid the deprived'.<sup>23</sup> A Communication of the African Commission of Human Rights can be used to illustrate how the correlative duties of rights can be broken down in the following categories: duties to respect, to protect, to

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<sup>17</sup> 489 US 189 (1989).

<sup>18</sup> *Oneriyildiz v Turkey*, App. No. 48939/99, Judgment of 30 November 2004.

<sup>19</sup> *Republic of South Africa v Grootboom*, Case CCT 11/00, Judgment of 4 October 2000.

<sup>20</sup> *Port Elizabeth Municipality v Various Occupiers*, Case CCT 53/03, Judgment of 1 October 2004.

<sup>21</sup> UN Doc. E/C.12/1991/4, para. 249.

<sup>22</sup> UN Doc. E/C.12/1991/4. See also CESCR, General Comment No 4, para. 18. For further analysis see General Comment No 7 on Forced Evictions, and Commission on Human Rights Resolution 1993/77, para. 1.

<sup>23</sup> H Shue, *Basic Rights* (Princeton, Princeton University Press, 2<sup>nd</sup> edition, 1996) p. 52.

promote and to fulfil.<sup>24</sup> On this analysis, the duty to respect is an essentially negative obligation to refrain from interference with the resources owned by someone. The duty to protect requires the state to adopt legislation and provide remedies. Intertwined with this is a duty to promote rights, which requires the state to ensure that individuals will enjoy their rights, through raising awareness, for instance. The last layer is a duty to fulfil, which is a positive obligation that the state creates the appropriate machinery for rights to be realised. The positive/negative rights dichotomy is misconceived, on this analysis, for each right might impose several different duties, or to use Waldron's words 'successive waves of duty'.<sup>25</sup>

## Costs

Sometimes the satisfaction of rights to basic material conditions requires public spending, a matter that leads to conflicts when there is scarcity of resources. It also raises questions on which branch of government has legitimacy to decide on resource allocation, which will be discussed later on. However, the above examples on forced evictions show that aspects of social rights, such as the right to housing, might be cost-free. At the same time, that civil and political rights might carry significant resource implications is well documented in literature<sup>26</sup> and was also illustrated in the above examples. In Europe, it was exemplified in a number of cases against Ukraine,<sup>27</sup> where the ECtHR had to examine the compatibility of extremely poor prison conditions with the ECHR. The Court said that the country's limited resources cannot justify prison conditions that attain the minimum level of severity contrary to article 3 that prohibits torture, inhuman and degrading treatment. Humane treatment that is an absolute and non-derogable right under the ECHR and many other human rights documents can sometimes demand significant public spending.

## Vagueness

The content of social rights, finally, is not bound to be imprecise. Social rights might appear to be abstract, because they have been neglected in legal scholarship, and the effort to explore their more concrete meaning has not been as systematic as the analysis of civil and political rights until recently. It is important to appreciate, for instance, that nothing in the ECHR tells us whether extradition to a country where someone is likely to face the death row phenomenon prior to the death penalty violates the prohibition of inhuman treatment.<sup>28</sup> Nor does the Convention provide in clear terms for the right of transsexuals not to disclose their sex to the authorities as an aspect of their private life.<sup>29</sup> Yet today in Europe people take for granted that human rights law imposes these duties. And the reason why it is taken for granted is because through moral argument, extensive academic debate, legal advocacy, and

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<sup>24</sup> *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), paras. 44-47.

<sup>25</sup> J Waldron, *Liberal Rights*, (Cambridge, CUP 1993), p. 214.

<sup>26</sup> S Holmes and C Sunstein, *The Costs of Rights – Why Liberty Depends on Taxes* (New York, Norton, 1999).

<sup>27</sup> See, for instance, *Khokhlic v Ukraine*, App. No. 41707/98, Judgment of 29 April 2003, para. 181.

<sup>28</sup> On this see, among others, *Soering v UK*, App. No. 14038/88, Judgment of 7 July 1989.

<sup>29</sup> *Sheffield and Horsham v UK*, App. Nos. 22885/93 and 23390/94, Judgment of 30 July 1998.

judicial interpretation, the scope of civil and political rights appears to be relatively clear and precise, constantly illuminated and further enriched. For the opposite reason, because of lack of rigorous engagement with their content by courts, practitioners, academic scholars and others, socio-economic rights are underexplored and appear to lack precision.

### The ‘integrated approach’

Additional evidence that the line between civil and social rights is blurred, emerged when courts in several jurisdictions slowly recognised that a state act that violates a social right can in fact breach a treaty or a constitution that protects civil and political rights. In a development that marked a significant breakthrough in our understanding of the links between social and civil and political rights, some courts started to accept that both groups of rights have similar moral weight, and they are sometimes so closely intertwined that a breach of a social right can constitute a violation of a civil and political rights document. The case *Sidabras and Dziautas*<sup>30</sup> of the ECtHR exemplifies this trend. The case involved the dismissal and ban from access to public and private sector employment of the applicants for a period of ten years, because of their status as former agents of the KGB. The Court was prepared to accept that the right to private life, protected under article 8 of the ECHR, can encompass what was in fact the applicants’ right to work. The case was described, therefore, as a paradigm example of an interpretive method that has come to be known as an ‘integrated approach’<sup>31</sup> to the interpretation of civil and political rights instruments, which opens them up to the claims of the economically deprived.

A similar position has been adopted in several other jurisdictions, such as Israel, India, Canada, Namibia, Ireland and Spain, where social rights are not directly justiciable. In the context of the UK, perhaps the best illustration of the interpretive method that reads socio-economic entitlements into civil and political rights documents is the *Limbuella, Tesema and Adam* case,<sup>32</sup> mentioned in the introduction of this paper. The applicants, destitute asylum seekers, challenged the compatibility of the withdrawal of social support from them and the resulting extreme hardship they suffered using article 3 of the ECHR that prohibits inhuman and degrading treatment. In an important judgment, the House of Lords held that the extremity of the circumstances reached the minimum level of severity that needs to be attained for the provision to be applicable. They held that extreme socio-economic deprivation in this case constituted a breach of the ECHR.

The adoption of the integrated approach to the interpretation of civil and political rights showed that even in countries that do not explicitly recognise social rights in their constitutions, these might sometimes be either essential preconditions to the enjoyment of the more traditional civil liberties or simply very similar to them. What is important to realise is that the supposed conceptual differences between the two categories collapses when advocates, courts and scholars engage in a substantive

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<sup>30</sup> *Sidabras and Dziautas v Lithuania*, App Nos 55480/00 and 59330/00, Judgment of 27 July 2004.

<sup>31</sup> V Mantouvalou, ‘Work and Private Life: *Sidabras and Dziautas v Lithuania*’, (2005) 30 *European Law Review* 573.

