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## <cn>8.<em><ct>Social rights in comparative constitutional theory

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On a recent tally of the constitutions of the countries of the world, 82 percent include rights to work and to public education at state expense, 78 percent include physical needs rights, 72 percent the right to unionise and organise, and well over half include children's rights and a smattering of other worker's rights.<sup>1</sup> The story of how social rights entered the modern lexicon of international human rights has been told and abridged many times. Another well-explored theme is the correct role for courts in enforcing social welfare rights provisions of constitutions.<sup>2</sup> The object of the present

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<sup>1</sup> David S. Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Cal. L. Rev. 101, 138 tbl. 2 (2011).

<sup>2</sup> Among the extended English-language treatments, there is Brian Ray, *Engaging with Social Rights* (2016); Jeff King, *Judging Social Rights* (2012); Katharine G. Young, *Constituting Economic and Social Rights* (2012); Virginia Mantouvalou and Conor Gearty, *Debating Social Rights* (2010); Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008); David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of*

chapter is to situate thinking about social rights in the broader tradition and contemporary theories of constitutionalism. Furthermore, it will examine an aspect of social constitutionalism that to my mind is underexplored by those working on judicially enforceable social rights—namely, the potential for social principles and even social rights provisions to have an indirect rather than directly enforceable impact on securing social entitlements in public and private law. Accordingly, this chapter will examine: (1) the theoretical and political history lying behind contemporary constitutional social rights talk; (2) the analytical structure and substantive content of social rights claims; (3) how social rights thinking fits into the influential constitutional theories of John Rawls and the deliberative democrats, notably Jürgen Habermas; and (4) three ways in which social constitutional principles can reinforce respect for social rights outside the conventionally understood role for directly enforceable social rights.

## <a>A PRELUDE: SOCIAL RIGHTS BETWEEN LIBERALISM AND SOCIALISM

It is common ground that classical liberal thought concentrated on a relatively narrow set of classical civil liberties concerned with imposing limits on the scope of state

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Socio Economic Rights (2007). There are also important and sometimes seminal articles on constitutional social rights by Philip Alston, Dennis Davis, Rosalind Dixon, Keith Ewing, Octavio Ferraz, Roberto Gargarella, Oliver Gerstenberg, William Forbath, Martha Jackman, Helen Herkshoff, Alana Klein, David Landau, Malcolm Langford, Frank Michelman, Aoife Nolan, Colm O’Cinneide, Bruce Porter, Craig Scott, Cass Sunstein, Murray Wesson, among many others in related areas, particularly by EU and labour lawyers. The scholarship on international and comparative law is broader still, and has penetrating insights for national constitutional law.

action. A theoretically sophisticated restatement of classical laissez faire liberalism can be found in the work of Friedrich Hayek.<sup>3</sup> According to Hayek, “[a] society in which free individuals co-operate under conditions of division of labor...is the essential condition of individual freedom, and to secure it is the main function of law.”<sup>4</sup> The *Rechtsstaat* and rule of law ideas recognise this idea and aim to promote it.<sup>5</sup> However, economic planning violates this rule of law necessarily because it involves the creation of vast amounts of administrative discretion.<sup>6</sup> Hayek provides a legally and philosophically sophisticated *restatement of a tradition*, it must be noted. As Carl Schmitt pointed out in 1928, the entire notion of a constitutional state in German state theory was bound up with liberal individualist thought.<sup>7</sup> This was no mere theoretical gloss, either. The rhetoric of constitutionalism and the rule of law provided the locus for highly potent juristic and political opposition to the growth of the welfare and regulatory state in both the United States and the United Kingdom.<sup>8</sup> To this day, federalism, bicameralism and constitutional judicial review are treated as

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<sup>3</sup> Friedrich August Hayek, *The Road to Serfdom* (1944); *The Constitution of Liberty* (1960); *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (1982).

<sup>4</sup> *The Constitution of Liberty*, *supra* note 3, at 141.

<sup>5</sup> *Id.* at chs. 11–14.

<sup>6</sup> *Id.* at ch. 15.

<sup>7</sup> Carl Schmitt, *Constitutional Theory* 169 (Jeffrey Selitzer trans. 2008).

<sup>8</sup> For a contextual summary of the relevant literature and experience, see King, *supra* note 2, at 212–18. The experience was noted in France: Edouard Lambert, *Le Gouvernement des Juges et la lutte contre la législation sociale aux États-Unis. L’expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (1921).

“veto-points” or equivalent barriers to welfare state growth by political scientists familiar with this history.<sup>9</sup> The contemporary offspring of classical liberal constitutionalism is found in the enormously influential field of public choice theory and constitutional economics, which is broadly libertarian.<sup>10</sup>

Due in no small part to this liberal trajectory, socialism from the outset also had an ambivalent relationship with rights-rhetoric and constitutionalism. While the more gradual and reformist elements of socialist thought in Germany and Britain were open to the discourse of rights and freedom, and had a pronounced impact on legislative changes, the farther left was resolute in its opposition to rights discourse. Marx laid the grounds for his critique of liberal rights in his essay, ‘On the Jewish Question’ (1843) and reaffirmed it in his ‘Critique of the Gotha Programme’ (1875) towards the end of his life.<sup>11</sup> Marx argued that liberal rights are merely atomistic rights for an egoistic man. A right to property is “the right of selfishness”.<sup>12</sup> The right

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<sup>9</sup> For some of much literature, see Fritz Scharpf, *The Joint-Decision Trap: Lessons From German Federalism and European Integration*, 66 *Pub. Admin.* 239–78 (1999); George Tsebelis and Jeannette Money, *Bicameralism: Political Economy of Institutions and Decisions* (1997); *Federalism and the Welfare State: New World and European Experiences* (Herbert Obinger, Stephan Liebfried and Francis G. Castles eds., 2005).

<sup>10</sup> James M. Buchanan and Gordon J. Tullock, *The Calculus of Consent* (1962); William H. Riker, *Liberalism Against Populism* (1982). For what is arguably the definitive rebuttal of Riker’s arguments, see Gerry Mackie, *Democracy Defended* (1996).

<sup>11</sup> Karl Marx, *A Critique of the Gotha Programme*, in *Karl Marx: Selected Writings* 610 (David McLellan ed., rev. ed. 2000) [hereinafter Marx, *A Critique of the Gotha Programme*]; Karl Marx, *On the Jewish Question*, in *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* 137 (Jeremy Waldron ed., 1987) [hereinafter Marx, *On the Jewish Question*].

<sup>12</sup> Marx, *On the Jewish Question*, *supra* note 11, at 146.

to freedom, for instance, and as with equality, is “that of a man treated as an isolated monad and withdrawn into himself.”<sup>13</sup> Of the proclaimed right of equality in the opening clause of the German Social Democratic Party’s Gotha Programme, he was excoriating of its formalism: “[t]his *equal* right is an unequal right for unequal labor.”<sup>14</sup> His core argument was that liberal rights are empty and purely formal for those not in possession of the means to enjoy them—and in his time, that was the vast majority. Marx’s critique was and remains potent.<sup>15</sup>

For all these reasons, the concept of social *rights* had a very rocky start, with enemies on the right and left. But liberalism underwent an early transformation in Britain and the United States, while social democracy evolved as a socialist alternative to the Marxist variety of communism. The reconciliation of rights-based thinking with the problem of social inequality began in earnest in the late nineteenth century. In Britain, the first nation to industrialise, the late-Victorian philosophy of “new” or “social” liberalism emerged and had a profound impact on the Liberal Party.<sup>16</sup> Harold J. Laski, a constitutional and political theorist as well as a prominent and senior member of the UK Labour Party, argued for an extended suite of social as

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<sup>13</sup>*Id.*, at 146.

<sup>14</sup> Marx, *Critique of the Gotha Programme*, *supra* note 11.

<sup>15</sup> See John Rawls, *Justice as Fairness: A Restatement* 148–52 (Erin Kelly ed., 2001). See *id.* at 176–79 for (late) clarification of how he felt his theory met this objection. Joseph Raz’s liberal perfectionism and Philip Pettit’s republicanism are examples of freedom-based theories that more directly confront this problem in liberal theory.

