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POSSIBILITIES OF CONSTITUTIONAL ADJUDICATION IN SOCIAL RIGHTS MATTERS*

ABSTRACT

Irrespective of the advantages or negative consequences of social rights, and unrelated to the textual recognition of such rights in a given constitution public opinion and a great number of scholars and politicians take such rights for granted. Most constitutional and supreme courts in welfare states have to operate (and in certain cases are willing to operate) as if these rights were part of constitutional reality. In this paper I take this point of departure as part of constitutional reality. This is, however, an open reality, i.e. even with strong textual recognition in more recent constitutions, it is to a great extent a matter of constitutional policy, a matter of judicial choice how these references will be used. The following remarks intend to review some of the applicable judicial strategies arguing that strong substantive recognition of such rights is justifiable only in very exceptional circumstances.

I. JUSTIFICATIONS OF SOCIAL RIGHTS

The list of social rights is long and uncertain. The medieval zoo of social rights is a collection of imagined and exotic animals and certain pets of people and (leftist) intellectuals. The chapters on social rights in national constitutions or in the International Covenant on Economic, Social

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and Cultural Rights (CESCR) contain fundamentally different claims.[1] Some of these rights concern basic needs satisfaction (right to drinking water and sanitation, food and shelter); others are about some level of insurance against incapacities and handicaps that fundamentally affect one's livelihood (old age pension insurance, maternity leave). Some of the social rights express concerns about accidents of life: here rights are provided in order to counter the injustice of bad luck. Rights of the disabled and sickness related rights, even unemployment benefits belong to this category, since health care related rights might be provided as insurance against misfortune. Social rights also include special status rights like privileges granted to motherhood and childhood. Finally, certain social rights express concerns related to access to communal shared public goods, where universal access of all to the service benefits the whole community, irrespective of the personal advantage. Education is one such good (with free elementary and increasingly mid-level education constitutionally guaranteed). Though free access to publicly provided roads is not constitutionalized, it has the same characteristics, just like public sanitation or vaccination for epidemiological reasons. The indistinct handling of morally, politically and economically different claims is a major source of uncertainty in constitutional law and results in controversial human rights policies. It contributes to the uncertainties regarding the proper role of adjudication and constitutional adjudication of social rights.

Given the uncertainty and ambiguity of the constitutional text regarding social rights, constitutional courts have to find ways to interpret such provisions. Moral and consequentialist considerations are particularly important here. In areas of uncertainty a court cannot disregard the public sentiment of the day.

Since positive formulations concerning social rights are mostly ambiguous, sometimes even missing in the constitutions, moral considerations become important for constitutional law. Demonstrably shared social values may help to fill the vacuum in the text. However, such public intuitions and sentiments cannot be accepted without proper moral justification. In the interpretation of social rights constitutional courts should refer to the reconstruction of the moral foundations of these claims. The interpretive choice should be based on the inherent logical force of the theory, and its social acceptance, in light of the foreseeable consequences of such theories.

[1] There is a certain inconsistency even as to the catalogue "social rights" enshrined in constitutions. Although several Central and Eastern European constitutions enumerate a number of the ICESCR rights (e.g. right of everyone to social security, right to health, right to education), the inclusion of others e.g. the right to adequate housing is not that unambiguous. While the Constitution of Poland explicitly mentions in its Article 75 par. 1 that "Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen", no such allusion can be found e.g. in the Hungarian Constitution and this interpretation was reinforced by the Hungarian Constitutional Court (Decision 42/2000. (XI. 8.) AB hat.). Similarly, the right to adequate housing is also missing from the Czech Charter of Rights and Fundamental Freedoms of 1991.On the other hand, it is incorporated into Section 26 of the Constitution of South Africa, which uses even stronger terms to create an obligation of the state to take `reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right` and also prohibits arbitrary eviction. Meanwhile, the Ugandan Constitution also includes e.g. special provisions on the rights of persons with disabilities.

For example, strict egalitarianism might be attractive to a majority because of envy but given the economic consequences of such understanding and the morally dubious nature of envy, courts should disregard it. Constitutional system is created exactly to exclude suicidal dictates of certain emotions. Additional constitutional considerations, related to the function of courts, may militate against such inclusion (see below).

There are a number of different moral and political considerations behind the social rights claims. After all, the constitutionalization of social rights presupposes that no morally legitimate political society can ignore such claims; though rights might be included for less stringent reasons and the presence of socioeconomic rights in a constitutional text is not in itself an evidence of their moral necessity. In the following pages I will sketch some of the relevant moral considerations that might point towards social rights to show that the normative foundations of these rights are multifaceted and contradictory, with specific consequences regarding the judicial enforcement of social rights.

It is often argued that social rights have a specific nature. They are not directly justiciable as claims of individual rights holders and the state's obligation is only a planned systematic effort to provide services depending on available state resources. This is corroborated textually in the CESCR[2] and in the constitutions following the example of the Irish Constitution which turns these rights into judicially non-enforceable state goals. But the textual arrangement is not decisive. The Indian example indicates how directive policies of the state and isolated provisions of the CESCR were turned into rights that serve to evaluate laws. The constitutional position on the nature of non-justiciable social rights is a consequence of the applicable moral concerns and of the role attributed to constitutional adjudication.

1. *Dignity.* A very common judicial justification refers to human dignity. Recognition of mutual equal dignity requires from all to grant at least minimum livelihood to all. This entails the satisfaction of basic needs through services provided by the state. There are fundamental differences as to concepts of dignity. In some versions of dignity, it is satisfied by equal respect without material services. The political/democratic concept of dignity emphasizes that since the constitu-

[2] Article 2 par.1. of the CESCR states the following: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." The obligations incumbent upon State Parties were further elucidated in the relevant general comment issued by the Committee on Economic, Social and Cultural Rights, and maintained that these obligations "include both what may be termed […] obligations of conduct and obligations of result." Nevertheless the Committee also reiterated that "while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect") e.g. "the undertaking to guarantee that relevant rights will be exercised without discrimination". General Comment on The nature of States parties obligations (Art. 2, par.1) : 4/12/90. CESCR General comment 3. par.1.

tional system is a democracy and equal participation in the democracy is a precondition, one should receive all the basic support that is needed for his or her meaningful political participation in a democracy. Some dignitarian claims operate under the assumption that the satisfaction of the basic needs is an absolute obligation of the state or even of the international community. But the actual formulations present in constitutions are less demanding.