<sup>32</sup> *R (on the application of Limbuella, Tesema and Adam) v Secretary of State for the Home Department* [2005] UKHL 66.



examination of their moral weight. This debate is really a distorted reflection of certain judgments about the limits of adjudication, because the traditional debate on the protection of social rights revolves around the role of courts in interpreting and implementing abstract norms, and the effect of individual petition on claims of social justice. The following section turns to explore this.

#### 4. Legal Protection

When thinking of rights to fundamental necessities, something significant is gained, which we realise if we express the same claim in a different vocabulary. The sentence ‘I have a right to housing’ entails a moral imperative that cannot be captured by the sentences ‘I would prefer not to be homeless’ or ‘It would be good if I had a home’, or even ‘I need shelter’. Having basic social *rights* invests these claims with normative weight, and also necessarily implies that others have a duty to respect, protect and fulfil these rights. It seems that such is the weight and urgency of these moral claims that any decent government must prioritise them. If these rights are breached, the duty-holder is required to be somehow held accountable, for otherwise these claims would appear like paper-tigers.

Some say that the ‘social rights discourse’ or the ‘human rights discourse’ depoliticise us, as if these words have a magic power that determines political attitudes; that people become somehow passive, and do not engage in politics if some claims to justice are couched in the language of rights. This is correct, in the sense that rights are above politics and should not be decided in ordinary political discourse. Social rights are constitutional essentials that ought to be removed from political bargaining. They have to be protected irrespective of whether we have a socialist or a conservative government. Social rights ‘trump’<sup>33</sup> the utilitarian calculations of the markets, which promote economic efficiency only. They provide a safety net that ensures that no one will suffer overwhelmingly by the failures of our economic or social system, no matter what the government prefers. In this sense, rights to basic goods *ought to be* above politics.

At the same time, the statement that social rights in Constitutions depoliticise people by definition is deeply misleading. Constitutional social rights entail a profound political statement that the provision of basic material conditions is not a matter of charity; that these entitlements of the needy can impose duties on the affluent. The concern of the opponents of the ‘social rights discourse’ is mistaken because social rights in fact have potential to inspire political movements, rather than lead to apathy, to motivate individuals and encourage them to engage with questions that they might otherwise only see as an optional matter, rather than an urgent political duty. In this sense, social rights can mobilise and *politicise* people profoundly.

Expressing access to basic material goods in terms of rights, therefore, makes us think: Does the law adequately protect the individual from poverty and its plights?

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<sup>33</sup> I am borrowing the term ‘rights as trumps’ from Ronald Dworkin, who uses it to refer to civil rights. See R Dworkin, ‘Rights as Trumps’, in J Waldron (ed) *Theories of Rights* (Oxford, OUP, 1984) p. 153.

The sections that follow examine the role of courts and legislatures for the protection of social rights, attempting to assess their prospects and challenges.

## **The Role of Courts**

The traditional debate on social rights involves their judicial protection, particularly through individual petitions. The position that courts are not the appropriate forum to hear claims arising from socio-economic deprivation is typically supported by three lines of considerations. First, that judges do not have the appropriate expertise; second, that judges are conservative and cannot be trusted, for they are likely to undermine socio-economic interests, rather than advance them; third, that the courts lack legitimacy in the field of social and economic rights.

### *Expertise*

A matter that is commonly presented as lying in the heart of the adjudication of social rights involves the courts' lack of expertise. Social rights are supposed to raise questions of a technical nature, which should be left to housing experts, economists and health-care providers to address. However, as Alston has perceptively stated, '[t]o suggest that economic rights issues should be dealt with exclusively by economists and others is tantamount to suggesting that civil and political rights issues should be seen as the exclusive domain of criminologists, trade unionists, psychologists, physicians, pediatricians, the clergy, communication experts and others';<sup>34</sup> but human rights law itself is a 'subfield of expertise'.<sup>35</sup> Judges can be trained to deal with technical questions, and can hear experts' opinions, as it frequently happens in court. In the same way that experts participate in a criminal trial to assess forensic evidence, they could also take part in a case that involves the right to healthcare, for instance, in order to assess medical issues that reach beyond the court's knowledge. In addition, the judiciary could also take note of materials of expert bodies that have previously examined the matters under consideration, something that already happens in certain jurisdictions.<sup>36</sup>

It is also important to remember that courts already adjudicate on claims to socio-economic provision when they implement ordinary legislation (not constitutional law). Anne Marie Rogers, for instance, won a legal battle in the UK, which gave her access to Herceptin, a drug that treats breast cancer.<sup>37</sup> She based her application for judicial review on the 1977 National Health Service Act, and claimed that the refusal of the authorities to provide her and others in her condition access to the drug that would significantly prolong her life was unlawful. In this context, the Court of Appeal decided that Ms Rogers should be given the drug that prolonged her

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<sup>34</sup> P Alston, 'US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy', (1990) 84 *American Journal of International Law* 365 at 375.

<sup>35</sup> *Ibid.*

<sup>36</sup> See, for instance, C Rozakis, 'The European Judge as Comparatist', (2005) 80 *Tulane Law Review* 257.

<sup>37</sup> *The Queen on the application of Ann Marie Rogers v Swindon NHS Primary Care Trust*, Court of Appeal (Civil Division), 12 April 2006 [2006] EWCA Civ 392.

life by at least three years. The Court was presented with technical information regarding the importance of the provision of Herceptin to Ms Rogers,<sup>38</sup> which it evaluated in the course of judicial review. Cases such as this also exemplify a point raised earlier, namely that socio-economic questions and claims to positive state action do not necessarily appear in the guise of constitutional social or human rights claims.

Judges can, therefore, deal with technical socio-economic questions. Can we trust that they will properly protect social rights, though, or is the nature and composition of the judiciary such as to make this endeavour hopeless?

### *The composition and character of the judiciary*

Some progressive scholars, supporters of the interests protected by socio-economic rights, oppose the idea of empowering courts to address claims to welfare provision. They argue that judges are conservative and should not be entrusted with this task. The reasons that lead to this scepticism differ in each country where this concern is raised: in the UK for instance, it is commonly said that the top judges are middle or upper-class, white males, educated at elitist institutions. This is problematic because courts are not representative of the interests of the society at large, and have no understanding or sympathy for the needy. Due to their background, the decisions they reach are likely to be hostile to the pleas of necessitous people.<sup>39</sup>

The empirical observation that focuses on the conservative character of the judiciary is contextually-dependent. In some jurisdictions, there are examples from the case law that justify this scepticism. In the UK, for instance, courts are notoriously reluctant to protect social rights – a point that is exemplified in numerous labour law cases.<sup>40</sup> In the US too, it is established jurisprudence that constitutional rights do not impose positive obligations, and it is unlikely that the courts will easily change their position.<sup>41</sup> In Canada labour law scholars commonly suggest that the judiciary is not friendly to socio-economic interests of the poor.<sup>42</sup>

To the empirical claim that a certain particular composition of the judiciary in some jurisdictions can be harmful to the interests of the weakest, the response should be empirical. The fact that the judiciary might be prejudiced in certain circumstances, because of the judges' background, should not foreclose outright the judicial avenue to the vulnerable. Concerns over the character of the judiciary should be addressed by revising the appointment methods and by training the judges according to the requirements of their role, rather than abandoning the idea of the judicial protection of social rights altogether. Moreover, the fact that judges may be conservative in

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<sup>38</sup> Ibid, paras. 8-15.