<sup>16</sup> Peter Clarke, *Liberals and Social Democrats* (1978); Peter Weiler, *The New Liberalism: Liberal Social Theory in Great Britain, 1889-1914* (1982).

well as classical civil rights in his most systematic work.<sup>17</sup> The sociologist T.H. Marshall would later describe the legislative creation of social rights by the Liberal and post-war Labour Governments as the emergence of a significant new category of rights—social rights or rights of social citizenship.<sup>18</sup>

In the United States, social democracy gained little traction, but classical liberalism was also around a similar time overtaken by the emergence of a new form of more progressive, sometimes called “pragmatic” liberalism associated in particular with John Dewey.<sup>19</sup> Dewey was himself inspired and influenced by T.H. Green, the earliest of the new liberals in Britain. Dewey believed that the state must secure the conditions to enable real rather than formal freedom for its citizens. While he was critical of President Franklin Delano Roosevelt’s gradualist centrism, and of rights rhetoric in particular, the basic social insights underlying many New Deal intellectuals were in harmony with Dewey and the new liberals’ restatement of liberalism. President Roosevelt gave formal expression to his perceived harmony between civil and social freedoms in his “Four Freedoms” speech to Congress in 1941, while his wife, Eleanor Roosevelt, would play a leading role in drafting the Universal Declaration of Human Rights.

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<sup>17</sup> Harold J. Laski, *A Grammar of Politics* 106–30 (1925)

<sup>18</sup> T.H. Marshall, *Citizenship and Social Class*, in T.H. Marshall and Tom Bottomore, *Citizenship and Social Class* (1992); in this same vein, see also the seminal Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990).

<sup>19</sup> Alan Ryan, *John Dewey and the High Tide of American Liberalism* 89–99 (1995) (on TH Green’s impact on Dewey); *id.* at ch. 8 (on Dewey’s politics); *id.* at 292–95 (for a harsh assessment of the coherence of Dewey’s opposition to Roosevelt’s policies).

Events in post-WWI Germany moved quite dramatically towards an overt fusion in the Weimar Constitution of 1919 of classical civil liberties and social democratic rights and freedoms. While an elaborate theory of social rights per se was not in wide circulation, the idea of a *soziale Rechtsstaat* (social rule of law state or social constitutional state) was developed by politically engaged social democratic jurists such as Hermann Heller, Franz Neumann and Otto Kirschheimer among others.<sup>20</sup> Though they rarely defined the concept in straightforward terms, all opposed it to the “liberal *Rechtsstaat*”<sup>21</sup> and Neumann comes closest by declaring its object to be “the realisation of social freedom.”<sup>22</sup> None of the Weimar Constitution’s elaborate social provisions survived in the post-war Federal Republic of Germany’s Basic Law of 1949, though the latter did include—without any discussion at the drafting stage—a commitment to the principle of the social state (Article 20(1) and the social rule of law (Article 20(1), Article 28).<sup>23</sup> It also included Article 15 (the socialization clause) which permitted an elected government to nationalize the means of production. The significance of these provisions spawned much post-war juristic debate about the

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<sup>20</sup> Otto Kirschheimer and Franz Neumann, *Social Democracy and the Rule of Law* (Keith Tribe trans., 1987); William Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, at ch. 2 (1994).

<sup>21</sup> The key reference for this distinction is Hermann Heller, *Rechtsstaat or Dictatorship?*, 16 *Econ. and Soc.* 127 (Ellen Kennedy trans., 1987). The original German piece dates to 1929.

<sup>22</sup> Franz Neumann, *The Social Significance of the Basic Laws in the Weimar Constitution*, in *Social Democracy and the Rule of Law* 27, 39 (Otto Kirschheimer and Franz Neumann eds., Keith Tribe trans., 1987).

<sup>23</sup> Hans Michael Heinig, *Der Sozialstaat im Dienst der Freiheit. Zur Formel vom “sozialen“ Staat in Art. 20 Abs. 1 GG* 38–39 (2008).

nature of the social state principle and social rule of law, most famously that between Ernst Forsthoff and Wolfgang Abendroth in 1954.<sup>24</sup> While the former argued that combination of a liberal *Rechtsstaat* and socialist dirigisme was impossible, the latter argued that the commitment de-liberalized the constitution and commended social readings of its various provisions.

The German experience and discussion was a powerful influence on the development of the concept of the social and democratic rule of law state (“*Estado social y democrático de derecho*”) proclaimed in Article 1 of the Constitution of Spain of 1978,<sup>25</sup> which in turned inspired a number of similar Latin American constitutional provisions. Notably, in the Spanish constitution, as with the Italian (1946) and French (1946 (Preamble), 1958) ones, the recognition of social rights did not tend towards any assertive role for courts in extending social provision. That was true of similar provisions across Europe.<sup>26</sup> Indeed, it is notable that among all the versions of liberalism and social democracy that were receptive of the idea of social rights, in no case was it considered that such provisions ought to be enforced

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<sup>24</sup> Collected along with others in *Sozialstaatlichkeit und Rechtsstaatlichkeit: Aufsätze und Essays* (Ernst Forsthoff ed., 1968).

<sup>25</sup> See e.g., Jose María Rodríguez de Santiago, *La administración del Estado social* (2007). I thank Dr. Maria Dolores Utrilla Fernandez-Bermejo for bringing this work to my attention.

<sup>26</sup> Directorate General for Research, *Fundamental Social Rights in Europe* 13–28 (Eur. Parliament Soc. Affairs Series, Working Paper No. SOCI 104 EN, 1999), [http://www.europarl.europa.eu/workingpapers/soci/pdf/104\\_en.pdf](http://www.europarl.europa.eu/workingpapers/soci/pdf/104_en.pdf).



vigorously by the judiciary (though neither was it argued successfully they were juridically inert).<sup>27</sup>

## <a>THE SUBSTANCE OF SOCIAL RIGHTS

Some authors believe that reference to social “rights” is an analytical or category mistake, however much they (might) accept the political importance of a redistributive welfare state. Earlier, the objection was largely about social rights not being important enough or because positive obligations were not enforceable. The present discussion is rather more sophisticated. The charge is that the concept is neither compatible with the analytical structure of rights, nor, and relatedly, is it precise enough to merit the designation of rights.

### <b> A. The Nature of Rights

Theorists tend to divide between “will” and “interest” theories of rights,<sup>28</sup> and the division often, if accidentally, tracks a disagreement about whether social rights are properly called rights. Both are accounts of what it is to possess a right, and the analytical relationships between rights-holders and duty-bearers.

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<sup>27</sup> Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* 137–41 (1997) (describing Heller’s theory as a “jurisprudence of judicial restraint”).

<sup>28</sup> For a penetrating analysis and rebuttal of both traditions, see Leif Wenar, *The Nature of Rights*, 33 *Phil. and Pub. Affairs* 223 (2005).

The will theory (at times also called the “choice theory”) postulates that a right claim is characterized by a specified power of the right-holder over the duty-bearer’s obligation. Rights are defined primarily by the existence of concrete and immediate claims over the duty-bearer. The approach, as oft noticed, tends to be located within a theory of substantive rights that make the pre-eminent and at times sole ultimate right the right to equal freedom.<sup>29</sup> The core idea of the theory implies a relatively firm correlativity between rights-holders and duty-bearers. The idea of a free-floating but ill-defined obligation against the “state” sits uneasily with this more rigid framework. In the language of Onora O’Neill, the rights must be “claimable” because “[w]e normally regard supposed claims or entitlements that nobody is obliged to respect or honour as null and void, indeed undefined.”<sup>30</sup> For her, social rights fall at this hurdle.

There are oft-noticed difficulties with the will theory that have particular relevance to social rights.<sup>31</sup> The emphasis on “choice” over duty-bearers means that it requires the right-holder to have rational agency, which excludes children’s rights and those of persons without mental capacity. It also cannot account for non-waivable rights, such as the right not to be enslaved or tortured. The strict correlativity between rights and duties, furthermore, and that the identity of the duty-bearer be known immediately, seem implausible. As Joseph Raz shows, there is a “dynamic aspect of rights” in the sense of their being capable of generating new duties. As circumstances

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<sup>29</sup> H.L.A. Hart, *Are There Any Natural Rights?*, 64 *Phil. Rev.* 175 (1955).

<sup>30</sup> Onora O’Neill, *The Dark Side of Human Rights*, 81 *Int’l Affairs* 427, 430 (2005); *see also* Onora O’Neill, *Towards Justice and Virtue* 131 ff. (1996).