2. *Equality.* Other justifications reflect equality concerns. Very often equality is satisfied as long as discrimination in the enjoyment of social rights is not tolerated. Sometimes equality is only an auxiliary consideration - but with extremely far reaching consequences as it serves to extend statutory welfare services. Such extensions, or better, the underlying equality concerns often prohibit the favorable targeting of the needy. Whatever services the state provides, especially if it concerns the provision of welfare, it should be provided to all, and perhaps on equal grounds. Additionally, transfer burdens have to be extended too (on grounds of equality, but also for the practical reasons of increased expenditure triggered by the extension of beneficiaries).[3] Once intergenerational equality is taken literally, the pension and health care systems of the welfare state will explode.

3. *Contractarian concerns.* Contractarian theories of constitutional government argue that the state is created not only to protect the life, liberty, property of participants through transfer of individual power to the state (the transfer of individual power is at the center of social compacts). The welfare state might be understood as an insurance system against hardship. Here people hypothetically "agree"—in the sense of a social compact, i.e. by constitutional *fiat* – to transfer self-protection regarding their old age income, other aspects of social security or health care through a system of social insurance that provides a level of service to a great extent irrespective of the actual contribution of the person and the actual occurrence of the event. The personal contribution might be totally irrelevant, as in the case of services and opportunities provided to the disabled. Here the insurance element is clearly based on an *ex ante* consideration. The contractarian theory is applicable also to situations of disaster relief: here at least some of the occurrences cannot be "insured" – society as an insurance association provides first aid. The contractarian theory of insurance reflects an agreement accepted behind the veil of ignorance: there is a statistical chance that some people will be born disabled or will become disabled. In view of such probabilities reasonable people would agree to protect themselves through cooperation. The service provided as a right reflects the average readiness of individuals in a society to insure themselves against such situations. One could argue that similar considerations apply in regard to the provision of minimum livelihood to those who deserve it or to those who are victims of bad luck, e.g. losing their job. Contrary to the dignity based approach, moral hazard considerations apply here: the person shall be responsible for his or her own choices and if she is not seeking a workplace etc., he or she is not entitled; otherwise the system would encourage people to rely on welfare institutions instead of trying to find work.

[3] See for BVerfG, 1 BvR 2014/95 vom 3.4.2001, Absatz-Nr. (1 - 93) (*Pflegeversicherung*).

While social insurance-based welfare might be provided strictly on grounds of contribution and on actuarial grounds, the constitutionalization of such systems as social rights departs from the strict insurance philosophy as it imposes disproportionate burdens on some people while the service provided is only partially related to the contribution. Since the different principles and justifications are mixed in the existing constitutional systems there is little consistency in human rights protection across the borders and even within a single jurisdiction. For example, in most jurisdictions the relevance of personal contribution is considered to be of high importance in social security pensions. At the same time, it is argued that in health care egalitarianism shall prevail, given the equality of life and health of all. In more aggressive formulations of this principle even a contribution brought on the market would violate the equal right to health claim.

4. *Compassion.* Additional considerations emerge from dictates of human compassion. Compassion driven considerations apply at least to those areas of needs satisfaction where suffering is identifiable. Obviously, this is a narrower concern than the one that emerges under the hardship or dignity arguments. Such compassion might be considered historically constitutionalized in the following sense. Historically, charity used to be a social class based or local community based expression of compassion. Compassion based institutions like church related welfare services and local charitable services were nationalized. It follows that the state shall continue to provide these compassion services.

5. *Communitarianism.* Communitarian considerations of social welfare emphasize that pertinence to a national community creates a community of fate, which becomes the source of obligations of solidarity, irrespective of personal contribution.

6. *Restorative justice.* A special case of social rights might be that of restorative justice. Where social injustice results from past governmental or social discrimination there might be compelling reasons to provide services that promote social rights. The grounds for providing such services are not related to preexisting, substantive social rights but to social injustice that happens to violate livelihood interests. Such considerations were voiced e.g. in the context of the mentally disabled in the US where members of this group were considered to be victims of systematic, past injustice originating in social prejudice. The Supreme Court never considered this to be a ground for constitutionally mandated legislative benefits, and not even the discrimination against the mentally disabled falls under stricter scrutiny. But the radical legislative empowerment was certainly constitutional and non-arbitrary in view of past injustice.

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Whichever background consideration is relied upon in the judicial construction of social rights, the accepted concept must respect two constitutional considerations. Contemporary constitutional governments cannot exist without the free market, and therefore they ought to presuppose

a market economy.[4] Secondly, the modern constitutional system operates under the assumption of equality of persons in the sense of *nonsubordination* of one person to another. As Kantians would say, no one should serve as a means to another person.[5]

Equality of persons is tricky. From a free market perspective it means equality of preference: in principle, one should accept that the preference to have shoes for 500 dollars is equal to the preference dictated by the need to have a 5 cent piece of bread. This implies that one shall not be deprived of the chance of buying expensive shoes even if 10.000 people could be nourished from that amount of money. Benthamites and socialist do not accept this logic. Utilities of the same amount differ; a dollar for the hungry is worth more than a dollar for the millionaire interested in buying an extra cask of expensive wine.