<sup>39</sup> J Griffith, *The Politics of the Judiciary* (London, Fontana Press, 1970).

<sup>40</sup> K Ewing, 'The Human Rights Act and Labour Law' (1998) 27 *Industrial Law Journal* 275 and V Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces', (2008) 71 *Modern Law Review* 912.

<sup>41</sup> R West, 'Unenumerated Duties' (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 221.

<sup>42</sup> H Arthurs and B Arnold, 'Does the Charter Matter?' (2005) 11 *Review of Constitutional Studies* 37. Cf J Fudge, 'The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* Case in Canada and Beyond', (2008) 37 *Industrial Law Journal* 25.

particular contexts, does not mean that they are by definition always conservative, as the House of Lords judgment in the *Limbuela* case that was discussed in the introduction of this essay reminds us. The adoption of the integrated approach to the interpretation of civil rights documents, which was mentioned earlier, provides further evidence of judges that show receptiveness to socio-economic claims. More generally, the judiciary can, and sometimes has indeed played a significant role in social transformation. Several examples from jurisdictions in Latin America, Eastern Europe, Africa and Asia exhibit its potential, which has been described by Gargarella, Domingo and Roux as ‘an institutional voice for the poor’.<sup>43</sup> To this interesting comparative study that presents the role of courts for social change, it is crucial to add an important collection of empirical studies on the role of social rights’ adjudication in developing countries: the study ‘Courting Social Justice’ gathers and analyses evidence on the role of courts as an element that determines the overall impact of ‘legalization of policy-making’. Gauri and Brinks find that in the countries examined courts neither take on an excessively activist nor a very deferential role, contrary to the views expressed by some ‘judicialization jeremiads’. In the case-studies, judges emerge to be open to the claims of the needy. Their decisions, in turn, ‘do not so much as stop or hijack the policy debate as inject the language of rights into it and add another forum for debate’.<sup>44</sup>

There are further important examples of individual judges, who have exhibited perceptiveness to the claims of the needy. Judge Albie Sachs of the Constitutional Court of South Africa constitutes one of the most enlightening and inspiring instances. Judge Sachs has sat in many social rights cases and has also published extensively on the role of social rights in courts. In the autobiographical book *The Strange Alchemy of Life and Law*, Sachs described the painful process of adjudicating socio-economic rights. Sachs’s sensitivity to the claims of the weak and the economically vulnerable is particularly evident in chapter 7, entitled ‘The Judge who Cried: The Judicial Enforcement of Socio-Economic Rights’, where he makes reference to the *Hoffman* case that involved the refusal of South African Airways to hire an HIV-positive individual.<sup>45</sup> Delivering a judgment that upheld Mr Hoffman’s right to be employed by South African Airways, Judge Sachs describes how his eyes were filled with tears, feeling ‘an overwhelming sense of pride at being a member of a court that protected fundamental rights and secured dignity for all’.<sup>46</sup>

The empirical claim that a particular composition of a court is conservative and might be hostile to socio-economic interests cannot take us far in our normative enquiry. The action that is needed, should the truthfulness of this consideration be established through empirical research, is not to abandon justiciable social rights altogether, because the judicial protection of social rights has a valuable role in modern democracies, as will be argued below. It is an agonising call for reform of our appointment processes and training of our judges.

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<sup>43</sup> R Gargarella, P Domingo and T Roux (eds.), *Courts and Social Transformation in New Democracies* (Aldershot, Ashgate, 2006).

<sup>44</sup> V Gauri and DM Brinks, ‘A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World’, in Gauri and Brinks (eds.), *Courting Social Justice* (Cambridge, CUP, 2008) 303 at 304 and 343.

<sup>45</sup> *Hoffman v South African Airways*, Constitutional Court of South Africa, Case CCT 17/00, 28 September 2000.

<sup>46</sup> A Sachs, *The Strange Alchemy of Life and Law* (Oxford, OUP, 2009) p. 183.

## *Legitimacy*

The third objection against the justiciability of socio-economic rights involves the courts and their institutional role. A central constitutional principle of the modern state is that of the separation of powers: the legislative, the executive and the judicial. If social rights are made justiciable, the judiciary will interfere with resource allocation, which is not in its realm of competence, violating the doctrine of the separation of powers.

The position that presents the judicial protection of social rights as a breach of the principle of the separation of powers is exaggerated. It underestimates, first, the fact that there is no sharp analytical division between social rights and civil and political rights, a point that was proven earlier. This necessarily means that if social rights, or better some of their correlative duties, bear close resemblance to civil and political rights, then the legitimacy objection should apply equally to all human rights claims, at least when they give rise to duties that are costly or positive. It would imply that when the right to a fair trial imposes a duty to provide legal aid to the poor and a duty to train judges or when the right not to torture imposes a duty to train the police force, courts should not have the power to decide these cases, so as to not interfere with the budget. Yet because all rights can be costly, this view of the role of courts in their protection is dangerously narrow, for it excessively restricts the content of the correlative duties. The position that courts should never examine questions of human rights where these involve positive duties or the allocation of resources, is supported by very few scholars today, and has been convincingly rebutted by proponents of judicial review.<sup>47</sup>

It is crucial to bear in mind that the idea of the separation of powers does not require a watertight division between the legislative, the executive and the judicial branch of government. The principle of the separation of powers is tied to the idea of 'checks and balances', which means that each of the branches of government ought to interfere with the others in certain circumstances, so as to ensure that they do not abuse their allocated areas of competence. The objection resting on institutional competence should not be seen as giving rise to 'all or nothing' solutions. It raises subtle questions regarding the legitimate degree of judicial intervention and brings the question of democracy to the forefront of the debate.

## **Democracy**

What is the relationship between social rights and democracy? Here it will be argued that democracy, properly understood, requires satisfaction of certain basic needs. The judicial protection of social rights, moreover, is compatible with democratic values and, often, helps to strengthen them.

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<sup>47</sup> See J Waldron, *Law and Disagreement* (Oxford, OUP, 1999) and responses by D Kyritsis, 'Representation and Waldron's Objection to Judicial Review', (2006) 26 OJLS 733 and A Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451.

Let us, first, consider the key definitions. We need to recall that social rights are rights to the satisfaction of basic needs. Let us now turn to democracy, which is a contested concept. In a democracy, people participate in the creation of the rules by which they are governed. When reference is made to this system of governance, we do not usually have in mind direct democracy. Democracy is today indirect and representative. Decisions reached are rarely unanimous; they are made by majorities. To suggest that any decision reached by a majority is democratic, though, would reflect a poor and inadequate view of democracy. There are other, much better, conceptions of democracy: liberal and social democracy; participatory and deliberative democracy.

