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TITLE:

**AN INSURANCE MODEL
FOR THE
JUSTICIABILITY
OF
SOCIAL AND ECONOMIC RIGHTS**

Candidate: Octavio Luiz Motta Ferraz

College: University College London

Degree: PHD

[2006]



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ABSTRACT

The topic of this study is the judicial enforcement of so-called social and economic rights, in particular the right to health care, education, housing, food etc, expressly recognised in international treaties and in many domestic constitutions (often referred to as social rights' justiciability).

Many believe that courts should refrain from enforcing those rights because they are neither legitimised nor institutionally competent to deal with the issues involved (i.e. matters of policy and resource allocation). Partisans of social rights' justiciability, on the other hand, insist that it is within the appropriate role of courts to adjudicate social rights and that no special expertise is required in that task that courts do not have or cannot develop.

I review this debate and conclude that neither side is correct. The main problem, I submit, is that both sides of the debate have been taking for granted a conception of social rights that I argue is flawed. Indeed, it is commonly thought that social rights are entitlements to a certain basic level of social goods (e.g. health care, food, housing), which are necessary for the individual to lead a decent life. I call this the "basic needs conception". I claim, however, that social rights are in fact entitlements to a fair share of society's resources not necessarily related to the capacity for the enjoyment of basic needs.

I propose, then, that the debate on legitimacy and competence has to be recast in the following terms: are courts legitimised or competent to deal with the intractable question of distributive justice posed by social rights? I claim that they are and propose an insurance model, inspired by the work of Ronald Dworkin, which they could follow to reach an acceptable answer to that question.

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INTRODUCTION

The subject of this study is the judicial enforcement of so-called social and economic rights (I will call this “social rights’ justiciability”). My main interest is on the justiciability of those rights in national legal systems, especially those that have expressly recognised them in a written constitution. The general issues I discuss, however, are also relevant to the international system of human rights protection and national systems where those rights have not been expressly recognised.

The problem of social rights’ justiciability has occupied legal academics across the world at least since the late 1960s. Most of the attention then has been focused on the international arena, following the adoption by the United Nations and regional international bodies such as the European Council of multilateral treaties on human rights.¹ The usual adoption of separate instruments for so-called civil and political rights on one side and social and economic rights on the other, combined with the establishment of different mechanisms of supervision (usually complaints procedures to judicial or quasi-judicial bodies in the former and periodical reports in the latter), spurred a heated debate on the nature of those two categories of rights and their suitability for judicial, or judicial-like enforcement.² But the debate has also taken place in national systems, not only where the International Covenant was ratified,

¹ The International Covenant on Civil and Political Rights – “ICCPR”; The International Covenant on Economic, Social and Cultural Rights – “ICESCR”; The European Convention on Human Rights (“ECHR”) and the European Social Charter (“ESC”).

² The classic texts on this debate in the international arena are E. W. Vierdag, “The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights”, 1978, pp 69-105, GJH van Hoof, “The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views”, in *The Right to Food*, P. Alston and K. Tomasevski (eds.), Martinus Nijhoff Publishers, (1982), Maurice Cranston, “Human Rights, Real and Supposed”, in *Political Theory and the Rights of Man*, DD Raphael (ed), Macmillan, London, 1967, pp 43-53.

but also where it wasn't, such as in the United States of America. In those latter countries it usually revolved around the issue of whether broadly drafted constitutional provisions, such as the American Constitution's equal protection clause (the 14th Amendment), could be read as recognising social and economic rights.³

Almost four decades later, the debate goes on, but the scenario has changed a great deal. In those early years, the defence of justiciability was almost indistinguishable from the defence of the *existence* of social and economic rights in the first place. This is because most arguments against justiciability were actually arguments denying social and economic rights the very status of rights. There seems to be now a larger and growing consensus that those rights are indeed genuine rights. No less than 142 countries have ratified the ICESCR to this date. The so-called "indivisibility" of human rights, i.e. the thesis that human rights are totally interdependent and therefore meaningless when taken separately, has been repeatedly acknowledged by international institutions, and has become almost a truism in human rights discourse.⁴ In the domestic arena, moreover, social and economic rights have been expressly recognised in a host of recently adopted national constitutions.

It would be wrong to conclude, however, that this more receptive general climate towards the existence of social rights has entailed a similar attitude to the question of justiciability. Many would be ready to recognise that those rights exist and yet be wary of entrusting courts with the power to enforce them even in those countries where they are constitutionally recognised with no express restrictions in terms of

³ See Frank I. Michaelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 *Harvard Law Review* 7, (1969)

⁴ Especially after the adoption by the UN of the Vienna Declaration and Programme of Action, that states: "5. All human rights are universal, indivisible and interdependent and interrelated." (A/CONF.157/23 12 July 1993)

justiciability, as is the case in both jurisdictions the appendix to this study focuses upon (Brazil and South Africa).⁵ There are concerns that such a power might entail an undue interference of the judiciary on matters which are the preserve of the political branches of the state.

When social rights are expressly recognised as legal rights in the constitution, thus, a certain *dilemma* seems to arise concerning their justiciability. As eloquently described by a commentator:

“By constitutionalizing social rights, the argument often has run, you force the judiciary to a hapless choice between usurpation and abdication, from which there is no escape without embarrassment or discredit. One way, it is said, lies the judicial choice to issue positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public house-hold against prevailing political will. The other way lies the judicial choice to debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies an unreviewable privilege of indefinite postponement of a declared constitutional right.”⁶

Now, that the fears expressed in both options of the dilemma are not overstated there is enough evidence. Recent social rights’ cases in the two jurisdictions which I deal with in the appendix provide clear proof of this fact. Indeed, as I discuss in that chapter, whereas the Brazilian courts (including the Supreme Federal Tribunal – the highest court in the country) have taken an approach to the enforcement of social

⁵In other constitutions, however, there are express provisions barring the judiciary from adjudicating social and economic rights. See, for instance, the Constitution of India, which recognizes social and economic rights as “directives of state policy”, and expressly prevent the judiciary from enforcing them: PART IV - DIRECTIVE PRINCIPLES OF STATE POLICY 37. Application of the principles contained in this Part.- The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

⁶ see Frank I. Michelman, “The Constitution, Social Rights, and Liberal Political Justification”, *International Journal of Constitutional Law*, vol 1, number 1, pp 13-34, 2003, p. 16.

rights such as the right to health care, for instance, which is arguably quite representative of the concern manifested in the former option of the dilemma (“usurpation”), the South African Constitutional Court’s decisions on social rights so far could be seen as representing the latter (“abdication”).⁷

But the dilemma itself, as I shall argue in this thesis, is somewhat overstated. Judicial enforcement of social rights does not have necessarily to entail either usurpation of political power by the judiciary or total abdication. We must surely take adequate heed of this risk, which is not as easily dispelled as most partisans of social rights’ justiciability seem to believe. Within an adequate adjudicative model, i.e. one which is based on an adequate conception of social and economic rights, courts might well be able enforce social rights in a manner which is not only competent, but also respectful of democratic values and the principle of separation of powers. My aim in this thesis is to make a contribution to the effort of building such a model.

One of my main contentions is that the *conception* of social and economic rights largely assumed in the debate on justiciability rests on shaky ground, namely the theory of *basic needs as absolute and universal entitlements*. I have to discuss at *some* length, therefore, *philosophical* ideas related to this problem, such as distributive justice, solidarity, needs etc.

It is not the aim of my thesis, however, to make any contribution in the realm of political or moral philosophy. It is rather to shed some light at the practical matter of social rights’ justiciability with theoretical ideas widely discussed in this field. I do not engage, as a consequence, in a comprehensive review of the extensive literature produced on those

⁷ I develop this point in chapter 4.

topics. I rather invoke some classical works which I find illuminating and discuss them in the depth which I deem necessary to clarify the advantages of the conception I defend over the one I criticise.

Last but not least, I should mention that my approach to the problem of justiciability is *normative*, not descriptive. I do not attempt to give any systematic or comprehensive account or interpretation of how courts of any specific jurisdiction have dealt with social and economic rights. I am rather interested in how courts *ought to* deal with the problems of legitimacy and capacity raised in almost all jurisdictions where social and economic rights have been recognised in the constitution. I use some individual cases in some of the chapters, thus, simply as examples to clarify the arguments I discuss from this normative perspective. Only in the appendix I focus on some cases adjudicated in two specific jurisdictions, yet still as a means to illuminate and consolidate the normative points I develop in the thesis.

The study is organised as follows. In Chapter 1, *The Justiciability Debate*, I review the current debate on social rights' justiciability and claim that it has been unduly confined to a discussion about the nature of social rights. Opponents of justiciability often claim that those rights should be unjusticiable because they are significantly different in nature from more traditional civil and political rights. Unlike traditional rights, they say, social rights are "positive" (i.e. generate duties of action rather than simple abstention), dependent thus on scarce resources, and exceedingly vague. Partisans of social rights justiciability, in their turn, maintain that those differences are fallacious, or at least not as pronounced as they are made out to be. Civil and political rights, they claim, are also "positive", dependent on resources and quite vague. In short, there is no significant difference, they claim, between both

categories of rights (I call this the “equal nature thesis”), and social rights should therefore be also justiciable. But “the equal nature thesis”, I argue, though correct in its main premise (i.e. that social rights are not significantly different in nature from civil and political rights), overstates its conclusion. That is, it falls short of making a strong case for the justiciability of social rights. It certainly shows that the argument against justiciability is inconsistent if solely based on the alleged differences in nature between social and civil rights. It does not provide a *positive* argument, however, for the justiciability of the former. One might well accept the equal nature thesis, that is, and still reject the justiciability of both types of rights when all or some of those aspects (i.e. positiveness, vagueness and resource dependence) are present. Despite being important in dispelling popular misconceptions about the different nature of social and civil rights, thus, the equal nature thesis is not in itself sufficient (as it seems to be often assumed) to make the case for justiciability. Difficult issues concerning the legitimacy and the institutional competence of courts to enforce positive rights in general remain to be faced.

Each of those dimensions (i.e. legitimacy and institutional competence), therefore, will deserve a separate chapter in my thesis. Before I tackle those issues, however, I deal in Chapter 2, *What are social rights?* with another point which has not received as much attention in the justiciability debate, namely the problem of definition and justification of the content of social rights. It is usually assumed in the debate that social rights are rights to the satisfaction of certain material needs to health, education, food etc, commonly denominated “basic needs”. But this conception (I call it the “equality of basic needs conception” of social rights, or simply “basic needs conception”), I argue, is inadequate. Given that the interests guaranteed by social rights

(and by all positive rights) are directly dependent on scarce resources, the content of those rights must be determined by a just distribution of those resources, i.e. through what an adequate theory of distributive justice would entail individuals to enjoy in terms of health, education, food etc. But basic needs satisfaction, I claim, is neither a sufficient, nor a necessary requisite of a just distribution of resources. A just distribution of resources might well entail, as I try to demonstrate, that some individuals enjoy less basic needs than others, or even that some can satisfy more than their basic needs whilst others cannot satisfy even those. I reject, therefore, the basic needs conception of social rights, and propose an alternate conception which I call “equality of resources conception” of social rights. Under my alternate conception, which draws on Ronald Dworkin’s well-known theory of distributive justice, individuals’ abilities in the enjoyment of health, education, food and housing needs will vary to a certain extent without being unjust. Social rights are thus not necessarily rights to an equal level of satisfaction of those needs.

In chapter 3, *Legitimacy: Social Rights, Democracy and Separation of Powers*, I discuss in depth and reject the argument that judicial enforcement of social rights would necessarily infringe principles of democracy and separation of powers. In chapter 4, *Social Rights and Institutional Competence*, I discuss the claim that courts are not institutionally capable of dealing with the issues involved in the adjudication of those rights, and conclude that the problem of institutional competence, though real, is less related to an inherent characteristic of the judiciary (and the judicial process), than to the complexity of defining the content of social rights. In chapter 5, thus, I consider the position that denies the possibility of conceiving social rights as immediately claimable, individual rights (“subjective rights”),

claiming that those rights give rise only to generic goals of state policy. I conclude, however, that such conception would suffer from the same problem identified in chapter 4, i.e. the lack of a clear standard to define the content of the state's duty to promote social rights, even if only as generic goals of state policy.

In the last two chapters, therefore, I discuss ways of giving some content to social rights. I argue that the adequate way to do so is through what I call a "minimum level strategy". That is, through the determination of minimum levels of health care, education, food and housing that one could safely presume would be part of a social right determined by the equality of resources conception defended in chapter 2. In chapter 6, *The Minimum Core Approach*, I discuss and reject an apparently similar yet fundamentally different strategy, highly popular in the legal literature: the so-called "minimum core approach". The problem with this approach, I argue, is the same as that of the basic needs conception I discussed in chapter 2, since it is, in fact, a mere strategy to apply that conception when resources are not sufficient to guarantee that everyone in society enjoys basic needs. So, if the equality of resources conception I defended is correct, we need to follow a different strategy in the adjudication of social rights. I develop and defend such a model in chapter 7, *Social Rights as Insurance*, where I draw again on Dworkin's distributive justice theory. I maintain, there, that the minimum levels of health care, education, food, housing etc that we could safely presume everyone in society would be able to enjoy if resources were justly distributed can be determined by what Dworkin calls the "hypothetical insurance scheme". I claim that this strategy could in principle be competently and legitimately applied by courts. In the appendix, I discuss recent cases involving social rights in South Africa, Brazil and other South American countries to illustrate two

opposite approaches to justiciability which I find inappropriate and submit could be replaced by the approach I suggest in this thesis.

Explanatory Note

The phrase “social and economic rights” can have different meanings, so it is necessary for me to explain what meaning I am attributing to it in this study. One common usage of the phrase, which we might call *broad*, employs it to refer to all those rights listed in the International Covenant on Economic, Social and Cultural Rights. Another more restricted usage of that phrase, which we might call *narrow*, refers to only those rights related to social goods that are *directly* connected to our welfare (sometimes called “welfare rights”).⁸ It includes, therefore, the rights to health care, education, food, housing and work, but excludes other rights recognised in the Covenant such as the right to strike, to form labour associations, or any of the rights which are usually collectively referred to as workers’ rights. In this study I am interested only in those rights encompassed in the narrow usage. Not, of course, because I find them more important, but rather because they pose more problems of justiciability than these other so-called social rights included in the Covenant.⁹

⁸ It is important to stress directly here because all rights are somehow connected to our welfare. The distinction is merely heuristic, thus, as most, if not all, distinctions in law.

⁹ See, for instance, Matthew Craven, The Justiciability of Economic, Social and Cultural Rights, in R Burchill, D Harris and A. Owers (eds), *Economic, Social and Cultural Rights: their implementation in the United Kingdom*, 1999.

CHAPTER 1
THE JUSTICIABILITY DEBATE

The Nature of Social and Economic Rights

Arguments against the judicial enforcement of social and economic rights are traditionally made, as we saw in the Introduction, under two separate (though overlapping) headings: *legitimacy* and *institutional capacity* (or *institutional competence*). I will deal with each of those issues separately in chapters 3 and 4. Before that, however, I must discuss the characteristics of social and economic rights which are supposed to entail the problems of legitimacy and institutional capacity we shall analyse in those later chapters. In this first chapter, thus, I deal with what we might call the “nature” of social and economic rights. That is, what type of right the so-called social and economic rights are. As we shall see, much of the opposition to their justiciability rests on the fact that those rights have what is called a “positive” nature, i.e. they are “positive rights”. We must therefore look carefully into the issue of the nature of social and economic rights. The discussion here is *normative*. That is, I am not concerned with how specific courts have actually dealt with social and economic rights. That is, if they have regarded them as “positive rights” in opposition to “negative” civil and political rights or not. I am rather interested in the moral and conceptual arguments about the nature of rights in general and social and economic rights in

particular. I cite only two cases, therefore, and merely as an illustration of the normative issue discussed.¹⁰

Another related and important issue to the justiciability debate is the *content* of social and economic rights. Many critics claim that they are too *vague* to be justiciable. This discussion will be carried out in chapter 2.

Positive and Negative Rights

According to a well-known classification, rights can be divided into *positive* and *negative*, depending on the type of duty they entail. Some rights, it is said, give rise to duties that involve no more than restraint from action (i.e. an *omission*), and therefore receive the denomination of *negative rights*. Other rights give rise to duties that require others *to act*, i.e. *to do something* for the right holder, being thus called *positive rights*. One of the main implications of the positive/negative rights distinction to the justiciability debate has to do with the issue of resource scarcity. Positive rights, it is claimed, are necessarily dependent on resources, whilst negative rights are not. Charles Fried provided a classic statement of the distinction between positive and negative rights in his famous book *Right and Wrong*:

“A positive right is a claim to something- a share of material goods, or some particular good like the attentions of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment- while a negative right is the right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the right not to be interfered with

¹⁰ As a matter of fact, I engage more thoroughly with case law only in the Appendix, where I discuss some South African and South American cases that deal with social and economic rights.

in forbidden ways, do not appear to have such natural, such inevitable limitations.”¹¹

Opponents of justiciability often claim that social rights fall into the category of positive rights, whilst civil and political rights are merely negative. This is supposed to impose a great hurdle to the judicial enforcement of the former, for a reason which I only mention here but discuss at length in later chapters.¹² Given the positive nature of social rights, their judicial enforcement places the judiciary in a position to tell the political branches *what to do* in areas which are traditionally considered the preserve of the latter: namely, social and economic policy and resource allocation. As I said, those important issues will be discussed in later chapters. Here my concern is with the nature of social and economic rights in the light of the positive/negative classification. Is the positive/negative distinction accurate or helpful?

The distinction is not devoid of intuitive appeal. When we think of violations of civil and political rights, such as freedom of religion or expression, or the right to vote, we imagine the state *interfering* with some of those rights, i.e. preventing, through some kind of coercion, their exercise by individuals. If the state were to comply with its duties, all it had to do would be to stop that interference, that is, *abstain from acting* (a *negative* duty). Now, when we think of infringements of social and economic rights, it is just the opposite. We think of a state failing to provide all its citizens with a certain level of social goods like education, health care, housing etc. Compliance with those duties would therefore require *action* from the state (a *positive* duty).

¹¹ *Right and Wrong*, Harvard University Press, 1978, p. 110.

¹² See Chapters 3 and 4.

These are certainly the stereotypical examples (“textbook examples”) of violations of both types of rights. But are they more than that, that is, do they accurately reflect the real nature of those rights? Or, to put it simply, do civil and political rights entail only negative duties and social rights only positive ones?

It has been exhaustively contented in the literature that this is not the case. All rights, it is claimed, entail positive and negative duties. Take, for instance, a classic example of a negative right: the right to physical security (or *security of the person*), a right that has been recognised in a number of international human rights treaties (International Covenant on Civil and Political Rights, art. 9, European Convention on Human Rights, art. 5, American Convention on Human Rights, art. 7) and in most, if not all, domestic legal systems, as a fundamental human right. That others refrain from harming us is certainly one of the duties this right must entail. But is it the only one? Imagine, for instance, that some individuals in our community are not prepared voluntarily to comply with that duty (as it is bound to be the case in any community). Suppose that, given the chance, they will harm others in order to take their property or for any other reason one might think of (e.g. out of pure pleasure, because, say, others support a different football team than theirs). So, does the right to physical security not also entail *positive duties* aimed at preventing people from harming others? It seems difficult to argue otherwise. What else, if not the right of individuals to physical security would justify the existence of the criminal system, i.e. the criminal courts, the police etc?

The purpose of the right to physical security is to protect people against unjustified attacks to their physical integrity.¹³ This protection

¹³ Someone might claim that what justifies the existence of the criminal system is the “public interest” in having a safe community, where trade and other activities can be carried out

can be achieved in different ways. Most people will respect others' physical integrity most of the time, out of a mere sense of duty. Others, however, will do it only out of a fear of the sanctions attached to the infringement of that duty. Others still will never do it. Now, if the world was made up exclusively of the first type of people, then the negative duty of non-interference might perhaps be coherently argued to be the only duty arising out of the right to physical security.¹⁴ But given that this is unfortunately not the case¹⁵, any community that takes physical integrity seriously needs to set up preventive mechanisms so as to reduce the instances in which people will attack others. As properly put by Mill, to have a right is "*to have something which society ought to defend me in the possession of.*"¹⁶

Now, whatever preventive mechanisms are chosen they will certainly involve the implementation of *positive* measures by the community, which shows that the right to physical security does entail *positive* duties as well. The most common way of doing this is by threatening to punish whoever breaches that duty or tries to do so (i.e. through deterrence), which involves at least the establishment of a criminal system with courts and police I have just mentioned.¹⁷

without encumbrance etc. I would not deny that this is certainly a positive consequence of an efficient criminal system, and also one of the reasons for its existence. It seems to me, however, that the individuals' right to bodily integrity is surely also a reason, if not the strongest, for having a criminal system in place.

¹⁴ I say perhaps here because even those people might exceptionally breach that duty, and then what I explain in the text would also apply.

¹⁵ See Henry Shue, (1996), *Basic Rights Subsistence, Affluence and US Foreign Policy*, Princeton University Press, 2nd ed.(Hereinafter "Basic Rights"), at 162, quoting Thomas W. Pogge, "How should human rights be conceived?", *Jahrbuch fur Recht und Ethick*, 3 (1995), pp 103-120.

¹⁶ See Utilitarianism, chapter V, p. 309, in *Utilitarianism*, edited by Mary Warnock, Fontana Press, 1962.

¹⁷ It should not be forgotten that the best deterrents against violence are probably education and equality, which underlies the thesis of the indivisibility of human rights. See Pogge, *op cit*, 115, and Shue, 163. Here I just want to make the point that civil and political rights also entail positive duties.

The same argument, as it should be clear, applies to all other civil and political rights. The values protected by those rights (e.g. freedom of expression, freedom of religion etc) are under constant threat of attack by individuals and groups. It would be totally inconsistent, thus, to recognise those rights yet not the positive duties on which the real protection of their underlying values are strongly dependent.¹⁸

Let us briefly see now the other side of the question, i.e. that social and economic rights entail not only positive duties, but also *negative* ones. Take the right to food. According to the negative/positive dichotomy this is a purely positive right, and that is indeed how we usually think of it. We imagine people starving and think of the community, or the state, as bearing a duty to *provide* food to them, i.e. a *positive* duty. Yet this is not necessarily the only way in which the interest underlying the right to food should, or could be protected. Imagine, for instance, that someone is currently able to provide himself and his family with sufficient food, through practising subsistence agriculture in his own small piece of land. Imagine, now, just for the sake of the argument, that the political authorities of his community decide to pass a piece of legislation or regulation forbidding people from using their land for anything else other than leisure. Now, irrespective of any arguments he might raise based on his right to property, could he not also claim that such a decision violates his right to food? If there is a right to food, thus, it must generate not only positive duties on others to provide food, but also *negative* ones protecting those able to provide

¹⁸ Henry Shue is acknowledged as being the first to make this now run of the mill claim in the context of human rights. See his "Rights in the Light of Duties", in Brown and Maclean (1979), and Basic Rights, chapter 2 and afterword p. 155 see also Jeremy Waldron, *Liberal Rights*, p 25: "Each right is best thought of not as correlative to one particular duty (which might then be classified as a duty of omission or as a positive duty of action or assistance), but as generating successive waves of duty, some of them duties of omission, some of them duties of commission, some of them too complicated to fit easily under either heading." See also Pogge, *op. cit.* pp 103-120.

food for themselves not to be interfered with in that endeavour. The principle, thus, is the same we mentioned above. There is nothing inherent in the nature of certain rights that make them purely negative or positive. The point of rights is to enable their holders to fully enjoy certain important interests.¹⁹ In order to achieve this, it will often be necessary to impose negative and positive duties on others. There are no purely negative or positive rights.

If this is correct, it is clear that civil and political rights are also dependent on positive public policies and scarce resources, the main obstacles, as we saw, raised against the justiciability of social and economic rights. Let us take again the right to physical security to illustrate this point. If this right generated mere negative duties of non-interference, it might perhaps be claimed that it was costless.²⁰ But an adequate conception of the right to physical security, as I claimed, would entail that it also generates positive duties on the state to prevent people from being harmed in the first place. It would be inconsistent to claim that the interest of physical integrity gives rise to a negative duty of non-interference but not to positive ones aimed at the effective protection of that interest.

Now, compliance with those positive duties is obviously dependent on resources. The example of positive duties I mentioned above which are usually taken as necessary for the effective protection

¹⁹ I should make clear here that, as it will become evident later, I do not hold the so-called interest-based theory of rights. I do not deny, however, that the function of rights is to protect certain important interests.

²⁰ As Fried himself admits, even a pure negative right of non-interference is not costless in the "economist's sense". "By asserting a negative right, one person makes it more expensive to respond to the claim of a positive right of another." *Op cit* at 112-3. Along the examples he cites in his book, we could mention the case of AIDS drugs. The negative element of the right of property of the drug companies makes it infinitely more expensive to patients to get their positive right to health care. It is surprising, thus, how Fried promptly dismisses this element of cost as not challenging to his argument. Since the other element, i.e. direct costs of respecting negative rights is strong enough to refute his position, I don't need to go in more depth into this issue.

of physical integrity (i.e. the establishment and maintenance of a criminal system) certainly requires a significant amount of resources to be properly discharged.²¹ It seems clear, thus, that civil and political rights are also dependent on public policies and scarce resources and therefore are not significantly different, in this respect, from social and economic rights.²²

²¹ A whole book was dedicated by Holmes and Sunstein to prove this point. *The Cost of Rights – Why Liberty Depends on Taxes*, Norton (New York: 1999). The situation in the big cities of Brazil is shockingly supportive of this claim. Greater São Paulo, the world's third largest metropolis with 17 million people, has a homicide rate of 54 per 100.000 inhabitants, which puts it amongst the most dangerous places in the world, behind only other disturbed cities like Cali, in Colombia (91/100.000) and Johannesburg in South Africa (115/100.000). To make the picture clearer, it can be noted that roughly the same amount of people lost their lives through assassination in São Paulo in 1999 as in the Kosovo war. Now, the most important information for our purposes is that both homicide victims and killers have little or no formal schooling. Only 2% of homicide victims and 10% of the killers ever reached high school. Unlike what is popularly believed, in part due to the biased attention of the media, only 5% of São Paulo's homicides happen during a robbery. See "Homicides: Why so many executions in São Paulo's Periphery?", Bruno Paes Manso, in Braudel Papers, number 25, 2000, <http://www.braudel.org.br/paping25c.htm>. This could be explained, in part, by the enormous amount spent on the security of the rich by government (it is well known that the rich areas are better lighted, patrolled, and that efforts and resources in homicide's investigation are proportional to the victim's social and economic status) and by the rich themselves. Some US\$9.5 billion (1,70% of GDP) are being privately spent annually by individuals to protect themselves against their fellow citizens. São Paulo has become the city with more armoured cars in the world. See *The Economist*, August 16th, 2001, p.45. It is interesting to note that on the very same issue where it denounces this "wall of security" that has been built in São Paulo to separate the rich from the poor, *The Economist* brings a special report where it endorses, or at least fails to dispel, the belief that civil and political rights are relatively cheaper to protect, "The Politics of Human Rights", August 16th, 2001. See also Alexy, *op. cit.* pp 440-441.

²² Some people might concede this point and yet claim that social and economic rights are nevertheless much more costly than civil and political rights. See, for instance, *The Economist*, "The Politics of Human Rights", 2001,... Now, even if that was clearly the case, it would be irrelevant to the issue in question, since, once it is proven that civil and political rights are also dependent on resources (no matter how much) the resource distinction collapses. It is rather puzzling, though, how one might determine if such a claim is plausible, let alone accurate. How, for instance, does one calculate how much it costs, say, to respect the right to education in comparison with the right to physical security? Rights are not discrete entities that don't interact, but rather strongly interdependent. It has been plausibly claimed, for instance, that societies with higher levels of education are less violent. Any serious attempt compare the real costs of rights, thus, would have to discount from the costs of the right to education those costs saved in the right to physical security. And so on with the numerous interactions among rights.

The tripartite typology of duties

Once we dispense with the positive/negative rights' classification and accept that all rights generate a multiplicity of duties which can be positive or negative in nature, our concern should be to identify what specific duties a particular right generates. The purpose of a right, as I claimed, is to afford individuals or groups effective enjoyment of certain interests as a matter of priority over other competing interests. What those interests are will depend on the substantive theory held, but once they are defined, they are to receive the kind of protection needed so as they can be effectively enjoyed by the beneficiaries of rights. Now, the way in which we try to guarantee that effective enjoyment is by imposing *duties* on others. Those duties are thus dictated by the interests whose enjoyment they are meant to guarantee. That is, when we need to determine what duties are generated by a certain right, we must ask what kinds of behaviour it is necessary to impose on people so as the interests protected by a right can be effectively enjoyed. Now, given the complexity of the real world, it is rather unlikely that an interest will achieve effective protection by the imposition of only one specific duty, which can then be classified as negative or positive. Rather, it will usually take many different duties to guarantee the effective enjoyment of an interest, and those will certainly be of positive and negative character.

Let me illustrate this point with our now familiar example of the right to physical security. Once this right has been recognised, it will generate duties whose aim is to enable people effectively to enjoy the interests protected by that right. What are those duties, therefore, is whatever it takes to effectively achieve that aim (i.e. enjoyment of physical integrity). Now, as we saw above, this will be hardly achieved

through the mere declaration in the constitution, or the criminal laws of the country, that “no-one shall harm anyone else”, that is, with the mere imposition of negative duties on individuals and the state. Given that some people, including state’s officials, will not comply spontaneously with this negative duty, we must create other duties that make sure that people do comply with that negative duty. Those will necessarily be of a positive character. The right to physical security, therefore, will necessarily generate negative duties of non-interference and positive duties of action.

But the point of this structural conception of rights is not simply to show that rights generate positive and negative duties alike, though this is in itself an important point. It is also, and perhaps more importantly, to clarify the relationship between rights and duties and, as a consequence, help us to identify the duties generated by rights.

The relationship between rights and duties is a means-end one. The end, as we saw, is the guarantee the effective enjoyment of a certain interest protected by a right. Duties are the means employed in the attempt to achieve that end. Now, bearing this in mind helps us to identify what duties specific rights generate, that is, *whatever it takes to enable people effectively to enjoy those rights.*²³ Now, it is obviously impossible to specify in advance and with any detail what those duties are. This will depend on many different factors (economic, social, cultural etc), which are highly variable from community to community. To give just one very simple example, it might be the case that the right to physical security in a certain community requires from the state simply that a single policeman walk around its streets from time to time during the day. In a more violent community, it might be necessary to

maintain a bigger police force, perform more frequent patrols, set up cameras in public places etc. But we can be fairly certain that, in most communities, those duties are likely to be not only of positive and negative character, but also much more complex than the positive/negative distinction leads one to believe.

To make that clearer, new typologies of duties have been proposed. Instead of the simple negative/positive distinction, they usually divide duties into more specific categories according to the content of the duty. One of the most popular such typologies was presented by Henry Shue, who has developed one of the first and strongest attacks on the positive/negative distinction.²⁴ After rejecting the positive/negative rights distinction with arguments along the same lines I exposed above, Shue recommended a new, tripartite typology of duties. Most duties could be roughly classified, he claimed, in one of three general categories: *duties of respect*, *duties of protection* and *duties of aid*. The first encompassed all those duties which are usually called negative, in that all it takes to comply with them is an omission. Respect is thus used on a purely negative connotation. The last two are duties of a positive nature. Duties of protection require that an individual be protected in the enjoyment of his right against the interference of others. Duties of aid, finally, demand that the person is provided with the object of the right in question. Similar typologies have been presented by other scholars with minor alterations. Asbjorn Eide, for instance, refers to four types of duties: duties to respect, to protect, to fulfil and to promote.²⁵ The German scholar Robert Alexy, whose theory of constitutional rights

²³ See Shue, *Basic Rights*, at 160, claiming that duties are “what it actually takes [i.e. what duties are necessary] to enable people to be secure against the standard, predictable threats to their rights.”

²⁴ See his “Rights in the light of duties” cited above.

²⁵ See “Realization of Social and Economic Rights and the Minimum Core Approach”, *Human Rights Law Journal*, vol. 10, n. 1-2, 1989, pp 35-51.

is highly influential in the Civil Law world, speaks of defence rights, protection rights, and rights to a service.²⁶

These typologies might be quite helpful in the handling of human rights issues. Yet one should be careful not to overestimate their importance. As Shue himself was eager to emphasise in the second edition of his famous book, “*the very simple tripartite typology of duties was not supposed to become a new frozen abstraction to occupy the same rigid conceptual space previously held by “negative rights” and “positive rights”*”.²⁷ As I have already said, its point is simply to make clear how complex the duties generated by human rights are likely to be, and provide us with a structural framework with which to pursue the more fundamental task of identifying the substantive content of those duties. This important job, therefore, is helped, but not finished by the typology.

Shue’s concern with this potential misuse of his theory is not without reason. One should never underestimate the propensity of lawyers to embrace neat dogmatic classifications as if they were the first and last word to be said on a subject. It is hardly surprising, thus, that after Shue’s influential work, it became difficult to come across an argument in favour of social and economic rights that doesn’t repeat his classification or a similar variant. What is rather rare to find are efforts to justify the specific content of the duties generated by social rights. I will deal with this point more thoroughly in the next chapter. Now I must turn my attention to some arguments that might be raised in favour of the negative/positive classification.

²⁶ See *A Theory of Constitutional Rights*, Oxford University Press, 2003.

²⁷ *Op. cit.*, at 160.

Some contend that the argument just presented, i.e. that all rights entail both negative and positive duties, is maintainable only through an artificial and misleading amalgamation of what are in fact separate rights. So, for instance, when one claims that the right to physical security entails not only a negative duty of non-interference but also positive duties of protection, one is mistaking the right to physical security for what are actually two, or possibly more different rights. The right to physical security, it is said, is just a right not to be harmed, i.e. a purely negative right that generates a purely negative duty. The duty of protection is generated by another separate right, e.g. the right to be protected against attacks, which is a purely positive right. And the same allegedly holds to every other right.

Now, this might appear to be an academic conceptual point on how adequately to describe the same situation. The important thing, one could claim, is that physical integrity be effectively enjoyed by individuals, and this is achieved by the positive and negative duties mentioned above. It shouldn't matter much if we consider that those duties are generated by a single, more general right to physical security, or by two or more separate specific rights. Classifications and distinctions are not valuable in themselves, but rather valuable insofar as they bring some light into the subject of our analysis.²⁸

But some who maintain the positive/negative rights dichotomy do claim that there are practical relevant differences between both approaches.²⁹ Charles Fried, for instance, claims that the sharp

²⁸ As often pointed out by Professor Fabio Konder Comparato, from the University of Sao Paulo Law School, there are only two types of classifications in Law, the useful and the useless.

²⁹ This is not the case of Cecile Fabre, *Social Rights under the Constitution*, Oxford, 2000, whose defence of the distinction seems to me based on purely academic conceptual issues. She argues, for instance, that Shue's theory does not "explain why we cannot argue [as she does] that we can make two demands [in the case of the right of physical security], each encapsulated by a different right: a demand that we not be assaulted, encapsulated by a

distinction between negative and positive rights is essential for the following reason. It helps us to discriminate properly between different kinds of wrongdoing, which in turn enables us to adequately attribute responsibility for the commission of different wrongs. Now, if this were correct, it would certainly provide a strong argument for the usefulness of the sharp distinction between positive and negative rights. This would be the very sort of argument I claimed is needed to justify such classifications. Let us consider, then, Fried's argument in more detail.

He takes again the right to physical security to illustrate the point. To claim that this right is not a purely negative right, he says, is to ignore the "*distinction between what is done to a person and what is allowed to happen*".³⁰ When someone is attacked by an assailant, for instance, it is absolutely correct to say that he or she violated the right to physical security. It would be wrong to claim, however, that *the state* also violated this right for failing to provide the victim with police protection. According to him, the state might well have violated a separate, positive right to receive protection, but "*it does not violate the right to bodily security. It is not the government which commits the assault. That right is violated by the assailant himself.*"³¹

The importance of keeping those two rights separate, thus, seems to be the need to distinguish clearly between the *wrong* done in each case. Whereas the assailant has himself *done harm* to the victim, the state has *allowed it to happen* by failing to protect her. Two very different kinds of wrongdoing, therefore, are in question. Now, the

negative right not to be assaulted, and a demand that we be protected against assaults, encapsulated by a positive right that the state take steps to protect us from potential attackers." P. 52 She then concludes that Shue's theory "cannot account for the conceptual possibility of talking of more specific rights" like these, p. 53. The point she seems to miss is that Shue should not, and actually *is* not interested in denying the "conceptual possibility" of separating between two or more different rights. His proposal is substantive, as I try to explain in the text, not merely conceptual.