The market principle implies that policies enabling self-reliance are to be promoted instead of redistribution.[6] This is certainly in line with one interpretation of dignity, namely dignity as autonomy and self-determination. The market consideration does not prescribe market rationality. John F. Kennedy famously said that a rising tide lifts all boats. A selective lifting of boats through social transfers founders many others, as the water level recedes (this does not exclude the temporary use of life-saving poles.) Institutions in charge of protecting the constitution as a rational enterprise should defend such rationality and perhaps even the institutions that promise market rationality. It is legitimate to assume that people would prefer an absolute improvement of their lot, which is quintessential for the satisfaction of basic (biological) human needs. Overtaxation in order to provide transfer for egalitarian or dignitarian welfare will diminish total welfare, at least understood in quantitative terms of aggregate wealth, measured, among others,

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[4] Justice Holmes famously claimed that there is no economic theory endorsed by the American constitution. However, to the extent the living constitution has to reflect generally shared beliefs of the nation the US is constitutionally a market system. Many post-1945 constitutions expressly state that the economic system of the country is a social market economy. Needless to say, social rights claims are often used as a platform to propose radical restrictions to the free market. See e.g. Menendez, A.J., *New Foundations for Social Rights. A deliberative democratic approach*, ARENA Working Papers, WP 02/32.

[5] Dworkin has argued that it is morally justified to create a system of insurance against bad luck in a community where egalitarianism (or other assumptions like feudalism, nationalism) ties people's fortune together. Redistribution is legitimate to counter, at least to some extent, bad luck, which is not attributable to one's choices. Government coercively operates to maintain the "insurance community". In this reasoning one does not need to rely on social rights, though social rights might be seen as indicators of special concerns about bad luck. See Dworkin, R. *Sovereign Virtue: The Theory and Practice of Equality*, Harvard University Press, 2000; Markovits, D., *How Much Redistribution Should be There?* 112 Yale Law Journal 8, at 2291 (2003). Relying on Rawls, Michelman promotes a non-insurance centered but still contractarian argument in favor of social rights: "How can we reasonably call on everyone, as reasonable but also as rational, to submit their fates to a democratic-majoritarian lawmaking system, without also committing our society, from the start, to run itself in ways designed to constitute and sustain every person as a competent and respected contributor to political exchange and contestation and furthermore to social and economic life at large? If we cannot do so, then no 'constitutional agreement' is a 'sufficient' one if it lacks all trace or token of such a commitment. It thus seems that social rights guarantee of some kind would have to appear in a legitimate liberal-democratic constitution." Michelman, F.I., *The Constitution, Social Rights, and liberal Political Justification*, 1 INTLJCL 13, at 25 (2003).

[6] See e.g. Epstein, R. A., *Against redre*ss, Daedalus, 2002, at 39-48.

in GNP and similar indicators.[7] May be people think and vote differently. It is quite possible that for many people it is relative deprivation that matters, at least above the level of basic needs satisfaction. Such people may prefer smaller slices of the cake (or dry bread) as long as their neighbor is as deprived as they are. A non-communist constitution is, by definition, a device against such preferences, as private property protection seems to indicate. True, in view of the acceptance of many instances of regulatory taking and social obligations of property this is not a very robust protection, but it is still a protection. Justice Holmes would intimate that courts don't have the power to protect the market economy, but this does not mean that they have a mandate to disregard the consequences of the rights-based choices.

The nonsubordination principle highlights more practical concerns. The principle indicates that only those arrangements are constitutionally acceptable that one would reasonably accept as a desirable social benefit for himself or herself in view of the equal burdens triggered by the benefit. Deciding behind the veil of ignorance would you accept a 5 per cent income tax to receive a subsistence pension if the likelihood of becoming invalid is *x* per cent? Certain social insurance models operating within the contractarian theory rely on such calculus. The requirement of nonsubordination is satisfied if the benefit is reasonable on the basis of actuarial tables and in view of median expenditure for such occurrences.

Let's assume that the free health care system is expected to provide the highest level of care. In such a system we just don't know how much the person benefiting of it would be ready and able to pay for the actual service, hence such a system easily violates the nonsubordination principle. In case of extreme poverty for which the person is not responsible (this is the case with children) one could argue that the money transferred to them has much more utility. In the insurance logic it is reasonable to assume under the veil of ignorance that we all might be born as needy children and cannot do anything about it. Here one should reasonably pay an insurance premium in order to have a better minimal care as a needy child. A more aggressive welfare rights protection emerges in the context of education. Extended participation in education provides benefits to all members of the society. Therefore you do not have to bother about nonsubordination, at least not at the level of primary and secondary education.

II. JUDICIAL POSSIBILITIES

What is the proper role of constitutional courts facing these multifaceted social rights? Irrespective of the applicable specific language of the constitution the real issue concerns the proper role of constitutional courts and the judiciary in social rights related matters. Judicial decisions may

[7] A strict Benthamite would depart from this position claiming that individual happiness is to be aggregated. However, most Benthamites will accept that on the long run – where aggregation should take place – a non-market based administrative distribution will diminish happiness as there will be less to distribute.

result in policy setting and may have direct budgetary impacts. The budget deficit may increase in direct consequence of them. Contrary to the argument that traditional rights are costly too and therefore the distinctions between positive and negative obligations of the state are meaningless, only social rights have direct fiscal effect. Only a welfare right enhances decision that sustains spending or creates additional spending by ordering the provision of a government service or a welfare payment results in an abrupt change, or prevents a necessary saving, by imposing a duty of immediate rewriting of specific expenditure lines in the budget.

As to the justiciability of social rights constitutional and prudential arguments were formulated indicating that the judicial enforcement of such rights through courts and even by constitutional courts is not appropriate. The Irish Supreme Court offers an authoritative summary of the constitutional concerns:

"The extent to which, and the manner in which, the revenue and borrowing powers of the State are exercised and the purposes for which the funds are spent are the perennial subject of political debate and controversy, but the paramount role of those two organs of state, the Government and the Dáil, in this area is beyond question. For the courts to review decisions in this area by the Government or Dáil Eireann would be for them to assume a role which is exclusively entrusted to those organs of state, and one which the courts are conspicuously ill-equipped to undertake."[8]