The best definitions of democracy entail not only procedural elements, involving the electoral system for instance, but also some key substantive features: a list of basic liberties that prevail over the will of majorities. This can be described as a liberal democracy. Ronald Dworkin, for instance, only sees the decision of a majority as legitimate, if it is a majority in a community of equals. He draws a distinction between 'statistical' and 'communal' democracy,<sup>48</sup> and suggests that communal democracy is central in all charters of rights. On this understanding a democratic decision is legitimate if people have expressed their will from a position of political equality. Social democracy bears similarities to the liberal conception of democracy, but pays special attention to economic power and to the importance of democratising not only the institutions of the state, but also those that exercise economic power. Other contemporary conceptions of democracy place emphasis on the value of citizens' participation in the political process. These models are first, the participatory and, second, the deliberative model. According to the participatory conception, the key aim of a democracy is the participation of citizens in decision-making. The deliberative model considers that for decision-making to be legitimate, it ought to take account of all those who will feel the impact of the decisions reached, so as to promote impartiality.

For the best models of democracy the existence of at least a minimum of socio-economic provision is crucial. This point can be supported by considering the relationship between certain social rights and political rights or political participation. Those who have not received basic education, for instance, or those who have no basic nutrition are unlikely (and are most probably not interested) to participate in the decision-making process. In fact, sometimes the destitute cannot even exercise their most basic political right, the right to vote, because in order to be included in the electoral register, they need a permanent home address that homeless people do not have. Certain social and economic rights may be essential for the best models of democracy, for they are enabling conditions for participation. Citizens who do not live in dire poverty are more willing and more capable to be politically active; they are most probably in a position of knowledge, thanks to their education, and also feel that their society treats them with respect. The destitute feel disrespected in the country that treats them with contempt. A condition of democratic governance is not only the respect of civil and political rights, but also the protection of social rights, without which a democracy will be imperfect.

With all the above models of democracy, where decisions are reached by majorities, the problem may be exactly the power that majorities can exert over

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<sup>48</sup> R Dworkin, *A Bill of Rights for Britain*, (London, Chatto and Windus, 1990) p. 35.

minorities. In countries where the majority is relatively affluent, the poor and marginalised minorities, who in the words of Joseph Carens, are ‘hard to locate on the map of democracy’,<sup>49</sup> have a very weak voice. The needy are often under-represented in parliament, and the power to express their views in public debate is minimal or non-existent. The majorities and their elected representatives can take decisions that neglect their interests and oppress them – decisions in which some are never given a right to express a view, or in which their view has been disregarded. On the other hand, in countries where the majority live in poverty, the poor are often ruled by a minority elite that again neglects their interests. The example of *Limbuela, Tesema and Adam*, the destitute asylum seekers of our introduction, reminds us of those who have not been represented, who have not had their voice heard and whose interests may have not been taken into account in the decisions of the majorities.

The role of judicial review when courts are properly constituted and do not only represent the powerful elites, is partly to correct the deficiencies of democratic systems and their effect on the most vulnerable. Here the judiciary can protect the rights of the few against the oppressive power of the many. The fact that the judiciary is unelected and unaccountable might in fact be not a weakness. Lack of democratic accountability might be an invaluable strength. This is because judges are in some contexts less likely to succumb to populist pressures, unlike politicians who seek to be re-elected.

The institution of judicial review plays a different role in each type of democracy, described earlier. In a liberal or social democracy judicial review ensures the protection of civil and social rights that are essential for the regime. For the deliberative model, the court can serve as another forum of deliberation. The deliberative conception of democracy in connection to social rights has been analysed by Roberto Gargarella.<sup>50</sup> The judiciary, here, is not seen as the final decision-maker, and the value of the judicial decision is not limited to the resolution of the conflict, as deliberation is a continuous process. The idea that the judicial decision does not provide a final determination of the matter under examination, but that it in fact constitutes part of a dialogue with the legislature, has been described in certain constitutional orders that promote this model, as a ‘dialogue between courts and legislatures’ or a ‘democratic dialogue’. In this context, it has been suggested that the judicial protection of rights affords them a prominent role and makes them central in a dialogue with the legislative body that has an opportunity to consider how to address the judicial determination.<sup>51</sup> Courts are ‘an engine of public debate’, a function that they are well-placed to exercise, as they hear complaints of the weakest, who might otherwise be excluded from politics; they also force the powerful to justify their decisions.<sup>52</sup> For deliberative democracy, the additional value of judicial review, as put

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<sup>49</sup> J Carens, ‘Live-in Domestic, Seasonal Workers and Others Hard to Locate on the Map of Democracy’, (2008) 16 *Journal of Political Philosophy* 419.

<sup>50</sup> R Gargarella, ‘Theories of Democracy, the Judiciary and Social Rights’, in Gargarella, Domingo, Roux (eds.), *Courts and Social Transformation in New Democracies* (Aldershot, Ashgate, 2006) p. 13 at 27.

<sup>51</sup> For analysis in the Canadian context, see PW Hogg and A Bushell, ‘The Charter Dialogue between Courts and Legislatures’, (1997) 35 *Osgoode Hall Law Journal* 75. For analysis in the UK context, see A Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford, Hart, 2008).

<sup>52</sup> Gargarella, above n 50, pp. 28-29.

by Gargarella, lies in the role of the judgment and its reasoning for the deliberative process.

The justiciability of social rights, in other words, is compatible with a democracy, and may strengthen it. Here the role of litigation ought to be considered in some more detail.

### **Effects of Litigation**

Litigation opens up an opportunity to participate to those that are excluded from democratic politics, who have no right to vote or whose interests are not represented by the majority in parliament. Yet it is sometimes suggested that the majority of the poor and marginalised do not have the means to seek judicial protection. Is this objection justified? It seems fair to say that litigation for social rights can generally be more inclusive and more effective than this position suggests.<sup>53</sup> Should a case be won, the individual applicant will often not be the only beneficiary. In some countries, a court order leads to an automatic amendment of the legislation. In other instances it opens up a dialogue with the legislative body. Elsewhere it puts political pressure on governments that might then amend the law which was ruled to be in breach of human rights law. In this way other people found in a similar situation to the individual applicant benefit from the finding of a violation.<sup>54</sup> Moreover and more generally, the judicial protection of social rights in countries such as South Africa and India has led to debates on the constitutional protection of social rights in other countries, where this category of entitlements is traditionally regarded as non-justiciable.<sup>55</sup> Litigation, in other words, can have a much wider impact than individual redress.