³⁰ Charles Fried, *Right and Wrong*, p 111.

importance of differentiating between them is in the regime of liability we apply to each case. Many people hold the belief, for instance, that it is usually worse from a moral perspective to cause harm directly through an action than it is to allow it to happen through an omission. But this controversial issue need not concern us here.³² Fried's point is independent of it. His claim is rather that whilst duties dealing with the first type of wrongdoing (i.e. causing harm) can be formulated in categorical terms, those concerning the second (i.e. allowing harm to happen) cannot. Let me explain this. The norm stating that what the assailant in the example did was wrong is usually formulated in the following categorical way: "You shall not intentionally harm!". There needs to be no exception to that norm based on the material impossibility of not complying with it.³³ It is always possible, Fried says, not to harm other people intentionally. But this is not the case in the second type of wrongdoing mentioned above. It is not always possible for the state to prevent harm from occurring, i.e. to protect individuals from being harmed by others. This is because this protection demands resources (i.e. police officers, teachers etc) which are scarce, and might thus not be available in sufficient amounts to effectively protect everyone at all times. The norm stating the duty of the state to protect individuals from being harmed by others, therefore, cannot be categorical like that forbidding people to cause harm intentionally. It has to be formulated along the following lines: "The state shall protect individuals from harm to the extent that it is possible within available

³¹ *Id.*, p. 112.

³² For interesting discussions on this so-called acts/omissions distinction see Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect." In Bonnie Steinbock, ed., *Killing and Letting Die*, pp. 156-165. Englewood Cliffs, NJ: Prentice-Hall, 1980.

³³ There is obviously the exception of self-defence, but it is not based on the material impossibility of not harming, but rather on the moral justification that self-defence provides for breaching the norm.

resources.”³⁴ This will clearly entail different regimes of liability. In the first case, liability emerges in a more straightforward way through the proof of causation and intention, whereas in the second a complex determination of possibility involving resource allocation decisions will be required.³⁵

Now, that we are talking of two different types of wrongdoing, and that each entails a different regime of liability, seems to me absolutely correct. It is not at all clear, however, why we need to distinguish sharply between specific positive and negative *rights* to keep that in focus. This seems to emerge clearly also when one dispenses with the sharp positive/negative rights distinction and regards the right to physical security as a more general right giving rise to different types of duties (i.e. positive and negative). Its negative duties will be often categorical, whereas the positive ones will not. It is far from clear, thus, why to regard these duties as flowing from the same right to physical security fails to capture the distinction between what is done to a person and what it is allowed to happen. We would gain no particular insight, therefore, from breaking the right to physical security down into two more specific rights, some purely positive, and others purely negative. One might well conclude, as a consequence, that this is after all an academic conceptual matter as we had suspected. So long as we can see that the interests protected by rights can only be effectively enjoyed through a combination of different and varied duties applying to different individuals and institutions, it does not matter if we regard them as flowing from the same, more generically formulated right, or from separate rights formulated in more specific terms.

³⁴ We will see later that this is how social and economic rights are usually worded.

³⁵ This is at the heart of social rights justiciability difficulties, as I shall discuss later in the text.

I must say a word or two, however, about why I think we should dispense with the positive/negative rights classification. For one thing, it has been traditionally used not simply to highlight the existence of different types of wrongdoing and regimes of liability, but also, as I pointed out above, as a criterion for distinguishing civil and political rights from social and economic rights. Now, as we saw, this latter claim is inadequate. So, even though it would no doubt be possible to dismiss this claim and still hold the positive/negative rights distinction (maintaining that there are positive and negative social rights and positive and negative civil and political rights³⁶), the strongly rooted misconception that social and economic rights are purely positive and civil and political rights are purely negative recommend, I believe, that we stop using that classification.³⁷

A clear example of this is to be found in the famous case *DeShaney v. Winnebago County Department of Social Services*³⁸, judged by the Supreme Court of the United States. In that case, a 4 year-old boy who maintained life-long brain injuries from his father

³⁶ See, for instance, Cecile Fabre, *op cit*, at 40 ff.

³⁷ A strong defence of this point was made by Henry Shue in his *Basic Rights*. After claiming that “a right provides the rational basis for a justified demand” (at 13), he appropriately adds that “a right has been guaranteed only when arrangements have been made for people with the right to enjoy it.” (at 16). These arrangements are translated into duties, and for a right to be effectively guaranteed, those duties have to be of three different types: duties to avoid depriving; duties to protect from deprivation, and duties to aid the deprived. (at 52) For Shue, thus, “It is duties, not rights, that can be divided among avoidance and aid, and protection.” (at 53), and since the guarantee of a right depends on the co-existence of these three types of duties, there makes no sense to talk of pure negative or pure positive rights. Now, as I said in the main text, there are no set criteria for describing rights. One could even claim, thus, that a better description would separate each right corresponding to each of those duties and call them rights to non-interference, rights to protection and rights to aid. Whether we describe a right more generally, encompassing all three elements, or more specifically, separating them, is not the most important question. What really matters is how we allocate their importance. I agree with Shue, as it is obvious from the text, that his way of describing is more useful, since the specification can be so extreme as to render the concept empty of meaning. Another good reason to separate duties and not rights into these categories is that the right is enjoyed by a single individual, whilst the duties might be ascribed to different people. See also Alexy, *op. cit.* p 429 and 441-2.

³⁸ 109 S. Ct. 998 (1989),

demanded compensation from the State claiming that the local social services failed to protect him. According to the majority of the judges:

"nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." ... "[i]ts purpose was to protect the people from the State, not to ensure that the State protected them from each other." ... "the Due Process Clauses generally confer no affirmative right to [provide] governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."³⁹

It should be clear by now why this interpretation of the Due Process Clause of the American constitution is inadequate.⁴⁰ If there are rights to life, liberty and property, there must be duties on others which effectively guarantee the enjoyment of those interests. This, as we saw, will certainly not be achieved by negative duties of non-interference alone. It is inconsistent, thus, to restrict to that type the duties generated by those rights. To claim the contrary, as I tried to show above, would mean to say that there is no duty on the State to maintain a police force, a judicial criminal system etc. If those institutions are not there in order to protect individuals' rights to life, liberty and property, then they might well be legitimately scrapped by a political decision of Parliament. I doubt anyone apart from true anarchists, not even the most radical libertarians, would want to concede that point.

This seems to show, I believe, the advantage of dispensing with the positive/negative rights classification. Whenever rights are at issue, the important thing is to look at what it takes to guarantee the effective

³⁹ *id.*, at 1003.

⁴⁰ See, for a good discussion of this point, Dinah L. Shelton, "Private Violence, Public Wrongs, and the Responsibility of States", *1 Fordham International Law Journal* (1989/1990), at 27-8.

enjoyment of the interests in question. If we break down rights into their specific components so that they can fit neatly into the positive/negative divide, we run the risk of losing sight of the broad picture, as seems to have been the case with the American Supreme Court in *De Shaney* and other cases.

A good example of the benefits of taking the approach I am recommending here can be found in the Inter-American system of human rights' protection. In its very first article, the American Convention on Human Rights helpfully spells out the duties of States Parties in relation to the rights recognised in the Convention:

“Article 1(1) - The States Parties to this Convention undertake *to respect* the rights and freedoms recognized herein and *to ensure* to all persons subject to their jurisdiction *the free and full exercise of those rights* and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”
(my emphasis)

This article makes clear that the rights recognised in the American Convention (which are basically the civil and political rights recognised in the American Constitution) impose on the State not only negative duties (“to respect” those rights) but also positive ones (“*to ensure the free and full exercise of those rights*”). There is no scope, thus, for an interpretation of the right to physical security (or any other right for that matter) as being a purely negative right, such as was the case in *De Shaney*. All rights recognised in the Convention, the right to life, liberty, security etc generate multiple and different duties, negative and positive in nature.

This has been repeatedly affirmed since the classic case

Velasquez Rodrigues, brought to the Inter-American Court of Human Rights against Honduras.⁴¹ It concerned the disappearance of a Honduran citizen, Mr. Velasquez Rodrigues. There was no definite proof that he had been abducted and killed by agents of the Honduran army for political reasons, as it was strongly suspected. Even so, however, the Court decided that the Honduran state had violated the rights established in articles 7 (right to personal liberty), 5 (right to personal integrity) and 4 (right to life). This was because the duties of the Honduran state entailed by those rights are not only negative duties of non-interference, but also positive duties of protection and promotion.⁴² As the Court clearly stated:

“An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”⁴³

As it became clear during the court proceedings, the Honduran state had not made any serious efforts to investigate the disappearance, find and punish the culprits. That, for the court, was a breach of its duties to ensure the free and full enjoyment of physical security, life and liberty by its citizens.

Now, as I said above, it would be perfectly possible to describe the situation in *Velasquez Rodriguez* in the vein proposed by Fried. The Inter-American Court could well have divided his rights into specific

⁴¹ Series C No. 4. I/A Court H.R., *Velasquez Rodriguez Case*. Judgment of July 29.

⁴² These positive duties are what Alexy calls the positive protection of liberty, *op. cit.* p 226. But he maintains that the duty to protect can be assimilated by the duty to respect seeing the state as a co-responsible if he doesn't protect. at 442-3.

⁴³ *Id.*, at 172.

rights, purely positive or negative: a purely negative right to physical security, held against other individuals and the State, and purely positive rights against the State to ensure his physical integrity, e.g. a right to police protection, a right to a criminal system that investigates murders seriously etc, and still reach the same result. But we have to be wary of interpretations like that of the American Supreme Court in *De Shaney*,⁴⁴ and those seem to be more easily arrived at when the positive/negative rights classification is adopted.

Justiciability Revisited

I tried to demonstrate that the traditional contention that social and economic rights are positive whilst civil and political rights are negative is flawed. All rights, as has been convincingly maintained by many authors for a long time, generate positive and negative duties, which can be helpfully classified, following Shue and others, into three different categories: *duties of respect* (which are negative), and *duties of protection* and *duties of promotion* (which are positive). There is no significant difference in nature, therefore, between civil and political rights and social and economic rights, unlike what is usually claimed by those opposed to justiciability. The features claimed to represent obstacles to justiciability (i.e. dependence on positive state measures and resource dependence) are actually shared by both categories of rights.

But this is not a definitive argument for the justiciability of social rights, contrary to what has been so often assumed in the debate. It simply shows that there is an inconsistency in the argument of those who oppose the judicial enforcement of the latter and not of the former based

⁴⁴ See Alexy, *op. cit.* at 446.

on characteristics which, we saw, are shared by both of them. What needs to be shown, however, is that those aspects are not obstacles to justiciability, not simply that they are also present in civil and political rights. Overlooking this point has been the greatest flaw, I believe, in the argument of those in favour of social rights' justiciability. They focused too much on rebutting the fallacy of the positive/negative rights distinction as if this was the only obstacle to be overcome. The strategy was understandable. Given that the main arguments against justiciability have been traditionally grounded on the "positive" nature of social and economic rights, and that no objections are usually raised against the judicial enforcement of civil and political rights, it seemed enough to show that those rights are not different in this "positive nature".

It would be surely relevant, though not decisive, if it were the case that those positive aspects had not traditionally been obstacles for courts to enforce civil and political rights as well. Then the inconsistency mentioned above would be found not only in academic argument, but also in the practice of courts, which would represent an unfair discrimination between victims of social rights and civil rights violations. Moreover, it might also show that it is not necessarily unfeasible to adjudicate those "positive" elements of rights. But is it the case that courts implement the positive duties generated by civil and political rights as a matter of routine?

I do not think so. It is very rare, for instance, for a plaintiff to claim that his right to physical integrity has been violated through the omission of the state to provide him with protection, or to create the conditions for him to enjoy that right. It is much more common for a plaintiff to go to court against the state when he has been directly harmed by a state's official, i.e. when the state fails to comply with its negative duty of non-interference. This does not mean, of course, that

plaintiffs should not bring such claims to courts, or that courts should not enforce positive duties generated by civil and political rights. It does show, however, that we cannot avail ourselves of the argument we are now considering, that is, that courts have been enforcing positive duties related to civil and political rights as a matter of routine and should not, as a consequence, refrain in principle to do the same as regards social and economic rights.

That seems to show, I believe, the need to consider with more attention the arguments from legitimacy and institutional capacity usually raised against the judicial enforcement of social rights. It was certainly important to lay bare how inconsistent it is to simply reject that those rights are justiciable whilst maintaining that civil and political rights are not, based solely on the “positive” nature of the former. But too much reliance has been placed on the mistaken assumption that civil and political rights are (or should be) themselves justiciable in all their aspects (i.e. positive and negative duties). This is certainly not observable in practice. Moreover, one might well admit that both types of rights are not relevantly different and claim consistently that *neither* should be justiciable when positive duties are involved. To put it another way, one might claim that only negative duties generated by both types of rights should be justiciable.

It is this kind of argument that those in favour of social rights’ justiciability seem to have overlooked. I shall take it up in chapters 3 and 4. But first I must turn to another issue which is fundamental for the debate on justiciability, namely, the content of social rights.

CHAPTER 2

WHAT ARE SOCIAL RIGHTS?

In the previous chapter I discussed the *nature* of social and economic rights. I rejected the contention that social rights are positive whereas civil and political rights are negative, and maintained that all rights give rise to multiple duties that are usually positive and negative in character. I also analysed popular typologies that divide the duties generated by human rights into at least three different generic kinds: duties of respect, duties of protection and duties of promotion or fulfilment. I have not yet discussed, however, another important issue to the question of justiciability, namely the precise *content* of social and economic rights. What exactly is the content of the rights to health care, education, housing etc, that is, what level of those goods should be respected, protected and promoted by others and the state? In this chapter, I try to shed some light on this question by analysing different possible approaches in the definition of the content of social and economic rights.

Social Rights in the Constitution

Constitutional provisions on social rights are usually drafted in very abstract terms. They recognise rights to health care, education, housing, food etc without much specification of what those rights precisely entail. They do not specify, that is, what level or standard of those goods individuals are actually entitled to. There are of course good reasons of constitutional law technique (which we don't have to discuss here) why this is so. What concerns us here is how to determine what those provisions require in concrete cases.

To guide our discussion in this chapter I will use examples related

to the right to health care in two countries that have recognised such right in a similar manner in their constitutions as a fundamental right of their citizens: South Africa and Brazil.⁴⁵ Now, if we accept the argument put forward in the previous chapter, this right entails all those duties which are necessary to guarantee its effective enjoyment by the citizens of those countries⁴⁶, and those duties are likely to be of at least three different kinds: duties of respect, of protection and of promotion. But what exactly are those duties? Does it entail, for instance, a duty on the South African state to provide renal dialysis in the public health system for everybody who cannot afford it?⁴⁷ Does it entail a duty on the Brazilian state to provide free AIDS drugs for everyone infected with HIV?⁴⁸ The answers to those questions are obviously dependent on what is the *content* of those rights.

Let us analyse, then, different theories (or conceptions) that might be followed in the determination of the content of social rights.

⁴⁵ The Constitution of South Africa recognises the right to health care in section 27:

“S 27. Health care, food, water and social security

(1) Everyone has the right to have access to –

(a) health care services, including reproductive health care;

(...)

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.” The Constitution of Brazil recognises the right to health care in articles 6 and 196: “Art. 6 – Education, health, work, housing, leisure, safety, social security, protection of motherhood and childhood, assistance to the destitute, are social rights in the form of this Constitution.” “ Art. 196 – Health is a right of everyone and a duty of the State, guaranteed by social and economic policies aimed at reducing the risk of illnesses and other hazards and at universal and equal access to the actions and services for its promotion, protection and recovery.”

⁴⁶ It might be worth clarifying now a point which will become clear in the text below: when I say that a social right entails *all those duties* necessary to guarantee its effective enjoyment I do not incur in the error of imposing on the state duties it might not be able to discharge due to lack of resources. As it will become clear when I defend the distributive conception of social rights, rights are themselves determined in light of the resources available in society and, therefore, do not ever give rise to impossible duties.

⁴⁷ This was the issue, of course, in the famous case of Soobramoney, which I discuss in detail in later chapters.

⁴⁸ This was the issue on a number of cases judged by the Brazilian Courts which I discuss in the Appendix.

The Traditional Conception: Social Rights as Basic Needs

The most common approach to the definition of social rights draws on the idea of *basic needs*. Everyone, it is claimed, is entitled to an “adequate standard of living”, and that is usually defined in terms of basic needs satisfaction. This conception has been clearly adopted, for instance, in the International Covenant on Economic, Social and Cultural Rights, whose articles 11 and 12 are worth quoting:

“Article 11. 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

“Article 12. 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

Now, the notion of basic needs, or even needs alone, is by no means uncontroversial. Some claim, for instance, that it is impossible to distinguish needs from preferences or desires.⁴⁹ But I don’t intend to go into this debate here. For my purposes, it is enough for us to use the intuitive idea that there are some things which are essential, or basic, in the following way. If we don’t possess them in a certain quantity or form, we cannot pursue any of our goals in life.⁵⁰ Or, to follow David Braybrooke’s formulation: basic needs are things that are “*essential to*

⁴⁹ For this discussion see David Baybrooke, *Meeting Needs*, (1987).

⁵⁰ For a well-known and influential defence of restricted rights to basic needs see Henry Shue, *Basic Rights*.

living or to functioning normally". (p. 31)

The concept of normality is also not free of difficulties. Yet, however one interprets this generic formulation, one is bound to include in a list of basic needs things such as nutrition, health, education etc. That is, those things that social and economic rights are meant to protect. Social and economic rights, therefore, are seen as a means of guaranteeing to everyone the satisfaction of those needs which are essential for people to have an adequate standard of living, that is, to live and function normally. Now, there are surely many difficult issues involved in those statements that merit further discussion. For now we shall concentrate on the following problem, which is the main topic of this chapter. What level of food, health care, education everyone should possess so as their basic needs to nutrition, health and education can be considered satisfied?⁵¹ In other words, what is the content of the social rights to food, health care, education etc?

As it is apparent, the answers to those questions are extremely difficult. It might be fairly simple for a nutritionist, for instance, to determine how much food a person needs in order to be kept alive. But how much food is necessary for a person to "function normally"? As to education, the problem is even more complex. It seems clear that an adequate standard of living in our modern societies requires at least the capacity to read and write, but how much more than that it requires? In a recent American case dealing with the right of education the judge tried to define adequate education as that enabling a person to read, write, and possess mathematical skills to the necessary level to participate in the

⁵¹ Note here that there is a distinction between basic needs (nutrition, health, education) and forms of provision (food, health care, education). See Braybook, *op. cit.*, at 197 and David Copp, "The right to an adequate standard of living: Justice, Autonomy, and the Basic Needs", *Ethical Investigations, Rights and Duties, vol 5 (Welfare Rights and Duties of Charity)*, Carl Wellman (ed). at 251.

political life of the community.⁵² Now, does this include a university degree?

A clear difficulty for the basic needs approach, thus, is this complexity involved in the specification of the concept of an “adequate standard of living”. But we should not make too much of this hurdle. As it is often pointed out, our laws are ripe with concepts like this, whose precise specification is difficult and controversial, especially in the field of human rights. To stay in this field, it is by no means uncontroversial, for instance, what exactly the right to freedom of expression entail in every context. To cite just the most common examples, does it entitle an individual to practice hate speech, that is, speech which is highly offensive to a particular race or particular group? Should it protect the individual who burns his own country’s flag? But also in more traditional fields of law imprecision is not a fatal problem. Think, for instance, of the field of negligence and the concept of *reasonableness*. What the “reasonable man” would have done in the place of the defendant is often highly debatable and controversial. The controversy (or imprecision) of the concept of an “adequate standard of living” is not, thus, a fatal problem to the basic needs conception.

But we must consider another, more important problem faced by the basic needs conception of social rights. Suppose we have somehow reached a fairly precise specification of what an adequate standard of living requires in terms of nutrition, health care, education, housing etc. Given that those goods are dependent on resources, for everyone in a

⁵² SUPREME COURT : STATE OF NEW YORK COUNTY OF NEW YORK : I.A.S. PART 25 X CAMPAIGN FOR FISCAL EQUITY, et al. : Index No.:111070/93 “The Supreme Court has long recognized that public education is meant to assist students to become “self-reliant and self-sufficient participants in society.” (*Wisconsin v Yoder*, 406 US 205, 221 [1971].) Most state courts that have examined the substantive right to education under the education clauses of their constitutions have recognized both civic participation and preparation for employment as the basic purposes of public education.”

certain community to be able to have their basic needs satisfied two conditions must obtain. Firstly, total resources in that community must be sufficient to fund basic needs to everyone (by total resources I mean the sum of resources held in a given community by all members, individually and collectively). Secondly, and perhaps most importantly, the *distribution* of total resources must be such that every person has enough to satisfy his or her basic needs. We must consider, then, two different scenarios that pose complex problems for the basic needs conception. In the first one, a community's total resources are not sufficient to guarantee social rights to all its citizens. In the second, a community's total resources *are* sufficient to guarantee social rights to everyone but are distributed in a way among its citizens so as some are able to satisfy basic needs (and more) whilst others are not.

We have here the well-known problem of resource allocation, traditionally raised in discussions about social and economic rights. If social rights are entitlements to an adequate standard of living, that is, for individuals to be able to have their basic needs satisfied, then it is possible, and rather likely, that some countries will not have enough resources to guarantee social rights to everyone, and others, despite having them, will not guarantee those rights to everyone due to an unequal resource distribution. That raises three different issues to the basic needs conception: a conceptual, a practical, and a normative one. The conceptual problem is this. It seems odd to say that someone has a right to something which is impossible to guarantee fully due to the circumstances of the real world. Rights generate duties, and those have to be capable of being fulfilled by the duty-holders. There cannot be duties, that is, to do that which is impossible ("ought implies can"). So, whenever it is impossible to guarantee basic needs due to scarcity of resources, the basic needs conception entails the odd situation of having

recognised rights which, in some situations (i.e. countries without enough resources) will not generate corresponding duties on States and others to guarantee them fully and immediately. Proponents of the basic needs approach have attempted to deal with this conceptual problem by claiming that social and economic rights are “progressive rights”, i.e. rights to be realised *progressively*, not *immediately*.⁵³

I will maintain below why this concept of “progressive rights” or “progressive realisation” is inadequate. But let us just accept it, for now, and move on to the practical problem I mentioned. How are we to distribute available resources when they are insufficient to fully guarantee everyone’s social rights to an adequate standard of living? That is, under a situation of resource insufficiency, what does “progressive realisation” entail in terms of duties?

The most common answer here is that we should apply principles of *priority* and *equality* to solve the problem. That is, we should allocate resources first to what is more urgent and then go up the urgency scale as long as we can provide everyone with the same level of provisions of basic needs. So, to take education as an example, resources should be concentrated first on primary education until everyone has access to it. Only once this is achieved we can start to provide secondary education and so on up the scale of priority.⁵⁴

Now, there are clear difficulties in defining priorities, especially when we look at the broader picture. Our allocative decisions will not be confined, of course, to one single field as in the example just mentioned. That is, we will have to decide not simply if primary education should have priority over secondary education, but rather how to distribute our

⁵³ This same claim is often grounded on the assertion that no right is absolute. As I argue below in the text, this is a conceptual matter which is not the most important here. The relevant point is how do you determine what the extent of a relative right is in a given case?

⁵⁴ For this kind of argument see Cecile Fabre, *op. cit.*

resources among all areas of needs (education, health, housing etc). Yet again, though certainly an utterly complex problem, we should not overestimate its magnitude. It should not be impossible to establish a rough scale of priorities within and among all areas of basic needs that could be used to determine the order of progressive realisation in situations of insufficient resources.⁵⁵

But the real problem for the basic needs conception posed by resource allocation is *normative*: *why should basic needs receive total priority over society's resources?*⁵⁶ This question has been rarely tackled in the literature, and is especially rare amongst human rights legal scholars.⁵⁷ Most people seem to rely on the strong intuition that a decent society should make sure that all its citizens are able to satisfy at least basic needs. Most of us are deeply disturbed to know that some people don't have enough means to satisfy their basic needs (however one defines it). It is an easy step, thus, to move on to a claim that everyone should have a *right* guaranteeing an "adequate standard of living". It seems also rather natural to interpret social rights provisions as guaranteeing precisely that. The resource issues highlighted in our two scenarios, however, raise questions that impose a re-appraisal of those strong intuitions. I must explain that now in further detail.

As we saw above, the basic needs conception of social rights

⁵⁵ Most of the recent work of the UN Committee on Economic, Social and Cultural Rights has been in this direction. Yet they attempt only to establish a scale of priority within each social right, not among them, through what they call minimum core. I discuss this in detail in Chapter 6.

⁵⁶ Missing this important point has diverted the debate from the real important question of distributive justice. Indeed, given the predominance of the basic needs approach, it became simple for opponents of social rights on moral grounds to disguise their objection as a practical issue of possibility. On this point, see Shue, *Basic Rights*, at 109-110. A classic opponent who uses this strategy is Maurice Cranston, *op. cit.*

⁵⁷ In the moral and political philosophy there have been attempts to justify rights to basic needs on various grounds, as I shall discuss below in the text.

requires that a community guarantees the satisfaction of the basic needs of its citizens as a matter of absolute priority. This is a corollary of the recognition of basic needs' satisfaction as a *right*. Indeed, the most important formal implication of rights (whatever material conception one follows) is that they establish priorities over other goals individuals or a society might wish to pursue.⁵⁸ Given that basic needs' satisfaction is dependent on resources, as we have been discussing, it follows from the basic needs approach to social rights that a society should allocate its available resources to basic needs' satisfaction and other rights as the absolute priority. We must test, then, the adequacy of this main implication of the basic needs conception of social rights. Is it morally justified that basic needs' satisfaction receives such a strong priority? In other words, should a society be constrained to allocate its resources having basic needs as an absolute priority? At first sight, it might appear that the answer to those questions is clearly yes, and thus the strong intuitive appeal of the basic needs conception. We are often outraged when we hear that governments of poor countries spend lots of resources in military equipment, sumptuous buildings, expensive marketing campaigns etc whilst part, or most of the population haven't got decent housing, health care, food etc. Let us reflect more deeply, though, on our intuitions, to see if they stand unchanged. Our two examples are meant to help us in this task.

In our first scenario (resource insufficiency), the basic needs conception would necessarily demand the following: until everyone's basic needs are satisfied, no one can have more resources than anyone else and no other common goals of society can be furthered with the

⁵⁸ This is often portrayed by the phrase "rights as trumps", made famous by Ronald Dworkin. See, among other works, *Taking Rights Seriously*, London, 1977 and "Rights as Trumps", in Waldron J., *Theories of Rights*, Oxford, 1984. See also, specifically on needs-based rights,

available resources of the community. Given the priority established by rights, all resources of society have to be first directed at the guarantee of social rights to basic needs' satisfaction. The community cannot invest in, say, arts, culture, environmental projects and other goals aiming at the improvement of the common good until everyone has achieved the threshold of basic needs satisfaction.⁵⁹ Moreover, no one should be able to satisfy more needs than anyone else until everyone has achieved that threshold. Only when everyone in that community is able to satisfy basic needs it can allow any investment on collective goals, or any of its citizens to go above others in basic needs' satisfaction.⁶⁰

Take now our second scenario, where resources are sufficient for everyone to satisfy basic needs but the distribution of resources among them leaves some above the threshold of basic needs satisfaction and others below. Here the basic needs conception would demand that resources be transferred from the better-off to the worst-off until everyone is capable of satisfying basic needs. Indeed, as clearly stated by one of its proponents, "*... the better off have a duty to pay their share until the point is reached that the worst off are enabled to meet their basic needs.*"⁶¹

But are those implications of the basic needs conception defensible? We are surely right in criticising communities that spend resources with things which are clearly superfluous such as sumptuous official buildings, excessive military equipment, luxurious official trips etc whilst most of the population don't have enough to survive. Yet the case is not as clear when the expenditure is done in areas of genuine

Shue, *Basic Rights*, pp 114-118: "the fulfilment of basic rights takes priority over all other activity, including the fulfilment of one's own non-basic rights", at 118.

⁵⁹ Or, for that matter, any other right.

⁶⁰ For the sake of simplicity, I am leaving aside problems like people who have handicaps who might be unable, however much resources they have, to reach the level of basic needs satisfaction. I discuss this in more detail below, in Chapter 6.



public interest. Should we *necessarily* condemn the decision of a community to spend some of its available resources in a project that will make the life of everyone more agreeable (say the construction of a public park in a polluted city without many green areas) when some of its citizens are not able to satisfy other more urgent needs? Is a community to live without arts, a reasonable military capacity, environmental projects and other common interest goods until each and every of its citizens have an adequate standard of nutrition, health, education and housing?

The same questions should be raised about differences in peoples' abilities to satisfy their basic needs. Is there anything *inherently* unjust in the fact that some are better off than others in regard to basic needs satisfaction, or even that some have gone far beyond the capacity to satisfy basic needs whilst others have not reached it?

Now, for the basic needs conception to hold, the answer to those questions should be yes. That is, it should be *necessarily* (or *inherently*) unjust for some to have more than others, or for a community to spend in others things than basic needs, until every individual in that community has reached an "adequate standard of living". By necessarily (or *inherently*) unjust I mean that the *reasons* why some people aren't able to satisfy basic needs are not morally relevant. What matters is simply that some people *are* below the level of basic needs satisfaction, whatever caused that situation.⁶²

But this, I believe, is not tenable. It *is* surely morally relevant *what* made some people unable to satisfy basic needs so as to determine

⁶¹ See Copp, *op. cit.*, at 206.

⁶² See J Waldron, "John Rawls and the Social Minimum", *Journal of Applied Philosophy* 3 (1986), pp. 21-33, making a policy argument for the basic needs: "The least that this requires, then, is the calculation of the minimum level of material well-being required before people are plunged into the despair and impulsion of abject need, and a determination to secure that level

if that situation is unjust. Let me try and illustrate this with a simple example. Imagine two members of the community of our first scenario (where resources are not sufficient to guarantee everyone's basic needs). Let us call them Carlos and Ana.⁶³ Carlos is able to satisfy 50% of his basic needs, whilst Ana can satisfy only 40% (say that Carlos can buy an extra loaf of bread per month than Ana). Now, can we tell, without any further information that it is unjust that Carlos is able to buy an extra loaf of bread than Ana, and should therefore transfer resources to Ana so that both can then satisfy 45% of their basic needs? Does it not matter why this is so, for instance, if Carlos works harder than Ana, or spends his money more prudently etc? I think that most people would think that it does, and that it would be unjust to Carlos, for instance, if he had to transfer resources to Ana earned through harder work, or more prudent spending. My point, thus, is simply that the mere existence of a difference in ability to satisfy basic needs is not a sufficient reason to justify a claim on others or the community for the transfer of resources.

Now, one might argue that my objection works only for cases such as that illustrated by my first imagined scenario, that is, where resources are not sufficient for everyone to be able to have their basic needs satisfied. In those cases, it might be argued, it is obviously better that some, at least, move closer to the basic needs threshold rather than no-one.⁶⁴ It might be claimed that the intuition underlying the basic

as far as possible for every citizen as a first charge on the resources and services of the society.”, at 30-1.

⁶³ I follow here the so-called “micro-model”, or two-person model, since it makes it easier to understand the underlying nature of redistributions. See, on this point, Jonathan Wolff, “Fairness, Respect and the Egalitarian Ethos”, *Philosophy & Public Affairs*, vol. 27, n.o 2 (Spring 1998), pp 97-122, at 99.

⁶⁴ In an article defending the importance of basic needs, for instance, H. Frankfurt states that: “It is a mistake, therefore, to maintain that “*where some people have less than enough, no one should have more than anyone else.*” It is also a mistake to maintain that “*where some people have less than enough, no one should have more than enough*” (italics of the original), “Equality as a Moral Ideal”, *Ethics*, 98 (1987), pp. 21-43, at 31. Derek Parfit made a similar

needs conception is stronger when a society *does have* enough resources to enable everyone to have their basic needs satisfied yet some people fall short of that threshold due to the unequal distribution of those resources.⁶⁵ At least in those cases, it might be said, basic needs should receive absolute priority, since redistribution from the better-off to the worse-off will not prevent the better-off from satisfying any of their basic needs.⁶⁶ But this argument, though it might seem quite appealing at first, turns out to be incoherent. Let us use our imaginary characters again and adapt our example to the second type of scenario. Imagine that our community has developed and that Carlos can now satisfy all his basic needs and still have resources to satisfy some of his *non-basic needs*, that is his *preferences* and *desires*. He has enough to feed, clothe, and house himself adequately, and to look after his basic health care needs, but also to go to the theatre once a month, attend a course to learn a second language and travel abroad once a year to satisfy his non-basic need (or call it preference if you will) to observe and experience different cultures. Ana, however, has got enough resources only to satisfy 80% of her basic needs. Again, we must ask, can we justify transferring resources from Carlos to Ana *without knowing anything about the causes that led both to possess the resources they now do*? I believe, again, that most people would agree that we cannot. Let us assume, again, that Carlos is a very hard working person, and that he spends his earnings very prudently, being able thus to save enough to satisfy those non-basic needs I mentioned. Ana, on the contrary, is rather lazy and, on the top of that, quite imprudent with the little money she

point in his famous "Equality or Priority", in *The Ideal of Equality*, Matthew Clayton and Andrew Williams (eds), Macmillan 2000. PP. 81-125 ("the levelling down objection").

⁶⁵ People are particularly outraged, for instance, with the fact that in some rich societies such as the United States there are still a large number of poor people. See, for instance, "Long queue at drive-in soup kitchen", *The Guardian*, 3.11.2003, on the rising levels of poverty in the richest country on earth.

manages to earn. It would be clearly unfair to impose on Carlos the sacrifice of his non-basic needs so as to enable Ana to satisfy her basic needs.

Let us imagine now, to finish, that in either of the cases just discussed, what explains the inequalities between Carlos and Ana is not differences in hard work and financial prudence. Let us assume, instead, that the reason why Carlos has more than Ana in terms of basic needs satisfaction is simply the fact that he is a *male*. Imagine that both are equally hardworking and financially prudent, but that, in their community, men get much better remuneration than women for the same work and the same level of effort. Now, in this case, most of us would agree that to impose a duty on Carlos to transfer resources to Ana so as to equalise both in resources *would not* be unjust, but rather the contrary.

These examples show a fundamental flaw in the basic needs conception, i.e. its failure to take *causal considerations* into account when dealing with the justice of certain inequalities. Inequalities in the absolute levels of basic needs satisfaction among people, though certainly morally relevant in different ways, are not sufficient, or even decisive, *in themselves*, to ground the imposition of duties on the community and its members to transfer resources to the worse off. The *causes* of those inequalities are fundamental in the assessment of the moral appropriateness of imposing such redistributive duties.⁶⁷

I will come back later to the issue of how the basic needs conception, though theoretically inadequate, has nonetheless got such

⁶⁶ See Shue, *Basic Rights*, p 110.

⁶⁷ The basic needs approach is a form of what in moral philosophy and economic is called “welfarism”. See Amartya Sen, “The right not to be hungry”, *The Right to Food*, P Alston and K Tomasevski (eds), Martinus Nijhoff Publishers “under welfarism a person’s claim to an adequate diet and other means of living is based on the influence that this things have on his welfare level.”, at 77 “No other characteristics of those alternative states should influence our moral judgements.” At 76 But note Sen’s points on the inadequacy of welfarist metrics (utilitarian or not), since unable to distinguish between different sources of welfare deficits.

strong intuitive appeal. For many it might seem the only alternative to Libertarianism.⁶⁸ As we shall see shortly, though, it is not. The conception I will defend, despite sharing with libertarianism of the sort defended by Nozick, sometimes called *right-libertarianism*⁶⁹, the idea that the justice of resource distribution cannot be based *solely* on a “end-state principle” such as differences in the ability to satisfy basic needs⁷⁰, differs strongly from libertarianism in fundamental respects.