Courts are not accountable for social policies and for the economic consequences of such policies. Policy and budget are matters of democratic accountability while constitutional court judges and the judiciary in general are placed beyond democratic accountability. Judges have no expertise regarding welfare policies and budget; the very nature of the judicial process precludes the judicial formation of reasonable social policy; courts cannot provide adequate remedies. These objections do not preclude, however, the taking into consideration in the determination of other matters interests that are classified as social rights, for example in a balancing procedure. These "nonworrisome ways almost certainly can play a useful role in the promotion of the distributive aims of social rights guarantees. … [however] Two possible grounds for hesitation remain, even for those who are persuaded morally of reasons to go ahead and fear no resulting evil of judicial overreaching. These are, first, a *democratic objection* […] to the effect that adding social rights to the constitution constricts democracy unduly, regardless of judicial involvement in the enforcement of such rights; and, second, a *contractarian objection* to the effect that adding social rights to the constitution defeats a crucial function of the constitution-as-law, that of providing legitimacy to the coercive political and legal orders."[9] Social rights preclude

[8] McKenna v An Taoiseach (No.2) [1995] 2 IR 10
[9] Michelman, op. cit., see *supra* note 5 (2003).

the democratic process. For some authors like Fabre this is not a problem, as rights are important values that are institutionalized exactly to curtail democracy.[10]

Given that the above legitimacy concerns remain contested and prevailing social expectations cannot be completely disregarded by courts,[11] even if the constitutional judge is honestly concerned with the constitution, one cannot rely on existing approaches applicable to fundamental rights. This restriction results from the very nature of social rights. Social rights refer primarily to collective benefits and to status related handling and they inevitably rely on positive government action, in opposition to civil and political rights which presuppose and enhance individual choice. At the same time, a disregard of the social rights claims as constitutional and social facts would be a dangerous mistake. There is a field of indeterminacy in the constitution and a sizeable field when it comes to social rights.

While the individual rights approach is not appropriate, there are a number of legitimate strategies in the constitutional handling of social rights. The following remarks concern some of the constitutionally permissible strategies and the constitutional consequences of the most commonly used strategies. The remarks are more descriptive than normative, although the consequences that emerge in light of the description are important in shaping normative considerations.

Constitutional strategies make sense in the specific context of the given case. The activism or deferentialism of social rights decisions depends, at least partly, of the procedure. An abstract review of a legislation that curtails existing entitlements has far reaching budgetary consequences, while a finding of constitutional omission in the name of a social right might have even more dramatic consequences, if it implies more than the obligation of specific planning and monitoring. On the other hand, the consequences of a decision emerging from an actual case might be more isolated, even if a positive duty of the state is recognized, as the impact might be fact specific and will be limited to local actions (e. g. the obligation to create a specific school to promote rights).

Social rights related strategies are more contextual than political and civil rights enforcement strategies. Torture is only slightly culture dependent, to the extent that humiliation or pain are culture specific, but there is nothing in the economic conditions that would make torture more or less “necessary”, and hence acceptable.

The need for social rights is very much dependent upon the actual economic conditions. Consequently social rights have fundamentally different implications in conditions of mass poverty or in a country where unemployment is below 30 per cent. For this reasons, the proper function of constitutional courts in social rights adjudication is to be understood in view of the specific

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[10] Fabre, C., *Social rights under the Constitution. Government and the decent life*, Oxford University Press, 2000, at 86 ff.

[11] Constitutions as living documents are built with at least a small window to look at the current values of society.

socio-economic situation. Abrupt poverty in extremely poor countries is different from the problem of the poor homeless in rich countries and hence the legitimate strategy in constitutional adjudication might be different too. It should be added that the actual possibilities of the courts are limited too, given the actual scarcities. The underlying justification of social rights might be equally important in strategy formulation. It matters to what extent one understands social rights as pertaining to all, instead of considering these rights the dictates of compassion responding to the actual suffering of the petitioners. "Social rights as constitutional insurance against hardship" is a different ballgame again.

In rich countries and even in post-communist transition countries welfare rights are administered as middle class entitlements. Constitutional courts do not have a moral duty to push for such policies, for example, by claiming that there is a constitutional obligation to provide existing services as entitlements. There is no constitutional obligation to sustain the ratchet effect of irrational services.[12] Of course, rule of law and property protection considerations are legitimate in decisions concerning welfare service provision. Such considerations might be quite expensive. But, at least for a lawyer the additional cost of the rule of law is not a decisive issue – if the rule of law is too expensive it is the very service that has to be discontinued.[13]

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The social rights related decisions of courts emerge from a wide range of very different judicial processes. There can be no valid generalization concerning the role and possibilities of constitutional adjudication without considering what really is at stake. Here are some of the recurrent situations:

1. The protection of *minimum livelihood* (either on clear textual grounds as in South Korea[14] or on the basis of general principles of the social state, as in Germany). In the cases I know, Constitutional Courts do not create such a right; in fact, the issue is always about the *extent* of min-

[12] The ratchet considerations reflect important legal concerns, including non-retroactivity in regard to civil rights protection where economic changes in society should not play a crucial role. The Supreme Court of the Nation (Argentina) stated that family allowances can be regulated but never withdrawn. (19 August 1999. V.916. XXXII. 22/96). But there is no *Rücktrittsverbot* embedded in the German social welfare state concept.

[13] Two examples: the Latvian Constitutional Court in its judgment of the in 2005 on the Compliance of the Provision Incorporated in Section 7 of the Law on State Social Allowances found unconstitutional a scheme that granted childcare benefit only if the parent was not working, which restricted the parent's right to occupational development (*Kristīne Dupate, Aija Freimane un Aivita Putniņa*. 4 November, 2005, case no. 2005–09–01). The Supreme Court of the Nation (Argentina) provided that cash compensation awarded to workers for certain occupational disabilities be made in a single lump sum and not in monthly installments. (*Milone, Juan Antonio v/ Asociart S. A. Aseguradora de Riesgos de Trabajo s/ accidente*, 22 October 2004, M. 3724. XXXVIII). Importantly, the consideration was one of lack of individual concern. This due process concern is recognized (at considerable expense as Justice Black, dissenting, indicated) in the US too: *Goldberg v. Kelly* 397 U.S. 254 (1970).

[14] 9-1 KCCR 543, 94 HunMa 33, 29 May 1997.

imum livelihood which is already recognized and operational at the level of statutes. The constitutional court's contribution is one of bringing consistency into the system that influences minimum livelihood. For example, a tax law should reflect the otherwise existing statutory livelihood concept and the constitutional court shall consider how the different statutory burdens affect minimum livelihood.