In response to the argument that the poor and marginalised cannot have access to court because litigation is expensive, it ought to be said that today the right to legal aid is recognised in many jurisdictions for those that are in economic want.<sup>56</sup> Obstacles of this type could also make us appreciate other ways in which litigation is already in some countries or has potential to become more inclusive. Strategic litigation, which is brought by NGOs or other activists, class action, which involves collective adjudication for groups of victims, or group action, whereby associations – trade unions, for instance – are able to bring claims on behalf of their members, can promote inclusiveness in judicial protection. Campaigners and other organisations have sometimes a right to participate in legal proceedings as *amici curiae*, something that is used, for example, both by the European Court of Human Rights and the Inter-American Court of Human Rights. A variety of different techniques that lead to wider participation in litigation create a platform for ‘pressure through law’,<sup>57</sup> which can be

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<sup>53</sup> See also V Gauri and DM Brinks, *Courting Social Justice* (Cambridge, CUP, 2008) pp. 338-340.

<sup>54</sup> For an overview, see *Social Rights Jurisprudence*, M Langford (ed.) (Cambridge, CUP, 2008).

<sup>55</sup> See, for instance, the UK Joint Committee of Human Rights, 29<sup>th</sup> Report, Session 2007-2008, Chapter 5.

<sup>56</sup> See, for instance, the judgment of the ECtHR *Airey v Ireland*, App No 6289/73, Judgment of 9 October 1979.

<sup>57</sup> For a study on this, see C Harlow and R Rawlings, *Pressure through Law* (London, Routledge, 1992).



valuable, as it can lead to a closer engagement between the judiciary and political actors.

On social rights in particular, the interesting Indian experience of public interest litigation provides us with useful insights. In this system, the Indian Supreme Court has opened up standing requirements, allowing any member of the public to initiate proceedings on behalf of people who ‘by reason of poverty, helplessness or disability or socially or economically disadvantaged position, [are] unable to approach the Court for relief’.<sup>58</sup> This is coupled by a flexible approach to the criteria of admissibility of complaints, which has led the Indian Court to hear cases even if applicants have not followed the formal procedure. Public interest litigation has given impetus both for social change and for a change in public culture, which sees judicial proceedings as a forum for debate between judges, state authorities and other organisations.

The remedies that a court can order can at the same time have an effect not only on the individual applicant, but also on others. In Europe, for instance, the ECtHR developed the idea of ‘pilot judgments’, which identify structural problems through individual petitions, and indicate legislative measures that can be taken to address these problems.<sup>59</sup> Respondent states more generally, even without the use of pilot judgments, tend to comply with the decisions of the ECtHR by not only awarding compensation to the individual, but also by amending the legislation that led to the breach of the ECHR. In America, the Inter-American Court of Human Rights can order guarantees of non-repetition, which include an order to adopt new legislation, and implement policies and programmes that are consistent with human rights obligations.<sup>60</sup> The Constitutional Court of South-Africa has also emphasised that in a country where the majority of the poor do not have the means to have access to courts, because of lack of resources, the courts have a special duty ‘to “forge new tools” and shape innovative remedies’.<sup>61</sup> At the same time, initiating litigation has potential to lead to mediation, which can reconcile the competing interests of the parties without being adversarial and without carrying the economic costs of the judicial process.<sup>62</sup> In these different examples and in different ways in each one of these, the judicial avenue can lead to a somewhat more systematic solution to the problem that is triggered by an individual case brought to a court.

It is also important to appreciate that litigation for social rights might contribute to the quest for social justice in two further ways: first, it might raise awareness by attracting publicity that socially deprived people would not otherwise have the means and the power to attract. Thanks to litigation, for instance, we become more aware of post-apartheid socio-economic inequalities in South Africa or the plight of migrant domestic workers in Europe.<sup>63</sup> Second, on a more substantive point,

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<sup>58</sup> S Fredman, *Human Rights Transformed* (Oxford, OUP, 2008) p. 126.

<sup>59</sup> See *Broniowski v Poland*, App. No. 31443/96, Judgment of 22 June 2004.

<sup>60</sup> See, for instance, *Case of Children’s Rehabilitation v Paraguay*, Judgment of 2 September 2004, Inter-Am.Ct.H.R. (Ser. C), No. 112.

<sup>61</sup> *Fose v Minister of Safety and Security*, (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997), para. 69.

<sup>62</sup> See the discussion in *Port Elizabeth Municipality*, Case CCT 53/03, Judgment of 1 October 2004.

<sup>63</sup> See the judgment of the ECtHR *Siliadin v France*, App. No. 73316/01, Judgment of 26 July 2005 and V Mantouvalou, ‘Servitude and Forced Labour in the 21<sup>st</sup> Century: The Human Rights of Domestic Workers’, (2006) 35 *Industrial Law Journal* 395.

individual claims for social justice push us all to think deeper about the principles that should govern our society. The judicial avenue gives the opportunity to a claimant to present her concern, forces state authorities to justify their action or omission, and requires courts to decide, providing moral reasons. Litigation for social rights, then, is not only beneficial for the individual or the group that bring a claim and have their voice heard. Even a wrongly decided case could be beneficial for us all, because it forces us to think harder about the decisions that our elected representatives make, and the key arguments for the principles of social justice that we adopt. The judicial protection of social rights has potential to have this crucial effect too.

Social rights adjudication can make a significant contribution to the protection of social rights. It can correct some of the deficiencies of our majoritarian systems by giving voice to the poor and marginalised: an individual can have her voice heard, might receive compensation, as well as an official recognition that her treatment was unjust; sometimes the legislation is amended following the finding of a breach, and other times a dialogue between the judiciary and other political actors begins. The judicial process more generally imposes an obligation on the authorities to justify their actions, and the judicial decision can provide reasons to the person that is suffering. Judicial reasoning can serve as an input to more general debates of social justice. The decision and surrounding debate can raise awareness about the particular problem that it highlights. It can also make us think harder about our principles of social justice. The justiciability of social rights in countries that have come to serve as paradigm examples in this matter, such as South Africa, can further lead to public debate in contexts where social rights are not explicitly guaranteed in the Constitution. There can be positive effects not only for the individual applicant, in other words, but also for others, who are found in a similar position, as well as for the society as a whole.

## **The Role of Legislatures**

Yet placing all our attention on courts would provide a picture that is incomplete and impoverished. Although a judicial decision leads to the amendment of legislation in some countries, which has an effect on a large number of people and not only on the individual applicant, it is generally reactive. An injustice is most often addressed if an individual claimant or a group brings a complaint. Change triggered by successful applications might lack the systematic planning that respect for principles of social justice requires. This situation also raises questions about the distributive implications of judicial decisions on social rights in certain contexts.<sup>64</sup> In addition, crucially, state inaction that leads sometimes to pervasive injustice might not be sufficiently targeted through justiciability, because courts might often be reluctant to impose positive duties on state authorities.<sup>65</sup> In some countries, moreover, the key concern voiced in liberal scholarship is that the judiciary will simply not be open to socio-economic claims, because of its conservative composition. Or that even if the composition of

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<sup>64</sup> See, for instance, O Ferraz, 'The Right to Healthcare in the Courts of Brazil: Worsening Health Inequities?' (2010) 11 *Health and Human Rights* 1.