To site one major point of difference, Nozick and other libertarians claim that welfare inequalities resulting from differences in peoples’ *natural talents and abilities* are not to be condemned. People are entitled, they claim, to their natural talents and abilities and, as a consequence, to the fruits of those natural assets. Taxing them and transferring resources from them to the less endowed would be therefore unjustified.⁷¹ The distributive justice theory I will defend below claims precisely the opposite, that is, that those differences are *morally arbitrary* and, therefore, justify redistribution of resources from the better to the worse endowed with natural talents and abilities⁷².

Now, I mentioned only a couple of basic, straightforward factors which are usually regarded as morally relevant in our assessments of resource inequalities: hard work, financial prudence and gender discrimination. But situations in the real world are bound to be infinitely

⁶⁸ *Ibid.* at 77.

⁶⁹ It is important to notice that there are many different conceptions of libertarianism, some of which, often called *left-libertarianism*, radically different to the more conventional forms such as the one I briefly discuss in the text. See, for instance, Michael Otsuka's *Libertarianism without Inequality*, Oxford, 2003. For the most influential account of right-libertarianism, see Robert Nozick's classical *Anarchy, State and Utopia*, Blackwell, 1974. For an influential critique, see Thomas Nagel, *Libertarianism without foundations*, *85 Yale Law Journal* 136 (1975).

⁷⁰ *Id.*, at 232.

⁷¹ *Ibid.* chapters 7 and 8, especially from page 213 onwards.

⁷² In fact, in Nozick's theory there is no space for the idea of *equality*, whilst the theory I defend in this thesis, though critical of strict egalitarianism of the welfarist sort, is nonetheless still egalitarian.

more complicated than my examples. In the real world, differences in people's ability to satisfy their basic needs will seldom be explainable (if ever), through such simple factors. Many other issues will often be involved in the explanation of those inequalities, such as individuals' natural abilities to perform certain activities (i.e. their talents), their physical conditions, their social background, the economic conditions of the relevant community etc.

We need some criteria, therefore, to classify the relevance of those factors in our appraisals of inequalities, that is, if they are relevant in the first place, and how relevant they are. Why, for instance, should we accept, to a certain extent at least, inequalities derived from differences in the effort people make as regards work, but not those resulting from other factors such as gender?

This issue has been often debated in the literature of political philosophy. I do not intend to discuss it here in any great detail. For my purposes, it suffices to give a rough account of the main topic of the debate. As I said, once we realise that, despite our initial intuitions, inequalities in basic needs satisfaction are not in themselves a justified ground for resource redistribution duties, and that we must look into the *causes* that generated those inequalities to make an adequate appraisal of their justice, we need criteria to distinguish and evaluate different possible causes. The most debated criterion in the literature was first mentioned by Rawls in *A Theory of Justice* and developed by Dworkin in various articles on the question of equality.⁷³ It is based on the distinction between *choice* and *circumstance*.⁷⁴ Individuals' inequalities

⁷³ See his *Sovereign Virtue*, especially chapters 1 and 2. Dworkin's criterion has been adopted in different versions by different philosophers who are commonly referred to, collectively, as "luck egalitarians". See, for discussions of this topic, Sheffler, "What is egalitarianism?", *Philosophy and Public Affairs* 31, n.1, 2003, pp 5-39. But see Dworkin rejecting the label in "Equality, Luck and Hierarchy", *Philosophy and Public Affairs* 31, n.2, 2003, pp 190-198.

⁷⁴ *Id.*, at 192.

are a result of the *choices* they freely make in their lives, or the *circumstances* they find themselves in (i.e. in the creation of which they have not participated). Now, this is obviously a great oversimplification. States of affairs are usually a result of a complex confluence of factors that involve choices and circumstances, and it is often impossible to determine the exact measure of each in that equation. The theoretical principle, however, is intuitive enough: inequalities caused by the free choices made by individuals in their lives are on the whole morally justified, whereas inequalities derived from circumstances are not. This captures well our basic intuition that individuals should be responsible for the consequences of their free acts (i.e. choices) but not for those which were completely out of their control (i.e. circumstance). Our examples, moreover, confirm the adequacy of the distinction in the field of distributive justice. The reason why we think that it would be unfair to transfer resources from hard working Carlos to lazy Ana in the first two examples is strongly connected to the fact that the differences between them regarding their ability to satisfy needs clearly result from *choices* they were both free to make rather than *circumstances* they did not choose. In our third example, however, where inequality is a result of gender discrimination, and thus not a result of choices, but circumstance, some form of compensation involving the transfer of resources from Carlos to Ana would not be unfair.⁷⁵

The distinction between choice and circumstance can serve as generic criteria, thus, for the evaluation of fundamental causal factors in distributive justice issues in the way I have just mentioned. Inequalities derived from choices are justified to a certain extent, whilst those resulting from mere circumstances are not. This can be applied to all

⁷⁵ The magnitude of that compensation is a matter of debate which I deal with in chapter 7.

other factors beyond those featuring in our examples. Disabilities, for instance, should be generally regarded as circumstances (with the possible exception of self-inflicted disabilities), as should family background, social and economic conditions and all those factors over which the individual has no control. On the other hand, people's free decisions on what profession to follow and how hard to work, life style, spending priorities etc should generally fall within the category of choice. A more difficult and controversial factor to qualify are individuals' talents. Some people have an innate talent to perform tasks which are highly rewarded in economic terms in certain communities. Given that they did not choose those abilities, but just happened to have them, many philosophers tend to qualify those "wealth-talents" under the category of circumstances and thus maintain that part of the higher economic benefits resulting from those talents should be used to compensate those who happen not to possess them. Others, however, point out that talents often demand some measure of effort and hard work to bring economic rewards and should therefore qualify under choice.⁷⁶

As I said above, I do not intend to go into this controversial debate here. There are certainly borderline cases that will be difficult to classify under one of those categories, and reasonable disagreement is bound to happen in many occasions. For my present purposes it suffices to establish that the distinction is morally relevant and should therefore play some role in any adequate principle of distributive justice. Now, the examples I have examined seem to provide us with a clear illustration that the distinction is indeed morally relevant. Our basic intuitions those examples arouse are well captured by the distinction. I want to show

⁷⁶ See Dworkin, *passim*, and Fried, *Distributive Justice*, claiming that talents are like organs and limbs, that is, part of a person. I discuss this in more detail in Chapter 7.

now, to strengthen my case, how those intuitions (and thus the criteria based on the distinction) are connected to some of our most basic moral principles.⁷⁷

Underlying those intuitions I claimed are brought out by the examples I mentioned are two basic principles of morality, which I shall call the principle of *equal value* (or equal importance), and the principle of *autonomy*.⁷⁸ (They are both specific dimensions of what is often generically called, especially in human rights talk, *dignity*). The former insists that everyone's life is equally important and entails, as a consequence, that everyone should be treated with equal concern. The latter states that each individual should be free to make decisions concerning his or her own life.⁷⁹ Its most direct implications are that we should respect those decisions. Both these principles are at play in the criteria I suggested should guide our moral evaluation of inequalities. When we accept some inequality derived from choice and reject inequalities resulting from circumstances, we treat people as autonomous beings whose lives are of equal importance. Indeed, to take our examples again, if we forced Carlos to transfer all his surplus of resources acquired through hard work to Ana, we would be violating

⁷⁷ I loosely follow here the method of moral reasoning that John Rawls called "reflective equilibrium", which recommends that we go from intuitions to general principle and vice-versa as a way of adapting and refining our moral beliefs. See also, on types of moral reasoning, Amartya Sen, 1982, *Equality of What?*, 353-4 He identifies three different ways of evaluating the soundness of moral principles: i. Appealing directly to intuitions; ii. Case-implication critique – taking a few particular cases where the principle applies and checking the results against our intuitions – from the particular to the general; iii. Prior-principle critique – from the general to the more general – checking if the principle is consistent with a more fundamental principle. I am using all those techniques here.

⁷⁸ There is a debate about whether the duty of equal concern applies only to governments or also to individuals. Dworkin seems to maintain the former position, which I conclude from the discussion in the *Colloquium in Legal and Social Philosophy*, at the Centre for Law, Politics and Society, School of Public Policy, University College London, during the years of 2001-2003.

⁷⁹ I am still following Dworkin here, but with some terminological differences. He calls the principle of autonomy the principle of special responsibility. I think that autonomy is a more adequate term to capture the implications of the principle (i.e. responsibility in a wide sense).

both principles just mentioned. To be a fully autonomous person we must bear some responsibility for the positive and negative consequences of the choices we make in our lives. If, whatever choices a person makes, all their consequences, bad and good, are borne collectively by everyone, there is a clear curtailment of autonomy. It would be disrespectful of Carlos and Ana's autonomy, therefore, to make them share equally the consequences of their freely made choices. In the specific case of Ana, it would be paternalistic (i.e. the opposite to autonomy) to relieve her from the bad consequences of her choices. An autonomy-conscious person will actually feel offended if we try to do so. To bear the bad consequences of one's choices is an important dimension of one's autonomy.⁸⁰ One of the reasons why we feel it would be inadequate to impose a transfer of resources from Carlos to Ana, thus, is because it would violate the fundamental principle of autonomy. But it would also be contrary to the principle of equal value. In fact, if we simply equalised Carlos and Ana's resources, we would not be treating them both with equal concern, as popular but misconceived ideas of equality might seem to suggest. Equal concern would be actually harmed if we simply ignored all the sacrifices made by Carlos which led to his higher possession of resources in comparison to Ana. To say that his efforts count for nothing is to deny his life the equal importance it deserves.

The Distributive Conception

I claimed above that the basic needs' conception of social rights is

⁸⁰ This important connection is highlighted by this quite frequent implication of accepting that others bear the bad consequences of our choices: they often claim a role in our future decisions. Think, for instance, of someone writing off some of our debts. They will often feel

inadequate because it might require, at times, transfers of resources among individuals which cannot be morally justified. Those transfers would violate, I maintained, the fundamental principles of equal value and autonomy. This is because a just criterion of resource distribution cannot focus exclusively, as I tried to show, on the outcome of people's conditions (i.e. basic needs' deprivation), disregarding the causal factors which led to that outcome. Not all inequalities in the enjoyment of basic needs are unjust.

Now, if this is correct, we must conclude that there can be no entitlement to the enjoyment of certain, fixed standard of basic needs as maintained in the basic needs' conception, unless we qualify the basic needs conception and incorporate in it what I call a "presumption of injustice" (I will discuss this in greater detail below). Given that basic needs are dependent on resources, and that a just distribution of resources has to take into account people's choices, it follows that different people, who are bound to make different choices in life, will therefore be entitled to different shares of resources and thus be able to satisfy different standards of basic and no-basic needs. If, through their own free choices, individuals end up with a different share of resources that enable them to satisfy different standards of basic needs, there seems to be no justification to force those with the higher share to transfer resources to those with the lower one.

This creates a further complication in the complex issue of defining the content of social rights. Indeed, when we talk of specific social rights to health care, education, food, housing etc, we instinctively think of a certain level of those basic needs as entitlements that individuals could claim against the state. If what I said is correct,

morally entitled (if not legally) to interfere in our future decisions that might have the same bad implications of the one they helped us out with.

however, we must shift the focus from the outcome of resource distribution (i.e. ability to satisfy basic needs) to resource distribution itself. Instead of simply verifying if individuals are able to enjoy a certain standard of basic needs, we must check if resource distribution is just according to the principles of equal value and autonomy. That would entail, contrary to what is popularly thought, that there are no such things as *specific rights* to health care, education, housing etc which are held by everyone without distinction, but rather a *generic right to a just share of society's resources*, which will vary from person to person depending on their choices in life. Popular claims such as “everyone has a right to adequate health care” would have to be displaced by “everyone has a right to a just share of society's resources”, which, for some, will be sufficient to enable them to enjoy adequate health care, but for others won't.

If we want to keep the language of rights to health care, education, housing etc, we must find a way to translate the generic right to a just distribution of society's resources into specific rights to those goods. For many, as we will see later, this is either an impossible enterprise (and thus the usual contention that social rights are too vague) or a political one (and thus the usual claim that social rights are unjusticiable). I will maintain in later chapters that both these claims are mistaken. For now I just want to emphasise that, if there are specific rights to health care, education etc, they are not definable, as maintained in the basic needs' conception, through the idea of needs and independently of causal factors in resource distribution. We cannot know what standard of basic needs an individual is entitled to enjoy as a matter of right, thus, until we identify what share of society's resources he should possess as a matter of justice. It is impossible, therefore, to try and define what social rights are and *then* figure out how to distribute

limited available resources in a way to guarantee as best as we can those rights. If there are specific social rights, they are *determined by* a just distribution of society's resources (i.e. one that respects the fundamental principles of equal value and autonomy), and not *independent* of it, as in the basic needs' conception. I shall call this the "distributive conception" of social rights.

I shall go back now to an issue I mentioned earlier on and must now discuss in greater detail. As I have admitted, the basic-needs conception of social rights has got a strong intuitive appeal to many, which is confirmed by its overwhelming predominance in the literature and judicial practice. It captures well (one might claim) the intuitions of many that there is something wrong in situations where some people cannot satisfy their basic needs whilst others have more, and sometimes a lot more than is necessary to enjoy them.⁸¹ Many of us believe that we have a duty to help the needy person if we can, even when we are *unaware of the causes that brought that situation about*. It is that duty, therefore, that underlies the basic needs conception of social rights.

There would seem to be a conflict, thus, between our intuitions. On one hand, we feel that those in dire need ought to be helped irrespectively of the causes that brought their situation about. On the other hand, when we know, as in the example of Carlos and Ana that I discussed above, that inequalities in the ability to satisfy basic needs resulted exclusively from different choices freely made by individuals, we think it would be unfair to force those who are better off to sacrifice their other needs and preferences so as to "subsidise" the bad choices made by the worse off. I believe, however, that this conflict is apparent,

not real. It emerges from the confusion we often make between two different types of duties related to resource redistribution. We must avoid such confusion, however, because only one of those types of duties correspond to social and economic rights.

Let me try and distinguish these two different types of duties with an example. Imagine that I come across two people who are in dire need, i.e. unable to satisfy their most basic needs. I do not know yet what led those two people to that situation of need. But I have so many available resources that I can easily help them both out of their situation without sacrificing any of my basic and non-basic needs. I believe it would be quite correct, in this situation, to say that I am under a duty to transfer some of my resources to those people. Imagine, now, that I happen to learn the causes of those individuals' deprivation. I know that one of them is in need because, say, being female in my sexist community, she earns much less than I do even though she has the same job as mine. The other one, who is male (and thus hasn't got this obstacle to overcome), is in need because he doesn't like to work. Now, it might still be the case that I am under a duty to transfer some of my resources to both of them. It would be quite wrong, however, to maintain that both situations are morally equivalent, that is, that my duty would be the same in both cases.

It seems clear that, in the latter case, my duty would be based on something like solidarity to a fellow human being in need. It wouldn't matter, therefore, if he got into that situation out of pure laziness. The mere fact that he is suffering and that I can stop that suffering without much sacrifice is a sufficient reason to place me under a duty to help, which we might call a *duty of beneficence, or solidarity*. In the former

⁸¹ See, for instance, in the recent literature on social rights, David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance", (2002) 118 *The South*

case, however, the reason why that person is in dire need (namely gender discrimination) is of fundamental importance. My duty here is not grounded on the mere fact that that person is suffering. Rather, it is grounded on the fact that, if not for the gender discrimination (i.e. an injustice), that person would be earning as much as I am and, as a consequence, would not be in dire need. It is out of *justice*, thus, and not out of solidarity, that I must transfer some of my resources to that person.⁸²

It is important to realise that this difference is not academic. Those duties are not only grounded on different ideas (i.e. *solidarity* and *justice*), but are also clearly different in *scope* and *strength*. In fact, whilst the duty of solidarity emerges whenever we can help someone who is in dire need without much sacrifice of our own needs, the duty of justice appears only when someone has less resources than they should have due to *circumstance* (not *choice*). On the other hand, whilst our duty of solidarity is conditioned on our ability to help without unreasonable sacrifice of our needs (basic and non-basic), the duty of justice is not. As a matter of fact, if someone is in need due to their own free choices, it would not be appropriate to force me to sacrifice some of my needs, even if non-basic, to help them, as I have already tried to show above with the examples of Carlos and Ana. But if the inequality in resources is a result of circumstance, not choice, it is not unfair to

African Law Journal, 484, Cecile Fabre, *op. cit.*

⁸² These twin-reasons can be observed in the 1977 policy statement “Human Rights Policy” of the then US Secretary of State, quoted by Henry Sue in the introduction of his Basic Rights, p. 5. He divides human rights into three different categories: “the right to be free from governmental violation of the integrity of the person”; “the right to the fulfilment of such vital needs as food, shelter, health care, and education”; and “the right to enjoy civil and political liberties”. He then explains that the second type of rights “can be violated by a Government’s action or inaction – for example, through corrupt official processes which divert resources to an elite at the expense of the needy, or through indifference to the plight of the poor.” The former example seems to me clearly based on the principle of distributive justice, since the resources diverted through corruption belonged to the needy. The latter is based on the principle of compassion, or humanity.

force the better off to transfer resources to the worse off.

This explains, I think, that the conflict of intuitions I mentioned above is only apparent. When we claim that there is a duty on the better off to transfer resources to the worse off irrespective of the causes that led to that situation of inequality, the latent idea is that of *solidarity*. But few would go as far as claiming that such duty is unconditional, that is, that the better off should transfer as much resources as it takes to raise the worse off to the basic needs' threshold, even if they have to sacrifice all their non-basic needs. On the other hand, when we claim that there is a duty on the better off to transfer resources to the worse off even if that would entail some sacrifice of their needs (basic or non-basic), the cause of the resource inequality must be some sort of *injustice*. Our intuitions, thus, do not conflict. When we dissect them we see that they apply to different situations.

My argument here follows a distinction between justice and morality in general which has been advocated, among others, by John Stuart Mill. According to this distinction, obligations of justice always correspond with moral rights. But this is not the case with any moral obligation. As it has been put in a well known paper:

“Mill says that obligations of justice in particular, but not all moral obligations, correspond with moral rights. An unjust act is the violation of another's right; but an act can be wrong without being unjust – without violating any person's right. Mill believes that we can act wrongly by failing to be generous or charitable or beneficent, and he treats the corresponding “virtues” as imposing “obligations”; but these do not

correspond with anyone's rights."⁸³

It should be clear, then, that I am not defending that solidarity imposes no moral duty to help others in need when we can do so at little or no cost to our own needs. I am arguing, rather, that this moral duty is not correspondent with a moral right. Justice, on the other hand, does give rise to duties which do correspond to rights.⁸⁴

It does not necessarily entail, however, rights to a minimum level of basic goods, since justice is plainly compatible with inequalities of wealth and basic needs' satisfaction.

Basic Needs as Presumption of Injustice

It should be clear by now that the basic needs conception of social rights, i.e. the claim that everyone has a right to an adequate standard of living measured in terms of basic needs satisfaction cannot stand. Even if we accept the existence of a duty of beneficence, or solidarity as I called it above, this duty wouldn't be strong enough so as to demand that those able to satisfy basic needs transfer all their exceeding resources to those unable to do so until they reach the basic needs threshold. That could be justified only by the idea of justice, but justice, as I have claimed, will be often compatible with inequalities in basic needs, because some of these inequalities at least will often be a result of *choice*, not *circumstance*. The crucial point in the issue of resource distribution, thus, is the identification of the causes that lead people to

⁸³ See Lyons, "Human Rights and the General Welfare", 6 *Philosophy and Public Affairs* 113, (1977), at 123.

⁸⁴ I should also emphasize that I am not claiming that justice is superior to solidarity, or that solidarity is irrelevant when we think of basic needs. They simply work in different dimensions of morality and, as I tried to maintain, only the former is material when we are in

end up with different shares. When they are matters of pure choice, no redistribution is demanded by justice (though it might be, upon conditions, by a duty of solidarity). When they are matters of pure circumstance, redistribution is required.

An obvious difficulty is the identification of the causes that led some people to be deprived of the resources required to satisfy basic needs. It is often hard, if not impossible, to tell if someone's current inability to acquire the resources which are necessary to afford basic needs is a result of his past choices or a matter of circumstance. Moreover, it might well be a mixture of both, and the precise identification of each share is just as difficult. This might lead one to conclude that an *outcome* theory⁸⁵, like the basic needs conception, is the only practical way of implementing redistributive social rights. I believe that this is indeed the only viable option and will discuss it in detail later on. But it is important to notice, first, that to adopt an outcome strategy based on basic needs is not the same as to endorse basic needs as the only morally relevant factor (as in the basic needs conception). Rather, one must use basic needs merely as a palpable device to implement as best as it is possible the intangible ideal of justice. I must explain that in more detail.

As I said, it will often be very difficult, if not impossible, to extract any practical consequence directly from the ideal of distributive justice that I defended above. This is because the information required for that purpose, i.e. that regarding the causes of inequalities in resources

the realm of rights. What makes a situation of lack of basic needs a matter of justice as well as solidarity is the causal connection with choice and circumstance, as I discuss above in the text,

⁸⁵ An *outcome theory* focuses on the *result*, or the *state of affairs*, rather than on the acts and facts that led to that state of affairs. In moral philosophy such theories are often called consequentialist, as opposed to deontological theories.

(choice or/and circumstance) will be rarely available.⁸⁶ We must avail ourselves of some sort of *presumption*, therefore, to implement that ideal. The concept of basic needs can work as such a presumptive device, and a kind of “false target” in the achievement of distributive justice. That is, we might adopt the presumption that, whenever someone is not able to enjoy a certain standard of basic needs, there must be a matter of circumstance, and not choice, in the roots of that outcome. If we aim at distributing resources so that everyone is able to satisfy that standard of basic needs, therefore, we are bound to achieve a just (or more just) distribution of resources. We use basic needs, thus, not because inequalities of basic needs are inherently unjust (we saw above that this is not the case), but rather because, if resources were justly distributed in the community, most people would be likely to enjoy a certain standard of basic needs.

The difference is crucial for the justification of resource redistribution. As I claimed, inequalities in basic needs alone are not a sufficient reason to justify a forced transfer of resources from the better off to the worse off. If we can demonstrate (or adopt a plausible presumption) that such inequalities are caused by unjust factors, however, redistribution is then fully justified. The critical point, thus, is to establish a plausible presumption. I will try and do so below in Chapter 6. For now I want to suggest that, perhaps unwittingly, this is also what some of the proponents of the basic needs’ conception have in mind when they claim that everyone has a right to an adequate standard of living. Let us see, for instance, how one of the most influential

⁸⁶ In the case of children, however, this difficulty is not present. No deficit in their capacity to satisfy basic needs can be attributed to choices. They might even be a result of choices made by their parents, but this is not a reason, of course, to consider those choices as if they were their own choices, i.e. to make them responsible for those choices. We might confidently assert, thus, that a child’s inability to satisfy her basic needs (in a community where resources are sufficient for the satisfaction of those needs) is unjust.

proponents of rights to basic needs, Henry Shue, has tried to justify his thesis. He invokes, first, the idea of *degradation* (which gives rise to the principle of “*degradation prohibition*”). That is how he puts it:

“A refusal on the part of an affluent person to use any of the wealth at his or her command in order that others might be enabled to enjoy their basic rights would be an insistence upon the maintenance of a degree of inequality which is degrading: an inequality constituted by protected affluence and unprotected subsistence.”⁸⁷

He is careful to explain, however, that his principle is not a strong egalitarian principle:

“The assumption about inequality incorporated into this principle is only that there are types of inequality that are morally unacceptable, namely, inequalities that are degrading. (...) The principle does not mean that all inequality is unacceptable – it leaves open the possibility of justifying various sorts of inequality. The principle means only that inequalities that are incompatible with self-respect – that are humiliating – are impermissible. Inequality is not prohibited by the principle but limited.”⁸⁸

The thrust of his argument, thus, is this idea of degrading inequality, i.e. of a threshold of inequality beyond which those at the bottom would be in a position that is degrading, humiliating. In those cases, then, society would be under a duty to transfer resources to those who would otherwise be subject to what he calls degrading inequality. This might sound, at first, like a defence of the intrinsic immorality of inequalities in basic needs, which I have already rejected above.⁸⁹ But

⁸⁷ *Basic Rights*, p 119.

⁸⁸ *Id.*, 119-120.

⁸⁹ I claimed that such inequalities might generate, at most, a duty of solidarity, or beneficence, that is, a duty to help our fellow human beings who are in dire need. But such a duty, as I tried to show, would be contingent on many factors, such as ability to help without sacrificing important, though non-basic needs, and not absolute as the basic needs conception to social rights seems to maintain. See also, on this point, the discussion in Chapter 6.

Shue soon brings into his thesis the idea of unfairness, and admits some confusion about the justification of basic rights:

“... this kind of inequality may be degrading because it is patently unfair. I have no clear intuitions about which is the more primitive concept. In any case, protected affluence in the face of unprotected subsistence is clearly both degrading and unfair to those who are unable to maintain life and health. For both reasons it would be wrong for the affluent to maintain their current advantages rather than to do their fair share to aid those deprived of subsistence *by the past failures of social institutions.*”⁹⁰ (my emphasis)

It seems clear from this passage that Shue is not claiming (or at least is not sure) that inequalities in basic needs are in themselves sufficient to ground a duty on the better off to transfer resources to the worse off. He has the telling need to bring in “unfairness” to the explanation and assumes, in the end, that those inequalities are a result of “the past failures of social institutions.” I believe, as I said, that this sort of presumption of injustice is indeed required to make the ideal of distributive justice practical. I will deal in detail with this issue in the final chapter of this thesis.

Now it is time I turn to the twin objections to the judicial enforcement of social rights I mentioned in the introduction: legitimacy and institutional competence. The next two chapters are devoted to each of those objections.

⁹⁰ *Op. cit.*, at 127. See also page 125.

CHAPTER 3
THE LEGITIMACY OBJECTION:
SOCIAL RIGHTS, DEMOCRACY AND SEPARATION OF POWERS

The so-called legitimacy objection maintains, as I mentioned in the Introduction, that the judicial enforcement of social and economic rights would represent an undue *intrusion* by courts into the arena of the political branches of the state. This is because social rights provisions will usually (though not exclusively, as discussed in chapter 1) require *active measures* from the state, i.e. elaboration of public policies (including the enactment of legislation⁹¹) and their implementation. They can be violated, therefore, not only by state action, but largely by state *omission*. Judicial enforcement would necessarily involve, thus, a power on the judiciary to compel the political branches to take action. Moreover, any effective judicial control would also have to encompass the power of the judiciary to indicate what precise measures should be taken when those adopted by the political branches prove inadequate.

But that would not be appropriate, it is claimed, due to the democratic principle of separation of powers. It would result in usurpation of legislative and executive powers by the judiciary, i.e. in “judicial tyranny”.⁹²

It is important to notice two different aspects in this objection: one related simply to the positive *character* (i.e. structure) of social rights,

⁹¹ Constitutional provisions that require complementary legislation to be applied are usually called non-self-executing norms.

⁹² For an account of this argument in the United States of America see Jonathan Feldman, “Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts

the other to their *content*. In the former, which we might call the “formal objection”, it is contended that any attempt by the judiciary to tell government, or parliament *what to do*, lacks legitimacy irrespective of what subject-matter is involved. This view stems from a conception of separation of powers that is purely negative. That is, it accepts judicial review as a legitimate practice yet only insofar as it is restricted to a negative role, i.e. telling the political branches what they *cannot do* (so-called “negative judicial review”), not what they should do (“positive judicial review”).⁹³ The legitimacy objection, thus, is based less on the subject-matter of the question involved than on the *form* of judicial interference with the other state powers. Positive interference is regarded as much more intrusive and therefore offensive to separation of powers than negative interference. When a court strikes down a statute or some governmental act (negative judicial review), it is simply closing that *specific* route chosen by parliament or government, which is accepted in the light of the traditional theory of *checks and balances*. But when the courts have to tell parliament or government what to *do* (positive interference), as opposed to what *not* to do, it will often restrict significantly the options available.⁹⁴

in an Era of Positive Government”, 24 *Rutgers L.J.* 1057 (1993), at 1060.

⁹³ See Feldman, *op. cit.*, *passim*.

⁹⁴ Peter Schuck proposes the following continuum to classify remedies according to their degree of judicial intrusiveness on official freedom. The further the remedy is in the right, the more intrusive it is supposed to be. Cf *Suing Government. Citizen remedies for official wrongs*. Yale University Press, New Haven and London, 1983, at 14ff.

←official freedom		judicial intrusiveness→		
declaratory judgement	damages award	prohibitory injunction	mandatory injunction	structural injunction

See also Donald L. Horowitz, *The Courts and Social Policy*, Washington, D.C., 1977 (“Traditional judicial review meant forbidding action, saying “no” to the other branches. Now the judicial function often means requiring action, and there is a difference between foreclosing an alternative and choosing one, between constraining and commanding.” At 19) This point, though, can be easily overstated. Feldman argues that negative judicial review can sometimes be more intrusive than positive one. (1085).

As to the latter, which we might refer to as the “substantive objection”, the stress is placed on the subject-matter of the issues that social rights adjudication would involve. The promotion of social rights requires the elaboration and implementation of complex and often costly public policies in the field of health, education, housing etc, that is, in what we are used to refer to as *social welfare*.⁹⁵ But those are precisely the issues, it is claimed, that are to be decided through the democratic process, especially because they require decisions about the level of resources to be demanded from society through taxation and about how to allocate those public resources among the various areas of state responsibility.

This is, in brief, the so-called legitimacy objection to the judicial enforcement of social and economic rights. To sum it up, it claims that judicial enforcement of social rights would place the judiciary in a position to tell other state powers not only *what* to do to discharge their constitutional duties, but also *how* to do it, and, even more controversial, in fields traditionally regarded as the preserve of democratic (i.e. political) decision making. We must see now how partisans of social rights justiciability have responded to it.

As I have already mentioned in chapter 1, the most common strategy has been to deny the differences between social rights and classic rights so that the justification given for the legitimacy objection cannot stand. Most efforts have been concentrated, as a consequence, on showing that the distinction between civil and social rights as negative and positive is flawed. Civil rights also generate, the argument goes, positive obligations to the State, and thus are also dependent on public policies and resources for their effective protection. An often quoted

⁹⁵ Horowitz, *id.*

example is the right to physical security (or security of the person). The State is under a duty not only to respect this right by abstaining from hurting its citizens but also to protect citizens from themselves through a system of public security (i.e. positive measures) which is certainly costly (i.e. resource dependent).⁹⁶ The mere positive character of social rights, therefore, cannot be a good argument for rejecting their justiciability.

Now, although it is true that the positive/negative distinction is flawed, or an oversimplification, as I have discussed at length in chapter 1, this is not in itself a sufficient rebuttal of the legitimacy objection. Indeed, it might well be maintained that the positive elements of civil rights should also be excluded from judicial scrutiny. It can be contended, for instance, that public security measures, just as social welfare, is a matter of policy for the elected branches of the state to decide, and that only the negative aspect of the right to physical security is justiciable. What is required to refute the legitimacy objection, thus, is an argument on *why* the courts are legitimate to tell government and parliament *what to do* and *how to do* it in matters involving social rights. This is what we must now discuss.

The “formal” objection: positive vs. negative judicial review

As I have just said, someone might well accept that the positive/negative rights dichotomy is flawed when applied to distinguish social from civil and political rights but still maintain that courts are not legitimated to enforce either of those types of rights in their *positive* aspects. In fact, I believe that this is actually what most serious objectors to social rights justiciability have in mind. They are just as against courts

⁹⁶ See chapter 1 for a more detailed discussion of this point.

getting involved with civil and political rights when their positive aspects are at issue. They would not condone, for instance, courts telling government or the legislature what to do in order to guarantee the security of the citizens, or how to do it, in a direct, mandatory manner. They would maintain, I suppose, that all that courts can do is to award damages when those branches violate the right to physical security of its citizens, or, at the most, stop them to do so (through issuing prohibitory injunctions).

We might call this type of judicial operation “negative judicial review”, as opposed to “positive judicial review”, that would involve judicial orders as to what and how the other branches should do (i.e. what positive measures they should take) to protect and promote rights. The formal legitimacy objection to justiciability, thus, can be understood in this way, that is, as an objection to *positive judicial review* in general, not specifically to the judicial enforcement of social rights. We cannot simply reject the positive/negative rights dichotomy, thus, and conclude that social rights should therefore be justiciable.⁹⁷ Rather, we must consider in depth the argument that positive judicial review is illegitimate.

The formal objection can be observed in the works of courts themselves, who are often more reluctant to give positive orders to the other branches (“positive judicial review”) than to strike down their acts (“negative judicial review”). In the United States of America, for example, even though most States’ constitutions establish clear positive duties of the State (especially concerning the right to education), most State courts have systematically refrained from enforcing those

⁹⁷ As it happens, social and economic rights are usually more readily identified with positive duties, and civil and political rights with negative ones. Thus, perhaps, the generalization that the latter are justiciable whilst the former aren’t.

provisions. The reason given for such restraint, as explained by Feldman, has often been legitimacy concerns. So he puts it:

“State courts which have refused to enforce positive constitutional rights have relied on negative separation of powers. This doctrine counsels that judicial review should be exercised to check governmental tyranny. When courts are asked to respond to legislative inaction, however, legislative tyranny is not present. Courts which rely on the negative separation of powers doctrine reason that if they were to define the legislature's obligation and require legislative action, judicial tyranny would result.”⁹⁸

The main legitimacy concern about the enforcement of positive duties, as illustrated with the passage just quoted, results chiefly from the *positive character* of judicial interference, and not from the substantive content of those duties. Thus our decision to call it the “formal” objection. It follows from a traditional conception of the principle of separation of powers that sees it as impeding the three main branches of state power to encroach on each other’s functions. If that conception were still accepted, however, judicial review itself, and not just positive judicial review, would have to be rejected as illegitimate, since any interference with another branch’s function, be it positive or negative, is a form of violation of the separation of powers in its pure conception.

But if one accepts judicial review in some form as a legitimate practice, as it is the case in most systems that have expressly recognised social rights in their constitutions,⁹⁹ then one cannot avail oneself of the pure separation of powers’ doctrine. One must hold a different, less absolute conception of the principle of separation of powers, and explain why the enforcement of positive duties would be illegitimate whereas

⁹⁸ *Op. cit.*, at 1060.

⁹⁹ As I have already mentioned, there are people who maintain this thesis (see for instance Jeremy Waldron, *Law and Disagreement*, Oxford, 1999), but I am assuming in this work that judicial review in some form is accepted as a legitimate practice.

negative judicial review (i.e. the enforcement of negative duties) would not.

Here the argument (though not always explicitly articulated) has often been that, although certainly incompatible with a pure separation of powers doctrine, negative judicial review is less intrusive than positive judicial review and thus less harmful to that principle. That is, the principle of separation of powers is certainly not absolute. It has to be accommodated with other important principles of a democratic and just society, such as, for instance, the protection of rights, which requires some form of judicial review. Yet this accommodation should try and respect as much as it is possible the principle of separation of powers, and that, as it might be claimed, is achieved better through restraining judicial interference with other branches to a negative form.

But there seems to be no plausibility in this position, at least from a pure legitimacy standpoint. It is not at all clear why positive judicial review would offend less the principle of separation of powers than negative judicial review. As intrusiveness is concerned, it can be just as interfering (if not more) for a court to strike down a whole statute as for it to declare that a constitutional provision in need of legislative or administrative action has not been complied with, or even to issue a mandatory injunction specifying what has to be done. Indeed, imagine a statute passed by the legislature setting up a whole system of health care provision to the population funded by the state being struck down as unconstitutional by the courts. Would that not be just as, if not more, intrusive than a court issuing a positive, mandatory order demanding that the legislature passes a statute implementing such a system. I believe the answer to this question is in the positive, and shows the implausibility of the formal objection. Indeed, to quote Feldman again, that view

“represents a serious misinterpretation of the negative separation of powers doctrine. A court's articulation of a legislature's duty does not result in judicial tyranny. Judicial interpretation of a constitutional provision entails a similar process whether the provision confers a positive right or a negative right. Consequently, a court oversteps its bounds no more when defining the parameters of required legislative action than when defining prohibitions on legislative behavior. ... In sum, the negative separation of powers doctrine imposes no obstacle to judicial review of positive rights claims, and the courts which conclude that it does are in error.”¹⁰⁰

It seems clear, thus, that what I have been calling the formal legitimacy objection does not survive a close scrutiny of its professed justifications. Its popularity can be explained, I think, by historical reasons. Indeed, the practice of judicial review appeared and was developed at the height of the so-called *Liberal State*, when it was widely believed that the State should be concerned only with keeping the order so as individuals could go about their own business as they wished. In that context, the only rights individuals had against the State were liberal rights, or, to use the current human rights language, civil and political rights. Judicial review was limited to the protection of those rights against interferences by the state, and therefore was negative by default. With the rise of the *Activist State*, or *Welfare State*, which survives until now despite the revival of libertarian ideas, it becomes clear that negative judicial review is insufficient to protect rights. This is because more and more *positive duties* of the State were gradually recognised, not only generated by new welfare rights, but also by a more comprehensive interpretation of traditional liberal rights, thought before to be purely negative and now regarded as generating both positive and negative

¹⁰⁰ *Op cit*, at 1060-1061. Furthermore, enforcement of a positive right need not result in judicial tyranny. As long as the remedy initially allows the legislature to fashion the curative legislation, the imposition of a remedy is even less intrusive than where a negative rights violation is involved. When negative rights are violated, the offending legislation must be struck down, an absolute rebuke to the legislature. When positive rights are violated, however,

duties. Now, given those positive duties are violated through State omission, not action, purely negative review is clearly incapable of enforcing them.