<sup>31</sup> *See* Neil MacCormick, *Rights in Legislation*, in *Law, Morality and Society* (PMS Hacker and Joseph Raz eds., 1977).

change (e.g., a change in law or social facts), the same right serves as the basis for new duties.<sup>32</sup>

The most influential account of the interest theory is found in the work of Joseph Raz but is evident in a range of writers from Jeremy Bentham, Rudolph von Jhering, Neil MacCormick and David Lyons. In Raz's account, "'X has a right' if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) under a duty."<sup>33</sup> On this view, rights are the ground for duties of others. The right-holder needs not be a rational person, nor need it control the duty-bearer in any way.<sup>34</sup> The person's interest, rather than control over another's duty, is the locus of attention. Such interests generate various duties that can graduate from indeterminacy to determinacy, be ascribed and transferred to new duty-holders. Raz uses the child's right to education as the example to illustrate this very point.<sup>35</sup>

Naturally, the interest theory is the most conducive to thinking about social rights. It is the approach followed in the leading work of Cécile Fabre, among others.<sup>36</sup> The interest theory is nevertheless not without fault, and its faults emerge in the analysis of social rights in particular. For one, the theory does not account effectively for the fundamental character of human or constitutional rights (though the

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<sup>32</sup> Joseph Raz, *The Morality of Freedom* 171 (1986).

<sup>33</sup> *Id.* at 166.

<sup>34</sup> See MacCormick, *supra* note 31, at 189.

<sup>35</sup> *Id.* at 170–71, 184–85.

<sup>36</sup> Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (2001); King, *supra* note 2, at ch. 2; John Tasioulas, *The Moral Reality of Human Rights, in Freedom From Poverty as a Human Right* 75 (Thomas Pogge ed., 2007).

will theory suffers from the same problem).<sup>37</sup> The flexibility of the model is purchased with a very (some might say extremely) low preemptory character or trump-like quality for the right at issue. For another, it arguably stands willing to accept that someone's interest or need can generate ill-defined obligations and for at times unknown duty-bearers. This is less of an answer to the objection of Onora O'Neill, so much as a refusal to acknowledge the problem.<sup>38</sup>

### **<b>B. The Content of Social Rights Claims**

We can now pick up the gauntlet just thrown down: what exactly are social rights claims and who is obliged to meet them? Demands, naturally, for resources related to fundamental social interests, but how stringent are the demands and against whom are they lodged? Fabre argues that at base social rights claims are claims to a minimally decent life.<sup>39</sup> I also follow this approach in *Judging Social Rights*, where I took some time to identify the content of a social minimum and the process for identifying it in particular communities.<sup>40</sup> In doing so, I examined how poverty has been studied in various countries, and what is revealed about subjective perceptions of poverty in

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<sup>37</sup> *C.f.* Raz, *supra* note 32, at, 186–92 (describing “The Importance of Rights,” and his definition of “fundamental rights”). In H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* 192–93 (1982), H.L.A. Hart conceded the same problem.

<sup>38</sup> See Simon Hope, *Kantian Imperfect Duties and Modern Debates about Human Rights*, 22 *J. Pol. Phil.* 396, 408–09 (2014), for this type of objection to theorists that deny claimability is an essential feature of rights.

<sup>39</sup> Fabre, *supra* note 36, at ch. 1, especially 22 ff.

<sup>40</sup> King, *supra* note 2, at ch. 2.

social surveys. I concluded there that the social minimum will be composed of a bundle of resources (understood as cash benefits, in-kind services and market regulations) that satisfies three relevant thresholds: a healthy subsistence threshold, a social participation threshold, and an agency threshold. (The resources in such a bundle are sensitive to what Sen refers to as functionings, and hence not vulnerable to the capabilities critique offered by Sen and Nussbaum). The first two of these thresholds are not particularly difficult for social scientists to identify, applying the appropriate methodology. An “agency threshold”, I argue, requires a bundle of resources and opportunities that gives persons a “real possibility” to engage in basic life planning, including the capacity to frame and achieve long-term goals. The most abstract statement of the social minimum is that it must provide a material foundation for *self-respect* by making its attainment a *real possibility*.<sup>41</sup> A social minimum, in this conception, is well below what social justice, or social citizenship rights, might demand.<sup>42</sup>

The institutional structures for delivering this kind of a social minimum are very well-known, though they vary between and even within states. A minimum floor of social protection is evident in the International Labour Organisation’s the Social Security (Minimum Standards) Convention, 1952 (No. 102) , its more recent work on the idea of a “social floor”, and is also seen in perusing the contents of any compilation of welfare state studies or social policy textbook. It contains a suite of means-tested or contributory benefits including social assistance (welfare),

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<sup>41</sup> *Id.* at 29–33.

<sup>42</sup> To compare the potential difference, see Stuart White, *The Civic Minimum*, at ch. 4 (2003), which includes self-realization and minimization of class inequality among the aspects of a civic minimum.

unemployment, disability and work accident, housing (depending on other benefits) and pensions. To this there must be guaranteed universal access to primary health care, and the same for primary and, depending on the society, secondary education. Now, although nearly all wealthy countries have all of these, most developing countries have only a few and in some cases none of these benefits. This raises an important question of how social rights talk fits with Kant's important observation that "ought implies can". A full reckoning of this issue is too deep for the present study. Nevertheless, the interest theory of rights, examined above, provides a conceptual framework that explains both the normative purchase of the (unfulfilled) interest and the (excusable) non-performance of state duties in relation to it. It also explains how interest-based rights can generate, in nearly all cases, *some* duties that obligate states to strive progressively within resources to secure the full spectrum of the right.

The actual benefit levels that would satisfy the three thresholds for the social minimum will depend on the composition and challenges faced by particular communities. Hence their determination must be with an eye on communal variation. The practice of setting a nation-wide poverty threshold at a percentage (usually between 40–60 percent) of median income may be a useful heuristic, but is too indiscriminate to be used exclusively to define a social minimum. A properly determined social minimum could be lower, but will often be higher. Its determination requires a multifactorial study of the costs of a basket of essential goods and services, including housing and health, calibrated for age and family status, but also in consideration of social participation and life-planning needs. This is not only feasible, but is an approach now pursued among a range of social scientists and

foundations that study poverty.<sup>43</sup> In my contention, what is essential is that the process for specifying the social minimum or poverty level be determined not by a Ministry under the control of a cabinet member, but by an agency with the resources and an ongoing mandate to set and review the minimum. Such an agency should be endowed with the status of independence reserved for judges, ombudspersons, auditors and the like. However, I am not aware of any country that does this outside the health and education fields.

The bundle of resources will of course correspond to needs that are also determined by how a regulated market operates. Thus the social minimum must be determined not only by reference to cash and in-kind benefits (e.g. free health care, public housing) but also market regulation. Such regulatory measures may include provision for sectoral wage bargaining, compulsory participation in public or private insurance schemes, nationalization and subsidization of key industries, as well as the conventional forms of labour standards, general health and safety standards in goods and services, health care, education, pharmaceuticals and other related fields. The precise nature of these standards varies between communities, but there is a large amount of convergence as well as guidance from supranational bodies, notably including the International Labour Organization and the World Health Organization. The scope of regulation, particularly in the field of labour relations, but more broadly as a feature of regulatory convergence in the service of trade harmonization, is a very debated question. The desirability of labour “flexicurity” (easy dismissal with strong benefits) and the impact of trade liberalization on welfare state outcomes are not

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<sup>43</sup> One such study is the Minimum Income Standards framework undertaken under the auspices of Loughborough University in the United Kingdom. For other studies, see King, *supra* note 2, at ch. 2.

questions to be answered in theory. And the evidence on them remains divided. This type of fact-sensitivity at the margins is hardly unique to social rights.

This takes us to the final question—the one concerning duty-bearers. The simplest answer is that the primary duty-bearer is the state. The state is the “community” personified, and hence it offers the medium through which interpersonal obligations can be fulfilled. The idea that social rights claims identify no duty bearer is, upon close scrutiny, misguided. The process described above will produce a clear bill as well as a set of procedural obligations, and the bill can be ascribed to society at large, that is, as a collectivity. The interpersonal obligation to support—just as with the duty to protect people’s civil rights—is managed by the state, for only collectively can it be discharged properly. It has traditionally done so through redistributive taxation and market regulation.<sup>44</sup> However, private individuals will also owe others direct interpersonal social rights-based duties, especially within but also beyond the family. Generally, the content of these duties will be proscribed in detail by legislation. Sometimes, however, their content will be determined casuistically by courts of law either applying legislation or elaborating general principles of law (e.g. professional fiduciary obligations, duties to negotiate in good faith, duties of care etc). The recognition of social rights as human or constitutional rights will condition how such law may be applied. This is examined in the final section below.