<sup>65</sup> R West, 'Ennobling Politics', Georgetown Public Law Research Paper No. 1172204. Available at SSRN: <http://ssrn.com/abstract=1172204>, p. 21; also in Jefferson Powell, Boyd White (eds), *Law and Democracy in the Empire of Force* (Ann Arbor, University of Michigan Press, 2009).

this body is favourable to a social rights claim, it might still perceive itself as having restraints (institutional mainly), and would not go as far as we might believe that it should. Faced with such situations, we would be disappointed, we would question the role of legal enforcement of social rights, and we might even start questioning the point of using the term ‘human rights’ altogether. We would become sceptics.

But the moral force and the transformative potential of social rights does not end here. It has another aspect, which is proactive rather than reactive. It involves the role of legislatures, and has mainly been developed by progressive US thinkers. To put this debate in context, it is important to be reminded that the US Supreme Court does not recognise positive duties: according to well-established jurisprudence, duties that correspond to constitutional rights are negative, requiring minimal government. In response to this Robin West, for instance, has stressed that constitutional substance should not be limited to the adjudicated Constitution. West insightfully and forcefully analysed the role of legislatures in her discussion of the ‘legislated Constitution, the Constitution looked to by the conscientious legislator as he or she seeks to fulfil her political obligations’.<sup>66</sup> On this analysis, it is essential to realise that principles of rights are addressed to legislators, as much as they are addressed to the judiciary. In fact the elected legislature has a primary duty to legislate for basic material conditions, while the court has an obligation to examine if legislation is compatible with this primary duty.

The moral, political or legal duties of legislatures have been neglected in academic scholarship on social rights. A common problem identified by West is that moral questions are equated to constitutional questions, constitutional questions are equated to legal questions, and legal questions are equated to judicial questions. On this understanding, all moral questions end up being questions that the judiciary addresses; the way that the judiciary responds to them also constitutes what the law says.<sup>67</sup> If the constitution or other law of a status higher than ordinary legislation, and constitutional jurisprudence, does not impose duties to legislate for basic material conditions, these duties are perceived as non-existent both as a matter of law and as a matter of morality. In the US, for instance, where courts reject the position that constitutional rights impose positive duties altogether, legislators are seen as neither under a moral, nor a political nor a legal obligation to act positively and adopt legislation that will promote welfare provision. Constitutional lawyers particularly equate political justice to constitutional justice, which is for them the adjudicated constitution. If the adjudicated Constitution does not recognise duties to legislate for basic material conditions, these duties are neglected altogether.

It is crucial to uncouple moral questions from the adjudicated Constitution because constitutional principles are not solely those proclaimed by courts. There is also the ‘Political Constitution’, the Constitution that guides the political process and sets the standards towards which politics should strive, as well as those against which political decisions should be assessed. Law-making by our elected representatives ought to be full of moral ambition, and this is a point that is often missed when the

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<sup>66</sup> R West, ‘The Missing Jurisprudence of the Legislated Constitution’, in Balkin and Siegel (eds.) *The Constitution in 2020* (Oxford, OUP, 2009) p. 79.

<sup>67</sup> R West, ‘Unenumerated Duties’, (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 221 at 242.

judiciary is regarded as the sole virtuous branch.<sup>68</sup> This is an incomplete understanding not only of constitutional substance. It is, above all, an ‘incomplete rendition of the social compact between state and citizen’.<sup>69</sup>

The position that legislators might have duties – moral, political or constitutional – to legislate for the satisfaction of basic material conditions, leads to new lines of enquiry. The key challenge is to be imaginative about how such arguments will be made in an influential manner. In some contexts, it is true that the legislative body might be more receptive to academic arguments than the courts are, though this is not necessarily so. There is a need to think how the universities, organisations that promote social justice and others will have an input to the legislative process. West suggests, for instance, that law students should be encouraged to do internships not only with judges, but also with legislators, and that university education should provide them with such possibilities. At the same time activists in the area of social rights might need to turn to strategies that do not only involve courts, but also political lobbying. This already happens in India, for example, where courts are receptive to social rights claims, but whose decisions do not always bring about the desirable change.<sup>70</sup> These are no doubt big challenges, and differ from one country to another, with their distinct legal systems, traditions and social problems, while some of these challenges are global, involving duties of the affluent to the desperate needy, nearby and distant.

It is essential to take both the judicial and the legislative avenue for the sake of the most vulnerable amongst us. The legislators who are elected and accountable have a primary obligation to adopt legislation that promotes basic welfare provision. The action or inaction of the elected branch will then be of judicial concern. The role of the court is to examine whether people’s social rights are rightly prioritised in the legislative process. The exact structure of the relationship between the two bodies will depend on the constitutional arrangements in each context, and particularly on the extent of judicial powers, but ideally, it should be a relationship of dialogue and partnership. Some of these issues will further be analysed in the section that follows.

## **5. Content of Duties, Right Holders and Duty Bearers**

Whether through explicit constitutional provisions that protect socio-economic rights or as components of civil and political rights, or even as directive principles of social policy, social rights are already embedded in several legal cultures worldwide. What is the content of these abstract claims? Social rights, like civil and political rights, might at first glance appear overly vague. What is a right to basic nutrition, someone will ask. Do we have a right to a house in the countryside? Are we entitled to the job of our dreams?

Most importantly, rights might give rise to dramatic conflicts. In resource-intensive claims, clashes are often due to scarcity of resources. Conflicts between rights would probably be avoided if we adopted a libertarian model, where rights

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<sup>68</sup> West, ‘Ennobling Politics’, n 65 above, p. 32.

<sup>69</sup> West, ‘Ennobling Politics’, n 65 above, p. 36.

<sup>70</sup> Brinks and Gauri, n 44 above, p. 312.

simply impose side constraints on government action.<sup>71</sup> If the government had an obligation not to interfere with a person's right to expression by not censoring her or someone's right to healthcare by not contaminating the land where she lives, it would be harder to envisage immediate conflicts. Because rights are not mere side constraints on government action, because rights to basic material provision can also impose duties to act (like civil and political rights), a complexity emerges. The right to healthcare might require the government to provide an expensive drug to someone, which might not always be available for everyone. The provision of an expensive drug to everyone who needs it could mean that resources might be limited for free primary education of a high standard. Prioritising resources for education might reduce the resources available for the creation and monitoring of decent jobs. Very often rights give rise to duties that impose a systematic burden on the state budget, which is limited. How could limited resources and clashes between rights be addressed in interpreting social rights?