Minimum livelihood is often determined on the basis of some kind of dignitarian approach. As the Italian Constitutional Court "has stressed on several occasions, protection of the right to health is subject to the constraints faced by lawmakers in redistributing the revenue at their disposal. However, the demands of public finance cannot become so great that they destroy the hard core of this right, which is protected by the Constitution as an inviolable part of human dignity. There can be no question that the right of poorer citizens - or 'the indigent', to employ the term used in Article 32 of the Constitution - to free health care comes under this heading."[15]

2. Social rights can be understood as intensive *liberty* protection. The protection of needs satisfaction as liberty is granted at the level of fundamental rights. This situation is the closest to individual rights claims. Here we can talk about a negative right, and of a corresponding government duty of non-interference. "At the very minimum, socioeconomic rights can be negatively protected from improper invasion."[16] Such understanding makes sense even in the context of basic needs, given the insensitivity and perverse interests of governments in such matters, which are detrimental to basic needs satisfaction. Consider e.g. the right to drinking water: corrupt or irresponsive governments are often ready to boldly embark upon projects that would jeopardize access to drinking water for many people. In that regard, social rights operate as enhanced liberties.

Such negative stance is no small treat. The only politically embarrassing decision of the South African Constitutional Court so far emerged in the *TAC*[17] case, where the Court decided to strike down a restrictive government policy 1) to make nevirapine available in the public health sector, and 2) to set out a timetable for the roll-out of a national program for the prevention of mother-to-child transmission of HIV. Here the primary function of social rights was to eliminate a government created obstacle to health care. The test applied is not one of compelling state interest. Furthermore, it is not likely that social rights as liberties would prevail in a balancing test, as it would be generally the case with a fundamental civil right.

The elevation of livelihood related liberties to the rank of social rights can be justified not only on grounds of their importance for everyday subsistence but also in more juridical-conceptual terms, in relation to their diffuse nature. The interests behind social rights claims are often un-

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[15] 309/1999, 16 July 1999 *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 21 July 1999, para. 29.
[16] *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of S. Afr.*, 1996 (4) SALR 744, 801 (CC), para. 78.
[17] *Minister of Health v. Treatment Action Campaign* (TAC) 2002 5 SA 721 (CC)

certain and depend on collective services; they cannot be individually provided and the nature and level of claim satisfaction does not depend on the beneficiary's choices. It is this non-specific, non individual nature of the social right that makes it very problematic to construe it as an individual claim triggering specific public services. This complication constitutes one of the major difficulties for justiciability. For the collectively provided service the legislative determination is decisive.

3. *Impact on other rights.* Of course, social rights, once recognized, may play a significant role in judicial decision making. This role consists in generating important considerations in the *determination of the proper scope of other rights* or government functions. It is for such reasons that most courts are quite easy going when it comes to radical restriction of property rights in the name of social policies, favoring those who are considered vulnerable and hence entitled to special protection of social rights. This attitude is present in American decisions, although without elevating the concern to the level of a fundamental right. The recognition of social rights considerations explains the deferentialism of the ECHR or the German Constitutional Court in matters of rights restrictive social policies. But such deferentialism cannot be taken for granted. In fact, it remains contested, especially where there was no actual positive legislation to determine and protect the social rights claim. The Czech Constitutional Court ruled:

"The long-term inactivity of the Parliament of the Czech Republic, consisting of failure to pass a special legal regulation defining cases in which a landlord is entitled to unilaterally increase rent, is unconstitutional. [It violates the right to property]. In matters of rent control it is not permissible to shift the social burden of one group of people (tenants) to another group (landlords), and […] it is also not permissible to create various categories of landlords, depending on whether the rent in apartments owned by a group is subject to rent control or not."[18]

The Czech Court is aware of the transfer effects of social rights based decisions and indicates the needs for a balancing that considers the interests of those who should carry the burden of social rights largesse.

4. *The impact of equality concerns.* Equality concerns and social rights often overlap. The consequences are quite similar as equality concerns often force the extension of existing social welfare services. This is illustrated in a number of Italian decisions, including the famous di Bella treatment cases.[19] Here the Italian Constitutional Court ordered the public health insurance

[18] "*Rent Control*" Pl. US 20/05, 28 February 2006. Available at: http://test.concourt.cz/angl_verze/doc/p-20-05.html. The Czech court does not deny the right of legislation to set rent control but refuses freezing of rents by legislative omission. This means that there is no directly enforceable constitutional right to controlled rent even where this right was earlier recognized.

[19] 185/1998, 29 May 1998; 253/2003, 18 July 2003. The equality and dignity considerations brought the Italian Constitutional Court to conclude that by allowing the prescription of the drug without its inclusion in the public insurance scheme violated the rights of the poor who have an expectation: the enjoyment of the right cannot depend on the financial means of the person. The state had to make additional transfers to the Health Fund to cover the

administration to extend the insurance coverage to accommodate desires of cancer patients, because the experimental drug was available to a small number of patients participating in a clinical trial. The di Bella treatment case illustrates some of the dangers of an activist enforcement of aggressive social rights claims to receive free services. The constitutionally mandated scheme undermined the reliability of the cancer drug experiments, which at the end of the day did not result in the hoped for miracle cure.

A fundamentally different understanding of equality is offered in the South African dialysis case.[20] Here equal access to treatment was denied in the name of efficient service provision based on professional considerations. The disparity in access to treatment was understood as not amounting to impermissible discrimination but was perceived as a matter of medical (professional) rationality. The health care provider's denial of dialysis to a terminally ill diabetic person was upheld since the reasonable choice of the provider was dictated by the scarcity of available resources.