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<sup>44</sup> A relevant abstract discussion of the background institutions for distributive justice is found in John Rawls, *A Theory of Justice* 242–51 (Rev. ed. 1999) [hereinafter *A Theory of Justice*] (discussing the allocation, stabilization, transfer and distributive branches in a way that divides the redistributive and regulatory responsibilities).



## <a>SOCIAL RIGHTS, CONSTITUTIONALISM AND THEORIES OF JUSTICE

Even if the language of rights is apt, and a social minimum can be identified with some precision, what remains missing are arguments for why society as a whole, and especially those whose income or property is taxed for redistribution, ought to accept the purported obligation to secure the social minimum. Rather than survey various theories of distributive justice, and in light of space limitations, this section will focus on the relationship between social rights and political legitimacy in two preeminent constitutional theories that squarely address the question of distributive justice.<sup>45</sup>

### <b>A. Rawls: The Social Contract and Justice as Fairness

The best known account of why people might accept such an obligation can be found in Rawls' justice as fairness.<sup>46</sup> Rawls asks us to imagine what principles of justice free and equal persons would choose under conditions of fairness to govern the basic structure of a well-ordered society. To simulate fair conditions, he asks us to imagine representatives choosing such principles from behind a hypothetical veil of ignorance ("the original position") in which no one would know what social position and natural talents she would hold in the resulting society. Rawls argues that free, equal and

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<sup>45</sup> I regrettably lay to one side not only the right-libertarian theories of Robert Nozick, Richard Epstein and Randy Barnett, but also the more congenial and increasingly influential constitutional implications of the work of Philip Pettit, Martha Nussbaum and Amartya Sen. So to also with left-libertarian arguments for a universal basic income.

<sup>46</sup> John Rawls, *Justice as Fairness: A Restatement* (2001) [hereinafter *Justice as Fairness*]; John Rawls, *Political Liberalism* (1996) [hereinafter *Political Liberalism*]; *A Theory of Justice*, *supra* note 44; John Rawls, *A Theory of Justice* (1971).

rational persons would choose two principles: (1) an adequate scheme of basic liberties compatible with equal liberties for all; and (2) that any social and economic inequalities would (a) be attached to offices and positions under conditions satisfying equal opportunity for all, and (b) be to the greatest benefit of the least advantaged-members of society (the difference principle, or, the *maximin* principle).<sup>47</sup> The first principle is given “lexical priority” over the second, but for Rawls it is clear that both must be realized in any fair society.

Notably, the difference principle is very demanding. Any deviation from perfect equality in the distribution of resources must be justified in terms of favouring the least well-off. While at first this looks like an apology for a U.S. style liberal welfare capitalism, Rawls makes clear in his later work that a welfare state would not suffice. Only a property owning democracy, in which ownership is widely dispersed and accumulations of wealth are prevented, or, liberal socialism, which permits a free though very highly regulated market, would suffice. The welfare state is rejected because although it guarantees something akin to the social minimum explained above, it would tolerate inequalities and concentrations of wealth that can produce what we would now call social exclusion: “a discouraged and depressed underclass many of whose members are chronically dependent on welfare.”<sup>48</sup> Nevertheless, Rawls repeatedly made clear that while the difference principle itself would be agreed behind the veil of ignorance, the policies giving effect to it would be introduced at the

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<sup>47</sup> A Theory of Justice, *supra* note 44, at 72; Justice as Fairness, *supra* note 46, at 42–43.

<sup>48</sup> Justice as Fairness, *supra* note 46, at 140. See *id.* at 138–40 for the discussion of the three systems.

The preface to the revised edition of A Theory of Justice, *supra* note 44, at xiv–xxvi, he clarifies the new emphasis on these differences.

legislative rather than constitutional stage.<sup>49</sup> Social justice on that (early) view is not for the constitution but rather for the legislature.

There are at least four different ways in which justice as fairness requires a guaranteed social minimum providing for the basic needs of all citizens. The first and second are through the ideas of the difference principle itself and the “strains of commitment” idea that is inherent in the social contract idea. These are best explained together. One common criticism of the difference principle is that its egalitarian (maximin) nature is more onerous than what rational people might choose in the original position—they may prefer to gamble for average utility if it resulted in a higher likely distribution after the veil is lifted.<sup>50</sup> Jeremy Waldron has supplied a different argument for averting the average utility principle.<sup>51</sup> He shows that under Rawls’ theory, another crucial reason why parties do not choose a utility-maximizing option instead of the risk-averse difference principle, is because of the “strains of commitment” idea already contained within justice as fairness. This idea is that principles chosen in the original position should not be so onerous that persons cannot reasonably remain committed to them once the veil is lifted and life’s hardships are assumed. Because of the one-off, irreversible and pervasive implications of the choice, the strains of commitment idea is an important feature of the hypothetical contract. But Waldron argues that the idea justifies choosing a social minimum covering basic needs and not the difference principle. Rawls was prompted by

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<sup>49</sup> A Theory of Justice, *supra* note 44, at 171–76; Political Liberalism, *supra* note 46, at 227–30.

<sup>50</sup> See Will Kymlicka, Contemporary Political Philosophy: An Introduction 66 ff. (1990), for a statement of and reply to this view.

<sup>51</sup> Jeremy Waldron, *John Rawls and the Social Minimum*, 3 J. Applied Phil. 21 (1986).

Waldron's critique to revise his criticism of the utility principle.<sup>52</sup> However, Rawls continued to believe that free and equal persons in the original position would choose the difference principle instead of the social minimum. He argued that the strains of commitment would prevent outcomes that are: (1) so severe that people would resort to violence to improve their lot; and (2) are so unequal that they cause people to withdraw, feeling sullen and resentful, unable to feel "part of society, and view the public culture with its ideals and principles as of significance to themselves."<sup>53</sup> He concluded that the social minimum would protect against the former, but the difference principle is required to defeat the latter. The difference principle is plainly more demanding and hence both ideas protect the social minimum.<sup>54</sup>

A third way in which Rawls' theory may also be understood to protect a social minimum is through the idea of fair equality of opportunity. This idea, contained with the second principle of justice, is that people must "have the same prospects of success regardless of their initial place in the social system."<sup>55</sup> Social positions are not

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<sup>52</sup> Justice as Fairness, *supra* note 46, at 127–30. One of the alternatives to the difference principle that parties are said to consider in the original position is the principle of average utility combined with a social minimum. See A Theory of Justice, *supra* note 44, at 105 ff.

<sup>53</sup> Justice as Fairness, *supra* note 46, at 129.

<sup>54</sup> *Id.* at 162. Rawls in fact discusses contrasting specifications of the social minimum in section 38.4. One of them refers to a citizen's essential needs required to lead a decent human life, and the other is specified by the difference principle. Following Waldron's discussion, *supra* note 51, and indeed Rawls' discussion in Political Liberalism, *supra* note 46 at 228–29, I have rather used the expression "social minimum" to refer only to the essential needs conception and I contrast it with the difference principle.

<sup>55</sup> A Theory of Justice, *supra* note 44, at 63, 73 ff.

just open in the formal sense, but all should have a fair chance to attain them.<sup>56</sup> Frank Michelman has developed the link between the social minimum and this principle.<sup>57</sup>

A fourth way is the idea that the first principle protects political liberties *and their fair value*. The fair value of the political liberties was an idea having presence in the 1971 statement of his theory, but it was developed to accommodate the objection that the liberties protected by his first principle were unduly formal. The fair value of the political liberties means that “everyone has a fair opportunity to hold public office and to influence the outcome of political decisions.”<sup>58</sup> As Thomas Pogge has argued, this would effectively require that the first principle also guarantee a social minimum.<sup>59</sup> Rawls’ later comments on the essential structure for “public political deliberation” to be “possible and fruitful”—which became an essential component of political legitimacy in *Political Liberalism*—also require at least a guaranteed social minimum to ensure fair access to and participation in such deliberation.<sup>60</sup> In that

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<sup>56</sup> *Id.* at 63; Justice as Fairness, *supra* note 46, at 43–44; Political Liberalism, *supra* note 46, at 324–31.