This schematic historical account¹⁰¹ serves nonetheless to explain, I believe, the popularity of the unjustified belief that negative judicial review is less harmful to the principle of separation of powers than positive review. A reluctance to let go solidified traditional schemes and conceptions outdated by social reality seems to be a widely shared characteristic of legal thinking in all places. One plausible explanation is that we seem to be thinking about problems brought by the welfare state with legal conceptions developed at the height of the liberal state.

In some legal systems, however, there have been attempts to break free of the past and move towards the future. Indeed, some countries have been establishing through legislation or judicial development specific judicial remedy for cases of omission of the legislature or the administration to give effect to constitutional provisions. The first country to explicitly adopt such a remedy through

the legislative process is set in motion, which allows for the exercise, albeit within judicially-prescribed boundaries, of legislative power.

¹⁰¹ See, for a more detailed analysis, Jurgen Habermas, *Between Facts and Norms*, Polity Press, 1997, chapter 6, especially section 6.1 – “The Dissolution of the Liberal Paradigm of Law”, pp 240-253. The following passage is particularly interesting for our discussion: “In the liberal model, strict legal constraints on the judiciary and the administration led to the classical scheme of separation of powers, which was once intended to bring the arbitrary will of an absolutist regime in line with the rule of law. The distribution of powers among the branches of government can be modelled along the temporal axis of collective decisions: judicial decision making is oriented to the past and focuses on past decisions of the political legislature that have solidified into established law; the legislature makes decisions oriented to the future and binding on future action; and the administration deals with current problems cropping up in the present. (...) If one takes this model as the standard, then the materialized legal order of the welfare state can appear as an upheaval, even as the corruption of the constitutional architectonic. (...) it signifies increased power for the judiciary, and it enlarges the scope for judicial discretion in a way that threatens to upset the equilibrium in the normative structure of the classical constitutional state at the cost of the citizens’ autonomy. (...) [The protection of basic rights] can no longer be understood only negatively, as warding off intrusions; it also grounds affirmative claims to benefits.” *Op. cit.*, at 245-247.

legislation seems to have been Yugoslavia, in its constitution of 1974, whose article 337 reads as follows:

“If the Constitutional Tribunal of Yugoslavia establishes that the competent organ has not enacted the necessary provisions to give effect to the dispositions of the Constitution of the Yugoslavian Republic, its federal laws and other federal provisions and general acts, it will give notice of this to the General Assembly.”¹⁰²

The Constitutions of Portugal (1976) and Brazil (1988) have similar provisions.¹⁰³ It is expressly recognized in those countries, therefore, that parliament and executive can behave in contradiction to the Constitution not only actively, but also passively, and that when this happens the judiciary is perfectly legitimated at least to declare so. In other jurisdictions, such as Italy and Germany and South Africa, even though there is no express provision establishing positive judicial review in the constitution, the Courts have nonetheless tackled legislative or administrative omissions through more or less traditional interpretive methods.¹⁰⁴ Now, this seems to be a logical corollary of the decision to include positive rights in a constitutional system that accepts judicial review as a legitimate practice. If courts can tell the other branches *what not to do* when active violations of rights are at stake, they should also be able, in principle, to tell them *what to do* when passive violations are at issue.¹⁰⁵

¹⁰² Apud Flavia C. Piovesan, *Protecao Judicial contra Omissoes Legislativas, Acao direta de inconstitucionalidade por Omissao e Mandado de Injuncao*, Revista dos Tribunais, São Paulo, 1995, at 113 (my translation from the Portuguese).

¹⁰³ In Portugal this is to be found in article 283 of the Constitution, and in Brazil in article 103, para 2. For an account in English of the Brazilian system of judicial review see, Keith S. Rosenn, “Judicial Review in Brazil: Developments under the 1988 Constitution”, 7 *Southwestern Journal of Law and Trade in the Americas* 291 (2000)

¹⁰⁴ For an account of the Italian practice, see Nardini, William J. “Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court”, 30 *Seton Hall Law Review* 1 (1999).

¹⁰⁵ For a similar argument in the context of American States’ judicial review see Helen Hershkoff, *Positive Rights and State Constitutions: the Limits of Federal Rationality Review*,

This is, I think, the correct way of responding to the first, formal aspect of the legitimacy objection. It dismisses the difference between positive and negative judicial interference (not between positive and negative rights), going thus to the heart of the matter. If the problem is mere intrusion into legislative and governmental affairs, then it is not significant which form (positive or negative) it takes. It is intrusion all the same. The positive character that judicial protection of social rights has necessarily to assume, therefore, cannot alone provide a justification for the legitimacy objection in its formal aspect.¹⁰⁶ As we will see later on in chapter 4, there is still an argument from competence to be made to justify the acceptance of negative judicial interference whilst rejecting positive one. But from the perspective of the formal legitimacy objection, as I have tried to show, no justification can stand.

But even when it is accepted that the mere positive character of judicial review of social rights does not make it illegitimate, it is still contended that such review has to be performed within certain limits. For some, it should not go beyond a mere *declaration* by the courts that the political branches have not complied with their positive duties. As a matter of fact, this is actually what a purely textual interpretation of the provisions of the Yugoslavian, Portuguese and Brazilian constitutions mentioned above would result in. Indeed, according to article 103, § 2° of the Brazilian Constitution, for instance: “Once the unconstitutionality for omission of a measure to make a constitutional norm effective is declared, the competent Power will be notified to adopt the necessary measures ...”¹⁰⁷. The judiciary simply declares, therefore, that it found the omission of measures to give effect to a constitutional provision unconstitutional and notifies the legislature of its finding. There is no

112 *Harv. L. Rev.* 1131 (1999), at 1138.

¹⁰⁶ We are assuming, it is important to keep in mind, that negative judicial review is accepted.

order for the legislature to act to rectify the omission, let alone any sanction for the failure to do so. Under this model, thus, the judiciary is not impeded from ruling on the constitutionality of the political branches' behavior even if this involves an indication of positive measures not taken by those branches. The judicial decision, however, has mere declaratory effects, i.e. cannot be enforced against the state in case of non-compliance.

The obvious problem with this model is the absence of any sanction for failure of the political powers to amend the declared unconstitutionality. One has to rely too much on their goodwill (not always plentiful) for effective implementation of the court's finding. In other words, it runs the risk of depleting justiciability of any meaningful content. An effective judicial role in the protection of social rights, therefore, has to encompass at least the power to issue injunctive orders with time limits and sanctions for non-compliance.

A truly effective role for the judiciary, however, would require even more than that. It would require that the judiciary not only order the other branches to act, but also *how to act*. But that would invite, as we saw, the legitimacy objection in its second aspect, i.e. that related to the subject-matter of social rights adjudication. Let us discuss it now in more detail.

¹⁰⁷ See Flavia Piovesan, *op. cit.*, at 104, note 10.

The “substantive objection”
Principle, policy and democracy

According to the substantive aspect of the legitimacy objection, courts should not adjudicate social rights not simply because that would involve ordering the political branches *what to do* (i.e. positive judicial review) as opposed to what *not* to do (negative judicial review). This is, as we discussed in the previous section, what we decided to call the “formal objection” of legitimacy. Rather, courts should not enforce those rights because it would demand them to tell government and the legislature what to do in areas that are traditionally regarded as the preserve of those political branches (i.e. social welfare and resource allocation).

To put it another way, it would be inadequate for the judiciary to determine what the political branches should deliver in terms of health care provision, education, housing etc not because that would consist in positive judicial review, but rather because those issues are thought to be “political”, or matters of *policy*, and therefore to be decided by the democratically elected powers of the state.

This argument has been forcefully put by Michael Walzer in the following way:

“The judicial enforcement of welfare rights would radically reduce the reach of democratic decision. Henceforth, the judges would decide, and as cases accumulated, they would decide in increasing detail, what the scope and character of the welfare system should be and what sorts of distribution it required. Such decisions would clearly involve significant judicial control of the state budget and, indirectly at least, of

the level of taxation – the very issues over which the democratic revolution was originally fought.”¹⁰⁸

The argument is grounded, thus, on the contention that when *certain issues* are involved, decisions taken by the representative political institutions should not be subject, in their merits, to the review of the judiciary. They are part of what is called the *discretion* of the political branches.¹⁰⁹

I think that the substantive objection has a stronger appeal than the formal one. Indeed, as I tried to show in the previous section, the formal objection is grounded on an outdated conception of separation of powers that can be easily seen to be inadequate to deal with the issues raised in the activist welfare state. The substantive objection, however, does not ignore this new social reality. On the contrary, it explicitly acknowledges it but contends that, in the activist state, some issues are eminently *political* and should, as a consequence, be decided by the political branches of the state without the interference of the courts.

We must analyse here in more detail, therefore, the justification for ascribing to the political branches discretion on issues of a political nature and the criteria proposed to identify those issues so as to see if social and economic rights are indeed to be qualified as such.

So, how are we to define what issues are political, and thus not subject to the review of the judiciary? A good starting point for this discussion seems to be the famous decision of the American Supreme Court regarded as the birthplace of the practice of judicial review. As famously put by Justice Marshall in *Marbury v. Madison*, “the province of the court is ... to decide on the rights of individuals, not to inquire

¹⁰⁸ In “Philosophy and Democracy”, *Political Theory* 9, (1981) at 391-2.

¹⁰⁹ For an interesting analysis of the concept of discretion and its different possible variants see Ronald Dworkin, *Taking Rights Seriously*, at 31-39. For a thorough study of discretionary powers see Galligan, D J. *Discretionary Powers*, Oxford University Press, 1999.

how the executive, or executive officers, perform duties in which they have a discretion”.¹¹⁰ He then went on to explain what duties are within the discretion of the executive:

“...whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

(...)

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. (...) The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

(...)

But ... when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.”

“The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.”

According to the influential decision in *Marbury v. Madison*, thus, the criteria to distinguish between political and legal questions is whether an issue concerns only the *nation* or if an *individual right* is involved. In other words, the discretion of the executive (and that goes to the legislature as well) ends, or is limited, to issues that respect the nation, that is, the common interest of the whole population. Whenever a right of

¹¹⁰ 5 U.S. 137, 1 Cranch 137, 1803 WL 893, (U.S. Dist. Col.), 2 L.Ed. 60.

an individual is involved, then the judiciary has the power, and indeed a duty, to protect that right.

This historical justification for judicial review has been developed at the theoretical level by Ronald Dworkin through his famous distinction between matters of *principle* and matters of *policy*. This is how he puts it:

“Principle and policy are the major grounds of political justification. The former secures some individual or group right; the latter advances a collective goal of the community.”¹¹¹

He distinguishes, thus, between issues involving rights of individuals, which Dworkin calls matters of principle and issues involving the general welfare of the community, which he calls matters of policy. It is the same distinction, I submit, we saw in *Marbury v. Madison*, and just as Justice Marshall maintained, so does Dworkin that the former should be subject to the scrutiny of the judiciary, the latter shouldn't. Indeed, as he puts it in *A Matter of Principle*

“My own view is that the Court should make decisions of principle rather than policy – decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted - ...”¹¹²

The reason for that separation of duties follows from a conception of democracy in which everyone's interests should be taken into account in decisions affecting the whole community, but also where individual rights enjoy a kind of priority over the general welfare (i.e. they are “trumps” to use Dworkin's terminology), and must therefore be protected

¹¹¹ *Taking Rights Seriously* (1977), at 82-3.

against potential violations in the name of the collective good.¹¹³ Under such a conception of democracy, it seems natural to entrust the political branches with matters of policy and the judiciary with matters of principle. Indeed, matters of policy, i.e. those issues concerning the welfare of the population as a whole, must be decided, in a democratic society “through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account. [i.e. everyone’s interests]”¹¹⁴ In our western democracies the workings of the political branches, elected by the people to represent their interests, seems to fit that purpose better. In order to protect individual rights from potential violations arising from the decisions taken through the political process, however, an independent power is needed, and the judiciary here is usually thought to be the best candidate.¹¹⁵

A lot of criticisms have been raised against the correctness of the principle/policy distinction, and the separation of tasks between the judiciary and the political branches based on it. Some have claimed, for instance, that the distinction is wrong as a description and a prescription, i.e. that judges do not follow it neither ought to follow it.¹¹⁶ It would go beyond the scope of this study, however, to go into any detail into this debate. My contention is with those who, accepting the distinction (as I

¹¹² Cf The Forum of Principle, in *A Matter of Principle*, 1986, p69.

¹¹³ See Ronald Dworkin, *Taking Rights Seriously* (1977), at 184-205.

¹¹⁴ *TRS*, at 85.

¹¹⁵ It is important to note that this traditional division of tasks between the political branches and the judiciary is not a necessary feature of a democratic system, but rather a matter of institutional design. As it happens, most western democracies have developed into a constitutional model where courts are entrusted with the protection of rights. See Wojciech Sadursky, “Judicial Review and the Protection of Constitutional Rights”, *Oxford Journal of Legal Studies*, vol. 22. n. 2, 2002, 275-299.

¹¹⁶ See, for instance, the Appendix of *Taking Rights Seriously*, A Reply to Critics where Ronald Dworkin discusses some criticisms raised against his distinction.

do)¹¹⁷, claim that social rights are matters of policy and, thus, should be decided by democratically accountable powers and not by courts. Indeed, the substantive objection from legitimacy I am discussing in this section holds precisely that, i.e. that social rights should not be justiciable because they involve *matters of policy*, not principle. Now that I have clarified the distinction, thus, I must discuss if this contention is correct. That is, are social rights really a matter of policy?

The usual justification for the claim that social rights, despite their name, are in reality a matter of policy is their strong dependence on resources. Education, health care, housing etc are costly goods. Their protection, as a consequence, is dependent on the resources available to a given state, and those resources are, in turn, dependent on the level of taxation imposed on the correspondent community. Those tasks (taxation and resource allocation) are traditionally regarded as a prerogative of the political branches.¹¹⁸

Yet again, historical factors seem to play an influential role in the explanation of the prevalent opinion. In fact, as well pointed out by

¹¹⁷ I believe that, if we are to have a criterion to set the boundaries of judicial and political powers the principle/policy distinction is the best available. Matters concerning the general welfare of the population should be entrusted with the political, democratically accountable powers, whereas the judiciary should restrict itself to protect rights. People will surely disagree on whether to define matters as principle or policy, as it is the case with social and economic rights as I discuss in the text. The distinction, however, is not dependent on such agreement. Another common point of contention is so-called group rights. My view is that, if by group rights one means rights which, though usually attributed to groups, can be exercised by each individual of that group, then they are matter of principle, and not a collective goal (e.g. the right of women to maternity leave, or the right of homosexuals to get married etc). If, however, one means interests which are not exercised individually, such as the sometimes called “right” to a balanced environment, then they are better seen as collective goals, i.e. matters of policy.

¹¹⁸ See Frug, “The Judicial Power of the Purse”, *University of Pennsylvania Law Review*, 1978, arguing that “The judicial impact on the purse is acceptable only if the legislature retains its discretion to raise and allocate money, a discretion limited by the need to meet the judicial order but not eliminated by it.” 788-9

Walzer in the passage I quoted above, the control of taxation (and distribution of resources derived from taxation) by the people through their elected representatives was one of the cornerstones of the democratic revolution. The power of exacting taxes and deciding how to invest its products, once the privilege of a non-elected and self-serving ruler or elite was transferred to the whole population. Those tasks have been considered ever since to be the preserve of the political branches.

It is not surprising, therefore, that any attempt to entrust the judiciary (a non-elected, and in many cases elitist power with this task) is seen with suspicion, as a potential usurpation of power from the political branches. Yet there seems to be no grounds, at least from the perspective of pure legitimacy, for regarding any interference of the courts with issues of taxation or resource allocation as inherently inadequate. Once it is realised that rights, all rights as we saw in chapter 1, are dependent on resources, then it must be accepted that their effective protection by the judiciary will necessarily involve some interference with matters of taxation and resource allocation, and that such interference won't be inherently illegitimate. Otherwise the political branches would be free to disrespect those rights by not taxing enough, or by distributing resources in an inadequate manner.¹¹⁹ One can always argue, of course, that the political branches are accountable to the people they represent through the mechanism of periodical elections. If they don't tax enough, one might say, the people can always punish their representatives with not re-electing them. This contention has been classically put forward by Thomas Jefferson several times, such as in a letter of 1820 to William C. Jarvis:

“When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough... The people themselves,... [with] their discretion [informed] by education, [are] the true corrective of abuses of constitutional power.”¹²⁰

This kind of accountability, however, might well be insufficient to guarantee the respect of rights. We don't need to go into any discussion about the shortcomings of the democratic process to see that.¹²¹ Even in an ideal, perfectly functioning democracy, the majority may well be in favour of curtailing rights, especially those of social and economic nature. If it is satisfied with the current pattern of resource distribution, for instance, it is very likely that any decision to increase taxation and redistribution will be politically unviable. The role of the judiciary is to guarantee those rights in spite of the will of the majority of voters.¹²²

¹¹⁹ I reemphasise here that there might be a reason of institutional capacity, which I discuss in the next chapter, to bar courts from adjudicating on those matters. Here I discuss simply legitimacy in its pure form.

¹²⁰ See *The Writings of Thomas Jefferson*, Memorial Edition (Lipscomb and Bergh, editors), 20 Vols., Washington, D.C., 1903-04 (15:278), available at the University of Virginia Thomas Jefferson Digital Archives, at <http://etext.lib.virginia.edu/jefferson/>.

¹²¹ For an interesting argument on this point, claiming that judicial review might actually enhance democratic accountability, see Kim Lane Scheppele *A Realpolitik Defence of Social Rights*, *Texas Law Review* June, 2004, at 1921 (“However, the larger problem with democratic fundamentalism, as with market fundamentalism, is that institutions in practice rarely, if ever, live up to the promises of theory. What are democratic failures? Some of the flaws of real world democratic institutions are well known. Politicians, parties, and agencies can be captured by particularly well-mobilized and resourceful constituents. Money can buy much of what is offered in politics--particularly access, but probably also influence. Collective action problems mean that many individuals who may share common interests with others never mobilize to express themselves to politicians with adequate forcefulness.”)

¹²² This follows from the theory of rights as trumps against majoritarian will which I adopt in this thesis. See pages 47 ff and 84.

Walzer is quite right in observing that the judicial enforcement of welfare rights radically reduces the reach of “democratic” decision making.¹²³ But this is a necessary corollary of the recognition of rights. The function of rights is precisely this, that is, to exclude from the scope of political deliberation some outcomes that are morally unacceptable. So, once it is recognized that health, education, food etc are to be protected as rights, political decisions regarding those issues (including resource issues) are necessarily limited.

I must deal now, in the remainder of this chapter, with a possible objection to the argument I have just presented. It might be said that, though in principle there seems to be no illegitimacy in the judicial enforcement of social rights, in practice such an enforcement would reduce so much the discretion of the political branches that most important issues would be decided by the courts. That is, not many important issues would be left for the political branches to decide, and that would go against the democratic ideal.¹²⁴

It must be noted, first, that it is rather difficult to establish at which point one should consider that too many important issues have been taken out of the discretion of the political branches. I agree, though, that making social rights judicially enforceable does involve a risk of over-interference by the judiciary on important issues, however one quantifies how much interference is adequate. But this risk, I submit, derives less from justiciability itself than from a wrong conception of social rights. As I discussed in chapter 2 and will further discuss in chapter 6, social rights are traditionally conceived as rights to an

¹²³ I take democratic here to mean simply political, since it is quite arguable that democracy is enhanced, not diminished, by judicial review. See, on this debate, Ronald Dworkin, *Freedom's Law, The Moral Reading of the American Constitution*, Harvard University Press, 1996, Introduction.

adequate standard of living measured in terms of basic needs. Now, if they try to enforce social rights under this conception, courts will probably get involved with all important issues, leaving nothing to the political branches to decide in a discretionary manner.

Let me try and explain this. As I tried to show in chapter 2, under the basic needs conception everyone has a right to have their basic needs satisfied so long as there are enough resources in society to afford that. It doesn't matter, as we saw, why some people are not able to enjoy basic needs whilst others are. It is an outcome conception. As a consequence, until everyone has been provided with sufficient resources to satisfy basic needs, no other goal of the community can be pursued. So, to give an example, if a community wishes to use some resources raised by taxes to improve the quality of its parks, and passes a statute to that effect, the judiciary would always be able to invalidate that statute and determine that those resources be used to provide basic needs to those unable to do so. No decision taken by the political branches, therefore, is immune from judicial interference as long as it involves the use of resources that are lacking for some people to satisfy basic needs. This, especially in less affluent societies, would indeed establish a government of the judiciary.

Under the distributive conception, however, this risk is much diminished (though not eliminated), since social rights are determined according to the resources available, as a matter of distributive justice. There will always be a significant scope of manoeuvre for the political branches to decide how to allocate resources which are not "earmarked" to the provision of basic needs.

¹²⁴ I am grateful to Yorgus Letsas for many enlightening discussions about this point.

Conclusion

I have argued in this chapter that the so-called legitimacy objection to the judicial enforcement of social rights does not stand. As to what I called the “formal objection” that rejects justiciability merely for the positive character that it takes (i.e. telling the political branches *what to do*), I claimed that it is grounded on an outdated and incoherent conception of the principle of separation of powers. Positive judicial review is no more intrusive than negative judicial review. As to the “substantive objection”, that rejects justiciability due to the *issues* involved in social rights (allegedly matters of *policy*), I contended that it also follows from traditional views that are not in touch with the modern functions of the activist state. If the state has a duty to promote and protect social rights, then the judiciary has, *in theory*, a power to interfere whenever that duty is disrespected. This is, in short, a matter of principle, despite the questions of resources and taxation involved.

I say in theory because practical factors can also bar the judiciary from interfering with decisions taken by the political branches, even when, in principle, no illegitimacy would be involved. It might be inadequate for the judiciary to try and enforce social rights due to a lack of *institutional capacity* to do so. This is, as I mentioned in the introduction, one of the most common objections to social rights justiciability. In the next chapter, I discuss it in detail.

CHAPTER 4 INSTITUTIONAL COMPETENCE

In the previous chapter I argued that no objection from legitimacy alone can be raised against the justiciability of social rights. If there are social rights to health care, education, housing etc, it must be legitimate, *in principle*, for the judiciary to protect those rights against violations by the political powers. I say legitimate *in principle*, however, because there might be practical obstacles that make it inappropriate for courts to enforce them. It is often argued, for instance, that courts lack the institutional competence needed to deal with issues involving social rights appropriately. That is, the judiciary is not well equipped to adjudicate the types of disputes that arise in relation to those rights.

It is important to see the different character of this objection. It does not claim that in a democratic society respectful of the principle of separation of powers social rights are a matter of policy to be decided by the political branches with total discretion. It rather claims that if courts tried to enforce those rights, they would do more harm than good to the protection and promotion of social and economic rights. This is because they lack the institutional capacity to deal with those issues, or are worse equipped than the other branches to do so.

This is arguably the most powerful objection raised against social rights justiciability. If correct, it applies also to systems that have expressly recognised social rights in their constitutions, which is the main focus of our study. Indeed, most of the proponents of this position do not deny the existence of those rights, or defend the legitimacy

objection we discussed in the previous chapter. They rather maintain that those rights, even if existent and expressly or implicitly recognised in the constitution, are “good candidate[s] for membership in the class of judicially underenforced constitutional principles”.¹²⁵ In this chapter, then, I shall analyse in some detail the arguments given to support the so-called institutional competence objection to the justiciability of social rights.

An illustrative case

We might start by imagining a case in which the claimant maintains that one of his constitutionally protected social rights has been violated in order to see what sort of difficulties would arise for the court in such a case. Imagine, for instance, a plaintiff in a country that has expressly recognised a right to health care in its constitution. He suffers from a medical condition whose treatment, though available in the private health care system, is too expensive for him to afford. He seeks then treatment in a local state hospital but is denied on the grounds that there

¹²⁵ Cf Cass R. Sunstein, *The Partial Constitution* (1993), at 155. For the concept of under-enforcement, see also Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 *Nw. U. L. Rev.* 410, 432 (1993), claiming that: “Basic welfare payments ... ought to be understood as constitutional entitlements, the primary provision of which is the constitutional responsibility of nonjudicial governmental bodies.”.. For a good review of the relevant literature, see Hershkoff, *op. cit.*, quoting the following authors: Laurence H. Tribe, *American Constitutional Law* 1336 (2d ed. 1988) (referring to “the familiar difficulties with judicial enforcement of affirmative duties”); Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. Rev.* 205, 238 & n.115 (1985) (stating that “[t]here may be a variety of institutional limitations on courts that make them unsuitable for the task” of enforcing minimal entitlements); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 *Stan. L. Rev.* 877, 900-01 (1976) (suggesting that “it may be that institutional considerations governing the relations between the judiciary and the legislative branch will forever preclude” judicial enforcement of subsistence rights); Michelman, *Welfare Rights*, at 684-85 (stating that the duty to satisfy unmet human needs “seems to be one that courts acting alone cannot or ought not undertake to define, impose, and enforce”). For the opposite view, see Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 *Loy. L.A. L. Rev.* 1207, 1211-16 (1992).

are not enough resources available to fund it. He goes to the judiciary, thus, and claims that such denial amounts to a violation of his constitutional right to health care.¹²⁶ Would courts be institutionally competent, that is well equipped, to assess if there was such a violation?

The key to decide such a case, and any right's case for that matter, is obviously the determination of what precisely the plaintiff has a right to. Once this is done, then the issue is simply to assess if this right has been violated or not. But here lies, of course, the most intractable problem involving social rights: what precisely are people entitled to in terms of food, education, housing etc as constitutionally recognised rights? In our imagined case, what exactly is the plaintiff entitled to in terms of health care?

This will depend, of course, on the specific legal provisions establishing social rights in the system in which the case is to be heard. Let us assume, then, that in our imagined case health care is expressly recognised in the constitution, or in an ordinary piece of legislation, in the following terms: "everyone has a right to access to health care ...". Now, this is a rather abstract provision, as is usually the case in most systems that recognise social rights, as we have seen in Chapter 2.¹²⁷ It is the capacity to translate such abstract provisions into clear and specific rights that is primarily at issue when the institutional competence of courts to adjudicate social rights is questioned.

¹²⁶ My imagined case is of course inspired in the famous real case Soobramoney, judged by the Constitutional Court of South Africa, which I discuss in detail in Chapters 6 and the Appendix.

¹²⁷ This is usually the case in most systems that expressly recognise social rights. Our imagined case, therefore, could be set in many different places, including South Africa and Brazil.

Vagueness and Policentricity

This is often called the “vagueness” obstacle to the justiciability of social rights.¹²⁸ According to this objection, social rights cannot be made justiciable because they are too *vague*, i.e. what they entail in terms of duties is extremely imprecise.¹²⁹ Courts have no clear standard to resort to in their adjudication. Here, again, the debate seems to have been focused on immaterial issues at the cost of tackling the really important ones. Indeed, some have simply argued that courts are used to working with vague concepts and therefore would not have problems to deal with the vagueness of social and economic rights. As put by one commentator:

"The so-called 'absence-of-standards' rationale borders on the disingenuous, because the Supreme Court has never been at a loss to decipher roughly workable standards for the vaguest of constitutional provisions when it so desires."¹³⁰

¹²⁸ See, for instance, Cecile Fabre, *Social Rights under the Constitution*, Oxford, 2000, p 154; Asbjorn Eide, “Realization of Social and Economic Rights and the Minimum Core Approach”, *Human Rights Law Journal*, vol. 10, n. 1-2, 1989, pp 35-51, referring to “the fact that ... the precise content of a number of economic, social and cultural rights ... remains extremely vague” at 35, Andreassen, Bard-Anders, Skalmes, Tor, Smith, Alan G., and Stokke Hugo. “Assessing Human Rights Performance in Developing Countries: The Case for a Minimal Threshold Approach to the Economic and Social Rights”, in *Human Rights in Developing Countries 1987/88, A Yearbook on Human Rights in Countries Receiving Nordic Aid*, Andreassen, Bars-Andres and Eide, Asbjorn (eds.), Akademisk Forlag, 1988, at 335 and Etienne Mureinik, “Beyond a charter of luxuries: economic rights in the constitution”, in *South African Human Rights Journal*, vol. 8, 1992, p467, and, in relation to the right to health care, Brigit Toebes, “Towards an Improved Understanding of the International Human Right to Health”, *Human Rights Quarterly*, vol. 21, 1999, pp 661-679, at 661. see also Scott and Macklem, *op. cit.*, at 45.

¹²⁹ This difficulty is usually referred to as often called the “vagueness” or “indeterminacy” of constitutional provisions that recognise them. It seems to me, however, that this terminology is rather misleading. Firstly, because vagueness (or indeterminacy) does not pose *in itself* an insurmountable obstacle for the judiciary, which is of course used to deal with indeterminate concepts as a matter of routine. (e.g. *negligence*, *reasonableness* etc). Moreover, because there is nothing vague in some provisions establishing social rights, as we will see below.

¹³⁰ Martin H. Redish, *Judicial Review and the "Political Question"*, 79 *Nw. U. L. Rev.* 1031, (1984-1985), at 1060.

Others have followed the strategy I criticised in Chapter 1 of comparing social rights to civil and political rights. The strategy, as we saw, is to dismiss the alleged differences between those rights so as to claim that, given civil rights are regarded as fully justiciable, so should social and economic rights be. Many have claimed, thus, that civil and political rights can be, in some aspects, just as vague as social and economic rights. The discussion here has a link with the positive/negative rights debate. Indeed, it is widely thought that vagueness is closely connected with the *positive* character of the duties entailed by some rights. That is, positive duties are thought to be usually much more imprecise than negative ones. Now, if the theory presented in Chapter 1 is correct, that is, if all rights generate positive and negative duties (i.e. duties of respect, of protection and of promotion), then vagueness is a feature of both social and civil rights. So, even if it is accepted that it is more difficult to establish the precise content of positive duties than negative ones, at least the negative duties entailed by social rights should not be subject to this criticism. Moreover, given civil and political rights also entail positive duties of protection and fulfilment, imprecision is not an exclusive attribute of social rights. In short, thus, civil rights can also be fairly indeterminate in their positive dimensions and social rights can be as determinate as civil rights in their negative aspects. As stated in an influential paper:

“The implications of primary obligations to respect social rights are relatively straightforward and precise. Imprecision increases the more one moves toward tertiary obligations to fulfil social rights. Yet this is also the case with civil rights, which can be hopelessly imprecise in the context of determining what a state must do to fulfil civil and political rights. In effect, when critics claim that, unlike civil and political rights, social rights suffer from lack of precision and therefore ought to

be imagined as nonjusticiable, they are comparing apples and oranges. That is, they are comparing civil and political rights at the relatively precise first level of obligations with social rights at the relatively imprecise third level of obligations, with second level obligations playing an ambivalent role in between.”¹³¹

This kind of argument, however, does not go very far in making the case for social rights justiciability. Indeed, even if it is accepted that the vagueness objection compares apples with oranges, this does not respond to the claim that positive duties generated by social rights are too vague and thus inadequate for courts to implement. It simply shows that, on one hand, civil and political rights also generate positive duties that are vague, and, on the other, that social rights also generate negative duties that are clear.

Now, one might claim that this would be already a progress towards justiciability, since at least one type of duty generated by those rights, that is, those negative duties of respect, could be just as justiciable as the negative duties generated by civil and political rights.¹³² But this seems to me a mistake for two main reasons. Firstly, because judicial enforcement of negative duties generated by social rights would not be such a great progress. It seems clear that the positive duties generated by social rights are often more significant and in need of enforcement, at least in developing countries. Indeed, in those countries, where many people fall bellow the standard of health care, education, housing etc that they should have as a matter of right, the state is failing to comply with its *positive duties* to promote social rights. Effective judicial enforcement, thus, would require primarily the adjudication of those duties, not negative ones.

¹³¹ Scott and Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992), 141 *University of Pennsylvania Law Review* 1-148, at 76.

¹³² See Craven, *op. cit.*

Secondly, and perhaps more importantly, because, contrary to what was claimed in the passage just quoted, the implications of negative duties to respect social rights are *not* “relatively straightforward and precise.” Even when the claim is one of violation of a negative duty to respect, for example, a case where the state withdraws a social benefit previously provided (more likely in developed countries), adjudication will necessarily depend on the definition of what was owed by the state in the first place. In such cases, therefore, the negative duty of respect suffers from the same problem of lack of precision as the positive duties to protect and fulfil. There is no reason to conclude, then, that it is harder for the courts to establish the unconstitutionality of an omission than the unconstitutionality of an act at the conceptual level.

This seems to show that the debate has not only focused on a narrow and not very helpful comparison between civil and social rights, but also that it has been based on prevalent yet mistaken premises. There is nothing intrinsic in negative and positive duties that make the former more and the latter less precise. The positive duty to pay income tax at a rate of 25% of someone’s salary is as precise as any duty can be, whereas the negative duty not to interfere with freedom of speech, for instance, can be extremely “vague”. Is burning one’s country flag an instance of speech protected by such freedom?

What makes a duty vague, or imprecise, is not its formal structure (positive or negative), but rather the nature of its content. What makes social rights’ duties (positive and negative) difficult to determine, as we have discussed in Chapter 2 and shall discuss further below, is the fact that they involve the intractable problem of distributive justice (i.e. resource allocation), not that they are often of a positive character. An adequate discussion of the judiciary’s institutional competence to adjudicate social rights, therefore, has to analyse how well prepared

courts are to deal with this difficult issue. This is what the debate on social rights justiciability has largely neglected, and we must now turn our attention to.

Social rights, resource allocation and distributive justice

The chief problem in defining the precise content of social rights, as we saw in chapter has to do with the fact that they are dependent on scarce resources.¹³³ What exactly an individual is entitled to in terms of health care, education, housing etc, as a consequence, is the outcome of a complex judgement of distributive justice, that is, a judgement on what distribution of the scarce resources of a certain community among its citizens is just. It is the extreme complexity of this enterprise that underlies (though often unwittingly) the assertion that social rights are too vague to be justiciable.¹³⁴ Are courts institutionally capable to make those distributive decisions on which the precise content of social rights turns?

The problem here, it is important to notice, is not just that there is no clear and infallible method to determine what distribution of resources is just.¹³⁵ This is surely a complicating factor. Reasonable people will hold different theories of distributive justice and will therefore disagree about what a just distribution of resources is. But this is the unavoidable case with any interpretive concept, such as liberty, equality, democracy, usually involved in fundamental rights issues. The problem here is also that the practical application of whatever theory of

¹³³ This is not, as we saw, a difficulty that affects exclusively social rights, but rather rights in general.

¹³⁴ See Chapter 2, where I discuss different conceptions of social rights and criticise the popular basic needs conception that seems to imply (or at least makes it ambiguous) that resource availability is an empirical, and not normative, constraint on social rights.

distributive justice is adopted requires an extensive and extremely broad analysis of numerous different factors¹³⁶ of the whole relevant community.¹³⁷ This is because, given resources are scarce, the decision to allocate some resources to a person or group will necessarily affect numerous other persons whose needs are also dependent on those resources. To go back to our example, if a decision is made that guarantees to our plaintiff the resources required for the treatment of his medical condition, other needs will have to go unmet due to the diversion of those resources to him. An adequate decision on the plaintiff's individual right, therefore, has to take into account not simply the individual need of the plaintiff, but all needs competing for the scarce resources of the community.