5. *Welfare ratchet.* The activities of the Hungarian Constitutional Court are praised by the friends of the court and in public opinion polls for the Court`s intervention to protect social rights by forcing governments to rewrite social policies and even changing the budget. In 1995 the Hungarian Court found that sick pay and pension are property like interests which cannot be simply curtailed at short notice where the beneficiaries had no time to consider alternatives.[21] It should be added that, given the way pensions were administered in communism social security services, they were not based on contributions. Furthermore, other welfare payments, like child support to all, irrespective of needs, were held to be protected in a rule of law state, because the relevant statute has created legitimate expectations, which cannot be revoked at 6-month notice. The 1995 Hungarian decisions limited the efficiency of the austerity package that was dictated by the fiscal crisis. The decisions were celebrated by American scholars as showing that the Constitutional Court found the proper role for courts in social rights matters.[22] This role would be the supervision of the means chosen in the social reform. The gentle pressure exercised by the court allegedly did not cause any serious economic hardship, and the economy did recover.

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expenses of the useless but expensive free drug to the poor and the claim to health is a "perfect subjective right', i.e. individual claims are enforceable. See Cassazione SS. UU. Civili, 24 June 2005, nº 13548 (*Giuseppe Buffone*). See further, Cassazione SS. UU. Civili, 23 May 2000, nº 209.

[20] *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), para. 29, was decided under the right to have access to health care services in section 27(1)(a) and (2) of the 1996 Constitution, the Court reviewed the allocation of resources in a provincial health budget and at hospital level for "rationality" and "good faith".

[21] Decision 56/1995 (IX. 15) AB hat. on sick pay, see also on other social security benefits: Decision 43/1995 (VI. 30.) AB hat. See also, Sajó, A., *Social Rights as Middle - Class Entitlements in Hungary: The Role of the Constitutional Court*, in Courts and Social Transformation in New Democracies An Institutional Voice for the Poor? Ed. by Gargarella, R., Domingo, P., Roux, T., Ashgate, 2006.

[22] See e.g., Schwartz, H., *The Struggle for Constitutional Justice in Post-Communist Europe*, University of Chicago Press, 2000; Scheppele, K. L., *A Realpolitik Defense of Social Rights*, 82 Tex. L. Rev. 7 at 1949 (2004); Scheppele, K. L., *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 6 University of Pennsylvania L. Rev. 154, at 1782 (2006)

In a way the court was authoritatively voicing the claims of the people and the needy in particular. "The decisions forced the Hungarian government to take the needy into account and to ensure that welfare reforms did not treat people as mere objects of state policy who lacked important claims of their own."[23]

True, the impacts were limited as the social reform represented only a small per cent of the total savings. But even this difference required a four point increase in the upper levels of personal revenue tax, which shows how problematic such judicial decisions might be from the nonsubordination perspective. However, lasting impacts are more interesting since the Court contributed to the freezing of the welfarist public mentality inherited from communism. This mentality became the fertile intellectual valley of populism. Welfare services continued to be provided as entitlements, irrespective of contribution and transfer consequences. A new generation has been educated in the belief that education from kindergarten to higher education has to be provided to all at no cost and without considerations of personal need. Needless to say, this meant that inherited privileges (e.g. early retirement for certain categories of employees) and institutional mismanagement were also protected. Government after government used a rethoric of entitlements and argued that these entitlements cannot be diminished because there is a "subjective right", i.e. a kind of birthright to such social rights. In fact, in the populist mood referring to equality and fairness consideration the services were extended. Nationalism (the communitarian concern) contributed to all this. People of Hungarian nationality, irrespective of citizenship and residence and hence contributions were entitled to certain welfare services. Contrary to the rosy picture of social rights preachers' expectation the economy could not continue under the pressure of entrenched rights.

In ten years the costs of welfare imposed such transfer burdens that by 2006 the economy lost its competitiveness. By 2009 Hungary is the only new member state of the EU that has a growth rate below the average EU growth rate.[24] By the time the government tried to impose a second austerity project, with elements of revision of the welfare system, it was too late.

By reinforcing the welfarist mentality, the Constitutional Court contributed to the denial of individual responsibility. When the 2006 reform package introduced a system of co-payment in higher education, this was met with public discontent, though the fee can be used only by the universities for educational purposes. Like in many other countries with similar reforms students (including those enrolled in semi-private education, which had to pay it already) are understandably against the change. But interestingly, even the majority of the non-concerned are against the measure as it violates something taken for granted and therefore is part of an entrenched right. As expected, the constitutional and political endorsement of the "subjective social rights"

[23] Scheppele, op. cit., see *supra* note 22.
[24] While economic growth in Poland was around 6-7% and that of Slovakia reached 8.3%; the economic growth of Hungary ranged around 3.9%. Data retrieved from the web-page of the World Bank: https://data.worldbank.org/

reinforced the endowment effect. What was once given became considered to pertain by right. The introduction of a one euro co-payment for medical visits triggered similar reactions. The Parliamentary Commissioner (Ombuds) for civil rights declared that the reduction of unused public hospital beds resulting in the closing of certain hospitals is unconstitutional as the current level of hospital services does not guarantee that the patients will receive "legally proper" treatment in the remaining hospitals because the medical services are not provided "in a foreseeable way".[25] The welfare activism of the Hungarian constitutional court reached a point where the underlying understanding of social entitlements did push for the revision of the very system of representative government, moving the country towards direct democracy. Following a referendum initiative of the opposition parties to bloc social reforms, the Hungarian Constitutional Court, in disregard of its earlier decisions, ruled that revocation of the various user (service) fees, which were introduced in public health care and in higher education, is a proper subject for referendum.[26] In conformity with the Hungarian Constitution the Court admitted that measures affecting the budget cannot be subjected to referendum, but the service fees were considered not to be "sufficiently closely" related to the budget. In its referendum decision the Court implicitly recognized that the democratic process may authorize free lunch to all in the name of social entitlements. In other words, even if constitutional social rights do not amount to specific individual claims enforceable in court, at least they are subject to a specific determination process, where individuals have direct deliberative power.

Of course, given that additional transfers cannot be required in a declining national economy, the "free" welfare services will continue to decline. Like in the past, in order to get free medical treatment, the patients will continue to bribe physicians.