<sup>57</sup> Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. Penn. L. Rev. 962, 988–89 (1973).

<sup>58</sup> Political Liberalism, *supra* note 46, at 327. *See generally id.* at 318, 324–31; *see also* Justice as Fairness, *supra* note 46, at 148–50; *c.f.* A Theory of Justice, *supra* note 44, at 179 (discussing poverty and the “worth of liberty”).

<sup>59</sup> Thomas Pogge, *Realizing Rawls* 145 (1989). An outstanding essay in this regard is Norman Daniels, *Equal Liberty and the Unequal Worth of Liberty*, in *Reading Rawls: Critical Studies of a Theory of Justice* 253 (Norman Daniels ed., 1975), and Rawls’ reply in Political Liberalism, *supra* note 46, at 324–31.

<sup>60</sup> Political Liberalism, *supra* note 46, at lvi–lvii.

respect, he arguably joins the list of deliberative democrats below who see a social minimum as a basis for communicative competence or effective participation.

The constitutional status and enforceability of the social minimum is also something Rawls addressed. In *Political Liberalism*, he is clear if too brief that it is a “constitutional essential” and that the difference principle is more demanding and is not.<sup>61</sup> He also found that it should presumably be entrenched and judicially enforced, and is on par with the basic liberties in this respect.<sup>62</sup> Rawls clarifies that as a constitutional essential, the obvious character of “basic human needs...meets the desideratum that the fulfillment, or lack of it, of a constitutional essential should be fairly obvious, or at any rate, a matter open to public view that courts should be reasonably competent to address.”<sup>63</sup> Even so, Frank Michelman, whose work appeared to convince Rawls of this view, takes a more subtle view of whether Rawls believed constitutional entrenchment and judicial review should follow. After admitting that “[i]t all does make one’s head spin, a little”, Michelman concludes tentatively that he did.<sup>64</sup> Michelman’s own work on social rights is vast, profound and

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<sup>61</sup> *Id.* at 228–29.

<sup>62</sup> *Id.* at 166, 228–29; Justice as Fairness, *supra* note 46, at 162.

<sup>63</sup> Justice as Fairness, *supra* note 46, at 162.

<sup>64</sup> Samuel Freeman, *Rawls on Constitutionalism and Constitutional Law*, in *The Cambridge Companion to Rawls* 394, 403–04, 406–07 (Samuel Freeman ed., 2003). To me Rawls’ endorsement in *Political Liberalism*, *supra* note 46, at 228–29, and as quoted above, seems relatively clear.

very subtle—worthy of standalone essays.<sup>65</sup> While he sees a subtle role for constitutional adjudication, his ambivalence is also noteworthy.

**<b>B. Habermas: Discourse Ethics and Deliberative Democracy**

Deliberative democrats believe that traditional democratic politics and liberal theory suffer from several problems.<sup>66</sup> Voting has a hard time accounting for adaptive preferences. Social choice theory indicates significant potential for arbitrariness in voting. Above all, the “fact of reasonable pluralism” and “moral disagreement” mean that reliance on “comprehensive moral doctrines” would be an illegitimate basis for coercing others. For Habermas and many others (notably Richard Rorty) it is also epistemically implausible to press forceful ethical claims at a time of “post-

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<sup>65</sup> A brilliant example of which is William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present*, 39 *Tulsa L. Rev.* 597 (2004). See *id.* at 631–36 on the role for courts. See also the more extended companion piece William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *Fordham L. Rev.* 1821 (2001).

<sup>66</sup> In respect of the paragraph that follows, consider Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *Democracy and Difference: Contesting the Boundaries of the Political* 95 (Seyla Benhabib ed., 1996), *reprinted* in *Deliberative Democracy: Essays on Reason and Politics* 407, 414 (James Bohman and William Rehg eds., 1997) [hereinafter *Deliberative Democracy*]; John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics and Contestations*, at ch. 1, 2 (2000); *Political Liberalism*, *supra* note 46, at 35–40, and ch. 1; Cass R. Sunstein, *Preferences and Politics*, 10 *Phil. and Pub. Affairs* 3 (1991). See also Jürgen Habermas, *Between Facts and Norms*, at ch. 1 (William Rehg trans., 1996); and William Rehg, *Translator’s Introduction*, in Habermas, *supra*, at xxii–xxiv, for deeper epistemological reasons for focusing on communication as a source of validity.

metaphysical thinking.” The influence of this thinking on constitutionalism and the role of judicial review is important and growing rapidly.<sup>67</sup>

The response deliberative democrats give to these problems is to argue for a theory of political legitimacy that is produced in accordance with a deliberative procedure that satisfies certain substantive and procedural criteria: “claims on behalf of or against [collective] decisions have to be justified to these people in terms that, on reflection, they are capable of accepting.”<sup>68</sup> In effect persons who would be affected by the political decision should be enabled to participate freely and equally in iterative deliberation over the decision. Their claims should be heard and given consideration, in the ultimate effort of seeking mutual acceptability and ideally consensus.<sup>69</sup> Hence, the legitimacy of political decisions depends on the deliberative conditions observed when making them. Several conceptions require the recognition of a social minimum to preserve equal, effective participation as well as communicative competence. For Joshua Cohen, for instance, the requirement that participants be *equal* creates a strong presumption in favour of an egalitarian distribution of resources akin to Rawls’ difference principle.<sup>70</sup> This is entailed by the idea that “the participants are substantively equal in that the existing distribution of power and resources does not shape their chances to contribute at any state of the

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<sup>67</sup> See The Cambridge Handbook of Deliberative Constitutionalism (Ron Levy, Hoi Kong, Graeme Orr and Jeff King eds., forthcoming).

<sup>68</sup> Dryzek, *supra* note 67, at 1.

<sup>69</sup> *Id.*; and Deliberative Democracy, *supra* note 67, provide good introductions to the vast literature.

<sup>70</sup> Cohen, *supra* note 66, at 422; see also Joshua Cohen, *The Economic Basis of Deliberative Democracy*, 6 Soc. Phil. and Pol. 25, 33 (1989) [hereinafter Cohen, *Economic Basis*].



deliberative process...”<sup>71</sup> Gutman and Thompson’s theory specifies several principles that they say the *outcomes* of any deliberative procedure must respect, one of which being the principle of opportunity, which includes respect for the social minimum.<sup>72</sup>

The work of Jürgen Habermas is different insofar as, for him, it is the procedure alone that legitimates the outcomes.<sup>73</sup> His monumental *Between Facts and Norms* is the most detailed account of the constitutional state and the genesis and function of legitimate law written by any major political theorist in a very long time. The work is large, complex and often obscure. Here, I will focus only on how social rights fit into his understanding of political legitimacy. Like Rawls, Habermas recognizes that the coercive character of law produces a demand for legitimacy, but also that law is necessary and plays a socially integrative function.<sup>74</sup> But the adoption of legitimate laws can, on his account, “fulfill the function of stabilizing behavioral expectations only if it preserves an internal connection with the socially integrating force of communicative action.”<sup>75</sup> His approach is also sensitive to history and sociology, and he offers a “reconstructive” account of the historical debate over what can be called the liberties of the ancients and the liberties of the moderns: basic individual liberty rights (what Habermas calls “private autonomy”) and democratic

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<sup>71</sup> Cohen, *Economic Basis*, *supra* note 70, at 33.

<sup>72</sup> Amy Gutman and Dennis Thompson, *Why Deliberative Democracy?* 199, 218 (2004).

<sup>73</sup> Habermas, *supra* note 66, at 278–79 for one expression of many along these lines. Rehg, *supra* note 66, clarifies the various points where the proceduralist understanding is elaborated throughout the book.

<sup>74</sup> Habermas, *supra* note 66, at ch. 3.

<sup>75</sup> *Id.* at 84.

self-determination through law-making (“public autonomy”). The recognition of basic rights enables persons to act freely and affirms their status as members of the community; but they can only exercise and protect (“*institutionalize*”) their rights through a system of laws created collectively.<sup>76</sup> Habermas recognizes a ‘co-original’ (i.e. co-equal in importance and equally significant in genealogy) role for both ideas in the production of legitimate law.