This requires not only the possession of a vast amount of information but also the ability to understand and process it. One must know, first of all, what the needs in the relevant community are. Then it must be decided how the available resources should be distributed among all those needs. This involves not only moral judgement but also technical knowledge. That is, the decision about *who* is to receive *what* has to be reached through the application of principles of distributive justice and informed by highly technical knowledge about effectiveness and efficiency (i.e. cost-benefit analysis). To illustrate this, let us take our example again. We know already that our plaintiff is in need of

¹³⁵ See, on this, Ronald Dworkin, "Objectivity and Truth: You'd better believe it", *Philosophy & Public Affairs* 25, no. 2 (Spring 1996).

¹³⁶ And merits, depending on the distributive justice conception held.

¹³⁷ This makes it more difficult to determine what social rights are than basic liberties. See Rawls, *Political Liberalism*, Columbia University Press, New York, 1996, claiming: "[w]hether the constitutional essentials covering the basic freedoms are satisfied is more or less visible on the face of constitutional arrangements and how these can be seen to work in practice. But whether the aims of the principles covering social and economic inequalities are realized is far more difficult to ascertain. These matters are nearly always open to wide differences of reasonable opinion; they rest on complicated inferences and intuitive judgements that require us to assess complex social and economic information about topics poorly understood.", at 229

some kind of medical resources to tackle his medical condition. Suppose, now, that his medical condition is renal failure and that there are at least two alternative types of medical resources that might be used for his treatment, e.g. renal dialysis or transplantation. If both were equally effective, justice would seem to demand the use of the least costly, because then more resources would be available for other needs. If both were not equally effective, but did cost the same, then justice would require that the most effective be used. But if they are neither equally effective nor cost the same, then it would be necessary to know exactly the difference between them in both respects (effectiveness and cost) to decide if possible advantages in effectiveness are enough to justify the additional expenditure required. So, a just allocative decision necessarily requires information on effectiveness, cost, and the relation between the two (cost-benefit).

The picture emerging from the discussion so far is already daunting. To decide if a plaintiff has a right to receive a certain kind of treatment one must possess information about all competing needs of the relevant community, all possible means of tackling them, their cost-effectiveness and, only then, apply an adequate theory of distributive justice to allocate among them the resources available. Yet, unfortunately, the difficulties do not stop here. Another significant complexity is that for each different allocative decision available there will be a different set of consequences affecting multiple different persons and groups. If a decision is made to give out resources for the treatment of the condition of our imagined plaintiff, a set of consequences will result. To imagine just a few, he will leave a longer and healthier life, during which he will possibly contribute somehow to the economic prosperity of his community, but will also require other kinds of resources to face other needs that his longer life will entail.

Moreover, those resources spent on him could well have been allocated in a different manner, say to provide housing to homeless people, or an educational programme to teach people how to prevent certain kinds of diseases, or whatever might be thought of among the infinite possibilities available. The consequences in each allocation would be totally different. When a choice is made to follow one allocation rather than another, all this possible consequences have to be taken into account and balanced against each other if an adequate and just decision is to be reached.

This type of decision-making context is what Lon Fuller famously called “polycentric”.¹³⁸ He explained what a decision of a polycentric issue involved with a set of examples, ranging from the division of an art collection between two heirs to the assignment of players in a football team to their positions. In all those cases, he claimed, each shift of any one player [or painting] might have a different set of repercussions on the remaining players [or paintings]”, since “we are dealing with a situation of interacting points of influence and

¹³⁸ See “The Forms and Limits to Adjudication”, 92 *Harvard Law Review* 353 (1978). He maintains that a multiplicity of affected persons is not an invariable characteristic of polycentric problems and that it is important to realize that polycentricity is often a matter of degree. That is, there are polycentric elements in almost all problems submitted to adjudication. “A decision may act as a precedent, often an awkward one, in some situation not foreseen by the arbiter. Again, suppose a court in a suit between one litigant and a railway holds that it is an act of negligence for the railway not to construct an underpass at a particular crossing. There may be nothing to distinguish this crossing from other crossings on the line. As a matter of statistical probability it may be clear that constructing underpasses along the whole line would cost more lives (through accidents in blasting, for example) than would be lost if the only safety measure were the familiar “Stop, Look & Listen” sign. If so, then what seems to be a decision simply declaring the rights and duties of two parties is in fact an inept solution for a polycentric problem, some elements of which cannot be brought before the court in a simple suit by one injured party against a defendant railway. In lesser measure, concealed polycentric elements are probably present in almost all problems resolved by adjudication. It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.”, at 397

therefore with a polycentric problem ...".¹³⁹ He further clarifies the point with the evocative allegory of a spider web:

"We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strand to snap. This is a "polycentric" situation because it is "many centered" -- each crossing of strands is a distinct center for distributing tensions."¹⁴⁰

Resource allocation was another example given by Fuller of a typical polycentric issue. As I have just tried to show, he was right, and this makes the task of determining the content of social rights even more difficult.

Yet this is still not the end of the story. There are yet other complicating factors that must be reckoned with. Even when all the difficulties discussed are somehow overcome and a seemingly just allocative decision is reached, there is no guarantee that it will remain so for a long time. That is, allocative decisions that seemed right, or reasonable, when they were made might soon become inadequate due to change in circumstances, such as the availability of better technology or more accurate information. Those can be related to the needs intended to be satisfied or to the means adopted to cater for them. Let us remain in the field of health care to illustrate this. Suppose that the health care needs of a population, and the corresponding means to cater for them, have been duly researched and determined, and that a seemingly just decision has been made as to the distribution of resources among those needs. A few months later, however, it becomes apparent that the

¹³⁹ *Id.*, at 395.

decision is not as adequate as it seemed to be. This can be due to various different reasons. It might be found out, for instance, the number of people suffering from a certain disease has diminished or grown more or less than initially predicted, or an epidemic of a new disease not covered in the initial plan might have broken out. It might be discovered, to give another example, that a certain treatment method is not as efficacious as thought, or more efficacious than thought etc.¹⁴¹ This highlights the tentative nature of measures aimed at the promotion of social rights and the need for continuous and periodic revisions.¹⁴²

This completes the rough picture I intended to draw of the complexities involved in the determination of the contents of social rights due to their resource dependence and resulting distributive nature. To recapitulate, it involves tackling an intractable moral and polycentric issue (i.e. resource allocation) for which a vast amount of information and expertise is required. It involves, additionally, a continuous revision of the decisions taken due to the probabilistic and changing nature of the circumstances on which those decisions are based. We must turn back now, thus, to our main question in this chapter: are courts institutionally well equipped to deal with those problems?

For many commentators, the answer to this question has to be in the negative. The very nature of the judicial function and the adjudicative process, it is claimed, is unsuitable to deal with the type of problem we have just described.¹⁴³ Let us see their position in more detail.

¹⁴⁰ *ibid.*

¹⁴¹ People's behaviour change, the environment changes, new technologies arise, unforeseen events happen etc.

¹⁴² It should be emphasised again that this is a characteristic of all positive rights.

¹⁴³ See, for instance, Fuller, *op cit*, arguing: "Generally speaking, it may be said that problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication.", at 400.

Institutional Limits of Adjudication

One common line of reasoning is that the judicial process is not suitable to pay adequate consideration to the wide breadth of interests that have to be balanced in the determination of the content of social rights. This is allegedly due to what is usually referred to as the *narrow focus* of adjudication.¹⁴⁴ Litigation is highly focused on the parties that come to court, who have a significant power to shape the terms of the dispute and to seize the exclusive attention of the judge. Indeed, most of the information based on which the judge is to make her decision is brought to court by the parties themselves.¹⁴⁵ As a result, litigation tends to focus on the individual case and neglect the general picture, unduly disregarding interests that will be necessarily affected by the judicial decision.¹⁴⁶ This results in the problem of unrepresentativeness, which raises questions not only of institutional competence but also of fairness. It deprives courts from the information required to make an adequate decision and excludes parties that will be affected by that decision from participating effectively in the process.¹⁴⁷

¹⁴⁴ See Horowitz, *op cit*, at 33, and also Sunstein, *op. cit.* (1993).

¹⁴⁵ The judge herself is not supposed, as a matter of rule, to seek information. This passive feature, which is allegedly necessary to preserve the impartiality of the judge, has the consequence of narrowing significantly the breadth of facts taken into account in the judicial decision.

¹⁴⁶ This bias is compounded by a strong psychological element not to be overlooked. The mere exposure of the judge to the detailed facts of the individual case can easily magnify the party's plight before her eyes in detriment of the equally deserving needs of those who, although not a party to the suit, are directly affected by the decision. I thank Riz Mokal for having drawn my attention to this point, which he calls the problem of "presence".

¹⁴⁷ A case such as the one we imagined, thus, is likely to be seen as a dispute between the individual plaintiff and the state rather than a matter of resource distribution among competing needs of the population as a whole. This can be clearly observed, as we will see below in the Appendix, in the right to health care decisions in the Brazilian courts. The problem of unrepresentativeness in the judicial process is usually resolved by the procedural rule that limits the effects of the judicial decision to the parties represented in court. Polycentric decisions, however, necessarily affect third parties. This realisation has actually spurned procedural developments towards the extension of the breadth of interests represented in

Another institutional limit commonly raised is the alleged inability of courts to deal with the kind of technical information required to tackle social rights cases. As we saw above, an adequate determination of the content of social rights involves extensive information about all competing needs in society and alternative means of satisfying them. Assuming all this information can reach the court, the question is whether judges are well prepared to use it, that is, to determine which is or are the adequate means to be employed, within the available resources, in the promotion of social rights. It is usually argued that judges lack the necessary expertise to carry out this task.

Finally, there are institutional problems in the remedial phase of adjudication. As we saw, the informational basis of decisions about the content of social rights is always changing, requiring, as a consequence, continuous monitoring and review. But the adjudicative process does not possess, it is argued, the necessary agility to deal with this. It lacks, in particular, adequate self-starting mechanisms for follow-up and review of its own decisions. If a remedy is not effective or becomes inadequate, the court has to rely on the parties to the case to come back to court and seek review. But if they fail to take this initiative, as it might well happen for lack of resources or loss of interest, the ineffectiveness or inadequacy of the judicial provision will go unchanged.¹⁴⁸ Moreover, even if the parties come back to the court to seek adjustment of the judicial decision, the sluggish pace of the judicial machinery makes any review extremely slow.

All these institutional limitations of the adjudicative process (narrowness of focus, lack of expertise of judges and remedial

courts, through devices such as collective legal suits (e.g. class actions) and amici. See, Abram Chayes, "The role of the judge in public law litigation", 89 *Harvard Law Review* 1281. 1311. Some claim, however, that those devices simply mitigate the unrepresentativeness problem, see Horowitz, *id.*

inflexibility) are supposed to make it inadequate for the task of determining what the abstract provisions recognising social rights actually entail. But how strong are those arguments on deeper reflection? It might be helpful to use our example again to tackle this question. So, how difficult would it be for the court to determine what the plaintiff's constitutional right to health care entailed in the face of the institutional limitations we have just discussed? Here I will also bring examples of real cases to illustrate the issue.

As regards the narrowness of focus of adjudication, it seems at first sight true that our imagined case would indeed place the court in a disadvantaged position to make an adequate decision. In fact, the court would find itself before an individual plaintiff who claims that his right to health care has been violated by a refusal of the local hospital to provide him with treatment. All the information available to the court, therefore, would be brought into the lawsuit by those two parties, and would tend to be narrowly focused on their own situation. The plaintiff would probably highlight his awful predicament, i.e. his desperate need to the treatment denied by the defendant. The defendant, in turn, would probably stress that there are not enough resources available to attend the plaintiff's request. But how is the judge to reach an adequate decision based on such narrow information? As we have seen, the question here is not simply empirical. It does not suffice to determine if, on one hand, the plaintiff really suffers from the medical condition stated and if, on the other hand, the state really hasn't got enough resources to fund the treatment of that particular plaintiff.¹⁴⁹ That would be the ideal, ordinary

¹⁴⁸ Horowitz, *op. cit.* at 53.

¹⁴⁹ Those who maintain a reversal of the burden of proof in the matter of resource availability seem to think that the question is this simple, see Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence", *South African Journal of Human Rights* (forthcoming) at 11, at 22 and Eric

case to be dealt with by a court. But this is not, as we saw, what is required in our case. What the court has to decide is whether, within the available resources in the relevant community, the plaintiff's right to a share of those resources would enable him to fund the treatment of his condition. This involves a broad analysis of all potential needs that compete for the same resources claimed by the plaintiff. That is, an intractable normative and polycentric question requiring a wealth of information and technical knowledge to be adequately answered.

It seems clear, thus, that with the restricted scope of information likely to be brought into court by the parties, it is virtually impossible for the judge to make an adequate, conscientious determination of the plaintiff's right. This problem can be observed in some cases involving the right to health care in South Africa and Brazil which I will discuss in more detail in the Appendix. In *Soobramoney*, for instance, the Constitutional Court of South Africa found itself unable to determine if the plaintiff's right to health care had been violated or not due to lack of information.¹⁵⁰ The court was therefore forced to take a restrained attitude, limiting its task to an assessment of whether the hospital's refusal to treat the plaintiff was irrational or in some way discriminatory, which it found it was not.¹⁵¹

In Brazil, the problem of narrowness of focus has also been producing unsatisfactory results, yet in an opposite direction. There, courts have been taking a more active role, actually deciding, beyond rationality and non-discrimination, if the state has complied with its duty to promote the right to health care constitutionally recognised. Due to the

Berger, "The Right to Education under the South African Constitution", 103 *Columbia Law Review* 614 (2003).

¹⁵⁰ But see my discussion of *Soobramoney* in chapter 6.

¹⁵¹ It would remain debatable, of course, if the court would have the expertise to use that information even if it were available, or would be able to fashion a suitable remedy. But here the court has to stop in the very first hurdle (narrowness of focus).

problems of narrowness of focus we have discussed above, however, those decisions can be hardly considered adequate. Indeed, given the traditional bipolar structure followed in those cases - i.e. an individual plaintiff against the state, the polycentric character of the problem has been completely missed by the courts and parties alike. On one side, there is the plaintiff claiming that his constitutional right to health care has been violated by the omission of the state to provide some sort of medical treatment. On the other side, there is the state arguing that there are not enough resources to satisfy the plaintiff's claim. The whole issue, then, is seen as an empirical matter of availability of resources to treat that specific individual's need rather than one of a just allocation of resources among the numerous needs of the entire population. Now, as the courts have a traditional suspicion about the state's management of public funds, they invariably dismiss the state's defence and order it to provide the individual plaintiff with the medical treatment required irrespective of the costs. The perverse outcome is that other needs, which might well be more deserving of resources, are sacrificed for the benefit of those individuals who have the means to access the courts.

These examples seem to give some support - or at least caution us to be more attentive, to the argument that the narrow focus of adjudication makes it unsuitable to deal with issues involving social rights. Let us appraise carefully, then, the points that can be offered to counter it.

It can be always contended that adjudication is not necessarily narrow in focus, even if it tends to be so. The information brought to the lawsuit can be always expanded, either by the parties themselves or by others called or allowed to participate in the case. As suggested by Chayes in his influential paper,

“[A] number of techniques are available to the judge to increase the breadth of interests represented in a suit, if that seems desirable. He can, for example, refuse to proceed until new parties are brought in, as in the old equity procedure, where the categories of necessary and proper parties converged. In class actions, the judge may order such . . . notice as may be required [“]for the protection of members of the class or otherwise for the fair conduct of the action,” including “sampling notice” designed to apprise the judge of significant divisions of interest among the putative class, not brought to light by its representatives. . . . The judge can also appoint guardians ad litem for unrepresented interests. And . . . he can and does employ experts and amici to inform himself on aspects of the case not adequately developed by the parties. Finally, the judge can elicit the view of public officials at all levels.”¹⁵²

Two issues, however, need to be raised. Firstly, not all legal systems have similar procedural devices to enlarge participation in lawsuits. Where those mechanisms are not available, therefore, the argument from narrowness of focus seems to stand. Moreover, even where those devices are available, it is not uncontroversial that they will always produce the desired results, i.e. to enlarge the breadth of interests represented in the lawsuit and its range of information so as to make possible an adequate decision.

Let us assume, however, that the problems of information and representation can indeed be superseded by those procedural devices. The question then is whether the court is capable of making good use of all this information, that is, of determining if the current allocation of available resources against which the plaintiff is contending is just. As we saw above, this is an issue whose decision involves extensive technical knowledge about the cost-effectiveness of all possible choices of means to satisfy competing needs. Here again it is claimed that judges, who are by nature generalists, don’t have the required expertise to deal with that information. Even if in the possession of all information available about resources, needs and possible means of satisfaction, thus,

¹⁵² *Op. cit.*

it would still be impossible for the judge, for lack of expertise, to determine if the plaintiff's individual need is to prevail over all other competing needs in society (i.e. if his individual need is to be granted the status of a right).

This seems to me the weakest argument raised about the institutional limits of the adjudicative process, since it could be easily defeated by pointing out to the possibility of training judges to acquire the technical expertise needed to make those decisions or, even simpler, the use of experts, which is obviously not alien to the adjudicative process.¹⁵³ The real point, though, is not whether *judges* have the expertise (expertise can always be acquired or borrowed), but rather if *anyone*, however well trained, can reach an adequate answer to the intractable question involved in the determination of an individual's social right. In other words, does this expertise really exist? What is it exactly? These important questions have been deeply overlooked in the debate, yet are clearly important. We must inquire, then, what exactly is this expertise that judges are supposed to lack?

Take our case again. What skills are required from a person in order to make an adequate determination of the right to health care of the plaintiff? Firstly, one must know what the need of the plaintiff is and what the available means to satisfy it are. One must also have knowledge, as we saw, of the cost-effectiveness of those means. In our case, this will involve medical and health economics information and knowledge. Yet, as we have also noted, one has also to know what other needs are competing for the same resources, and thus hold technical knowledge in the specific areas of those needs as well. Now, this will involve virtually all areas of knowledge that exist, since the needs competing for the scarce resources claimed by the plaintiff are simply all

needs of society. Indeed, to ascertain if the plaintiff should be entitled to his medical treatment one must decide if his plea is to prevail against educational, housing, security, environmental and all the other numerous needs of society. Expertise must be held, therefore, in all those areas. Now, it is obvious that no single person will possibly be an expert in all those areas of human knowledge. The question, thus, is evidently not if the judge, or whoever is to be entrusted with the decision, has the technical expertise in all those areas, but rather if, with the aid of expert information and advice in all those areas he or she is capable of making an adequate decision on who is to have what share of society's resources, that is, what needs of society are to be satisfied with the resources available.

This, then, is the "expertise" required for the determination of the content of social rights. That is, the ability to distribute the available resources of society among its numerous needs *in a just way*. The sheer scale of the task is daunting. What amount of resources should go to improve the health system, prison conditions, road conditions, make the streets safer, protect the environment, subsidise art, and the list goes on and on? We must remind ourselves, moreover, about the polycentric character of the problem. That is, for each choice of decision there is, a different set of consequences (often unpredictable) will follow. So, a decision to improve road conditions might diminish the rate of accidents and thus save resources in the health system. But it might also increase the number of cars in the roads, raising the levels of pollution and associated health problems, putting more pressure on the health system. The "expertise" required for such a decision is therefore Herculean. Do judges possess it? Certainly not. But neither do any other officials or experts. No one, it seems to me, can claim such "expertise". Some

¹⁵³ See, for such an argument, Fabre, *op. cit.*, at 171. But see, *contra*, Horowitz, *op. cit.*

people are surely better prepared than others in specific areas and that is why we call them experts. Public health experts will know with some degree of precision, for instance, how much money is required to minimize significantly the risks of public health hazards, but their technical expertise will provide limited (even if valuable) insight on, say, if this money would be more justly spent in giving subsidies to exporting industries so as to strengthen the economy or to improve the conditions of the transport system. Even someone in possession of reliable information of all the needs of society and the means and resources required to satisfy them, as a judge aided by experts or a member of parliament might well be, will be incapable of reaching such a comprehensive allocative decision and claim that it is correct.

It seems inadequate, thus, to keep discussing whether judges have the required *technical expertise* to make the broad allocative decisions involved in the determination of the content of social rights in the type of case we have imagined. No one has. The real problem seems to lie, therefore, not in the unsuitability of the adjudicative process to tackle polycentric tasks, but rather of any process. How is any institution (courts, parliament, executive, regulatory agencies etc) to determine what mix of specific medical treatments, educational or housing policies, food provision etc is required to guarantee social rights? In other words, it is the very intractability of the questions involved in social rights that make it virtually impossible for any process (adjudicative, legislative, and administrative) to define their precise content.

But where does that leave us? Two main options come to mind. It could be argued, for instance, that social rights cannot entail, after all, individually claimable rights (what is usually called a “subjective right” in civil law jurisdictions. Given this impossibility of determining their

precise content that we have just seen, all they entail are generic duties on the state to implement policies aimed at improving the satisfaction of the social needs of the population. If there is a role for the courts, then, it is not one to order the state to provide individual plaintiffs with a certain precise level of social goods. It is rather, at the most, one of assessing if the policies devised and implemented by the state are roughly capable of achieving their aim (sometimes called a “reasonableness” assessment). But it could also be insisted, alternatively, that social rights do entail subjective rights that might be claimed by individuals in the court, so long as we adopt some kind of presumptive device that enables us to determine their content with some precision without the need of embarking on the extremely broad and complex task of allocating resources among all competing needs of society. The former option is the topic of the next chapter. The latter will be discussed in chapters 6 and 7.

CHAPTER 5

SOCIAL RIGHTS AS GENERIC GOALS OF STATE POLICY

Given the significant difficulties of defining the precise content of social rights we have discussed in the previous section, it is often claimed that the constitutional provisions recognising those rights do not give rise to what is normally implied when a *right* to something is invoked, that is, the imposition on others of precise duties that can be individually enforced by the right-holder, usually through the courts (what is called a “subjective right” in civil law jurisdictions). Instead, it is argued, they entail generic *goals* that the state should pursue for the improvement of the population’s standard of living through the protection and direct provision of the social goods related to social rights (i.e. education, health, housing etc).¹⁵⁴ This type of constitutional norm is usually referred to as “directives of state policy” (in common law countries) or “programmatically norms” (in civil law jurisdictions).

The normative status of those norms is a matter of debate. For some, they give the political branches full discretion as to how and when

¹⁵⁴ For a philosophical defence of this position see L. W. Sumner, *The Moral Foundations of Rights*, Clarendon Press, Oxford (1987), arguing : “The coexistence of these two categories of rights in international law stands as a fossil record of the expansion, and consequent dilution, of the notion of a right. Rights in their narrow sense formulate urgent or insistent demands precisely because they constrain the pursuit of social goals. They are thus completely at home when they are invoked to protect basic liberties, due process, or political participation, since we are prepared to say that a society must secure these goods for all of its citizens alike regardless of any further goals it might elect to pursue. However, a society which fully satisfies this standard might for all that still contain widespread poverty, illiteracy, unemployment, or disease. When we notice this fact the obvious remedy is to formulate additional standards to eliminate these further economic, social and cultural evils. And when we wish to underscore the importance of these additional standards the obvious device is to formulate them in the same language of rights. Thus by degrees we move from using rights to impose constraints on the pursuit of social goods to using them to formulate just such goals.” At 17.

to pursue those goals. There should be no mechanism, they claim, to force the political branches to implement measures aiming at those goals, or to review the measures actually taken. They are, in short, merely “aspirational”. But this extreme position cannot be coherently maintained. It would render the constitutional provisions related to social rights devoid of any normative force, which would be incompatible with the role constitutional norms are meant to play in any legal system.¹⁵⁵ Any defensible position, therefore, has to ascribe some kind of normative force to those constitutional provisions. That is, they cannot be simply aspirational.

A less extreme position maintains that the state is indeed under a *duty* to pursue those goals. This duty has positive and negative dimensions. Under the former, the state has to devise and implement policies aimed at the protection and achievement of those constitutional goals. Under the latter, the state is forbidden from taking action that affects them.

Those duties, moreover, can be subject to some judicial control, though maybe not as thoroughly as they would be if subjective rights were at stake. When the state completely or partially fails to pursue the constitutionally mandated social goals, or takes action that unjustifiably affects them, it incurs in unconstitutionality. There is no reason, therefore, why the judiciary, as a guardian of the constitution, should not be called upon to remedy the violation. The question is how exactly the courts should exercise this constitutionality control. The matter was put with clarity by Professor Fabio Konder Comparato in the following way:

“... the legal system does not create a legal claim on the individual against the state to force it to realise those [social] rights ...

¹⁵⁵ See J.J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituicao*, Coimbra, at 1102-3.

It is simply a matter of checking if the state really develops or not, programmes of action aimed at ‘eradicating poverty and exclusion, and at reducing social and regional inequalities, as determined by article 3 of the constitution....

That doesn’t mean, obviously, that people don’t have, as individuals, any right to those social welfare benefits. The individual distribution of those goods and services appear in a second moment, as reflex rights...”¹⁵⁶

Amartya Sen proposed to call these meta-rights in a well-known article:

“A metaright to something x can be defined as the right to have policies p(x) that genuinely pursue the objective of making the right to x realisable. As an example, consider the following "Directive Principle of State Policy" inserted in the Constitution of India when it was adopted in 1950:

"The state shall, in particular, direct its policy toward securing ... that the citizens, men and women equally, have the right to an adequate means of livelihood:"¹⁵⁷

As regards *form*, two different options arise. When the state takes measures that unjustifiably affect social rights, it incurs in unconstitutionality *by action*. The remedy is thus conventional enough, that is, a declaration of unconstitutionality or, depending on the case, a negative injunction (i.e. “negative judicial review”). When the state fails to act, however, it commits unconstitutionality *by omission*, and the remedy has to be positive, that is, the court has to order the state to take

¹⁵⁶ See O Ministerio Publico na Defesa dos Direitos Economicos, Sociais e Culturais (2001). My translation from the Portuguese text: “o ordenamento jurídico não cria pretensão e ação individual do particular contra os Poderes Públicos, para a realização desses direitos. ... Cuida-se, tão só, de verificar se os Poderes Públicos desenvolvem ou não, de fato, programas de ação para “erradicar a pobreza e a marginalização e reduzir as desigualdades sociais e regionais”, como determina o art. 3º de nossa Constituição. Isto não significa dizer, obviamente, que as pessoas não tenham, enquanto indivíduos, nenhum direito a essas prestações de bem-estar social. A distribuição individual desses bens e serviços surge num segundo momento, sob a forma de direitos reflexos, ...”

action in order to comply with its constitutional duty (i.e. “positive judicial review”). We have already discussed the problems and objections to positive judicial review in chapter 3. Here I will concentrate on the substantive dimension of the judicial task. That is, by what standard is the court to assess unconstitutionality (active or omissive)? In other words, how can the court determine which measures are required in the pursuance of the social goals mandated by the constitution?

There seems to be a preference among partisans of social rights as generic goals for what has been called an administrative law approach in the adjudication of those rights.¹⁵⁸ Given the impossibility of deriving “subjective rights” from the constitutional norms that recognise social rights, courts should focus on the measures taken by the state to further the constitutional goal of improving the population’s standard of living. Now, the way in which courts have traditionally assessed the legality of state’s measures to further legal goals has been through the concept of reasonableness developed in administrative judicial review.

Let us see, then, if this administrative model provides an adequate answer to the question I have just posed. In this task, I will look at two

¹⁵⁷ “The right not to be hungry”, *The Right to Food*, P Alston and K Tomasevski (eds), Martinus Nijhoff Publishers, pp 69-81.

¹⁵⁸ See, for instance, Cass Sunstein, *Designing Democracy* (2000), Eric Berger, “The Right to Education under the South African Constitution”, 103 *Columbia Law Review* 614 (2003), and Hare, Ivan, “Case Analysis – Minister of Health v. Treatment Action Campaign: The South African AIDS Pandemic and the Constitutional Right to Healthcare”, [2002] *European Human Rights Law Review*, Issue 5, pp 625-630. “... the manner in which it gives effect to those rights must be sensitive to the legitimate functions of the other branches of government and to the interests of the general population it serves as well as to the constitutional rights of the parties before it. This presents a curial body with an immensely difficult balance. ... [he criticizes Brown and praises South Africa for choosing a different route]: one which uses the principles of administrative, rather than constitutional, judicial review to supervise the exercise of power.” P 629

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...

recent decisions involving social rights taken by the Constitutional Court of South Africa where it has adopted that model.

The Administrative Model

The South African cases I mentioned deal with the rights to housing and health care (*Grootboom* and *TAC*). In *Grootboom*, a group of homeless people complained that their right had been violated by the state, whose policy did not provide them with housing as guaranteed in the constitution. In *TAC* a group of organisations headed by Treatment Action Campaign challenged the policy of the state on the AIDS problem for not complying with the right of all HIV infected mothers to receive nevirapine (an AIDS drug) in the state hospital system. This drug, which was offered to the state for free, was scientifically proven to reduce significantly the rate of mother-to-child transmission of HIV, but was being provided by the state only in two state hospitals, in a pilot scheme planned to last for 2 years. In both cases, the role of the court was not, the court said, to determine if an individual's social right had been violated and order the state to provide that individual with whatever the court defines as her specific social right. Constitutional provisions concerning social rights do not entail, for the court, subjective rights (i.e. individually claimable rights). They state, as we have seen, generic goals to be pursued by the state in order to improve the standards of living enjoyed by the population. The role of the court, thus, is rather to assess if the state has discharged *properly* its constitutional duties. This is to be done through the standard of *reasonableness*. That is, the court is to determine if the measures taken by the state in order to comply with its duties are reasonable. In the words of the Court in *Grootboom*, "*the real question in terms of our Constitution is whether*

the measures taken by the state to realise the right ... are reasonable."¹⁵⁹

In those two cases where the reasonableness test was applied, the measures under scrutiny were those implemented by the state in compliance with its constitutional duties to provide access to housing (*Grootboom*) and health care (*TAC*) to the population. In both cases the Court found that those measures were *unreasonable*, and hence declared them unconstitutional. But how exactly did the Court reach those conclusions? That is, how did it determine that the state's measures were unreasonable?

The concept of reasonableness pervades all fields of law, from the "reasonable man" standard in torts to the "beyond reasonable doubt" criteria in criminal law. It is the specific administrative law use of reasonableness, however, that interests us here. A measure is reasonable if it is capable of achieving the aim it is supposed to achieve (in our cases, the realization of the rights to housing and health care). The test of reasonableness focuses, therefore, on the relation between the *means* selected and employed by the state and the *ends* established in the Constitution. Now, though the test appears very neat and simple in its general formulation, it is obviously far from that when it comes to its employment. Two main orders of problems should be emphasized, one related to the *means*, the other to the *ends* side of the relation.

As to the former, there are two sets of concerns. Firstly, there might be more than one means capable of achieving an established aim. Secondly, it might be extremely difficult to establish whether a particular mean is in fact capable of achieving that aim. The Court dealt with the first set of problems in the following way:

¹⁵⁹ *Grootboom*, para 33.

“A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.”¹⁶⁰

It left for the state, therefore, a scope for choice between more than one reasonable means. This is certainly correct and is justified on general principles of law and morality related to positive duties. Positive duties can be usually discharged by a set of different but equally efficient (i.e. reasonable) measures. When that is the case, it is logically possible to comply with the duty by choosing any of those measures. Robert Alexy instructively calls it “means-selecting discretion” and gives a simple and clear example to illustrate it:

“This discretion arises from the structure of positive duties. If one is required to save a drowning person, and if this can be done by swimming out to them, by throwing them a life-ring or by sending out a boat, then the duty to save does not require the implementation of all three measures.”¹⁶¹

As to the availability of more efficient measures than those chosen by the duty holder, it is also a general feature of reasonableness that a person is not under a duty to act always in the best possible way, but rather in a way that an average person (the “reasonable man”), in his place, would have acted.

The Court did not deal, however, with the second difficulty we

¹⁶⁰ *Ibid*, para 41.

¹⁶¹ Robert Alexy, *A Theory of Constitutional Rights*, Oxford University Press, 2003, at 396. see also Limburg principles, para 71: “In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control

mentioned. What if it is impossible to establish the reasonableness (i.e. the capability of achieving aims) of the measures chosen by the state? In that case, as we will see below in more detail, there is also a strong reason for courts' deference to the state's decision out of what we might call, following Alexy again, *epistemic discretion*. If it is uncertain what measures are adequate to achieve the established aim, then a court will have little grounds on which to base its reasonableness assessment.¹⁶²

Yet the most important difficulty seems to be related to the *ends* side of the relation of reasonableness. To establish whether a certain measure or set of measures are reasonable one must necessarily be clear about the aim that those measures are supposed to be capable of achieving. In our context, the aim is the realization of social rights. But what do those rights exactly consist in? In other words, what do the abstract provisions of the Constitution (access to health care, access to adequate housing) exactly entail? So that the measures taken by the state to provide those goods to the citizens can be deemed reasonable or unreasonable, one must necessarily answer those questions. Absent that, the assessment of reasonableness is obviously impossible.¹⁶³

Yet nowhere in the judgements of the cases in question is a clear definition of the rights involved to be found. In *Grootboom*, for instance, the court was satisfied with a very abstract formulation of the right to access to housing:

may adversely affect its capacity to implement particular rights.”) and Scott and Macklem, at 79.

¹⁶² Here Alexy talks of “epistemic or knowledge related discretion”, *op cit*, at 414 ff. See also David Bilchitz, “Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance”, (2002) 118 *The South African Law Journal*, 484, at 495, for a similar treatment of reasonableness.

¹⁶³ This same point was made by David Bilchitz in “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence”, *South African Journal of Human Rights* (forthcoming) at 11. Yet our proposed solutions for the problem differ substantially, as will be clear in the next chapter.

“The extent and content of the obligation consist in what must be achieved, that is, ‘the progressive realisation of this right.’ ... the right referred to is the right of access to adequate housing.”¹⁶⁴

The same problem is to be found in *TAC*, where the Court never attempted to formulate with any precision what exactly the right to access to health care consisted in.

Now, against such abstract paradigms, the reasonableness test, if not rendered impossible, becomes almost impracticable. Indeed, if one doesn't know with more precision¹⁶⁵ what access to housing and health care mean, how can it be established if state's measures in that direction are reasonable or not?

It is rather surprising, thus, that the South African Constitutional Court did find, in both cases, that the state's housing and health care policies were unreasonable without a clear standard for assessment. In *Grootboom*, the court found that the state failed, in his policy, to pay adequate regard to desperate homeless people, providing them with short term accommodation relief. The state's policy was unreasonably focused, the court claimed, on medium and long term results. In *TAC*, the health policy of the South African state was deemed unreasonable for not providing the drug nevirapine comprehensively, that is, in all public hospitals in the country. Yet why, it might be asked, was the state under a duty to provide short term accommodation relief for homeless people in desperate need instead of maintaining its exclusive medium and long term plan to provide housing for everyone? What makes the provision of nevirapine only to selected hospitals of the public system

¹⁶⁴ *Grootboom*, para 45.

¹⁶⁵ I am not saying here that one needs a fully “fleshed out” conception of a standard before one can claim a violation of it. Even the insurance based standard I defend in chapter 7 cannot be fully fleshed out, as I myself admit. What I claim here is that the South African Constitutional court did not even try to give some content, however vaguely, to the standard they were judging in those cases, i.e. the rights to health care and housing.

unconstitutional?

It is important to make clear that I am not questioning the possibility that the Court's conclusion might have been right in both cases. Rather, I am challenging the method through which those conclusions were reached. In other words, how do they follow from the abstract constitutional provisions that recognise to everyone a right to access to housing and health care?

Reasonableness in itself, as I hope is clear by now, cannot provide this answer, since it depends on (rather than provides) a clear determination of the aims to be pursued by the state. The findings of unreasonableness in *Grootboom* and *TAC* could be properly justified, thus, only if the goals of access to adequate housing and health care had been furthered specified by the Court as encompassing short term relief of those in desperate need (in the case of *Grootboom*) and the provision of nevirapine (in *TAC*). It is arguable that this is in fact what the Court actually did, albeit in a confusing way, that is, by “implicitly building [those goals] into the concept of reasonableness” in the apt phrase of a commentator.¹⁶⁶ The problem is that reasonableness in itself, as I have just contended, cannot do this work. We need a proper justification for why the abstract provision of the South African constitution encompasses those goals, which was by no means provided in the judgement of those two cases. In other words, we need a clear definition of the content of the social goals guaranteed in the constitution. That involves the very same complex normative and polycentric issues of resource distribution we discussed in the previous chapter. Why is the state to spend resources on short term housing, for instance, instead of improving the quality of primary education, or satisfying any other need that might be competing for its scarce resources?