The interests that underlie social rights, and values, such as the idea of dignity, should be able to provide guidance to some of the very complex questions on the content of these claims. Two points ought to be made: First, that because rights are grounded on urgent interests of the person, they will always trump utilitarian calculations in case of conflict between a right and an interest that does not attain the status of right. Second, that even if rights trump utilitarian interests, they may still clash with each other. In these instances, there will still be a need for trade offs, which will not, however, be of the brute sort that utilitarianism embraces.<sup>72</sup>

When rights themselves clash, agonising decisions have to be reached by governments that decide on resource allocation, and agonising questions ought to be answered by courts that are asked to determine complaints. A crucial clarification is due here. The above discussion distinguished between the role of courts, on the one hand, and the role of legislators, on the other. When thinking about the content of rights, it is important to appreciate that this might differ depending on the branch of government that examines each particular question. Or more precisely that it is not the meaning of rights that is altered; it is rather that what each branch of government can order for social rights might differ. The courts, it was said earlier, might not be able to decide for the provision of social rights in detail in individual applications that impose a heavy and systematic burden on the budget, because an individual complaint might not lead to fair distribution of resources. Courts have the power and the duty, however, to examine whether government policy is principled, and to declare it, if they find it unprincipled. Lawrence Sager suggested that 'the adjudicated Constitution, is reduced from the whole, and the whole of constitutional substance is reduced from all political justice',<sup>73</sup> and claimed that welfare entitlements belong in the realm of constitutional substance, but not in the domain of adjudication: they are part of the 'underenforced Constitution'.<sup>74</sup> Perhaps Sager's position is appropriate for the US model where the Supreme Court has very strong powers, but could be modified for other purposes where the argument for social rights is addressed to courts, as much as it is addressed to legislatures.

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<sup>71</sup> R Nozick, *Anarchy, State and Utopia* (Cambridge, Basic Books, 1974).

<sup>72</sup> See generally, J Waldron, *Liberal Rights* (Cambridge, CUP, 1993), Chapter 9.

<sup>73</sup> L. Sager, above n 1, p. 1431.

<sup>74</sup> L. Sager, *Justice in Plainclothes* (New Haven, Yale University Press, 2004), p. 95 ff.

## Legislative Determination

The duties of our legislative bodies in the area of social rights are wide. What a court can decide and what a court can order on these matters may be more limited to what the government is required to do, so as to deliver its constitutional obligations. When thinking about the duties of legislatures, the content of state obligations might be illustrated by the approach of the CESCR. The CESCR, which provides authoritative interpretations of the provisions of the ICESCR, attempted to determine the content of states' obligations in General Comment No. 3.<sup>75</sup> This explains that while the fulfilment of social rights depends on the availability of resources, some of the corresponding duties, such as the prohibition of discrimination, are immediately effective. The steps that states should take towards the 'progressive realisation' of social rights, moreover, ought to be taken immediately, and be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant'. Legislation might be essential in order to fulfil the relevant obligations; yet the state should also take all other appropriate measures. Finally, there is always a minimum core of social rights that the authorities ought to protect, which is described as follows in General Comment No. 3:

10. [...] a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant [...]

In assessing whether the state complies with its minimum core obligations, the Committee pays attention to resource constraints, but in order for a country to blame scarce resources for its failure to comply with the minimum core, it has to show that it has made very serious effort to address its minimum core duties. The approach of the CESCR could usefully serve to determine the duties of legislators in the area of social rights.

Two questions might arise here, one involving the relationship between social rights and social justice, the other the role of economic efficiency arguments in the social rights debate. On the first matter, it is fair to say that each government will have a different conception of principles of social justice that it seeks to employ. One might follow the account of John Rawls and the 'difference principle', for instance, and consider that inequalities in the distribution of goods are permitted insofar as they work to the benefit of the worst-off.<sup>76</sup> What is the relationship between this principle as an account of social justice, on the one hand, and basic social rights, when addressed to courts and legislators, on the other? Social rights are 'constitutional minima'.<sup>77</sup> They do not provide a full account of a theory of distributive justice; they identify some minimal requirements for a decent life that any account of social justice

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<sup>75</sup> CESCR, General Comment No. 3, 'The Nature of State Parties' Obligations', 14 December 1990.

<sup>76</sup> J Rawls, *Political Liberalism*, above n 1, pp. 281-282.

<sup>77</sup> Sager, above n 1, p. 1422

would have to respect and ensure. Social rights as advocated here, in other words, should form the heart of any conception of distributive justice, and would be compatible with most conceptions of social justice.

As to the relationship between social rights and economic efficiency, there is a neoclassical view of the economy, according to which creating a safety net by providing for a minimum level of socio-economic provision might harm productivity. On this view, people will become idle if basic welfare is guaranteed, and this will in turn be problematic for social rights in the long term because the reduction of productivity will result in fewer resources for all, including the worst-off in society. This argument is often made in the area of labour rights, for instance, where it is suggested that the creation of rigidities in the form of basic social rights might increase unemployment in the long term.<sup>78</sup> It ought to be stressed that this is a contested issue and there is no evidence to prove that the protection of basic rights harms productivity in reality. In fact it could be suggested that the right to education, for instance, provides the basic tools for labour market participation that will enhance economic flourishing.

In any case, the efficiency argument would have to be supported by extremely compelling evidence in order to play some role in the debate on social rights. A government that treats people as means to an end – that of economic efficiency – is one that cannot be regarded as decent; its legitimacy is therefore questionable. Letting people suffer undernourished, live in unemployment and ill-health without any social support, for the reason that the market might do the work – it might promote economic flourishing and consequently create more housing, healthcare and employment in the long-run – is a position that is contrary to ideas of basic concern and respect that a state ought to show towards its members, and goes against the grain of human rights law. Short-term human suffering for some supposed long-term goals of economic development neglects the value of the person as an individual. It is also profoundly undemocratic, if we define democracies as requiring a minimum level of social provision, which are based on equal concern and respect or if we opt for a deliberative model that values participation of all citizens. Social rights are basic preconditions for a fair society, having a central role in addressing the failures of the market, which is in any case not designed to operate for the meeting of basic needs of all and might well not achieve this outcome in the long or short-run.<sup>79</sup>

## **Judicial Determination**

Returning to the role of courts in defining the content of social rights, in interpreting them and examining the compatibility of other state action with the corresponding duties, several positions can be adopted, some being more deferential than others. The appropriate solution will vary depending on the form of judicial review and remedies in each country.<sup>80</sup> In some jurisdictions, when a court finds a violation of a

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<sup>78</sup> On this debate see A Santos, 'Labor Flexibility, Legal Reform and Economic Development', (2009) 50 *Virginia Journal of International Law* 44 at 47.

<sup>79</sup> See J Donnelly, 'Human Rights, Democracy and Development', (1999) 21 *Human Rights Quarterly* 608.