Laws produced in this system must further be justified according to the discourse principle, a principle of impartial justification: “[j]ust those action norms are valid to which all possible affected persons could agree as participants in rational discourses”<sup>77</sup> Observance of this principle—often compared to Rawls’ notion of public reason, though is much more tolerant of comprehensive doctrines—represents proper respect for private autonomy and the need for law-making, in a “post-metaphysical” political environment. In the effort of respecting public and private autonomy, and meeting the justificatory burden imposed by the discourse principle, he offers a “discourse theoretic justification of basic rights.”<sup>78</sup> A system of rights is needed, in this formula, to “institutionalize the communicative framework for a rational political will-formation.”<sup>79</sup> Such a system includes five sets of rights: the first three relate to rights to extensive liberty, to membership status and to actionability of rights in courts; a fourth relates to the equal opportunity to participate in political decision-making (will-formation) or consultation and discussion (opinion-formation);

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<sup>76</sup> The clearest exposition of this often obscure relationship is in *id.* at 93–94, 121–22.

<sup>77</sup> *Id.* at 107.

<sup>78</sup> *Id.* at 118–31.

<sup>79</sup> *Id.* at 111.

and the last is derivative of the above rights, namely, basic social and environmental rights. The status of this fifth set of rights is made clear: “The recognition of claims to social benefits...is justified in relative terms: such recognition is indirectly related to the guarantee of personal self-determination as a necessary condition for political self-determination”, adding that they are meant to protect “communicative competence.”<sup>80</sup> These are contrasted with the “intrinsic” value of the other four categories. Other writers working in this tradition explore at greater length the necessary relationship between communicative competence and the social minimum.<sup>81</sup>

While Habermas emerged from the tradition of critical theory, his justification of social rights as derivative of freedom and communicative competence ironically puts them on weaker footing than they have in Rawls’ brand of liberal egalitarianism. His treatment of social rights is on the whole quite ambivalent, in fact. In the final chapter of *Between Facts and Norms*, where he had earlier promised to elaborate the understanding of social rights, Habermas rather offers a lengthy critique of the “social welfare paradigm” which he argued led to excessive paternalism. While he envisages a more democratized, inclusive and less state-driven form of social policy, the form of protection and the juridical status of social rights remains quite unclear.

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<sup>80</sup> *Id.* at 417–18.

<sup>81</sup> James Bohman, *Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities*, in *Deliberative Democracy*, *supra* note 66, at 321, 337; *see also* Joshua Bohman, *Public Deliberation* 148 (1996); Jack Knight and James Johnson, *What Sort of Equality Does Deliberative Democracy Require?*, in *Deliberative Democracy*, *supra* note 66, at 279.

Compounding matters, a famous later essay of his omits mention of the social rights category altogether when restating the theory of rights.<sup>82</sup>

Despite all this, one might argue that Habermas was right about the social determinants of communicative competence and wrong about the juridical potential of constitutional social rights (and wrong too in his evaluation of the permeation of the social into private law). A range of influential German jurists see an important status for social rights whose function is to protect “factual freedom” in the social service state,<sup>83</sup> and the paradigm he treats as spent is far from so, as my discussion below will confirm. Notably, furthermore, the leading authors in the “republican revival” in the United States, who all see a similar role for deliberation in legitimating law, do envisage a restrained but welcome role for some constitutional judicial review of socio-economic rights.<sup>84</sup> In other words, deliberative democracy and even much of Habermas’ approach tend to support constitutional recognition of social entitlements and quite plausibly, dependent on instrumental considerations relating to judging, constitutional social rights themselves.

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<sup>82</sup> Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 *Pol. Theory* 766 (William Rehg trans., 2001).

<sup>83</sup> Robert Alexy, *A Theory of Constitutional Rights*, at ch. 9 (Julian Rivers trans., 2002). A seminal other contribution in this vein was Peter Häberle, *Grundrechte im Leistungsstaat*, 30 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 44 (1972).

<sup>84</sup> For the republican arguments for deliberation, see Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (1988); Frank Michelman, *Law’s Republic*, 97 *Yale L.J.* 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539 (1988). Each has published books and/or leading articles on social rights in which their subtle views on the role for courts are made (somewhat) clear.

**<b>C. The Question of Courts**

It was fruitful to see how a right to a social minimum figures in the work of Rawls and Habermas because they are respectively the most important political philosophers in the Anglo-Saxon and German speaking worlds in the post-war period. Each had an elaborate understanding of a liberal or deliberative constitutional democracy, and both see a fundamental constitutional role for social rights. Too many thinkers have been left out of this discussion, but a keen reader would soon discover that many other candidates for influential political theories will come to the same or a similar result. Yet at the end of any such tour in democratic theory, the question hanging over any such account will remain—whether or not they are “constitutional” principles in the sense of being a core matter for the basic structure of society, is it desirable for judges to enforce them? My own view on this position is clear—yes, depending on the background political conditions prevailing in the country, though I advocate a form of judicial incrementalism for the countries I focus on.<sup>85</sup> But a defence of that view is subtle, more instrumental and empirical than theoretical, and hence context-dependent. I will thus in the space that remains instead examine ways of giving constitutional recognition to the social that are likely to be more universally applicable in comparative constitutional theory.

**<a>THE INDIRECT PROTECTION OF SOCIAL RIGHTS IN CONSTITUTIONS**

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<sup>85</sup> King, *supra* note 2.

We have seen in the historical examination above that social provisions and even social rights provisions in constitutions can serve functions other than grounding direct subjective claims to social services. In this section I examine this phenomenon more closely. There are at least three types of such provisions that are relevant to the functions explored below. First, the constitution can set out a commitment to social welfare as a set of non-binding directive principles of state policy, as in Ireland, India and several other countries. Second, the constitution may enumerate rights or principles that, although the constitution does not declare the provision non-justiciable, judges and possibly drafters nevertheless understood them as not intended to create direct (subjective) rights (as with the Weimar constitution and several European nations). Third, the constitution may expressly set out commitments to principles such as the social state principle that we have seen in German and Spanish law, and which is also evident in France (“social republic” “*République ... sociale*” (Article 1, Constitution of France of 1958)). Now, the temptation to marginalize or even deride these kinds of unenforceable provisions is strong. This may be a misguided judgement, just as the underestimation of constitutional preambles is. In my contention, these provisions can and do play three distinct roles that can be significant in protecting and strengthening the social state and defence of the social minimum.

#### **<b> A. The Rejection of Neoliberal Public Law**

The prophylactic function of social clauses can be seen in the history of some US state constitutional social provisions. For instance, the state of New York held a constitutional convention in 1938 and among other provisions adopted its “welfare

clause”, its “housing clause” and various other new provisions relating to taxation and spending. These clauses were added to confirm the existence of the state’s powers in respect of these functions. The precise role for these provisions was clarified extensively in the important Poletti Report, a multi-volume background study on the case for various forms of constitutional reform.<sup>86</sup> The report makes clear that the purpose was both to provide secure constitutional foundations for these powers and overcome various judicial decisions that had obstructed previous efforts to regulate labor conditions, regulate the private provision of care services, and finance poor relief from taxation or debt. These provisions took effect towards the end of the *Lochner* period, and hence they were less liable to review for incompatibility with the Federal Constitution.

The inclusion of the social state principle in the German Basic Law did not have exactly that intention, though it did result from a compromise whose chief prize for the Social Democratic Party was a more directly prophylactic clause: the socialization clause, Article 15. It provides that “Land, natural resources and means of production may for the purpose of socialisation be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation.” Through obtaining this clause, the Social Democrats believed they would secure their legal right to carry out a major nationalization programme without any constitutional obstruction. By the time they reached power in 1966, their ambitions in that respect had been curtailed significantly. But the social state clause in article 20 continued to have significance—one that resonated with more conservative

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<sup>86</sup> New York State Constitutional Convention Committee: Problems Relating to Bill of Rights and General Welfare (1938).

Christian Democratic jurists and politicians as well. The meaning of the social state clause fell to be elaborated by scholars and the Federal Constitutional Court. A number of jurists recognized that it committed the state to actively shape the social sphere (*Gestaltungsaufgabe*) with a view to bringing about greater social protection.<sup>87</sup> Whatever ambiguity is implied in such a conception, it is clear that a classical liberal or neo-liberal conception of the state is off the table. In the post-war German practice, just as a range of the commentators from Abendroth to Hans Carl Nipperdey, Ulrich Scheuner and Otto Bachof predicted early on,<sup>88</sup> the principle would serve often as a limitation principle used to justify limitations of the liberal rights provisions of the constitution that were deployed in *Lochner*-type challenges.<sup>89</sup> The fear, moreover, that such a role promotes a deferential court is belied by the Federal Constitutional Court's activist post-war record.