The Hungarian approach is one where the court is basically concerned with ratchet effects. The decisions stand up for the defense of the existing welfare system that is understood as an endowment, irrespective of actual needs of the indigents and to a great extent irrespective of actual contributions. The Court continues to act as a defender of the middle class that continues to expect the protection of its welfare privileges. The dignity of the poor, or even their suffering, remains below the constitutional radar. As the Constitutional Court ruled the homeless have no right to shelter, only in case of life-threatening situation (that applies again to all, irrespective of means).[27]

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[25] Parliamentary Commissioner for Civil Rights statement on the shutdown of the National Institute of Psychiatry and Neurology, **OBH 2530/2007 (September 17, 2007).**

[26] See e.g. Decision 34/2007. (VI. 6.) AB hat., Decision 33/2007. (VI. 6.) AB hat. on the admissibility of referendum service fees introduced in public health care and Decision 15/2007. (III.9.) AB hat. on service fees in higher education. The service fee to be paid for medical visit is about one Euro, the measure allegedly reduced visit at least by 20-25 percent (though other factors may also have contributed to this reduction). Erdei, E., *Tudatosabbá tette a betegeket a vizitdíj*, Weborvos egészségügyi magazin, 15 August 2007. Available at: http://www.weborvos.hu/regionalis_hirek/tudatosabba_tette_betegeket/95742/.

[27] 42/2000. (XI.8.) AB. hat.

To my knowledge the most dramatic example of resistance to legislation in the name of social rights was offered by the Polish Constitutional Tribunal. In 1992 the Tribunal rejected the radical reform of the pension system that intended to flatten and reduce current and future benefits.[28] The tribunal's position was formally respected; even the Minister of Finance has resigned. But the solution accepted by the legislator after the ruling of the Tribunal did not really change the situation: the law now contained a provision that the difference between the current pension payment and what the Tribunal found to be legitimate is to be paid later. Inflation took care of the rest of the problem. Given that the deferred payment was nominal it became completely irrelevant for the budget as well as for the beneficiaries. The Tribunal may have asserted important principles about rule of law and its own powers but without actually influencing the public spending.

6. *Enforceable individual social rights.* We are short of reliable studies regarding the effects of judicially devised social rights-based policies. But the cases regarding pavement dwellers in India are indicative. Thousands of pavement dwellers live in big Indian cities and are a major nuisance. When Mumbai (Bombay) Municipal Corporation evicted pavement dwellers in 1981, the Supreme Court of India responded with a landmark judgment (*Olga Tellis*). The Court found that the Right to Life, recognized in the Indian Constitution included the Right to Livelihood. As livelihood of the poor depends directly on where they live, this was a verdict in favour of pavement dwellers.[29] The decision in the *Ahmedabad* case found that pavement dwellers cannot be removed from the streets unless they are provided some permanent shelter, even housing.[30] The ruling had a particularly perverse effect as organized gangs expelled the original dwellers from the judicially recognized area and replaced the original poor with their own people in the hope that these people will be the beneficiaries of the judicially ordered housing development. It is not clear whether the cities really built the housing or who actually benefited of it. But it is clear that such judicially dictated policy meant that the municipality had to readjust its welfare service priorities, something that might have resulted in serious inefficiency and even violation of other social rights. Because of reallocating money for housing there might be less left for education, etc. I am not sure about the positive consequences of judicial activism. Here is what happened:

"In the early 70s [Mumbai] passed Slum Clearance Act, while the Slum Upgradation Scheme was conceptualized in the 80s, which later became the Slum Redevelopment Scheme of the 90s.

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[28] 11 February 1992 (K. 14/91). The Tribunal based its decision on rule of law considerations; here the acquired rights were taken away by the reform, without suitable adjustment period. Would it have been legitimate for the Tribunal to rule instead that the reasonable expectation created by the pervious law was that pension benefits would not be reduced so long as the country did not face serious economic difficulties and fundamental socio-economic changes?

[29] Roy, D., *Urban poor increasingly made homeless in India's drive for more 'beautiful' cities*, *Combat Law*. Available at: http://www.citymayors.com/development/india_urban1.html. The most important case is *Olga Tellis v. Bombay Municipal Corporation & Ors,*Supreme Court of India [1985] 2 Supp SCR 51.

[30] *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Ors*, Supreme Court of India [1996] Supp. 7. S.C. R. 548.

But at the turn of the century the very same metropolis used massive force with helicopters and armed police, to evict 73,000 families from the periphery of the Sanjay Gandhi National Park. This action was in response to Court orders in another 'public interest' petition but filed this time by the Bombay Environmental Action Group (BEAG)."[31]

Notwithstanding the unexpected consequences[32] of *Olga Tellis* and some other similar decisions one can see here a legitimate judicial concern. First of all, *Olga Tellis* was about genuinely poor people, who could not do much about their misery given the existing social conditions. The original approach of the municipalities was to send back the pavement dwellers to their village of origin forcibly, a move that most likely made their conditions even worse. What the *Olga Tellis* decision required was to offer them the possibility of finding a (miserable) place for dwelling at the outskirts of the city, actually close to the industrial zone (Let's leave the health hazards aside).

We should keep in mind that the activist reaction advocated by the Indian Court, at least in *Olga Tellis*, refers to a specific situation. Contrary to the all-encompassing effects of a constitutional court decision, the impacts of such specific rulings are case bound and the impacts are incremental as similar measures require additional litigation. The proposed judicial remedy is one of ultimate despair and one that is based on considerations that do not exist in the context of the welfare reforms in Central or Western Europe. The desperateness is the reason given for the judicial intervention in *Olga Tellis* by Justice Chandarchud (para 49):

"There is no doubt that the petitioners are using pavements and other public properties for an unauthorised purpose. But, their intention or object in doing so is not to "commit an offence or intimidate, insult or annoy any person", which is the gist of the offence of 'Criminal trespass' under Section 441 of the Penal Code. They manage to find a habitat in places which are mostly filthy or marshy, out of sheet helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice."