The main problem with the generic goals conception of social rights in terms of justiciability, thus, is exactly the same faced by the subjective rights conception, i.e. the lack of a clear standard for the assessment of compliance with the constitutional norms (be they rights or generic goals). The administrative model of social rights adjudication, as we have just seen, provides no solution for this problem.

Other proposals

Other proposals take this lack of standards problem into consideration but come to a much less ambitious conclusion. The role of the judiciary, for them, is necessarily dependent on the previous action of the political branches. For the judiciary to be able to play any role, they claim, there must be first some action by the political branches specifying the constitutional provisions that recognise social rights. Once this is done, then courts can exert some control by assuring that they are promoted to everyone without *discrimination* or that they are not *curtailed without justification*.¹⁶⁷

Ronald Dworkin has defended the option recently on a comment about the South African cases involving social rights discussed above.¹⁶⁸ When constitutions expressly recognise enforceable social rights, he says, courts must choose between two different strategies:

“Judges must choose between two strategies. The first strategy is substantive. It requires judges to review at least the major decisions that government has made in allocating resources to satisfy the basic needs specified in the Constitution, and to reject any such decisions

¹⁶⁶ David Bilchitz, *op. cit.*, at 498.

¹⁶⁷ In chapter 3 I have discussed a similar approach yet from the perspective of legitimacy. Here I am dealing with the problem of institutional capacity discussed in chapter 4.

¹⁶⁸ “Response to Overseas Commentators”, *The International Journal of Constitutional Law*, vol. 4, issue 1, 2003, pp 651-662.

they find unreasonable. This substantive strategy might require judges to declare that government policy is unreasonable because it spends much too much on health care and, therefore, not enough on housing, for example, or vice versa. The second strategy is egalitarian: it insists not that government must make any particular allocation of resources but that it must show equal concern for all in the allocations it does make. It cannot, for example, distribute what it does assign for health care in a way that ignores greater or more basic health needs for that allocation.

A literal reading of the language of the South African Constitution might seem to recommend the first, substantive strategy. The constitution declares that “[t]he state must take reasonable legislative measures within its available resources to achieve the progressive realisation” of the rights it recognizes, and that would seem to mean that the state’s major allocation of resources must themselves be reasonable. It would be open to the courts, on this view, to declare that money must be taken from the government’s road building programs, for example, to provide renal dialysis for all patients whose life that would prolong, because it is unreasonable to devote monies to transportation that might be used to save lives. But the second, egalitarian, strategy is also a plausible reading: the Court may read “reasonable”, in this context, to mean “consistent with equal concern for all.

Chaskalson’s account of the three decisions he discusses suggest that the Court has adopted (properly, in my own view) the egalitarian strategy.”¹⁶⁹

According to this view (which Dworkin calls the egalitarian strategy), thus, courts should not impose on government any particular allocation of resources. Yet once an allocation is done, it should make sure it abides by the egalitarian principle that requires that individuals be treated with equal concern and respect. So, if the legislature passes a law determining that a certain benefit will be available to a certain class of people the judiciary can extend that benefit to everyone else excluded without a justified reason based on the principle of non-discrimination or equality.¹⁷⁰ This method has been largely used in Italy, for instance,

¹⁶⁹ *Id.*, at 651-2.

¹⁷⁰ See, on this point, Victor Abramovich and Christian Courtis, “*Apuntes sobre la exigibilidad judicial de los derechos sociales*”, p. 4, available at <http://dex1.tsd.unifi.it/jg/es/surveys/latina/courtis.htm>

under the name of “additive interpretation” (“sentenze additive”). To give an example, the Italian Constitutional Court has extended one aspect of the right to housing, namely the right to succeed deceased spouses in rental contracts, to unmarried partners, who hadn’t been included by parliament in the relevant statute.¹⁷¹

The other method of judicial intervention mentioned above is based on the so-called “principle of non-retrogression”. According to this principle, if the state decides to withdraw or curtail an existing benefit, the judiciary might veto the decision. This principle was maintained by the Committee on Economic, Social and Cultural Rights in the following way:

"[A]ny deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."¹⁷²

The advantage of this principle in terms of justiciability is supposed to be that social and economic rights become more like “negative rights”, demanding from the judiciary to apply the traditional enough for of judicial review we discussed in chapter 3 (“negative judicial review”). As put by Scott and Macklem,

“[l]evels of provision of social goods existing in statutory form at the time of constitutionalization can themselves be specifically worded and entrenched in the constitution as minimum constitutional, as opposed to statutory, standards. For example, debate is currently occurring in

¹⁷¹ See Luis Maria Diez-Picazo and Marie-Claire Ponthoreau, *The Constitutional Protection of Social Rights: Some Comparative Remarks*, European University Institute, Florence, 1991, at 12.

¹⁷² *General Comment No. 3*, Report on the Fifth Session, U.N. ESCOR, Comm'n on Economic, Social and Cultural Rights, 5th Sess., Supp. No. 3, Annex 3, at 85, U.N.Doc. E/1991/23, E/C.12/1990/8 (1990)

Canada over whether to constitutionalize the elements of universality, accessibility and portability of the existing health care system so as to render those elements constitutionally sacrosanct. Were this to occur, a so-called positive right would in effect be recognized as a negative right, at least in the sense that specified components of the social state (as opposed to the 'state of nature') become the baseline for constitutional analysis. Social rights constitutionalized in this way would operate in much the same way that the system of private property and contract rights functions as a constitutional baseline in the United States.”¹⁷³

The principle of non-retrogression was applied in Portugal, where the Constitutional Court invalidated a statute that tried to diminish significantly the scope of the Portuguese National Health Service (Serviço Nacional de Saúde)¹⁷⁴

Hence, although the constitutional provisions cannot give rise to “subjective rights”, they do give rise to rights (call it meta-rights if you will) that government should adopt policies to advance the standard of living of the population and, once those policies are adopted, rights of equal access and non-retrogression are created, which are sometimes referred to as *derivative*, or *reflex* rights, as we saw above.¹⁷⁵

But these solutions suffer from obvious problems. Firstly, they still leave to the political branches a considerable degree of discretion on when and how to act. Indeed, as we saw, the judiciary can take some action only when, and if, the political branches decide to implement policies. If they remain inert, however, there would be no baseline from which the

¹⁷³ Scott and Macklem, *op. cit.*, at 80, and note 265. See also Charles Reich, 73 *Yale Law Journal* 733, (1964) at 739-46 (describing removal of social benefits as a government activity bounded by constitutional protections), at 739-746.

¹⁷⁴ See Canotilho, *op. cit.*, at 448-9, Acórdão do TC n.o 39/84 (DR, I, 5-5-1984).

¹⁷⁵ E. W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 1978, pp 69-105, at 101-3. Fabio Konder Comparato, *idem*.

judiciary could apply the principles of equality and no-retrogression. In Dworkin's egalitarian strategy, for instance, courts should not tell government how to make major allocations. Yet, it must be asked: what if government fails to allocate any resources at all, for instance, to health care?

Moreover, that might even discourage action to promote social rights rather than encourage it. In fact, the political branches are aware that, when they act, then the judiciary will be able to interfere. It might be better, thus, not to act, and thus be free of judicial interference, than to do so and become subject to it. There are of course political pressures that impede the political branches from remaining inert, so there will always be some opportunity for courts to intervene whenever they do act. But this takes us to a final problem. Such a fragmented method of intervention impairs the development of a coherent system of definition and implementation of social rights. On the contrary, it establishes a haphazard system where social rights are guaranteed through patchy measures adopted by the state and enlarged by the judiciary in a disordered manner. It might well be the case, for example, that the political branches made a wrong decision to concede a certain benefit, one that should be now withdrawn in order to liberate resources for more important needs. Yet, judicial interference to control equality or non-retrogression might extend or perpetuate such benefits and by that increase, not diminish real inequalities.

The principles of equality and non-retrogression, therefore, are meaningless, or inadequate, unless we can establish in the first place with some degree of precision what goals should be pursued by the state to advance social rights. Once we are able to do that, however, there is no reason to limit courts' role to those two methods. They might well

then interfere when government does not take the measures they should to advance those goals.

The very same problem we highlighted in the previous chapter, therefore, thwarts the conception of social rights as generic goals of state policy. Unless those goals can be determined with some precision, an adequate judicial control will remain impracticable. No meaningful reasonableness test will be possible. Equality and non-retrogression reflex rights, as we saw, will not fare any better.

Conclusion

The discussion so far leads us to the conclusion that the judiciary is indeed incapable of adjudicating social and economic rights. Yet, this is not because of any inherent institutional characteristic, as the argument from institutional competence would have it, but rather due to the extreme difficulties that the precise determination of the content of those rights involves. But this, as we saw in the previous chapter, affects any institution in charge of dealing with those rights. Courts are at no necessary comparative disadvantage, thus, in relation to legislatures and administrators.

It is unhelpful, therefore, to keep debating about the capacity, advantages and disadvantages of the courts in comparison with the political branches to adjudicate social and economic rights. As long as the difficulties we have discussed in this and the preceding chapter are not superseded, no institution is capable of performing this intractable task. We urgently need a method, thus, to tackle or circumvent those obstacles. In the next chapter I will analyse a proposal which has been growing in attention and popularity in international and domestic quarters, the so-called minimum threshold approach.

CHAPTER 6

THE MINIMUM CORE APPROACH: GIVING SOCIAL RIGHTS TEETH?

In the previous two chapters I discussed the standard institutional competence objection to the justiciability of social rights and concluded that it is inadequate. What makes courts incompetent to adjudicate social rights, I argued, is not any inherent institutional characteristic of the judicial process or the capacity of judges. It is rather the extreme difficulties of determining with some degree of precision what exactly those rights entail. That is, the lack of a clear standard through which to assess whether those rights have been respected or not. This, as we noted, is something that afflicts not only the courts, but rather any institution or official that embarks on the task of determining the content of social rights.

There is a clear need, thus, for a method of specification of the content of those rights if they are not just to become justiciable, but also if social rights debate (whatever the forum) is to proceed in a coherent and meaningful way.

In this chapter I analyse the most influential proposal that has been advanced to solve this problem, namely the so-called “minimum core approach”.

The minimum core idea

The idea that fundamental rights in general, or their corresponding obligations, have an essential or minimum core content is not new. It has been widely used in German constitutional law, for instance, where the

1949 constitution expressly refers to such a core in article 19(2): “19(2) In no case may the core content of a constitutional right be infringed.” It is supposed to single out those elements of a particular right which are so important that, without them, we would not be able to describe it as that particular right anymore.

The practical relevance of such a concept for the German constitutional system has to do with fundamental rights’ limitation in cases of conflict of rights or between rights and other interests. In situations where it is impossible to fully guarantee all rights or values recognised in the constitution, the minimum core is thought to provide guidance for the required balancing procedure. The closer one gets to the core elements of a right, the more important the interests involved and, as a consequence, the greater the need to protect them.

Here, two possible interpretations of the function of the minimum core are available, an *absolute* and a *relative* one. In the former, the minimum core establishes an absolute threshold beyond which no further limitation is ever justified, whatever the importance of the countervailing interests at stake. It sets, thus, “final untouchable areas”, as put in a German constitutional case.¹⁷⁶ In the relative interpretation, the core content does not impose an absolute threshold. It rather demands that any limitation to the minimum core must be justified by extremely hefty countervailing reasons.¹⁷⁷

Cases where the minimum core has been applied have usually involved conflicts between the right to privacy and the public interest. In a decision concerning secret tape recording of conversations, for instance, the German Constitutional Court, taking an absolute approach, decided: “even overwhelmingly important public interests cannot justify

¹⁷⁶ See Robert Alexy, *op. cit.* 194.

a limitation of the absolutely protected essential core of private life
...”¹⁷⁸

The idea of a minimum core content seems to have been taken up in the social rights literature from the late nineteen eighties onwards.¹⁷⁹ It hasn't been always used in a unitary way or with the same connotation, nor even referred to with the same terms. Some call it minimum thresholds, others minimum core rights or minimum core obligations. For some, as we shall see below, it should be used to entail justiciable subjective rights; for others only standards for the assessment of states' compliance with their objective duties. The basic idea, however, is similar to that used in the context of classical rights. The closer one gets to the core elements of a certain right, the more important its protection becomes. As put by David Bilchitz in a recent defence of the approach, “[t]he recognition of a minimum core of social and economic rights that must be realised without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests.”¹⁸⁰

The practical relevance of the minimum core approach in the context of social rights lies also in the solution of conflict situations. That is, when it is impossible to fully guarantee a certain social right, the minimum core is supposed to take priority.

¹⁷⁷ For a discussion of article 19(2) and its interpretation by the German Constitutional Court, see Alexy, *op cit*, at 192 ff.

¹⁷⁸ BverfGE 34, 238 (245), apud Alexy, *id*. For South African cases involving privacy where the minimum core has also been applied see David Bilchitz, *Towards*, at 16-7.

¹⁷⁹ For the article that seems to have first proposed it, see Andreassen Bard-Anders, Skalnes, Tor, Smith, Alan G., and Stokke Hugo. “Assessing Human Rights Performance in Developing Countries: The Case for a Minimal Threshold Approach to the Economic and Social Rights”, in *Human Rights in Developing Countries 1987/88, A Yearbook on Human Rights in Countries Receiving Nordic Aid*, Andreassen, Bars-Andres and Eide, Asbjorn (eds.), Akademisk Forlag, 1988.

¹⁸⁰ *Id.*, at 14.

It is not difficult to see why the minimum or essential core idea has acquired such popularity among supporters of the judicial enforcement of social and economic rights. It seems to provide the answer to the chief hurdles we have discussed above: *resource scarcity* and *indeterminacy* (i.e. lack of precision) of social rights provisions. The minimum core is at the same time a method to partially specify the content of social rights and a way to avoid the traditional objection of resource scarcity. So, even if it is impossible to define the precise content of social rights, or, due to resource scarcity, to provide everyone with their full content (however defined), at least a basic minimum can be defined with a fair degree of precision and, most importantly, should not be impossible to guarantee to everyone within available resources.

But is the enthusiasm grounded? This is what we must appraise in this chapter.

Minimum core and resource scarcity

One of the alleged virtues of the minimum core approach, then, is to provide a solution to the problem of resource scarcity and resource allocation. The fact that the positive aspects of social rights are dependent on resources has always been an obstacle, as we saw, to the clear determination and scrutiny of the corresponding states' duties. It has always been accepted, even by the most fervent advocates of social rights, that what is called their "full realisation" is impossible to achieve in the short term due to resource limitations. As a consequence, all that can be expected from states is that they adopt all possible measures within available resources aiming at the long-term achievement of the

realisation of those rights. Their duty, in short, is one of “progressive realisation”, not immediate guarantee of those rights.¹⁸¹

Once it is admitted that immediate “full realisation” is impossible and that “progressive realisation” is the standard, the obvious difficulty, as we saw in the previous chapters, is how to assess compliance with it. How to determine, that is, if the state is taking all possible measures within available resources to progressively achieve, as soon as possible, the ultimate objective of “full realisation”? The extreme difficulties of such an assessment threaten to deplete the state’s duties of any meaning.

It is here that the minimum core is meant to perform its role. It is supposed to establish a set of measures and goals that can be demanded from the state *immediately*, not in the vague future. This is how the UN Committee on Economic, Social and Cultural Rights, who has adopted the minimum core approach, has explained it:

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

The rationale, therefore, is this. Even though resource limitations are accepted as an obstacle to the immediate “full realisation” of social rights, this is not to deplete those rights of all their strength. The state is still under a duty to take immediate action in that direction within its possibilities. The minimum core is supposed to provide a criterion for

¹⁸¹ I have tried to show in chapter 2 that the idea of “full realisation” is based on a flawed conception of social rights (which I called basic needs conception). For the purposes of understanding and appraising the minimum core approach, however, we must assume that there is such a thing.

defining what measures should be taken first.¹⁸² It is a principle, thus, of *priority*: in the face of resource scarcity, priority should be given to what is most important, i.e. the minimum core, which is supposed to single out the most important elements of the right. Once the minimum core is guaranteed and more resources become available, then we can start to improve on it towards the full realisation of rights.¹⁸³

So far, we have a structural and functional definition of the minimum core. It is supposed to single out the most important elements of a right (structure), and establish a priority over scarce resources, imposing immediate duties on the state to protect the minimum core (function). We must turn our attention now to the difficult question of the substantive definition of the minimum core, i.e. what are these most important elements of social rights that should receive priority in the allocation of scarce resources? That is, how do we define the minimum core of a social right.

Minimum core and basic needs

The definition of the content of the core minima of social rights is traditionally done through the idea *basic needs*. As we saw in the Committee's citation above, the minimum core is defined as "minimum essential levels of each of the rights", that is "essential foodstuffs, ... essential primary health care, ... basic shelter and housing, ... the most

¹⁸² See Lucie Lamarque, "The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights", *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Chapman and Russel (eds), Intersentia, 2002, pp 87-114, explaining the minimum core obligations as respecting "urgency for action, as well as the limited means of States.", p.103

¹⁸³ See, for instance, Bilchitz, *Towards*, "The idea of a minimum core obligation suggests that there are degrees of fulfilment of a right and that a certain minimum level of fulfilment takes priority over a more extensive realisation of the right." And G van Bueren, "Alleviating Poverty through the Constitutional Court" (1999) 15 *South African Journal of Human Rights* 52, at 59 ("a minimum core approach ... should be viewed as a springboard for further action).

basic forms of education ...”.¹⁸⁴ One commentator talks of needs we all have “at a minimum, to be able to lead a decent life.”¹⁸⁵ We all have a vague, intuitive grasp of what is meant by basic needs. Yet the concept is by no means a clear, uncontroversial one, as we have already discussed in chapter 2. It can be restrictively interpreted, for instance, as those needs necessary to “ensure survival”, i.e. survival needs.¹⁸⁶ Or it might be more broadly conceived as encompassing not only “survival needs”, but also “needs which we have by virtue of leaving in a given society”. In the latter interpretation, for instance, it is argued that a television set should be considered a basic need in most developed countries.¹⁸⁷

I will not engage here in this debate on the precise scope or appropriateness of the concept of basic needs, neither on the appropriateness of the concept in the first place.¹⁸⁸ For my purposes in this chapter, I will be contented with the general, intuitive formulation of basic needs as those essential for someone to lead a minimally decent life. Whatever specification one derives from this abstract formulation, the problem is how to defend it in view of the function that the “basic needs-core minima” are supposed to perform.

The function to be exerted by the core minima, as we saw, is to establish a set of essential elements of each social right, which can be regarded as giving rise to immediate, and not merely progressive, state’s duties. They establish a priority claim, therefore, on the allocation of the scarce resources of a society. Two important issues then arise. Firstly, what if a country’s resources are still insufficient to afford even the core

¹⁸⁴ For discussions of a social minimum based on needs see J Waldron, “John Rawls and the Social Minimum”, *Journal of Applied Philosophy* 3 (1986), pp. 21-33, David Copp, “The right to an adequate standard of living: Justice, Autonomy, and the Basic Needs”, *Ethical Investigations, Rights and Duties*, vol 5 (Welfare Rights and Duties of Charity), Carl Wellman (ed).

¹⁸⁵ Fabre, *op. cit.* At 35.

¹⁸⁶ Bilchitz, *Towards*, at 17.

¹⁸⁷ Fabre, *id.*

minima? Secondly, even if there are enough resources, why should we give total priority to the protection of those needs singled out in the core minima over other, less basic needs? I shall deal with each of those issues in turn.

In many developing countries, it is rather plausible that resources available would not be sufficient to guarantee even the core minima of social rights (however one defines them). This has not been ignored by the UN Committee in its general comment n.3, where it recognises that “any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned....” It is clear, therefore, that the minimum core obligation is not absolute, that is, failure to discharge it is not automatically established by the mere fact that in a certain country the minimum core is not actually guaranteed to everyone. If resources are insufficient, the state cannot be held liable (“ought implies can”). What can be asked from the state, thus, is not that it guarantees the minimum core no matter what, but rather that it makes “every effort ... to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”¹⁸⁹

Yet it must be inquired if this does not impair significantly the function that the minimum core was supposed to perform. Indeed, we saw that the minimum core was to entail immediate and clear obligations for the state, and that was supposed to solve the problem posed by the highly indeterminate standard of progressive full realisation. How can one determine if the state has made “every effort ... to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”? If there are no sufficient resources for the

¹⁸⁸ I have discussed this problem in greater detail in chapter 2.

guarantee of the core minima, the issue is again the intractable polycentric one of how to distribute limited resources among numerous competing needs. But this is exactly the problem the minimum core was supposed to circumvent.¹⁹⁰

We must conclude, then, that the minimum core approach represents no solution to the resource-dependence problem when not even they can be afforded by a certain state.¹⁹¹ But what about countries that do have sufficient resources to provide the minimum core? Are they really under an absolute duty to guarantee the core minima?¹⁹² This leads us to the second question I raised above: why should we give total priority to the protection of those needs singled out in the core minima over other, less basic needs?

The claim of priority made for the core minima, as I have already discussed in chapter 2 when I dealt with the idea of basic needs, has a strong intuitive appeal. Most of us are instinctively appalled by the fact that in our day and age so many people still die of malnutrition, lack simple medical treatment for diseases like tuberculosis and malaria, don't have access to basic education etc. It seems quite appropriate to conclude that everyone should be guaranteed at least a basic minimum of those social goods which are so essential to enable a person to have a minimally decent life if there are enough resources in a given community

¹⁸⁹ This is sometimes called an obligation of means (or conduct), as opposed to an obligation of result.

¹⁹⁰ It is no solution to the distributive problem to claim that the minimum core can be relative, that is, specific to the country's availability of resources, since the definition of this country specific minimum core would be precisely a distributive matter.

¹⁹¹ This was actually what happened in *Grootboom*, where the court expressly stated that in South Africa not even the minimum core was possible.

¹⁹² I am leaving aside for the moment the important and also intractable question of how to determine if a country has enough resources to guarantee the minimum core.

for that purpose. The principle underlying this intuitive claim is sometimes referred to as the principle of urgency.¹⁹³

Now, despite the strong intuitive appeal of this principle, on further reflection it is not as straightforward as it seems at first. Indeed, a number of difficult issues arise, which are particularly relevant in the context of the less developed and developing countries (but also apply to developed ones).

A first, empirical hurdle, rarely tackled in the literature is related to the method and criteria to be used in the determining if a country has got enough resources to provide the core minima. How does one calculate, in other words, the amount of resources available in a given country to establish if they are sufficient to guarantee minimum core social rights to everyone?

I will leave the discussion of this empirical problem aside. For my purposes in this study, I will assume that it can be overcome, so that we can discuss two other issues, one political, another normative. In many countries, even if there were enough resources in society to guarantee the core minima to everyone immediately (however one calculates this), that would certainly not be possible without significant redistribution of resources among individuals and groups. This raises two important questions. What if such redistributions prove to be politically unfeasible? Can we still hold a state accountable for failing to provide the minimum core? Moreover, even if such large-scale redistributions were feasible, would they be always morally justified? An example might help us to illustrate and deal with those questions.

Imagine, for instance, a country in which available resources were sufficient to guarantee everyone with the core minima of housing, health

¹⁹³ See, here, the classic paper by T. M. Scanlon. "Preference and Urgency", *The Journal of Philosophy*, Vol. 72, No. 19, Seventy-Second Annual Meeting American Philosophical

care, education, food and other social rights (let us assume as the measure of a country's resource availability, just for the sake of the argument, its Gross National Product - GNP)¹⁹⁴. Let us suppose that the cost of guaranteeing the core minima to the whole population would add up to 40% of its GNP. So, according to the minimum core approach, a state would be in violation of its duties if it did not guarantee to everyone in that society the core minima. But would that be adequate? As I mentioned, two different problems have to be considered, one related to political feasibility, the other to moral justification. Let us discuss each in turn.

Let us assume, for instance, that the state's total revenue (from taxes and other sources) amounts to 20% of the country's GDP.¹⁹⁵ If the state is to guarantee the core minima to everyone, it will have to impose further significant resource redistribution in society. That can be done in various different ways, such as direct taxation, tax incentives etc. But those means are not always, or rather very rarely politically available or effective, especially in developing countries.¹⁹⁶ By that I mean that a government is often not able to adopt the measures needed in order to perform the redistribution required to guarantee the core minima, either for lack of parliamentary support, or fear that if they do they will not be

Association, Eastern Division. (Nov. 6, 1975), pp. 655-669. b

¹⁹⁴ This is a problem rarely, if ever, discussed in social rights literature. What are "available resources"? I take GDP here as a stipulation. Should we not also count, however, private and public savings?

¹⁹⁵ I chose 20% because this has been the mean average tax ratio in the world for the period between 1975 and 1998 according to a recent study. See Joweria M. Teera, "*Tax Performance: A Comparative Study*", 2002, available at <http://www.bath.ac.uk/cpe/workingpapers/paperconferencebristol.PDF>. For an interesting account of America's political difficulties in raising social spending see Jeff Madrick, "Health for Sale", *New York Review of Books*, Volume 50, Number 20 · December 18, 2003, explaining that, despite being the developed country that taxes and spends least with social benefits, there is a widespread perception in the United States of America that taxes are too high and government spends too much.

¹⁹⁶ Studies have concluded that "A higher per capita income reflecting a higher level of development is held to indicate a higher capacity to pay taxes as well as a greater capacity to levy and collect them". Teera, *id.*

re-elected, since the potential payers of increased taxes and other forms of redistributive measures are usually politically influential. Moreover, even if those measures are successfully passed through parliament, it is not certain that the desired results in terms of resource redistribution will ensue. To cite only one possible obstacle, *tax evasion* might prevent government from raising the amount of revenue required.¹⁹⁷

Now, although those problems are primarily of a pragmatic nature, they do have normative relevance, especially in light of the possibility principle (“ought implies can”). Would it be right to condemn a government for failing to implement the redistributive measures required for the guarantee of the minimum core even when they prove to be politically unfeasible, or would certainly result in severe damage to its electoral prospects?¹⁹⁸

For some this might be actually an extra reason for entrusting the judiciary with powers to enforce social rights by ordering public spending and resource redistribution. It would function as a corrective to the failures of the democratic process, and an opportunity for governments to blame unpopular measures on the judiciary.¹⁹⁹ But it

¹⁹⁷ One of the most common ways of evading taxes is to operate “underground”, or “informally”. The significant growth of the so-called informal sector, or “hidden economy” in development countries has a significant effect on their tax capacities. Terra, *ibid*.

¹⁹⁸ What I am calling political unfeasibility might well be, under some circumstances, as a reluctance of government to tax the rich. Even if it is so, it is not an irrelevant factor. Governments depend on votes to stay in power. If they do take decisions that go contrary to what those with political influence want, they are likely to be taken out of power in the following elections and substituted by representatives who will certainly overrule their decisions. But it might also constitute a real impossibility to increase taxes because the majority of the population does not support it, or, which is rather usual in developing countries, because agreements with international financial institutions such as the IMF prevent governments to do so without breaching the agreement. See, on this last point, Joseph E. Stiglitz, *Globalization and Its Discontents* 2002, at 80-84, pointing out that the IMF believes that poverty should be fought through economic growth and not distribution of existing wealth. This might be another justification for judicial review, as I say in the text. See also the discussion in page 87.

¹⁹⁹ For an interesting example of such a use, see Scheppele, *op. cit.*, at 1948, claiming that the Hungarian parliament took advantage of the constitutional court’s ruling to protect social rights to avoid even more austere measures imposed by the IMF than it actually had to comply with.

could also lead to the risk of damaging public confidence in the judicial power if its decisions in that direction prove ineffective.²⁰⁰

It is the second question, however, that is more crucial. Even if it were politically feasible for the state to pass all measures necessary to redistribute resources in order to guarantee the minimum core (with or without judicial interference), would that be necessarily morally justified? In other words, why should the core minima receive absolute priority over other interests and goals of individuals and society? I have tried to show above that it isn't (see discussion in Chapter 2, especially that on justice and solidarity at page 64 and notes 77 and 78). Despite the strong feelings of moral regret evoked in most of us when some people do not achieve the core minima even in societies where resources would in principle be sufficient for everyone to enjoy them, I claimed that an adequate theory of distributive justice would not necessarily require, *without more*, that absolute priority be given to their universal guarantee. I argued that an adequate theory of distributive justice would take into consideration peoples' *choices* in life before requiring any distribution from the better off to the worse off, even if the former were above the minimum threshold and the latter were below it.

A similar point is made by John Rawls, though in a slightly different context, when he deals with Amartya Sen's argument that people's different ends and tastes entail corresponding differences in the level of satisfaction they derive from an equal bundle of what Rawls calls primary goods. Against those who claim it would be "unreasonable, if not unjust, to hold such persons responsible for their preferences", he claims that citizens should not be seen as "passive carriers of desires". We must assume, on the contrary, that citizens have the "moral power to

²⁰⁰ As is usually argued, the judiciary, not having the power of the sword or the purse, has to rely on its respectability to have its voice heard, see Gerald Frug, *The Judicial Power of the*

form, to revise, and rationally to pursue a conception of the good ... adjusted ... over the course of their lives to the income and wealth and station in life they could reasonably expect.” As a consequence:

“ It is regarded as unfair that [some] should now have less in order to spare others from the consequences of their lack of foresight or self-discipline.”²⁰¹

It is not very clear, however, if Rawls means this to apply when the issue in question is a guarantee of the basic minimum, since he seems to include those among the basic rights and liberties that are to be held equally by everyone according to his theory of justice.²⁰² In the restatement of his *Theory of Justice*, moreover, he says:

"This principle may be preceded by a lexically prior principle requiring that basic needs are met, at least insofar as their being met is a necessary condition for citizens to understand and to be able fruitfully to exercise the basic rights and liberties.”²⁰³

To ascertain if my position differs significantly from Rawls’s in that specific respect (that is, in the justification of the basic minimum), and if the minimum core approach could derive any support from Rawls’ theory, I would have to discuss in detail his two principles of justice (the principle of equal liberty and the difference principle), which would go far beyond the scope of my thesis. What is important to retain here are

Purse, *University of Pennsylvania Law Review*, 1978, vol. 126, n.4.

²⁰¹ *Political Liberalism*, at 186.

²⁰² *Id.*, at 230.

²⁰³ *Theory of Justice: a restatement*, p. 44. In p. 162 moreover, he writes that the difference principle should not be affirmed in the constitution, nor should judges have the power to enforce because ‘this task is not one they can perform well’. Then he adds: “What should be a constitutional essential is an assurance of a social minimum covering at least the basic human needs. For it is reasonable obvious that the difference principle is rather blatantly violated when that minimum is not guaranteed”

his ideas on choice and responsibility, which are at the core of his cast of liberalism.

Now, there are many complex issues related to the ideas of choice and responsibility that need to be dealt with in a complete discussion of distributive justice.²⁰⁴ This restricted analysis is sufficient, however, to show that a principle such as that advocated by the minimum core approach is not adequate in that it overlooks those important moral considerations in the distribution of resources among individuals in society. This is not to say, of course, that redistribution from the better off to the worse off will be never justified, but only that it is not justified by the mere fact that the better off are above the minimum threshold and the worse off are below. It is necessary to see how they arrived at that situation.

The discussion above seems to lead to the conclusion, thus, that the minimum core approach does not actually solve, on reflection, the difficulties it was supposed to solve. It does not provide an adequate criterion for the allocation of scarce resources, and cannot supply, therefore, the clear standards needed for the meaningful debate and adjudication of social rights. This is true not only in societies where resources are clearly not sufficient to guarantee everyone with the core minima, but also in those that, in principle, would be wealthy enough to do so. Indeed, in the former, the definition of the minimum core will be just as difficult as the definition of the “full” right itself, that is, it will involve the intractable distributive issue the minimum core was supposed to avoid. In the latter, the minimum core will face obstacles of a political

²⁰⁴ I discussed this issue in more depth in Chapter 2, when I analysed the basic needs conception of social rights, on which the minimum core approach draws on. For a comprehensive discussion of those issues see Ronald Dworkin, *Sovereign Virtue*, chapters 1 and 2.

nature (unfeasibility of redistributing resources) and a normative nature (unjustifiability of redistributing resources).

We can go back now to a question we raised above, whose discussion we postponed, on how to determine if a society has got enough resources to provide the core minima. It should be clear by now that, though perhaps important, it is not as central a question as it would be (despite being usually ignored) if the minimum core approach were adequate. Indeed, the correct question, missed in the minimum core approach, is not whether *there are* enough resources in a society for the guarantee of a minimum core to everyone. It is rather whether the available resources in that society *have been justly distributed*. This is because, as we saw, there might be nothing wrong (i.e. unjust) in a situation where some people have more than the core minima and others have less. If this is the result of free decisions made by people over their lives on how to spend their fair share of society's resources, it seems to be perfectly legitimate.

We seem to be back, thus, to our original problem, that is, the extreme difficulties of determining the content of social rights, and the minimum core approach provides no solution. Are we to resign ourselves, then, to the fact that social rights cannot entail clear standards to enable a thorough assessment of states' duties, but only generic goals whose pursuance by the state is almost impossible to scrutinise?

If we go by the current proposals we have been discussing this seems to be the unfortunate case. This state of affairs is backed, moreover, by what actually happens in most jurisdictions where those rights have been expressly recognised. Before we accept defeat, however, I wish to propose a different way of justifying the basic minima

which might, I suggest, make them appropriate as clear standards for social rights justiciability and debate.

As I have been claiming throughout this study, one of the main problems for the justiciability of social rights is the extreme difficulty in defining their content, which results from the intractable distributive justice issue it involves. Thus the appeal of the idea of a basic minimum that could circumvent the necessity of engaging in such intractable distributive calculus. As we saw in the preceding section, the minimum core was supposed to provide a standard which was at the same time clear and affordable by most states. I argued above, however, that the principle maintained by the minimum core approach, according to which the basic minimum should be guaranteed to everyone as a matter of absolute priority and irrespective of any consideration of choice and responsibility, cannot be morally justified. But could we not use the basic minimum idea in a way that is morally defensible? This is what I want to discuss in the remainder of this chapter.

Basic Minimum and the Presumption of Injustice

The chief problem with the minimum core approach, as we saw, is that it completely overlooks that differences in people's abilities to satisfy the core minima are not necessarily unjust. It is the same problem, thus, I discussed in Chapter 2 when analysing the basic needs conception of social rights, on which the minimum core approach is actually based. The strict priority it requires to the guarantee of the core minima, as a consequence, cannot be morally justified by the sole fact that some

people have more and others have less than the core minima.²⁰⁵ This would demand, in many cases, an unreasonable sacrifice of other people's individual interests and society's collective goals. What should determine the moral adequacy of resource redistribution, I argued, is not deprivation of needs *per se*, but unjust deprivation. The redistribution of individual and society's resources to guarantee the basic minimum, therefore, has to be justified by a demonstration that some people's inability to satisfy that minimum is a result of an unjust distribution of resources.

Yet it would be extremely difficult and costly (if at all possible), to determine case by case if someone's deprivation of the basic minimum is unjust (i.e. a result of his own choices in life rather than injustice, or bad luck).²⁰⁶ Moreover, it would defeat the whole purpose of the basic minimum idea, which is, as we saw, to circumvent the intractable distributive issues involved in the determination of the content of social rights.

But there is a way, I believe, in which we could use the idea of the basic minimum that avoids this intractable problem and is not subject to the criticisms we raised in the previous section. Instead of claiming that everyone in society should have a basic minimum guaranteed irrespective of their choices on how to lead their lives, we might argue

²⁰⁵ Unless we ground it on a kind of duty of charity instead of justice, which I discussed and rejected in Chapter 2. See, for such an argument for the "social minimum", Charles Fried, "Distributive Justice", 1 *Social Philosophy and Policy* (1983), pp 45-59.