Notably, some provisions that outwardly appear to be justiciable social rights provisions can be read down so as to constitute directives to the legislature instead of enforceable individual rights ("subjective rights" as many European jurists would call them). So, the constitution of Italy guarantees a suite of constitutional social rights

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<sup>87</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1 BVerfGE 97, 105, Dec. 19, 1951 (Ger.); Hans Peter Ipsen, *Enteignung und Sozialisierung*, 10 Veröffentlichung der Vereinigung der Deutschen Staatsrechtslehrer [VVDSStRL] 74 (1951).

<sup>88</sup> Ulrich Scheuner, *Die staatliche Intervention im Bereich der Wirtschaft*, 11 VVDSStRL 1, 6 (1952); Otto Bachoff, *Der soziale Rechtsstaat im Verwaltungsrechtliche Sicht*, 12 VVDSStRL 37, 39 (1953). For the thought of Hans Carl Nipperdey, *Grundrechte und Privatrecht*, in Festschrift für Erich Molitor zum 75. Geburtstag 16, 19–21 (Erich Molitor and Hans Carl Nipperdey eds., 1962).

<sup>89</sup> As an exemplar of a much broader trend, see the decision on the 1979 Worker Co-Determination Law, BVerfG, 50 BVerfGE 290, March 1, 1979 (Ger.).



provisions. Yet in the early decades such rights were primarily interpreted as offering directives to legislatures, and since the 1990s have been subject to the doctrinal stipulation of being “conditional on finances.”<sup>90</sup> Here too, such underenforced provisions at the very least work against neoliberal interpretations of other provisions of Italian constitutional law.

Rawls’ writings could in what might be called uncharitable sense be read to bolster a neoliberal reading of constitutional law. For instance, he asserts repeatedly that the basic liberties have priority over the second principle (equal opportunity and the difference principle). The latter is “subordinate” and even “less significant in a well-ordered society than the basic liberties secured by the first [principle].”<sup>91</sup> Notably, also, only the *political* liberties are to be guaranteed their “fair value”—on the whole a quite limited reply to the charge laid out by Norman Daniels and Marx before him.<sup>92</sup> On the other hand, Rawls takes pains to argue that the basic liberties are not merely formal, and emphasizes in particular the fair value of the political liberties.<sup>93</sup> He justifies campaign finance and election regulation on this rationale, and embarks on a lengthy analysis of the infamous *Buckley v. Valeo* decision of the US Supreme Court.<sup>94</sup> In that case, the Court recognized campaign donations as protected speech, and found that expenditure limitations relative to particular candidates were

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<sup>90</sup> See the introductory essay of Alessadra Albanese, *Italy, in Social Rights in an Age of Austerity: European Perspectives* (Stefan Civitarese Matteucci and Simon Halliday eds., 2017).

<sup>91</sup> *Political Liberalism*, *supra* note 46, at Lecture VIII, 367–68 in particular.

<sup>92</sup> See *supra* note 20 (Marx), 21 (Rawls) and 74 (Daniels) and accompanying text.

<sup>93</sup> *Political Liberalism*, *supra* note 46, at 324–31.

<sup>94</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

unconstitutional restrictions on political expression. Rawls puts what many others refer to as the “anti-distortion” rationale in his own vernacular: “to ensure [the] fair value [of the political liberties] it is necessary to prevent those with greater property and wealth...from controlling the electoral process to their advantage...Formal equality is not enough.”<sup>95</sup> At a more fundamental level, it is clear that Rawls’ theory in the round envisages a very active regulatory and redistributive role for the state. If liberal socialism is one of the two economic regimes he viewed as compatible with his theory, he quite evidently could not tolerate neoliberal readings of the basic liberties. His strong repudiation of both *Buckley v. Valeo* and *Lochner v. New York* was thus unsurprising.<sup>96</sup>

#### **<b>B. The Materialisation of Private and Labour Law**

Under welfare-capitalism, much of the “social” is governed by private law, including residential tenancy, retail banking, employment and now diverse areas of retirement, disability and health care services, and increasingly education and pensions. Of course, family law must be added to this picture. The liberal heritage has delayed, if not denied, the recognition in public law of positive constitutional duties to regulate such areas of social activity. Rather, there has been a rigorous maintenance of the public/private divide, with the latter as the exclusive province of public law (accepting meanwhile that private law liability extends to public authorities).<sup>97</sup> One

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<sup>95</sup> Political Liberalism, *supra* note 46, at 360–61.

<sup>96</sup> *Id.*, at 362.

<sup>97</sup> Frank I. Michelman, *The Bill of Rights, The Common Law, and the Freedom-Friendly State*, 58 U.

plausible interpretation of social constitutional provisions is that they represent a constitutional decision to reject this libertarian orientation in public law and mandate a proactive role for the courts to extend (social) constitutional values into private law as a form of pan-legal public policy.<sup>98</sup>

Germany's legal order famously led the way in recognizing the application of the basic rights provisions to affect the content of civil law disputes between private parties (indirect horizontal effect).<sup>99</sup> According to this doctrine, when applying in particular the "general clauses" of the German Civil Code such as the duty of good faith (article 242) and the prohibition on immoral contracts (article 138), courts must do so in light of the basic rights provisions of the constitution. So a contract that interfered with political expression would be considered immoral under this type of influence. From early on, scholars supporting this application of the constitutional rights provisions to private law, recognizing in particular state duties to protect (*Schutzpflichten*), saw them linked to the social state clause and social rule of law concept.<sup>100</sup> This type of approach would later see the extension of this idea into contracts concerning vulnerable parties. The Federal Constitutional Court's seminal "sureties case"<sup>101</sup> recognised, reversing a finding of the Federal Court of Justice, that the basic rights provisions of the Basic Law of 1949 required courts to be prepared to invalidate contracts agreed under severe imbalances of bargaining power that led

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Miami L. Rev. 401 (2003).

<sup>98</sup> Matthias Kumm, *Who is Afraid of the Total Constitution?*, 7 German L.J. 341 (2006).

<sup>99</sup> On which, see *id.*

<sup>100</sup> This is evident, in among other studies, in Nipperdey, *supra* note 88, at 16, 19–21.

<sup>101</sup> BVerfG, 89 BVerfGE 214, October 19, 1993 (Ger.). (*Bürgschaftsentscheidung*).

vulnerable persons to accept gravely burdensome obligations. In that case, a father had arranged for his 21 year old daughter to sign a surety agreement that made her liable for 100,000 Deutsch Marks. The Federal Constitutional Court found that the right to human dignity (article 1) and the right to private autonomy found in (article 2), read in conjunction with the social state principle (article 20(1)), required the civil courts to apply the general clauses in a way that inquired into the vulnerability of persons in the daughter's situation. On reconsideration, the Federal Court of Justice found the contract unenforceable.

It is important to see the German development as extending beyond the doctrines of horizontal effect and the recognition of the duty to protect, to include a broader reconceptualization of fundamental rights in constitutional affairs. Jürgen Habermas neatly summarizes the key characteristics of this transformation, which he situates broadly within the “dissolution of the liberal paradigm of law”:

<quotation>These include the “reciprocal effect” (or *Wechselwirkung*) between ordinary legal statutes and fundamental rights (which remain inviolable only in their “essential content” (*Wesensgehalt*); the “implicit limits on basic rights”, which hold even for those basic individual rights, such as the guarantees of human dignity, that impose affirmative duties on the state (the so-called *subjektiv-öffentliche Rechte*); the “radiating effect” (*Ausstrahlung*) of basic rights on all areas of law and their “third-party effect” (*Drittwirkung*) on the horizontal rights and duties holding between private persons; the state's mandates and obligations to provide protection, which are tasks the Court derives from the “objective” legal character of basic rights as principles of the legal order’ and finally, the “dynamic protection of constitutional rights” and the links in procedural law between such rights and the “objective” content of constitutional law.<sup>102</sup></quotation>

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<sup>102</sup> Habermas, *supra* note 66, at 247.