Such concerns might be legitimate under, and limited to, compassion as one of the moral justifications of social rights claims. When the Russian Constitutional Court in its 1997 postonovlenie found that the reduction of unemployment money to one month violates constitutional rights of subsistence, this might have been justified under the above approach. Of course, the *individualization* is missing, i.e. there is no need to prove that the affected is actually suffering a basic deprivation once she is unemployed, but in 1997 it was reasonable to assume that the overwhelming majority of the dismissed laborers will face enormous hardship. The claim is stronger where there are actual, specific individuals, i.e. victims singled out by the rights restrictive

[31] Roy, op.-cit., see *supra* note 29.
[32] Unexpected consequences are another reason for deferentialism.

policy. Furthermore, it makes a difference if the court advocates temporary measures of limited impact which do not determine the structure of welfare, and are dictated by genuine compassion to genuine suffering, as these conditions guarantee that no *permanent* duty of public spending is generated.

7. *Setting policy priorities.* To avoid judicial budget (re)writing in the name of social rights is not easy. In the celebrated *Grootboom* case[33] the South African Constitutional Court had to decide an actual claim to housing presented on behalf of squatter families. More specifically, in the case of Ms Grootboom single mothers with children suffering in pouring rain without adequate shelter were asking for relief. The Court held that the state's failure to make proper provision for people in desperate need violated its obligations under section 26(1) and (2) of the 1996 Constitution to "take reasonable and other measures within its available resources" to provide access to adequate housing. What the Court did in this case was a reversal of priorities in existing housing policies, insisting that under a rationality analysis priority should be given in housing to mothers with children (while earlier the parents were left out where priority was given to children). This approach remains at the level of policy review on traditional judicial grounds and does not, in fact, require the state to change its budget or even allocations within chapters of the budget, or increase transfers. The decision may still be criticized as it recognized Ms Grootboom's claim although she put herself in illegal position and benefited of it by jumping the queue. But *Grootboom* is more important for what it does not say about social rights: in fact it refuses the claim of petitioners to recognize a substantive social right. Let me quote Theunis Roux, a South African scholar:

"Closer examination of the reasons for the decision, however, reveals a diplomatically worded and respectful message to the political branches, overwhelmingly endorsing their efforts, even as the Court finds fault with aspects of the national housing programme. The key discretionary gap exploited by the Court in *Grootboom* was the ambiguity surrounding the application of international law, in particular, General Comment 3 of 1990 issued by the UN Committee on Economic, Social and Cultural Rights. Paragraph 10 of this Comment interprets articles 2.1 and 11.1 of the International Covenant on Economic, Social and Cultural Rights as meaning that States Parties have to devote all the resources at their disposal first to satisfy the 'minimum core content' of the right to adequate housing. Counsel for the amici curiae in *Grootboom* had argued strongly that this was the governing norm, and therefore that the Court should order the state to 'redirect its spending so as to devote all available resources to meeting the needs of people in the position of the claimant community'".[34]

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[33] *Government of the Republic of South Africa and Others v Grootboom and Others*, 2001 (1) SA 46 (CC). For a famous praise of social rights in this context see Sunstein, C. R., *Social and Economic Rights? Lessons from South Africa*, 11 Constitutional Forum 123 (2001).

[34] Roux, T., *Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court*. Available at: www.law.wits.ac.za/cals/lt/pdf/norway_paper.pdf. See also, *Grootboom*, see *supra* note 33, para 18.

The reasonableness review standard is not one of imposing spending but a mid level equality scrutiny. The government has to show that its welfare policy or social program that promotes constitutional rights and goals does not unreasonably exclude the segment of society to which the claimant group belongs. The concern is primarily that of social exclusion.

CONCLUSIONS

Irrespective of the meaning attributed to social rights, courts should keep in mind what is actually at stake in a social rights claim. Only where the democratic constitutional process fails to operate, that is where the poor or other social groups are permanently unable to protect their interests in the democratic process, is there a place for judicial intervention. Likewise, only where state policies contribute to absolute poverty and in particular to personal suffering that judicial activism might be appropriate in the name of social rights. This, however, can be achieved without reliance on substantive social rights theories: quite often the special suffering resulting from poverty is a problem of discrimination, and it could be treated on such grounds. No-fault poverty and other social suffering that are deemed to be social rights violations result from systematic governmental neglect, like in the Indian case where certain villages populated by minorities never had access to a built road. In other situations the presumption is that judges, in adjudicating social rights, should refrain from substituting their judgments for that of the legislative processes. They should merely "remind the government that it is under a duty to do x: [the judiciary] should not tell the government how to fulfil this duty […]."[35] In principle courts refrain from doing so, but in reality a judicial philosophy dictated by otherwise legitimate ratchet considerations results in status quo support, which amounts to choosing a specific policy (the one that exists).[36]

There are many violations of this prescription, and not only dictated by ultimate compassion with suffering, or in case where governments abuse their regulatory power to the detriment of important and specifically vulnerable liberties called social rights. Social rights activism is not only a problem of constitutional interpretation. Constitutional positions regarding socio-economic policies are not occupied in a vacuum. At least some constitutional courts are very politicized. Sometimes judicial rejection of restrictive social policies is about taking sides in polarized political conflicts.

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and Dougart, J. , Roux, T., *The Record of the South African Constitutional Court in Providing and Institutional Voice for the Poor:1995-2004* in Gargarella *et.al.*, op.cit., see *supra* note 21, at 114.

[35] Fabre, C., *Constitutionalising Social Rights*, 6 J. Polit. Phil. 263, at 279 (1998).

[36] "Yet public health and human rights have also, at times, been powerful tools for maintaining the status quo, reinforcing hierarchies of power and domination based on race, gender and class". Freedman L., *Reflections on Emerging Frameworks of Health and Human Rights*, 1 Health and Human Rights 4, at 315-348 (1995).

Power hungry or rights committed constitutional courts are able to shape their functions and support to populist causes. They gain popular support by providing goodies to large segments of society. Such popularity grants them additional authority and hence more power.

In view of the danger of politicization there is a very strong reason to avoid activist positions in social rights adjudication, except in case of dire need of the poor who cannot help themselves, and who are never the darling of majorities and oppositions.