<sup>80</sup> M Tushnet, 'Social Welfare Rights and the Forms of Judicial Review', (2003-2004) 82 *Texas Law Review* 1895 at 1903.

constitutional right, it has the power to strike down legislation that is in breach of the relevant constitutional provision. If we have strong review, which gives courts this power, the judicial decision is determinative. If there is an interference with social rights and a judicial decision is likely to have very wide resource implications, the court might rightly refrain from being too activist. However, there is an alternative model: weak judicial review. When there is a model of weak review, a court should be able to declare that legislation is incompatible with human rights law without particular hesitation, as the government will in any case have the final say.

The Constitutional Court of South Africa has refrained from using the standard of the ‘minimum core’ of the CESCR, which was presented earlier, opting for a model of weak review. Faced with the question of the minimum core of the right to housing in the *Grootboom* case, Yacoob J stated that it did not have the necessary information to determine it, unlike the CESCR, which could use states’ reports and other materials. The Court has employed the standard of ‘reasonableness’ instead of the minimum core. The role of the standard of reasonableness in the judicial protection of social rights, particularly when there are resource-constraints, is well illustrated in the *Soobramoney* case. Mr Soobramoney was severely ill with chronic renal failure. He requested to have kidney dialysis treatment at the hospital where he was being treated, but there were not enough machines available for the necessary treatment. His claim was rejected for shortage of resources. In a manner that illustrated the painful process of decision-making, Albie Sachs said: ‘If resources were co-extensive with compassion, I have no doubt as to what my decision would have been’.<sup>81</sup> However, resources are limited and the judiciary decided to show deference to a decision of the authorities that it held to be reasonable.

The ‘reasonableness’ approach is not foreign territory for human rights lawyers. It brings to mind debates on the proper role of unelected bodies like courts in other areas of law – debates which are couched in the terms of ‘deference’ in the UK or the ‘margin of appreciation’ before the ECtHR.<sup>82</sup> The notion of reasonableness alone cannot do all the work for if the courts always defer to the government, they do not really protect rights. If they always find a violation, they ignore the problem of scarcity of resources. Several scholars criticise particularly the standard used by the South African Constitutional Court for being overly deferential to the power of the legislative and executive branches of government, and others suggest that deference is the right way forward for a court that needs to respect political decisions.<sup>83</sup> The heart of the matter here is that a theory of what is reasonable for the government to do will be needed, and the question is whether one such theory underlies the decisions of the South African Constitutional Court.

Which is the most appropriate test – a strong or a weaker one – to determine the content of social rights when decided by the judiciary is relative to the institutional architecture in each country. It will therefore vary from one country to the other. Considerations involving scarce resources when rights clash might

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<sup>81</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)*, Case CCT 32/97, Sachs J, para. 59.

<sup>82</sup> On deference see A Kavanagh, *Judicial Review under the Human Rights Act*, (Cambridge, CUP, 2009), Part II. On the margin of appreciation see G Letsas, ‘Two Concepts of the Margin of Appreciation’, (2006) 26 OJLS 705.

<sup>83</sup> D Bilchitz, *Poverty and Fundamental Rights* (Oxford, OUP, 2008) and O Ferraz, ‘Poverty and Human Rights’, (2008) 28 OJLS 585.



legitimately compel a court to let the government decide, insofar as this decision can be supported by fair principles. While the court might not be able to prescribe how resources should be allocated when rights clash, it should be able to determine that a certain level of socio-economic provision resists trade-offs when there is a conflict with policy considerations that do not attain the status of rights. Suffices it to say that social rights can obtain a clear content, as much as civil and political rights can; that legislatures have wider obligations than courts; and that courts should hold them accountable if they fail to deliver their primary duties to basic social provision, without being overly intrusive.

The heart of the argument in this section can otherwise be described as follows: the limits of the judicial protection of social rights might be distinct to the constitutional meaning of rights.<sup>84</sup> Courts and other bodies with judicial functions do not have to (and sometimes should not) show excessive activism in individual cases that might impose a systematic burden on the allocation of resources to other poor and needy individuals that cannot access courts. For legislators social rights should be regarded as an absolute priority. The exact degree of this duty would be subject to disagreement, of course, but a minimum level of socio-economic provision provided by the state as a safety net can obtain a certain degree of objectivity and concreteness, and can be determined either by the government alone or by the court and other human rights institutions in partnership with the government. It can fairly be said, though, that in a manner similar to civil and political rights, social rights can be rendered concrete through systematic engagement and moral argument on the scope of their correlative duties; and that the elaboration of this content can be both subject to judicial and to legislative work.

## **6. Conclusion**

Although you and I might desire different things, to conclude, we have certain shared fundamental necessities: to water, basic nutrition, housing, healthcare, work and others. If these are neglected, we will not be fully human; we shall have no dignity; we shall be unfree and feel excluded and disrespected. Because of accidents of history – the Cold War in particular – the current legal framework is characterised by striking weaknesses in the protection of social rights, their personal scope and the institutional design. These become particularly striking if compared to the civil and political rights framework.

This essay argued that social and economic rights are constitutional essentials at domestic level, as much as civil and political rights are; the two groups of rights are based on common values and have no sharp conceptual differences. Social rights should resist trade-offs and should constitute very weighty considerations for the judiciary when adjudicating and for the legislature when legislating. Some legal orders have made advances that reflect an understanding of the fundamental character of social rights, and their importance as a safety net when social structures fail and economic policies lead to destitution.

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<sup>84</sup> Sager, above n 1, p. 1426.

What has been achieved so far in international and national human rights law, thanks to the moral force and the motivating power of these claims, should not be underestimated. The judicial protection of social rights has in various countries proven capable of providing an important avenue for the poor and needy, while important academic scholarship has emerged focusing on legislative duties. Yet there are several challenges in all these fields: theoretical enquiry into the best institutional arrangements,<sup>85</sup> empirical research on the practical limitations of the contribution that courts can make, the remedies that best serve the protection of the rights of the poor, the role of legislatures in protecting social rights. Societies should be structured in a way that shows the concern and respect of the affluent for the basic needs of the poor. How this will be achieved is an urgent matter for moral, political and legal argument. In addition, there are questions that this essay did not touch upon at all, as it focused on the law. How should each one of us show concern for the global poor, how should private citizens and the civil society strive to save the lives of those in extreme deprivation? These are important questions with which philosophers are grappling.<sup>86</sup> All these complex matters open up numerous avenues for research and for action.

With their exceptional moral force, social rights provide a starting point that captures the key challenges. They reflect the belief that rights to basic material conditions are universal and have a distinct status. They provide a basis and a motivation for improvement of the many shortcomings of the world order; they have potential to inspire and lead social transformation. Reflection on how this will be most effectively achieved is, therefore, a pressing need and a challenge for each one of us interested in a fairer society and a more just world order.

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<sup>85</sup> Some of these issues are further discussed in C Gearty, V Mantouvalou, *Debating Social Rights*, forthcoming by Hart Publishing in 2010, in the section entitled 'Global Social Rights' that involves the duties of the affluent towards needy foreigners.

<sup>86</sup> See P Singer, *The Life You Can Save* (New York, Random House, 2009).