The significance of the differences between this understanding of the “total constitution” and the narrower, American and British tradition, is best described as “enormous.”<sup>103</sup> Such developments are not limited to Germany, either. The so-called constitutionalisation of private law is often welcomed by private law scholars who affirm a role for social justice in private law,<sup>104</sup> and have had a similar impact and reception in labour law.<sup>105</sup> Nevertheless, there remain left-leaning dissenters.<sup>106</sup>

South Africa notably also follows this approach, but guided specifically by the social rights provisions of the constitution. The experience in this respect has been analysed in a masterful overview by Sandra Liebenberg.<sup>107</sup> Horizontal application is provided for directly by the text of the constitution, and there is a range of cases in property and contract law where such provisions have been applied. Liebenberg concludes that it has proved difficult to unseat deep-seated baselines concerning respect for freedom of contract (in contract law in particular) despite the

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<sup>103</sup> Kumm, *supra* note 98 at 350 (describing the impact of the “radiation effect” on German law).

<sup>104</sup> Gert Brüggemeier et al., *Social Justice in European Contract Law: a Manifesto*, 10 Eur. L.J. 653 (2004); *c.f.* Horst Eidenmüller et al., *The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems*, 27 Oxford J. Legal Stud. 659 (2008).

<sup>105</sup> Manfred Weiss, *The Interface between Constitution and Labor Law in Germany*, 26 Comp. Lab. L. & Pol. J. 181 (2005). Notably, Nipperdey was the first President of the post-war Federal Labour Court.

<sup>106</sup> In particular, see the outstanding study by Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (2014); Habermas, *supra* note 66, at ch. 9, and especially at 392–409.

<sup>107</sup> Sandra Liebenberg, *The Application of Socio-Economic Rights to Private Law*, 3 J. S. Afr. L. 464 (2008), though revised and substantially expanded in Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution*, at ch. 7 (2010).

constitution's promise. This is also a recurrent theme in the German experience. Yet as the experience across Europe accumulates, there will likely be room for cross-fertilisation, just as there has been in comparative human rights scholarship.

Rawls is relevant here too, for, the classical liberal pedigree of Rawls' tradition is bound up, as Liebenberg deftly shows, with a focus on state rather than private action, and the belief that private affairs are not suitable for state regulation. In *Political Liberalism*, Rawls seeks somewhat indirectly to overcome these limitations. For instance, he declares that the basic liberties are "inalienable" and this means that "any agreement by citizens which waives or violates a basic liberty, however rational and voluntary [it] may be, is void *ab initio*..."<sup>108</sup> This is entirely of a piece with the idea of horizontal effect of the basic rights provisions, and Rawls' language here is notably legalistic. In another instance, Rawls is particularly clear in his last work on public reason that the family is part of the basic structure of society.<sup>109</sup> This is a response to feminist criticisms that his theory paid insufficient attention to justice in the family. Whether his objective in this regard was effectively negated by his statement that "political principles do not apply directly to [the family's] internal life", along with firm protection for religious doctrines that are plausibly seen as an impediment to gender equality, is a matter of debate among liberal as well as other

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<sup>108</sup> *Political Liberalism*, *supra* note 46, at 365.

<sup>109</sup> John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997), reprinted in *Political Liberalism*, *supra* note 46, at 440 § 5.

feminists.<sup>110</sup> But his intention to move past this failing in classical liberalism and his own earlier work was clear.

### **<b>C. The Social Reading of the Civil Liberties**

Charles Reich's "The New Property" advanced a groundbreaking thesis: that the creation and widespread distribution of new forms of governmental largesse, in the form of statutory benefits, permits and licenses, has created a new form of "property" within the meaning of the Due Process clause of the Fourteenth Amendment of the Federal Constitution.<sup>111</sup> This thesis was recognised in a footnote in the important Supreme Court case *Goldberg v. Kelly*,<sup>112</sup> which recognised pre-termination hearing rights in cases where welfare (social assistance) benefits under the Aid for Family with Dependent Children were cut off. Frank Michelman also authored a series of groundbreaking articles arguing for pro-poor readings of the Fourteenth Amendment. For my own part, I doubt the propriety of considering social benefits "property". This privileges the status quo of current holdings over the claims of redistribution, and it fails to discriminate between the value of different kinds of (so-called) property. Under such an approach, pension rights are liable to be given, and have been given, constitutional protection against alteration in favour of downward distribution in times of crisis.

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<sup>110</sup> *Id.* at 469; *c.f.* Susan Moller Okin, *Political Liberalism, Justice and Gender*, 105 *Ethics* 23 (1994) (finding *PL* worse than *TJ* from a feminist perspective).

<sup>111</sup> Charles Reich, *The New Property*, 73 *Yale L.J.* 732 (1964).

<sup>112</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

At any rate, Reich and especially Michelman's arguments were profound, but were entertained only briefly and ultimately dismissed by the courts. One reason for the cool reception was the absence of any textual commitment to welfare in the U.S. constitution. While not essential (the European Court of Human Rights takes a much different approach), text does seem to matter. It is therefore more plausible, as a matter of interpretation, to read classical civil rights in a manner that extends them into the domain of social relations when the text of the constitution contains express social commitments. This is common practice in both India and Germany. One advantage of this approach is that it can facilitate a gradual, more cautious expansion of social rights protection, leading to some experimentation. It is certainly a way to meet at least somewhat the persistently forceful charge that the unequal worth of liberty is not addressed adequately in the liberal theories of Rawls and Habermas, as well as the tradition of liberal constitutionalism more broadly. It would mitigate the objection by showing that the civil liberties are not *arbitrarily* sealed off from social justice. At the same time, the approach still allows considerations of democratic legitimacy, proper constitutional authorization of judicial control, and considerations of epistemic competency, to justify a measure of judicial deference to executive and legislative determinations of social policy. For that very reason, the gradualist expansion of social rights protection through this approach is likely to be somewhat restrained. It cannot, without more by way of justification, be an alternative interpretive strategy used to justify reading down what are otherwise constitutionally entrenched social rights. If the approach in this section leads to a satisfactory state of affairs for the mature welfare states and comparatively highly unionized nations of



Europe, it may not be so in other countries seeking a deeper and more pervasive transformation. There is no general answer to this specific question.

Experimentation can be good and can facilitate the expansion of principled constitutional thinking in public discourse and legislation. This has certainly been the approach of the European Court of Human Rights (despite having no textual commitment to social rights) as well as the German Federal Constitutional Court. The experience in India, on the other hand, might not reasonably be described as cautious and experimental, though its expansion was somewhat gradual. However, nearly all agree that the experience there is very much a product of highly dysfunctional politics. Whether it is a model that is suited to incremental approaches is a matter of some debate.<sup>113</sup>

## <a>CONCLUSION

Constitutionalism is an outgrowth of liberal theory and politics, and that has always been somewhat infertile soil for the constitutional recognition of social justice. Yet liberalism has transformed itself, theoretically, politically and legally, over the course of the late nineteenth and throughout the twentieth century. Distributive justice and social freedom are now prominent features of this tradition, and classical liberalism is now widely viewed to be what Rawls calls “not liberalism at all but libertarianism.”<sup>114</sup>

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<sup>113</sup> Tarunabh Khaitan and Farrah Ahmed, *Constitutional Avoidance in Social Rights Adjudication*, 35 Oxford J. Legal Stud. 607 (2015) (reviewing my book and advocating incrementalism for Indian social rights claims).

<sup>114</sup> Political Liberalism, *supra* note 46, at lvi.

Whether he and Habermas can so easily escape the ghosts of this tradition is an open question. Certainly, most of the accommodations Rawls made to meet the objections to classical liberalism were either latecomers to justice as fairness or only latently within the original statement. For his part, Habermas' relative neglect of social rights and distributive justice in *Between Facts and Norms* is as noteworthy as his clear inclusion of social rights in his discourse theoretic conception. Yet both traditions regard social justice as a foundational matter, and the social minimum in particular as a subject for constitutional regulation. The precise outworking of that commitment is unclear in their own work, but this task is for jurists, political scientists and legislators working in non-ideal theory. Once we consider the institutional permutations, we can see that the inclusion of social and social rights provisions can generate at least three valuable and generally applicable functions for social constitutionalism: the rejection of neoliberal constitutional law; the materialization of private law; and the social reading of the classical civil liberties. Whether constitutional drafters and judges should go further and provide the direct enforcement of subjective social rights claims is a question of public policy that can admit of national or at best regional answers, not theoretical and universal ones. But happily, it is in those fields that national and comparative lessons emerge at a striking rate.