²⁰⁶ This is mainly due to the unavailability of information, an unavoidable obstacle to the implementation of ideal theories of justice. In such cases, all we can do is settle for a "second-best", as I will suggest below in the text. See, on this point, Ronald Dworkin, *Sovereign Virtue*, *passim*, but especially p. 78, note 5. But also to the problems derived from the fact that choice and circumstance (or luck) cannot be totally separated; on the contrary, they interact, creating what Dworkin calls the "strategic problem" of a distributive justice theory: "How ... should it draw the distinction between those influences [choice and circumstance] on an agent's fate for which he must take responsibility and those whose influence the community has a responsibility to mitigate? How, in practice, is that distinction to be enforced?", *id.*, pp 324-5.

that, when some people do fall below a certain minimum, that *must be* the result of an unjust distribution of resources in society.²⁰⁷ That is, we might defend a sort of *presumption of injustice* in the situation in which some people do not have enough resources to satisfy certain minimum needs.

Now for such a presumption to be plausible and morally defensible, it is clear that we cannot use a concept of absolute basic needs (as the minimum core approach does) to set the minimum levels of social rights. In very poor communities, for instance, it is more likely that someone's inability to satisfy basic needs is due to the general low level of economic development than an unjust distribution of resources. A presumption of injustice grounded on basic needs would therefore be rather inappropriate. In rich communities, on the other hand, it might be quite defensible to ground our presumption on a higher level than mere basic needs. Given the necessary connection between social rights (and thus minimum social rights) and a just distribution of resources, for the presumption of injustice to work the basic minima have to be directly related to the level of economic development of the relevant community. In wealthy communities, thus, the minimum threshold should be set at a higher level than in poorer ones, and arguably even at a higher level than absolute basic needs.

It is of course true that some proponents of the minimum core approach do suggest that the core minima should depend on the level of economic development of the country at stake. Scott and Alston, for instance, distinguish between *relative* core minima (which are dependent on a country's availability of resources), and absolute core minima (which are based on some absolute conception of basic needs), and claim

²⁰⁷ This idea is inspired on an unpublished paper presented by Anne Philips at the UCL Colloquium of Legal and Political Philosophy of 2002/2003, at the Centre for Law, Politics

that the standard of compliance with social rights duties should be the former.²⁰⁸ But they seem to be still relying on the sufficiency principle we rejected as the ground for the state's duty to guarantee social rights' relative core minima. In my conception, the ground for such a duty is the presumption of injustice, that is, the likelihood that people's inability to satisfy the core minima derive from an unjust distribution of resources.

The reason why in wealthy societies the minimum thresholds should be higher than in poor ones, hence, is not simply because they can afford it (as is the rationale in the minimum core approach on the relative version), but rather because we might be able to safely presume that, were resources justly distributed in that society, most people would certainly be able to satisfy their needs to a higher level than most people in a poor society under an equally just distribution.²⁰⁹

This is, I believe, the only adequate way of morally defending the duty of the state to guarantee a minimum level of social rights to everyone, since it justifies that duty (and the redistribution of resources it entails) on adequate principles of distributive justice, i.e. taking into account the essential consideration of individuals' responsibility for the choices they make in life. Now, someone who accepts my criticisms of the minimum core approach might still find my alternative proposal unsatisfactory in that it makes use of a presumption to identify the element of injustice necessary to ground the duty of the state. He might argue that this will entail situations in which resources will be redistributed from their legitimate holders to undeserving beneficiaries, that is, to people whose situation can only be attributed to their own

and Society of the School of Public Policy, called "*Defending Equality of Outcome*".

²⁰⁸ See Craig Scott and Philip Alston. "Adjudicating social priorities in a transnational context: a comment on Soobramoney's legacy and Grootboom's promise", in *South African Journal on Human Rights*, v. 16, 2000, pp 206-268

choice, and not to any injustice. This is certainly not only plausible but also probable. Yet I can see no other option in the face of the indeterminacy of what a just distribution of resources would entail. So long as those cases are exceptional, I see no reason to discard my proposal. Indeed, if we have to err, it is certainly better to err on the safer side. By that I mean the following. Given it is virtually impossible to determine with accuracy when a particular distribution of resources is just, we have two options. We either provide no compensation at all for anyone, or we lower our standards of precision so as to allow some people (i.e. those who fall below the minimum) to be compensated. In both cases we are bound to make mistakes. In the former, some people (or rather a lot depending on the community) will fail to be compensated for real distributive injustice; in the latter case, some people will be rightly compensated, others will receive compensation without deserving it. I believe the latter case is by far more adequate.

This is my argument, thus, to show how the idea of a state's duty to guarantee a minimum level of satisfaction of social rights could be morally justified. Now I need to turn to the difficult practical problem of how to determine with more precision what those levels are. I have already advanced in the preceding discussion that they will vary according to the level of economic development of the relevant country. But this is obviously still too vague. I must try to show now how this could be further specified.

The question we are trying to answer is this. What minimum level of satisfaction of basic social goods we can confidently presume that, were resources in our society justly distributed, most people would be

²⁰⁹ I am not sure if my approach and the relative core minima approach would lead to very different levels of core minima. I touch on this point in the text further on. My point here is

able to enjoy? This is not, as it is apparent, a simple question.²¹⁰ But it is not as difficult, I believe, as that of determining what precisely a just distribution of resources would require in each individual situation. One plausible way of going about it is to follow what Ronald Dworkin termed the “prudent insurance ideal”. In the next chapter I try to explain it and show how it could be applied to our problem of defining the basic minima.

purely of justification for the duty to provide core minima.

²¹⁰ I must admit at this point that the absolute version of the minimum core approach has a clear advantage on this matter. Indeed, the concept of absolute basic needs, although not totally unambiguous or uncontroversial, provides nonetheless a reasonably clear standard for the determination of the core minima. It is not impossible to specify with some degree of precision, as the Committee has been doing for quite some time now, what levels of goods and services people require to be able to satisfy their most essential needs. But, as I claimed above, this method will not be available for all countries, especially those with lower levels of economic development. It might be possible to use basic needs core minima in developed countries, where the presumption of injustice would be quite plausible. Some might complain, however, that the minimum would be then too low.

CHAPTER 7

SOCIAL RIGHTS AS INSURANCE

In the previous chapter I appraised and rejected the so-called “minimum core approach” - adopted by the UN Committee on Economic, Social and Cultural Rights (“the Committee”) and favoured by most human rights’ academics. I concluded that it is no solution for the main obstacle to social rights justiciability, i.e. the extreme difficulty of determining the content of those rights. I claimed, on one hand, that when countries do not have sufficient resources to guarantee those rights to everyone it faces the very same problem the minimum core was supposed to avoid, i.e. how to allocate scarce resources among the competing needs of the population. On the other hand, when there are in principle sufficient resources so as everyone in a community could enjoy the minimum core, I maintained that the imposition of the minimum core as an absolute priority lacks moral justification.

An adequate theory of distributive justice has to be sensitive, I claimed, to our basic intuitions that people should bear some responsibility for what we have called the free choices they make in life (even when they are somehow determined by traits of their personality which they have not chosen). This is a corollary not only of our fundamental conviction that human beings are endowed with free will, but also that it would be unfair to place certain burdens on some people that result from others’ free choices. On the other hand, we consider unfair that disadvantages not resulting from free choices but from what we called circumstances be totally borne by individuals. An adequate theory of distributive justice, thus, should seek to minimise inequalities derived from circumstance, not choice. The failure to take this fundamental principle into consideration, I claimed, is the main flaw of

the minimum core approach and, as I discussed at more length in Chapter 2, of the basic needs conception of social rights to which the minimum core is closely related.

Yet this should not lead us to dismiss the possibility of using a “minimum levels” strategy as a tool to overcome the difficulties of determining the content of social rights. So long as we do not determine and justify them with the concept of basic needs, but rather by what I called a “presumption of injustice”, we might still employ standard “minimum levels” as a useful and adequate device. The idea, as I put it in chapter 2 and the end of the previous chapter, is this. What justifies a person’s claim on society’s resources to enable her to satisfy a certain minimum level of needs is not simply the fact that this person is below that level at the moment of the claim. It is rather that the *reason* why that person is below that level is very likely to be *unjust*, i.e. not morally justified. It is possible to use standard minimum levels to specify immediately claimable social rights (i.e. subjective rights), therefore, if we set those minimum levels in a way that allows us to confidently presume that, *but for some injustice*, most people would be certainly able to satisfy the specified minimum levels of needs.

In this final chapter I try flesh out this basic idea and discuss its problems. In that effort, I adapt and use an idea put forward by Ronald Dworkin in his classic essay “Equality of Resources” and further developed in later essays, namely the employment of a hypothetical insurance scheme as a device to work out what redistributions a just society would perform in order to compensate individuals for disadvantages resulted from circumstance and not choice.²¹¹ I should

²¹¹ The main essay was originally published in *Philosophy and Public Affairs* in 1981. Here I use the version published in *Sovereign Virtue, The Theory and Practice of Equality* (Harvard: 2000), chapter 2, where the other essays I mentioned in the text were also published. They are “Justice and the High Cost of Health Care”, and “Justice, Insurance, and Luck”.

perhaps mention that Dworkin never speaks of social and economic rights in those essays, and has rarely done so in his work in general.²¹² The possibility of applying his proposal for the specification of minimum level social rights, thus, is my exclusive inference, which I now proceed to explain and argue for.²¹³

Dworkin's Hypothetical Insurance Scheme

An adequate theory of distributive justice, as I argued in chapter 2, has to be sensitive to the principle that distinguishes choice and circumstance as reasons to make people responsible for their fate or to compensate them from disadvantages. An obvious difficulty, however, is that choice and circumstance are often extremely hard to distinguish (they often interact with each other), which poses what Dworkin calls the “strategic problem”.²¹⁴ How to apply that distinction in the enforcement of redistributive measures required by justice? That is, how to determine if, and to what extent, a particular inequality is due to circumstance or choice, so as to adequately compensate individuals for their unjust disadvantages?

²¹² A notable exception can be found in *Taking Rights Seriously*, Appendix: A Reply to Critics, at 364 ff where Dworkin maintains that his theory of rights as trumps is not incompatible with the idea of welfare rights, contrary to what Joseph Raz claimed in “Professor Dworkin’s Theory of Rights”, XXVI *Political Studies* 123 (1978). It is not clear, however, if he would derive those rights from his own substantive theory. I believe that he would recognise at least a moral right to equality of resources.

²¹³ More recently, Dworkin has directly tackled the issue of social rights’ justiciability and concluded that courts should not try to define the contents and enforce those rights. The role of the courts, he claims, is simply to make sure that, once the political branches have defined what social rights are, everyone is treated equally. He does not explain, however, why courts should not define themselves the contents of those rights when the political branches omit themselves. I believe his reason would run along the lines of the institutional capacity objection I discussed in chapter 4. See “Response to Overseas Commentators”, *The International Journal of Constitutional Law*, vol. 4, issue 1, pp 651-662. See also my discussion of his argument in Chapter 5 above.

²¹⁴ *Op. cit.* At 324-5.

One familiar option is to make presumptions about causal responsibility and accept deviant cases as a necessary evil. It can be done in two opposite directions. Some people (Dworkin calls them “conservatives”), for instance, will insist that choice is by far the dominant factor, which enables us to presume that, in most cases, failure to achieve a certain level of basic needs satisfaction is a person’s own responsibility. No redistribution of resources is justified, therefore, save perhaps in cases where individuals can overwhelmingly rebut that presumption.²¹⁵ Others (i.e. “liberals”) will usually make the contrary presumption, that is, that peoples’ failure to achieve a certain level of welfare can almost always be attributed to circumstance, not choice, and thus will claim that redistributions are always justified. Both propositions are inadequate for Dworkin, however, in that they are both reliant on “controversial psychological presumptions”, which might explain to some extent the appeal of theories of justice that make no use of the distinction between choice and circumstance²¹⁶ (the classic example is equality of welfare, of which the basic needs conception is a strand).

But Dworkin thinks that is possible to construct an alternate strategy that does not rely on such psychological presumptions of causal responsibility. We can make use of a hypothetical insurance scheme, he claims, to determine not only when redistributions are justified, but also at what specific level they are so. To put it very succinctly, his argument is this. We should compensate those disadvantages which, given the opportunity under equal conditions, most individuals in a given community would have insured against. By equal conditions Dworkin

²¹⁵ That would lead either to a total denial of social rights, or, at the very best, to the establishment of the minimum levels at a very low rate. This seems to be the prevalent opinion in the United States of America, which has the least generous welfare system of the developed nations. See Jeff Madrick, “Health for Sale”, *New York Review of Books*, Volume 50, Number 20 · December 18, 2003.

²¹⁶ *Id.*, pp327-328

means two things. Firstly, that “wealth and other opportunities have been fairly distributed” in that community. So everyone has roughly the same economic power to buy insurance, i.e. no-one would choose a less generous level of coverage for unjust lack of purchasing power. Secondly, “insurance is offered ... at the same premium for the same coverage package for everyone”.²¹⁷

We will see in a moment what risks and at what level of coverage Dworkin believes people in the United States of America would choose to insure. But before that we must be clear about why the upshot of such a hypothetical exercise should be accepted as an adequate guide for a just resource redistribution. Where lies the moral appeal, that is, of the hypothetical insurance scheme? According to Dworkin, it lies not only in the fact that such a device “is sensitive to choice but not to circumstance”, but also in that

“[i]t would leave scope for the play of personal choice, the influence of character, and the attraction and utility of gambles. It would not (as more drastic egalitarian suggestions would) squeeze the differences out of persons and lives. It would not dampen initiative or flatten society or compromise any sensible conception of liberty. ... It is, moreover, a realistic scheme. Since its calculations are modeled on hypothetical decisions of actual people choosing among various calls on their resources, those calculations would never require a community to spend more on welfare benefits than it should given its responsibilities to provide other services essential to its members’ lives. Since income taxes would be modeled on assumed premiums in that market, those taxes would be both fair and feasible.”²¹⁸

Now, let me try to clarify those various and complex claims. It might be helpful to remind ourselves, firstly, of the basic problem Dworkin is trying to avoid with the use of the hypothetical insurance

²¹⁷ *id.*, p. 332. In a real market this would only be possible if the risk insured was the same for everyone.

²¹⁸ *Id.*, p. 334.

scheme. As we saw, first and foremost he wants to escape the need to ground a just redistribution scheme too strongly on “presumptions about causal responsibility”, that is, on presumptions about whether peoples’ disadvantages are a result of choice or circumstance. With the insurance scheme he succeeds in that respect because the focus of our attention is shifted from what caused a particular disadvantage (choice or circumstance, or both) to the *risk* of suffering such disadvantage and the decision to insure against it. If we can confidently assume that most people would have bought insurance at a certain coverage level for certain types of disadvantages with their initial fair share of society’s resources, “no one could justly complain that [someone] ought not to be compensated because his character had contributed to [the insured disadvantage].”²¹⁹

The other virtues of the insurance scheme hailed by Dworkin in the passage quoted above depend on the level of coverage he assumes most prudent people would choose if offered the insurance under the stipulated conditions. Let us see, then, what those levels would likely be. Unlike it might at first appear, he claims, prudent people would not pursue a “maximin” strategy, that is, “a strategy that would set the floor of their prospects as high as possible”.²²⁰ On the contrary, given that insurance is in a sense always a “bad buy” (i.e. “premiums must ... substantially exceed the expected return” for it to be attractive for the insurer), prudent people tend to insure only against “sufficiently serious” risks, i.e. those that justify “a technically bad investment to avoid any chance of it.”²²¹ He concludes, then, that most prudent people would “attempt to buy coverage that would at least enable them to maintain life

²¹⁹ *Id.* P. 333.

²²⁰ *Id.* P 334.

²²¹ *Id.* P 335, I reversed the order of the last two sentences.

with some dignity – provide food, decent shelter, and a minimum level of medical care for themselves and their family.”²²²

Now the virtues of his proposed insurance scheme should be apparent. Being limited to this minimum level that prudent people would supposedly choose, the required redistributions will not be so great as to entail the undesired consequences that more radical egalitarian theories would produce, such as “squeeze the differences out of persons or lives”, “flatten society”, “compromise liberty” etc.

But this, one might argue, sounds too little. If the aim commanded by our distributive justice theory is the *elimination* of any inequalities resulted from circumstance (i.e. luck), then the insurance scheme clearly under-compensates for those inequalities, since people disadvantaged by circumstance and not choice will still have much less resources than others, even after they receive the insurance coverage.

Dworkin agrees that this is indeed the outcome of the insurance scheme, and expectedly so, since its “strategy is not to eliminate the consequences of brute bad luck ... but only to mitigate it to the degree and in the way that prudent insurance normally does. The strategy aims to put people in an equal position with respect to risk, rather than to negate risk altogether.”²²³ But he denies that this would be unjust, or fail to show equal concern to those under-compensated. To make his argument, he uses an example from the field of health care. His insurance scheme, as we saw, would demand redistribution of resources only to the point that is enough to pay the coverage which prudent people are expected to choose if offered insurance, which, in Dworkin’s opinion, would be limited to a minimum level of health care. An alternate popular principle of distribution, however, would demand much more than that.

²²² *Ibid.*

²²³ *id.*, 341.

It would require that people be offered medical treatment, however speculative or expensive, that increases, no matter how marginally, a patient's life expectancy (he calls this the "rescue principle").²²⁴ But such a principle, he points out, would be impossible to redeem without crippling society, since it "would have to spend so much on medical care that it would have nothing left with which ... to make the lives of its members good as well as long."²²⁵

Now, this is certainly not an attractive outcome, and it shows that elimination of all inequalities not resulted from choice cannot be an unconditional aim in an adequate theory of distributive justice. Some disadvantages are so severe that not even if all resources of society were diverted to that purpose that aim would be achieved. Moreover, even when it is possible to achieve that aim, it is so only at an extremely demanding cost to others which can hardly be thought of as requirement of justice.²²⁶ There must be limits, therefore, to what an adequate theory of distributive justice would require in its aim to compensate disadvantages resulted from bad luck (i.e. circumstance). James Griffin forcefully made this point in a recent article as follows:

²²⁴ *Ibid.* A longer and more developed version of that discussion appears in Chapter 8, "Justice and the High Cost of Health".

²²⁵ *Ibid.*

²²⁶ "Suppose that the welfare (on any interpretation) of an entirely paralysed but conscious person is vastly less than the welfare of anyone else in the community, that putting more and more money at his disposal would steadily increase his welfare but only by very small amounts, and that if he had at his disposal all the resources beyond those needed simply to keep the others alive he would still have vastly less welfare than they. Equality of welfare would recommend this radical transfer, that is, until the latter situation was reached." Dworkin, *Sovereign Virtue*, 61. See also "Equality, Luck, and Hierarchy", *Philosophy and Public Affairs*, 31, n.2 (2003), where he makes clear that his theory does not require that all disadvantages resultant from bad luck be compensated, and that the insurance device is not a second best, at 191. The same point is made by Charles Fried, *Right and Wrong*, p. 128. It is interesting to note that Fried also discusses, in this book, insurance as a possible way of determining positive rights, yet, as we will see later in the text, he seems to abandon the idea in the later article "*Distributive Justice*". In *Right and Wrong* he raises this interesting point, which I discuss in Chapter 6: "But if we have a clear notion of what is a fair share of income, then why not just provide the measure of income itself.", p. 128 I do think that this might be an option, but cannot discuss it here.

“There are limits ... to what one can demand of the sort of persons one would want there to be. Such persons will sacrifice themselves and their families only up to a point. Those limits would be difficult to place exactly, and anyone who tries to place them will have to put up with much roughness and arbitrariness. But these are, or at least should be, familiar problems in ethical life. This implies that there are limits to what any redistributive welfare programme can require. Its demands must stay within the capacities of the sort of people the society should want there to be.”²²⁷

It seems clear, thus, that the rescue principle, or any other form of equality of welfare, is inappropriate not only because it would demand a level of redistribution which is unjustified, but also one that might often prove impossible. What exact level of redistribution would be justified, that is, how much sacrifice can be demanded from “lucky people” to benefit the unlucky, as Griffin rightly puts it, is difficult to determine. It is precisely for that reason that Dworkin’s insurance scheme seems to me so appealing. It reduces the “roughness and arbitrariness” that Griffin speaks of to a very acceptable degree. Indeed, if it is unfair, on one hand, not to give any compensation to disadvantages resulted from circumstances, and on the other hand, to impose too heavy a burden on society for the sake of mitigating those disadvantages, the insurance scheme seems to be the ideal way to show equal concern for all. It allows everyone to insure on the same terms, in a manner prudent people would likely do when making decisions on how to spend their resources in their own lives.

Dworkin was careful to note, however, that his insurance scheme did not exclude the possibility of us finding a different analytical tool

²²⁷ James Griffin, Welfare Rights, *The Journal of Ethics* 4: 27-43, 2000, at 36 See also, for this argument, Charles Fried, Right and Wrong, arguing: “But we cannot draw the conclusion that a person has a positive right to the fair satisfaction of his needs without regard to the burden this puts on others. ... Just when the interference becomes excessive is, of course, the crucial question.”, p. 123.

that would justify greater compensation²²⁸ without extrapolating the “sacrifice threshold”. In the absence of such a device, however, the insurance scheme gives us the confidence that at least that level of redistribution it recommends is justified.

Social Rights as Insurance

In the previous section I tried to explain and defend Dworkin’s insurance scheme as an adequate way for implementing our favoured distributive justice theory and thus mitigate those disadvantages among people which result from circumstance and not their free choices. I must try and show now in more detail how his scheme could be used in order to determine the content of social rights.

As I claimed in the previous chapter, the adequate way to justify the imposition of a duty on States to guarantee a minimum level of social goods to everyone is by demonstrating that a failure to do so is certainly, or very likely unjust. I rejected the so-called minimum core approach precisely because it fails to make that case. It is not sufficient, I claimed, to point out to the outcome (i.e. people falling below the minimum level - however one establishes it) to prove injustice. We still have to determine if that outcome was a result of choice (in which case it would not be unjust), or circumstance (in which case it would). Moreover, by defining the minimum levels through the concept of basic needs, the minimum core approach runs into the obvious problem that some poor countries would not be able to guarantee even those minimum levels. The minimum core approach has to be rejected, thus, because it entail duties which would be sometimes unfair, sometimes unfeasible, often both.

²²⁸ *Id.*, 341.

The insurance approach, on the contrary, provides a solution which is at the same time fair and feasible. Indeed, by defining the minimum levels as what prudent people would choose to insure against in a given community where they all have the same risk to suffer disadvantages and resources are fairly distributed, we can be confident that those levels will never be more than a community could afford or should provide as a matter of justice.²²⁹ That is, the minimum levels will be always connected to resource availability and adequate principles of distributive justice.

But we still must try to see if this ideal insurance scheme could yield practical, i.e. manageable standards for the debate and protection of social rights, especially through courts. Before I move on to that, however, a note of caution. As Dworkin and other philosophers are always eager to warn, “it would be foolish to expect any philosophical theory to answer [the difficult practical questions they try to address] in detail, and even more foolish to expect it to provide answers that everyone in the relevant political community would accept.” What they can do, however, is to “provide a structure within which a public debate could usefully take place, a structure that both sets the terms of argument and provides limits to the range of answers that any side could in good faith take to be plausible.”²³⁰

I do not claim, therefore, that the insurance scheme can provide a clear and uncontroversial definition of minimum level social rights easily manageable by courts, but rather a much better and adequate guide than the minimum core approach in this admittedly difficult task.

²²⁹ Dworkin makes the same claim in *Sovereign Virtue*, at 334.

²³⁰ Id, p. 322. Note, however, that some philosophers are completely sceptical of, and sometimes against, the claim that philosophy might be useful to the solution of practical matter in any ways. For the first view, see Thomas Nagel, *Mortal Questions*, Introduction, for the second view, see Michael Walzer, *Philosophy and Democracy*, op. cit.

So, what would the insurance scheme have to say about the level of food, housing, health care etc the State has a duty to guarantee to all its citizens? As it is clear from the discussion above, this is a question to be answered differently according to the specific circumstances of the community in question. This is because differences in economic development, people's attitudes, tastes and preferences, will all have a significant impact in the outcome of the hypothetical insurance exercise. What I will aim to do, then, is test the insurance approach in a couple of real situations where we have a reasonable idea of those factors to see how it might work. Let us take again, for that purpose, the South African cases concerning the right to health care which we have already discussed in previous chapters.

Take *Soobramoney* first, a case in which the plaintiff, a 41 year old unemployed person suffering from kidney failure claimed that his constitutional right to health care should entitle him to renal dialysis.²³¹ Let us speculate, first, how the alternate approaches we have rejected would have dealt with this case. If the courts followed the "rescue principle", which we will see in the appendix is the prevalent approach in Brazil and other South American countries, Mr Soobramoney would have won his case without any difficulty. In fact, all the court would have to say is that the constitutional right to health care demands that the State provides any treatment required to everyone, no matter how expensive or efficient. We saw already how such an approach, when not totally unfeasible, would lead to consequences that can be hardly regarded as just. Let us turn, then, to the minimum core approach. Would Mr Soobramoney win or lose his case? That depends on whether renal dialysis is defined as part of the minimum core or not. As we saw, there are two different versions of the minimum core, which we called

absolute and relative above. On the absolute version, the minimum core is defined independently of the issue of resource availability. It is based purely on basic needs. So, if the court followed that version of the approach, it would have first to decide whether renal dialysis is a basic health care need. If so, the duty of the State to provide it, and as a consequence the corresponding right of Mr Soobramoney, would have been established. It might still turn out, however, that available resources (however defined) are not sufficient to fund such a right to everyone. Here, as we saw, the minimum core approach has to rely on the counter-intuitive claim that some rights might be impossible to fulfil at a given moment, or on the unhelpful concept of progressive rights which I have criticised in Chapter 2.²³² But let us assume, for the sake of the argument, that there are enough resources (however one defines that) to provide everyone with renal dialysis and all other social rights defined according to the absolute version of the minimum core. The prima facie right of Mr Soobramoney would then become a definitive right, and the court would have to order the State to provide him with renal dialysis. But that, as I argued, would completely overlook one of the basic principles that any adequate theory of distributive justice has to respect, namely that which makes people responsible for their own choices in life. Indeed, what if Mr Soobramoney, for instance, has spent all his resources in heavy drinking, which caused not just his kidney failure but also his incapacity to pay for the treatment he now needs? Would it be fair to ask others to sacrifice some of their non-basic yet also important needs in order to give him treatment? In the minimum core approach this question doesn't even arise. Moreover, even if it was clear that Mr Soobramoney's current condition was due exclusively to circumstance,

²³¹ See the Appendix for a different discussion of this case.

²³² See discussion in Chapter 2.

that would not automatically establish his right to have his disadvantage completely eliminated. As I tried to show, the aim of justice cannot possibly be to eliminate all disadvantages resulting from circumstance, but rather mitigate them in a way that doesn't cripple society or takes from everyone else's what is essential not just for surviving, but to lead a fulfilling life. We must discard, thus, as we had already shown, the absolute version of the minimum core approach. But thus the relative version fare better? It would surely avoid the counter-intuitive claim of proclaiming rights which might turn out to be impossible to guarantee. It would not be immune, however, to the other flaws of the minimum core approach. Indeed, it doesn't offer any help in defining what is actually required from the State when the core minima cannot be guaranteed due to lack of resources (however this is determined).

Let us speculate now, then, how the insurance scheme would deal with Soobramoney. The judges would have to imagine what level of coverage prudent people would choose to insure for if everyone had the same risk of suffering from the same medical conditions and, equally important, resources in South Africa were fairly distributed. As I have admitted above, this is not an easy task, and its outcome would not be uncontroversial. That is, different reasonable people engaging in it would probably come up with different results. It should not be impossible to come up with a range of outcomes, though, within which most reasonable people's opinions would fall. So, the crucial question in *Soobramoney* is: would renal dialysis be covered by such hypothetical insurance? If so, in which cases, i.e. for people of what age, for how long, under which conditions etc?

Now, the first thing to take into account, as we saw, is the economic capacity of the relevant community. Since the insurance approach is strongly reliant on actual people's hypothetical choices, we

have to speculate what level of coverage prudent people would actually choose, not ideally wish for. Our point of departure, thus, is a fair distribution of the relevant community's actual resources. It seems plausible, hence, to take *income per capita* as our rough guide to what a initial fair distribution of resources would be, based on which people would make their choice of insurance coverage. In communities with more resources, and therefore a higher *income per capita*, the chosen coverage would probably be higher than in poorer communities. That is what, incidentally, drives our moral instinct when we feel more outraged with poverty in societies with plenty of resources than in poorer ones.

Let us analyse, thus, some basic information about South Africa's economy to shed some light into our speculative exercise. Its gross national income *per capita* is, according to the latest survey of the World Bank, US\$ 2,820 which, in purchase power parity (ppp)²³³, goes up to US\$ 10,910. This qualifies South Africa as a high income country (US\$ 9,206 or more), placing it above European countries such as Russia (US\$ 6,880) and Poland (US\$ 9,370), and just behind Hungary (US\$ 11,990).²³⁴ This information should provide the basis for the hypothetical insurance exercise. What sort of coverage would a prudent person, whose fair initial share of resources were US\$ 10,910 be likely to buy, taking into account local circumstances such as the prevalent diseases, social attitude towards them, other important interests of individuals and the community etc? For our specific purposes in dealing with Soobramoney, would the likely chosen coverage include renal dialysis in Mr Soobramoney's circumstances?

As I said, it is foolish to expect the insurance scheme to provide a clear and uncontroversial answer to these difficult questions, but it can

²³³ i.e. the equivalent purchase power to American dollars in the US economy.

surely provide an approximate answer. Taking into account the real economic situation in South Africa, that is, a high income country (i.e. income per capita of US\$ 10,910), it would be impossible to maintain, for instance, that the minimum level could not cover even fairly basic procedures and treatment such as those usually described as primary health care (e.g. consultation with a general practitioner, basic medicine such as antibiotics, basic preventive measures such as simple information on how to prevent common diseases etc). On the other hand, it could also be confidently ruled out of the minimum level very expensive or speculative procedures such as life maintaining and enhancing treatment for the very old. Now, it is important to re-emphasise that this is not simply because South Africa, or any other country at a similar level of economic development, would be able to afford the former but not the latter (that would be the rationale of the minimum core approach which I have rejected). Rather, it is for the normative (i.e. morally determined) reason that prudent people with that level of resources would certainly buy insurance for the former but not for the latter conditions.

This is certainly still too vague to provide any useful guidance in a case such as *Soobramoney*. But it would be quite sufficient in other cases, such as *TAC* (which we will discuss shortly) and is rather helpful to make us see the real flaw in statements such as the following, made by Chaskalson CJ in that case:

“[35]A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a "core" service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.”

²³⁴See World Bank's World Development Indicators 2003, available at <http://www.worldbank.org/data/wdi2003/index.htm>.

In Grootboom the relevant context in which socio-economic rights need to be interpreted was said to be that

"[m]illions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted . . ."

Chaskalson J is clearly focusing on the fact that millions of people in South Africa are deprived of even basic needs, so that immediate satisfaction of those needs would require a vast amount of resources which, he claims, would be impossible for the South African government to afford. Now, impossibility can be interpreted in many different ways. If what Chaskalson CJ is claiming is that South Africa is too poor a country to be enable everyone to satisfy basic needs, he is clearly wrong, as we have just seen. US\$ 10,910 per capita (ppp) a year would be evidently sufficient for people not to fall below a basic needs threshold. What makes millions of people unable to do so is the distribution of resources prevalent in South Africa. That fact alone, however, though morally relevant, has to be analysed in more depth from the perspective of distributive justice. When we claim, for instance, that the distribution of resources that deprives millions of South African people of basic needs *is itself unjust and demonstrate this through the insurance approach*, then we show not only that Chaskalson CJ's claim is wrong (i.e. that it is not impossible to guarantee basic needs to everyone), but also that this is morally required.²³⁵

²³⁵ Not surprisingly, however, along with countries such as Brazil, and Guatemala, South Africa is one of the countries in the world with the most unequal income distribution. Income

But we must return, now, to *Soobramoney*, which represents a greater challenge to the insurance approach. Indeed, it is easy to see that very basic treatment would certainly feature in the insurance policy chosen by prudent people with an initial annual income *per capita* of US\$ 10,910. But what of renal dialysis, would that be chosen? In what cases? We should not overstate, however, the difficulties of this inquiry, especially in countries like South Africa where there is an actual and reasonably developed private health insurance sector that can serve as a paradigm.²³⁶ We might well look at what private health care insurers would charge to cover for renal dialysis, for instance, to help us consider whether that would likely feature in our prudent person's choice of insurance in the hypothetical scheme. One of South Africa's main providers of health care insurance, for instance, offers three different choices of policies, ranging from R565 to R2265. Now, since all of them cover the total cost of renal dialysis treatment, we can take the cheapest one (at R565) as our paradigm of comparison.²³⁷ That is the equivalent of US\$ 80 a month, which adds up to US\$ 960 a year.²³⁸ The question we have to ask, thus, is this: would a prudent person whose annual income was around US\$ 10,910 be likely to choose a policy covering for health care and including the risk of needing renal dialysis treatment at

distribution among the population is usually measured through the GINI coefficient, which goes from 0 to 100. Since 0 represents absolute equality (i.e. everyone gets the same amount of income) and 100 total inequality (i.e. one person in a country gets all the income) the closer to 0 the more equal a country's income distribution is and vice-versa. On the study I have used, the South African GINI index was 58.4, losing only to Brazil (63,4) and Guatemala (59,6). see Tatyana P. Soubbotina , Katherine Sheram, *Beyond Economic Growth: Meeting the Challenges of Global Development*, World Bank, 2000. Table 1, pp 110-121.

²³⁶ Out of the 44 million population of South Africa, 7 million benefit from some form of private health insurance.

²³⁷ This data is available at the website of the private insurance company Protector Health (www.protectorgroup.co.za/h_index.asp). The different policies available are called, from the most expensive to the cheapest, "Flexicare plus", "Flexicare", and "Xtreme Care", all of them covering renal dialysis at "100% of Recommended Scale of Benefits tariff" and subject to pre-authorisation.

²³⁸ Exchange rate of 10.10.2003, according to the webpage www.xe.com .

the cost of US\$ 960 a year, that is, roughly 10% of her annual income?²³⁹

Now, this would again vary from country to country, since what a person would be able to do with the remainder 90% of her annual income, and what are the things she would have to sacrifice in order to pay the insurance premium would certainly vary according to economic, social and cultural factors prevalent in the relevant community. To take an extreme example, it might well be the case, for instance, that to accumulate as much gold as one can during one's life span (no matter how long it is) is perceived as infinitely more important in a certain community than having a reasonably long and healthy life. In such a community, it would be plausible to infer that the extra costs of insuring against the risk of needing renal dialysis treatment would impact so much on this other, more important need, that prudent people would not choose to insure against that risk. In most societies, however, it seems more plausible to assume that most prudent people would not miss the opportunity to insure against such a debilitating and lethal risk if it can be done at the cost of a small percentage of one's annual income. Further evidence to that is the fact that, as we saw, all policies available in the market, including the cheapest, most basic one, does cover for renal dialysis.

I believe it would be fair to conclude, thus, that the insurance approach would probably recommend a different decision in *Soobramoney*. If I am right to assume that the cost to insure against renal dialysis is such that most prudent people would purchase such insurance if resources were justly distributed in South Africa, then renal dialysis

²³⁹ It is important to notice that the price of health care insurance covering renal dialysis in the ideal insurance scheme would likely be much lower than that offered in the South African private market. This is because the pool of insurable people would be 44 million and not just 7 million.

could be confidently regarded as encompassed in the social right to health care. It should be clear, after this discussion, that the insurance approach would also recommend judgement for the plaintiffs in the *TAC* case.²⁴⁰ It is actually hard to imagine a case in which the insurance scheme would provide a clearer answer. The consequences of not receiving treatment are so dreadful in that case (i.e. passing HIV on to your baby), and the costs of the treatment so insignificant, that no rational prudent person would consider not taking the insurance.

In the light of the discussion above, I think it is possible to conclude that the insurance approach would require a different decision in *Soobramoney* and provide a better justification for the decision in *TAC*.

In the final section of this chapter I want to discuss another different approach to the justification and determination of the social minimum, put forward by Charles Fried in his famous book *Right and Wrong*, and developed further in a well known article called "*Distributive Justice*".²⁴¹ The reason why I think this is necessary is that Fried's proposal, as we shall see, shares the belief we have been defending in this study against the minimum core approach, i.e. that an adequate theory of distributive justice should be sensitive to the principle of individual responsibility, and yet bases the social minimum on a very different argument to the one I have just defended.

²⁴⁰ See chapter 6 for a description of the case.

²⁴¹ See *Social Philosophy and Policy*, 1 (1983), 45-59.

Duty of Beneficence

I have claimed so far in this chapter that the minimum core approach is to be rejected in favour of the insurance approach because it fails, contrary to the latter, to provide an adequate moral justification for the resource redistribution it demands. My main arguments to that effect were that the principle of distributive justice on which the minimum core approach relies (i.e. equal basic needs satisfaction) is insensitive to one of our most basic moral intuitions (that people should bear responsibility for their free choices in life) and would demand, if seriously followed, redistributions which would not only be often unfeasible, but also impose an unfair sacrifice on society, infringing the most fundamental principle of justice, that is, equality in the sense of equal concern and respect.

We must consider now, thus, an alternate approach which purports to take into account that basic intuition and fundamental principle, but, unlike my favoured approach, maintains that distributive justice has got nothing to do with equality of resources. I take Charles Fried's "Distributive Justice" as an academic illustration of such approach, but I think it might appeal to many people.

The argument goes like this. Even though disadvantages resultant from circumstance (e.g. lack of talent), are certainly regrettable from a moral perspective, they are so not because of the inequality that ensue between the unlucky and the lucky. There is nothing morally wrong, he claims, in the fact that wealth-talented people do better in comparison with non-talented ones. Talent, for Fried, is part of a person, and so should be the fruits of that talent. In his own words:

“I am entitled to them [his talents] as I am entitled to my two kidneys. ... But if I am entitled to what I do not deserve – i.e. my talents - it is no long step to conclude that I am also entitled to what I acquire by those talents, at least if I do so without depriving anyone else of what he may have had but for my activity.”²⁴²

He doesn't claim, however, that no redistribution is therefore morally required from talented and able people to non-talented and disabled ones, but only that the justification for redistribution is not in what Rawls and Dworkin call morally arbitrary inequalities (those not derived from choices). Rather, he maintains, it is grounded on a duty of beneficence based on the sympathy we must display towards our fellow citizens without which we “would devalue in others what gives us moral worth.”²⁴³ In short, it is not equality that imposes on us a duty to help the needy, “it is the need itself, the misery itself, which makes the claim upon us for our sympathetic concern as fellow human beings.”²⁴⁴

He concludes, then, that

“A person has a claim on his fellows to a standard package of basic or essential goods – housing, education, health care, food; i.e. the social (or decent) minimum – if by reasonable efforts he cannot earn enough to procure this minimum for himself.”²⁴⁵

Fried's proposal might seem quite similar, at first sight, to the minimum core approach I rejected in the previous chapter. Like that

²⁴² *Id.*, p. 50.

²⁴³ “To proclaim indifference in the fact of misery is to devalue in others what gives us moral worth.” *op cit*, p. 51. This supposedly follows Kant's fourth example in *The Groundwork of the Metaphysics of Morals* Cambridge University Press, 1997, pp 33 and 39. (duty of beneficence). Kant derives a duty to help from his categorical imperative “Act as if the maxim of your action were to become by your will a universal law of nature.” He claims that no-one could will that a maxim that left needy people to their own devices became a universal law, “since many cases could occur in which one would need the love and sympathy of others and in which, by such a law of nature arisen by his own will, he would rob himself of all hope of the assistance he wishes for himself.”, p. 33.

²⁴⁴ *Id.*, p. 52.

²⁴⁵ *Ibid.*

approach, for instance, he takes the idea of *needs* as the crucial element in distributive justice. It is important to notice the following fundamental differences in both approaches, however, in order to duly evaluate Fried's proposal. Firstly, it is not clear in the minimum core approach if an individual's entitlement to the resources necessary to the satisfaction of basic needs is dependent on his reasonable efforts to "earn enough to procure this minimum for himself." I interpreted the minimum core as being insensitive to choice, and this should include, I believe, the choice not to work. Secondly, the decent minimum, for Fried, is actually the *maximum* an individual can claim in the name of distributive justice from his fellow citizens, whereas in the minimum core approach it is just a part of a much larger claim to the full satisfaction of needs (and not just basic needs), provisionally on hold due to resource scarcity. Finally, whilst Fried's proposal denies the role of any idea of equality in his distributive justice theory, the minimum core approach is reliant on a particular version of that idea (equality of welfare).

Though apparently similar, therefore, those approaches are actually radically different. I have already discussed the flaws of the minimum core approach. Now I must show why the insurance approach I defended is superior to Fried's proposal as well.

His main contention, then, is that equality plays no role in the principle of distributive justice that should determine the decent minimum. What really matters is the fact that some people are in *dire need*. To deny them help, thus, would display a lack of recognition in others of the worth which we, as human beings, all have. Now, this might strike many as intuitively right. Most of us are deeply bothered by the mere thought that some people have less than what we think is necessary for anyone to lead a minimally decent life, without necessarily knowing how they compare with other people in their communities. That

might well indicate, one could argue, that what underlies our moral feelings is, as put by Harry Frankfurt in a well known paper, “not the fact that some of the individuals in those situations have *less* money than others, but the fact that those with less have *too little*.”²⁴⁶ He calls this the “doctrine of sufficiency”.

I certainly agree, as it should be clear by now, that what bothers most of us, or should bother us, is not the fact that some people have more money (or resources in general) than others. That would be condemned only by a radical theory of equality of outcome in wealth (economic equality in Frankfurt’s terminology), which I have dismissed above as inadequate and utterly unappealing. But, as I also tried to show above, what is morally relevant in terms of distributive justice is not simply that some people have too little, irrespective of what brought that situation about. The *causes* of deprivation are not only important, but actually essential for the adequate moral assessment of the issue. If someone has too little *now* because of free choices he made in the past (say, to spend all his resources in leisure rather than saving), we might still feel sympathy for his current predicament, and even feel compelled to give some of our resources to minimize his plight. But we will certainly not regard that person as having an entitlement to our help based on any idea of distributive justice. This would become even more clear if, to help that person, we had to sacrifice some of our non-basic but still very important needs. Imagine, for instance, that I have saved for a long period of my life so as to buy a good piano, which will satisfy my important (but arguably non-basic need) of practising at home in order to become a better piano player. Just when I am about to buy that piano in the shop, I learn that with the same amount of money I could save Mr Soobramoney by paying for him to have his badly needed

²⁴⁶ See, H Frankfurt, “Equality as a Moral Ideal”, *Ethics*, 98 (1987), pp. 21-43, at 32.

dialysis in a private hospital. Now, should I be under a moral duty based on justice to give up buying the piano and transfer my money to Mr Soobramoney? Now, it is clear that this question cannot be properly answered without a host of information such as why the state hasn't got enough resources to provide Mr Soobramoney with dialysis, whether other people besides me are also in a position to help Mr Soobramoney etc. An even more crucial piece of information, however, would be the reason why Mr Soobramoney is now incapable of affording the renal dialysis he needs whilst I can afford a new piano. If, for instance, despite having had a real opportunity to use his fair share of society's resources to protect himself against such situation, say by buying medical insurance, he nonetheless decided not to do so, it is inappropriate to claim that I am under a duty now to give up my non-basic need for a piano in order to rescue Mr Soobramoney.²⁴⁷

This is enough to show, I believe, how the doctrine of sufficiency is inadequate. Just as the minimum core approach, it fails to take into account our moral basic intuition that the personal responsibility for our own choices is to be included in any adequate principle of distributive justice. But Fried's proposal, as you will remember, is different from the minimum core approach in this fundamental way: it does take into account the principle of personal responsibility. In fact, as we saw, it conditions the entitlement to the decent minimum on the reasonable effort of the individual to procure the minimum for himself. This reveals an inherent tension in Fried's proposal. Indeed, he seems to want to avail himself of the doctrine of sufficiency, which places basic needs at the

²⁴⁷ It is important to remember, at this point, that the insurance approach would most likely lead to the conclusion that renal dialysis should be included in the decent minimum in a society with the economic strength of South Africa. In that case, however, it would be also likely that I, as a citizen of that country, would not have to give up my piano need in order for Mr Soobramoney to have his dialysis. My example now is meant to show only how the doctrine of sufficiency is flawed for not being sensitive to choice.

core of a distributive justice theory, without ignoring, however, the principle of personal responsibility. Does he succeed? I don't think so.

The very appeal of the doctrine of sufficiency, as we saw, draws on our intuitions that it matters when people are unable to satisfy their basic needs. Once we complement those intuitions with the principle of personal responsibility, however, it becomes clear that basic needs *per se* cannot provide a metric for just resource distribution. It might be absolutely fair, as we showed, that some people have more than what is necessary for the satisfaction of their basic needs whilst others have not. But what justifies such conclusion is precisely the idea of equality (interpreted as equal concern) that Fried wants to reject. In fact, the very principle of personal responsibility that Fried tries to capture in his condition for the decent minimum entitlement can only be explained by that idea. That is, we do not impose transfers from the better off to the worse off when the latter's predicament is exclusively resultant from their free choice because that would entail treating the better off unfairly (i.e. without equal concern).

To justify why some people are entitled to the decent minimum whilst others are not, therefore, Fried cannot do away with the idea of equality. For that he would have to embrace the doctrine of sufficiency without conditions, but then be open to the criticism made above (which he clearly does not want to do). But once the idea of equality is seen as essential for an adequate theory of distributive justice, the other flaws of Fried's proposal become apparent. It becomes clear that his decent minimum might be too much at times, and too little at others and, perhaps most importantly, that his justification for the decent minimum entitlement is inadequate. Let us see this in more detail.

I have tried to show above that a basic minimum determined through the idea of basic needs would yield results that might not only

be unfair, but also unfeasible. The classic example, as we saw, is that of the severely handicapped person. To bring that person to the level of basic needs satisfaction might be simply impossible, or possible only through demanding a huge sacrifice from society which would display a lack of equal concern to those required to make such sacrifice. That is why one of the great qualities, I maintained, of the insurance approach. It aims at minimizing disadvantages by giving to people an equal opportunity to insure against them at a prudent level, not at eliminating the risk of disadvantage itself. Fried's proposal, on the contrary, would demand the impossible, or such huge sacrifice from society, because the only test imposed for the entitlement to the decent minimum is that the person makes a reasonable effort to earn the decent minimum, a test which we might assume the severely handicapped would automatically pass.

But let us assume that this problem can be solved by adding an extra condition to the decent minimum entitlement. Let us say, for instance, that "a person has a claim on his fellows to a standard package of basic or essential goods – housing, education, health care, food; i.e. the social (or decent) minimum – if by reasonable efforts he cannot earn enough to procure this minimum for himself", and (my addition): "to the extent that this is not unfeasible and does not impose an excessive sacrifice on society." Now the obvious question would be how to determine what represents an excessive sacrifice on society, and the metric of basic goods or needs would be totally unhelpful.

This points out to the other, opposite problem that Fried's proposal faces. Why is someone's entitlement restricted to his basic goods decent minimum? Why, for instance, in a rich society distributive justice would recommend redistribution only to this maximum limit of the decent minimum? Fried's explanation combines two elements. The

decent minimum is supposed to satisfy the moral demand of sympathy to others' misery but only up to a level that does not impinge excessively on liberty. I have just showed how this second concern is not totally cared for in Fried's proposal, especially when applied to poor communities. But now we are dealing with the opposite objection, that is, that the decent minimum might be too little when applied in rich communities. The extent to which liberty is infringed, as I claimed, is a normative question, which is dependent (and not autonomous) on the broader question of justice we are dealing with. That is, if it is just that resources are redistributed from the better off to the disadvantaged, there is no loss to liberty. What we must try to determine, then, is when that transfer is recommended by justice. Fried's proposal here seems to me completely implausible in trying to replace beneficence, or sympathy for equality.

He suggests that there is nothing inherently wrong in the fact that some people, due to their talents (or wealth-talent to be more accurate), end up having a bigger share of society's resources than others, who happen to lack those talents, or whose talents are not wealth-talents during their life span. He rejects the claim, in other words, that inequalities derived from circumstance and not choice are morally arbitrary and should therefore in principle be mitigated. But he doesn't want to go as far as radical libertarians and claim that no redistribution is therefore morally justified because it would entail a violation of people's liberty. His strategy is thus to defend what he claims is an independent ground for the justification of redistribution: a duty of beneficence. I have tried to show above that this is not really an independent ground for redistribution (i.e. independent from equality), because Fried's other claim that only those who make a reasonable effort to procure the decent minimum for themselves but fail are entitled to receive it from others is

better explained by the idea of equality as equal concern. It would display a lack of equal concern for those who did make reasonable efforts and succeeded to take their resources to rescue those who did not even make a similar effort. What I want to ask now, then, is if this idea of beneficence, or sympathy, has any supplementary value in a theory of distributive justice. On one hand, the idea of beneficence has the connotation of someone helping another out of a concern for that person's predicament and nothing else. It doesn't matter what brought the predicament about. Fried is right, then, to describe this duty as flowing from "the need itself, the misery itself ..." as an appeal to "our sympathetic concern as fellow human beings."²⁴⁸ On the other hand, beneficence implies help that demands from the helper a sacrifice in the sense of giving away something that is rightly his and, as a consequence, is right of him to keep beyond the very restricted limits of his duty of beneficence. It is closely related, thus, to the idea of charity. Fried's proposal seems to be clearly contradictory as to the former aspect of beneficence. If what matters for beneficence is the need itself, and not how it came about, it is plainly irrelevant (from the perspective of beneficence) if someone made reasonable efforts or not to avoid his predicament. The major flaw in his argument, however, is related to the second aspect of beneficence. Indeed, his argument to restrict redistribution to the decent minimum works only if we accept his contentions that wealth-talents are "part of a person" and that, as a consequence, the fruits of wealth-talent are like a person's kidneys, that is, something to which they are entitled. If this were correct, then he would be right in his claim that the only justification for redistribution is beneficence, and beneficence, as we saw, tends to be rather restricted.

²⁴⁸ *Id.*, p. 52.

But Fried is not right, I believe, in his position regarding wealth-talents. Even if we go along with him in the metaphysical claim that they are “part of a person”, we are still not committed to agree that they are therefore like our kidneys in the sense that we are entitled to them. To the extent to which we can classify wealth-talent as a matter of circumstance, or at least partially so, (i.e. of having the right talents at the right place and the right time), there is no compelling moral argument to justify our full entitlement to the fruits we are able to amass with them. Moreover, to claim that someone is entitled to the fruits of his wealth-talent is tantamount to claim that he is also entitled to the system in which his wealth-talent bears those fruits. But this is plainly absurd.

He seems to confuse a matter of distributive justice with charity. People are entitled to a certain minimum of social goods not because of others’ sympathy, or duty of beneficence, but rather because they own a fair share of society’s resources which would enable them, in a just society, to achieve that minimum through their own means.

CONCLUSION

I appraised in this study the controversial question of the judicial enforcement of so-called social and economic rights (social rights justiciability), specifically the rights to health care, education, housing and food. I reviewed the main arguments usually raised against justiciability, namely that courts lack *legitimacy* and *institutional capacity* to deal with the issues involved (i.e. resource allocation issues).

I rejected, like others have done, that the judicial enforcement of social rights would necessarily entail usurpation of political powers by the courts. I did not contend with the argument that courts should never adjudicate rights, whether civil and political or social and economic. That is, the view that judicial review is irreconcilable with democracy and therefore always illegitimate, though I disagree with it. Rather, I claimed that once judicial review to protect rights against the majoritarian will is accepted as a legitimate practice in a given community, as it is the case in most countries that have recognised social rights in their constitutions, then there are no grounds for distinguishing between civil and social rights in terms of legitimacy. The enforcement of social rights entails no different interference than that of civil and political rights.

I was less ready to dismiss the argument from institutional capacity, however, than many partisans of social rights justiciability. I admitted (and provided concrete examples in the appendix) that courts are not used to deal with those types of problems that Fuller famously called *polycentric* (those in which a decision has direct effects far beyond the parties to the lawsuit). They have a tendency to see the

lawsuit as a bilateral dispute with no effects on the wider community in which the decision is made.²⁴⁹ Given the prominent allocative effects of decisions concerning social and economic rights, this lack of insight can have inauspicious consequences.²⁵⁰ If this were the only obstacle, however, it could be easily overcome. Indeed, the judicial process could be adapted (and actually has already been to some extent in various countries) to deal with polycentric issues in a more adequate manner.

But the most difficult problem for justiciability, I claimed, is not that courts might be at an institutional disadvantage against the political branches to deal with polycentric issues. It is rather that the type of polycentric issue in question, i.e. the allocation of resources among competing individuals and social goods, involves an intractable normative problem of *distributive justice* which no institution can claim expertise over.

This point has been often overlooked in the debate, I argued, due to an inadequate conception of social rights usually assumed as correct, which I called the basic needs conception. According to that conception, which I discussed in detail in chapter 2, social rights are rights to the satisfaction of those needs, which can be deemed basic in the sense that human beings cannot survive (or lead a dignified life in a broader conception) without them. I left aside as not fatal to that conception objections related to the difficulties of defining basic needs. I claimed that we might well be able to reach some definition of basic needs which, though not accepted by everyone as correct, can be accepted as plausible by most people. The problem with the basic needs conception, I argued, is elsewhere. It is in the very justification of social rights to basic needs. Why, that is, is everyone in a given community entitled to

²⁴⁹ Even more so judges of civil law jurisdictions, since their decisions have no binding force on other courts.

have their basic needs satisfied, no matter how wealthy that community is, or how differently individuals of that community behave?

As to the first point, given that, according to basic needs conception, social rights are defined according to needs alone, resource scarcity is wrongly seen as a contingent problem, not a constitutive one to the definition of the contents of social rights. That is, no matter how wealthy a community is, everyone has an abstract right to the satisfaction of basic needs. If it turns out that the community in question does not have enough resources which, if evenly distributed, would enable everyone to satisfy their basic needs (however defined), then that abstract right cannot be immediately realised. All attention, thus, is focused on an ideal future, when resources will be sufficient for the *full* guarantee of social rights. Whilst that day does not come, we are told that social and economic rights are not immediately claimable, but rather “progressively” so, as resources allow. As I claimed in this study, this creates not only a conceptual problem for the basic needs theory (how can we call rights something which cannot be immediately claimed?), but highlights the flaw in its justification.

Indeed, even when that day arrives when a community has enough resources so that everyone could in principle have their basic needs satisfied (as it has for many developed countries), it is not clear why that community would be under a duty to fully guarantee everyone’s basic needs before furthering other common interests it might wish to pursue, and before anyone else in that society can afford satisfying more than basic needs. If we accept that *equality* in the sense of *equal concern and respect* is a fundamental principle of a democratic community, we are bound to conclude that, even when resources are

²⁵⁰ See the discussion in the appendix about the Brazilian cases.

sufficient to satisfy everyone's basic needs in a given community, that does not necessarily mean we have a duty to do so at the cost of all other interests and needs we have as individuals and collectively.

To illustrate this point I built a "two-person model" community in which one of them, Carlos, was hard working and thus managed to produce enough resources so as to be able to satisfy his basic needs and more, whilst the other, Ana, was rather lazy and therefore unable to satisfy her basic needs through the resources she managed to produce. This simple but powerful example, which emulates, of course, Aesop's famous fable, is sufficient to highlight the major flaw of the basic needs conception. Indeed, it would be very implausible to argue that Ana is entitled to demand from Carlos that he transfers to her all the resources she needs to be able to satisfy her basic needs even if he has enough to do that and still satisfy his own basic needs. This is because a just distribution of resources has to be sensitive to the *choices* people make in their lives, as I discussed in detail in chapter 2 when adopting Rawls and Dworkin *choice-circumstance* dichotomy as a basic tenet of distributive justice. I was careful to make clear that I do not discard the plausibility that Carlos might be under a duty to help Ana. Yet such a duty, I claimed, would be based on the value of humanity, solidarity, or beneficence, and not on a corresponding right of Ana grounded on the principle of justice.

Whatever the level of resources available in a community, therefore, the definition of the content of social and economic rights will always involve an intractable normative problem of resource distribution. This is because, as we saw, social and economic rights are not rights to the satisfaction of a determined level of basic needs. They are rights to a fair share of society's resources which might well vary

from individual to individual, enabling some to satisfy basic needs and more, and others not to satisfy basic needs.

The definition of what level of health care, food, housing etc an individual is entitled to as a matter of right collapses into the daunting distributive justice question of *how much resources that individual is entitled to have*. When a court is called upon to decide whether someone's right to health care, or any other social right, has been violated, it has to tackle this intractable distributive justice issue.

The usual argument that courts lack institutional capacity to deal with polycentric issues, therefore, has to be qualified in the light of this correct conception of social rights, which I call the distributive conception. Indeed, if the basic needs conception was correct, then courts might well have been in a much more disadvantaged position, as compared to the executive, so as to allocate resources among all areas of basic needs. Indeed, in a democratic society, the executive has at least a *prima facie* institutional advantage in that matter, given the host of departments and personnel it maintains in each of those areas. It could be consistently argued, then, that the judiciary should refrain from interfering but for in those cases where it is clear that resource allocation is discriminative of certain groups or needs.²⁵¹ Once it is clear that the social rights are not rights to basic needs, but rather rights to a fair share of a community's resources, then the argument from institutional competence loses a great deal of its appeal, since it is rather implausible to claim that the executive or the legislature are better equipped than the judiciary to answer this intractable normative problem.

The sheer difficulty of the problem could certainly induce a sceptical stance towards social rights justiciability. One could claim, for

²⁵¹ The South African decision in *Soobramoney*, which I discuss in the Appendix, would be a perfect model if the basic needs conception was correct.

instance, that, given there is no right answer to this question of distributive justice, judges should better refrain from making decisions on social rights, leaving them for the political, representative institutions of society. This is not because, as I have just said, those institutions have more expertise on the matter. Rather, since no institution has an expertise advantage, it would be better that every citizen participated in those decisions, and not just a few.²⁵²

But this would entail an abrogation of power by the judiciary that might be very dangerous. For one thing, given the shortcomings in representation to be found in any political institution, it might well be the case that judicial restraint curbs rather than enhances participation for many citizens, namely those whose financial condition exclude them of the political game. In the specific case of social rights, which benefit mostly the economically vulnerable, this is quite a real danger. Courts might well be the only channels of participation they can afford against an insensitive legislature. Moreover, even when the representative institutions do work properly (i.e. guaranteeing participation to everyone), there is a real risk that majoritarian rule keeps producing outcomes which will consistently ignore the interests of some minorities.

Those dangers of abrogation have to be taken into account and balanced against the danger of entrusting judges with controversial decisions such as those involved in the definition of the content of social rights. It is in this more restricted sense²⁵³, thus, that social rights justiciability poses a dilemma. If judges try to enforce them, they might be criticised for imposing their own view on issues that people fiercely disagree about. If they recoil from the task, however, the view of the

²⁵² A philosophical defense of this argument as regards rights in general (not just social rights) can be found in Jeremy Waldron, *Law and Disagreement*, (Oxford, 1999).

²⁵³ As opposed to the broad sense described by Michelman in the passage I quote in the Introduction.

political majority of the day will prevail and, quite arguably especially in developing countries, the most vulnerable will have their social rights systematically ignored.

It seems quite arguable, thus, that given the special position of the judiciary as protector of rights and minorities in a constitutional system that accepts judicial review, and the institutional constraints that apply to the judicial decision making process (namely the need to base their decisions on principles rather than policy grounds), they might be more suitable, *in principle*, to adjudicate social rights, even if the issue involved, *distributive justice*, is highly controversial.

Whatever institution takes up the task of defining social rights correctly understood as *distributive rights*, i.e. rights to a fair share of community's resources, it will face the impossibility of applying the choice-circumstance criterion on an individual basis and with total precision. It will be rarely possible to determine if someone's predicament as regards his ability to satisfy basic needs is traceable to the free choices he made in his life or to circumstances beyond his control. Most likely, it will be a combination of both, and the impact of each in the final outcome will be impossible to determine.

There is a need, therefore, to make use of some kind of presumption to circumvent this problem. That is, we must determine a level of social rights satisfaction below which we can safely presume that, most individuals, having had a fair opportunity to participate in the resources produced in that community, would not fall. I considered the possibility of using basic needs in that manner, that is, as this presumptive minimum level. It would rescue the basic needs conception from the inconsistency I claimed it has. But it would be too arbitrary to elect basic needs as that minimum presumptive threshold. Indeed, it

would certainly be too high at times, especially in poorer countries, and too low at others, especially in richer ones.

I suggested, thus, a model inspired on Ronald Dworkin's theory of distributive justice (equality of resources), and his strategy (the prudent insurer ideal) to render it applicable in the real world. I discuss that model in detail in chapter 7. According to that model, to reach a minimum threshold of resources below which most people would not fall save for some likely unjust reason (i.e. factors related to circumstance rather than choice), we should perform a counter-factual judgement in the following way. What level of health care, food, or resources in general, would someone insure against the risk of not being able to command, if certain ideal conditions obtained? Those conditions are the following: everyone has the same initial share of the community's resources, everyone has the same antecedent risk of not being able to command those resources, and everyone can buy insurance against it with the same policy structure. The answer to that question, i.e. what level of coverage would the reasonable person purchase in that ideal insurance market can serve as the presumptive minimum threshold we need to determine the contents of social rights. The appeal of such an insurance model is that, unlike basic needs, it is inextricably linked to the actual resource availability of a community. In poorer communities, the minimum level will be certainly lower than in richer ones. Moreover, it circumvents the problem of identifying the input of choice-circumstance in a person's predicament in a highly defensible way. Indeed, it is quite plausible to argue that most people, when able to command a fair share of resources in the beginning of their lives, would choose to set aside a certain, reasonable part of those resources to insure against the risk of not being able to command a certain minimum of social goods in future. We can safely presume, therefore, that those who

fall below that minimum in our community are likely victims of circumstance, not choice, and are entitled, therefore, to that minimum as a matter of justice.

As I said in the final chapter, I do not expect that such a model could be easily adopted in the courts. I do believe, however, that it can shed some light on the debate on justiciability.

APPENDIX
CASE ANALYSIS – A COMPARATIVE STUDY

I have argued in this study that the debate on justiciability has been unhelpfully focused on the alleged structural differences between civil and political rights at one side, and social and economic rights at the other. As a consequence of that, the most important issue for justiciability, namely the determination of the precise content of social and economic rights, has received little attention. I discussed different possible conceptions of social rights in chapters 2, 5 and 6, and maintained that the greatest obstacle to justiciability lies in the intractable problem of distributive justice that the correct determination of their precise content involves.

In this appendix I intend to look in some depth at real cases involving social rights (some of which I mentioned in passing in the thesis), to see how courts already entrusted with social rights adjudication have coped with the obstacles I discussed above. The bulk of cases I analyse are from South Africa and Brazil, which have expressly recognised social and economic rights in their constitutions, yet take a very different approach to justiciability. They provide an interesting and fruitful opportunity for a comparative analysis. I do discuss other cases incidentally, though, mainly from other countries in South America (whose approach is similar, if not identical, to the Brazilian approach) and from the United States of America which, despite not recognising social rights in their federal constitution, have developed an interesting caseload on the right to education at the states' constitutional jurisdiction level.

Two Opposite Judicial Approaches

South Africa and Brazil provide an interesting case for a comparative analysis of social rights justiciability for many reasons. Both countries have adopted constitutions that expressly recognise social and economic rights soon after the ending of authoritarian regimes. Brazil came first, with the Constitution of 1988, nicknamed the “Citizen Constitution”, which brought back direct democratic elections for the President of the Republic, among many other democratic changes, and consolidated the end of the military regime that lasted for 21 years, until 1985. South Africa’s constitution was adopted in 1996, with the end of the apartheid regime. In both countries, however, democracy in the form of political and civil rights wasn’t perceived as the single goal to be pursued through law reform at the end of the dictatorial regimes. The abject poverty of large parts of the population was also regarded as a matter for the legal system to amend. This certainly has something to do with the fact that South Africa and Brazil are both assiduous occupants of the unenvied top of the world table of income inequality in the among citizens. As a consequence of this inequality, even though neither country can be regarded as a poor country in terms of GNP per capita, large parts of the population, as I mentioned, live in poverty and are thus unable to satisfy their most basic needs to health care, education, housing, food etc.

That might explain to some extent why those countries have decided to constitutionalise social and economic rights. It was clear that their political systems had completely failed to deliver the distributive justice necessary to curb poverty in resource plentiful countries. The

hope that the constitution and its enforcement could amend the situation was high during the redemocratisation period.

After 8 years in South Africa and 16 years in Brazil, the effects of the constitutionalisation of social rights are anything but auspicious in either country. They continue to top the table of the most unequal countries in the world and poverty, as a consequence, remains at shameful high levels. If the constitutional hope was hollow, to paraphrase the famous title of Gerald Rosenberg's well-known book, is beyond the scope of this study to say, and actually almost impossible to ascertain.²⁵⁴ What I can and will try to do in this appendix is to see how the courts in these two countries have tackled cases grounded on the constitutional provisions recognising social rights.

The Constitutional Provisions

Brazil

It seems appropriate to start by analysing the wording of the constitutional provisions that recognise social and economic rights in both countries. In Brazil, a whole chapter (chapter II, Title I) of the 1988 Constitution was dedicated to social rights ("Dos Direitos Sociais"). Article 6 is the most relevant for our purposes:

"Art. 6 – Education, health, work, housing, leisure, safety, social security, protection of motherhood and childhood, assistance to the destitute, are social rights in the form of this Constitution." (*Art.6º - São direitos sociais a educação, a saúde, o trabalho, a moradia, o*

²⁵⁴ *The Hollow Hope: Can courts bring about social change?*, Chicago: University of Chicago Press, 1991, where he argues, based on empirical information about the desegregation cases in the United States, that litigation has played no significant role in the advancement of social change

*lazer, a segurança, a previdência social, a proteção à maternidade e à infância, a assistência aos desamparados, na forma desta Constituição.”)*²⁵⁵

Further down, in Title VIII of the 1988 Constitution, named “Of The Social Order” (“Da Ordem Social”), each of those rights is further specified. Article 193 establishes the general principles of the social order in the following manner:

“ Art. 193 – The social order is founded on the primacy of work and aimed at social well-being and justice.” (*Art.193 - A ordem social tem como base o primado do trabalho, e como objetivo o bem-estar e a justiça sociais.*)

The following articles specify further how social security shall be financed and organised, and then comes article 196, which details the right to health established generically in article 6 quoted above:

“ Art. 196 – Health is a right of everyone and a duty of the State, guaranteed by social and economic policies aimed at reducing the risk of illnesses and other hazards and at universal and equal access to the actions and services for its promotion, protection and recovery.” (*Art.196 - A saúde é direito de todos e dever do Estado, garantido mediante políticas sociais e econômicas que visem à redução do risco de doença e de outros agravos e ao acesso universal e igualitário as ações e serviços para sua promoção, proteção e recuperação.*)

In the following articles, the Constitution establishes how the health care system is to be organised (through the Unified System of Health – “Sistema Unico de Saude – SUS) and financed. As to the former, it is important to highlight article 198, II, that guarantees “*full*

²⁵⁵ An English version of the Brazilian and other constitutions can be found at the webpage of the International Constitutional Law Project, at <http://www.oefre.unibe.ch/law/icl/br00000.html>. Note, however, that it is not fully updated.

service” in the health care system, at the same time as it establishes priority for preventive activities. (art. 198 - Public health actions and services are part of a regionalized and hierarchical network and constitute a single system organized according to the following guidelines: ... II. full service, priority being given to preventive activities, without prejudice to assistance services”).²⁵⁶

As we shall see later, such a provision runs the risk of being misinterpreted as demanding from the state all treatment whatsoever needed by a citizen, whatever the costs, which is obviously impossible to provide everyone with in a situation of resource scarcity.

As to the financing of the health care system the constitution brings an interesting and, so far as I know, pioneering and unique provision, establishing *minimum percentages of the budget* to be compulsorily applied in health:

“§ 2º - The Federal Government, the States, the Federal District and the Municipalities shall apply, yearly, in health actions and health public services, a minimum of resources calculated as a percentage of: ²⁵⁷

²⁵⁶ The official Portuguese text reads as follows: 198, II - atendimento integral, com prioridade para as atividades preventivas, sem prejuízo dos serviços assistenciais;)

²⁵⁷ This whole provision wasn't in the original constitution promulgated in 1988, but rather included through the Constitutional Amendment 29/2000, at the end of year 2000. (Emenda Constitucional 29/2000 - D.O.U. 14.09.00)

“§ 2º - A União, os Estados, o Distrito Federal e os Municípios aplicarão, anualmente, em ações e serviços públicos de saúde recursos mínimos derivados da aplicação de percentuais calculados sobre: I - no caso da União, na forma definida nos termos da lei complementar prevista no § 3º;

II - no caso dos Estados e do Distrito Federal, o produto da arrecadação dos impostos a que se refere o art. 155 e dos recursos de que tratam os arts. 157 e 159, inciso I, alínea a, e inciso II, deduzidas as parcelas que forem transferidas aos respectivos Municípios;

III - no caso dos Municípios e do Distrito Federal, o produto da arrecadação dos impostos a que se refere o art. 156 e dos recursos de que tratam os arts. 158 e 159, inciso I, alínea b e § 3º. § 3º - Lei complementar, que será reavaliada pelo menos a cada cinco anos, estabelecerá:

I - os percentuais de que trata o § 2º;

II - os critérios de rateio dos recursos da União vinculados à saúde destinados aos Estados, ao Distrito Federal e aos Municípios, e dos Estados destinados a seus respectivos Municípios, objetivando a progressiva redução das disparidades regionais;

A fairly complicated system follows for the calculation of those minimum resources which is not necessary to explain in detail here. What is important to highlight is that government at all levels (federal, state, municipal) are bound to follow those minimum levels. As we will see later, this enables some kind of judicial enforcement of social rights that does not present the obstacles discussed in the thesis.

It is important to note that this minimum investment requirement established for the guarantee of the right to health was not the first of that sort determined in the constitution. On the contrary, the original text of 1988 had already adopted such a guarantee in relation to the right to education, which receives perhaps the most extensive specification of all constitutional social rights. It is worth quoting the constitutional provision in full:

“Section I Education

Article 205 [Education, Duty and Right]

Education, which is the right of all persons and the duty of the State and of the family, shall be promoted and encouraged with the cooperation of society, aiming at full development of the individual, his or her preparation to exercise citizenship, and his or her qualification for work.

Article 206 [Fundamental Principles]

Education shall be provided on the basis of the following principles:

- I. equal conditions for access to and remaining in school;
- II. freedom to learn, teach, research, and express thoughts, art, and knowledge;
- III. pluralism of ideas and of pedagogical concepts and coexistence of public and private teaching institutions;
- IV. free public education in official schools;
- V. appreciation of teaching professionals, guaranteeing, pursuant to the law, a career plan for public teachers, with a professional minimum salary and admittance exclusively by means of a public competitive examination of tests and titles, and ensuring a single legal regime for all institutions maintained by the Republic;
- VI. democratic administration of public education, pursuant to the law;
- VII. guarantee of good quality.

III - as normas de fiscalização, avaliação e controle das despesas com saúde nas esferas federal, estadual, distrital e municipal;

IV - as normas de cálculo do montante a ser aplicado pela União.

Article 207 [Universities, Autonomy]

Universities enjoy didactic, scientific, administrative, and financial and equity management autonomy and shall comply with the principle of indivisibility of teaching, research, and extension.

Article 208 [State Duty]

(0) The State's duty concerning education shall be discharged by ensuring the following:

I. compulsory and free elementary education, including for those who did not have access to school at the proper age;

II. progressive extension of compulsory and free education to secondary school;

III. special classes for the handicapped, preferably in the ordinary school network;

IV. assistance to children of zero to six years of age in day care centres and pre schools;

V. access to higher levels of education, research, and artistic creation according to individual capacity;

VI. provision of regular night courses adequate to the student's conditions;

VII. assistance to elementary school students through supplementary programs providing school supplies and material, transportation, food, and health assistance.

(1) Access to compulsory and free education is a subjective public right.

(2) The proper authority are liable for the Government's failure to provide compulsory education or providing it irregularly.

(3) It is incumbent upon the Government to conduct a census of elementary school students, to call them for enrolment and see, jointly with their parents or guardians, that they attend school.

Article 211 [Education Systems]

(0) The Republic, the States, the Federal District, and the Municipalities cooperate in the organization of their educational systems.

(1) The Republic organizes and finances the federal educational system and that of the Territories and renders technical and financial assistance to the States, to the Federal District, and to the Municipalities for the development of their education systems and provision of compulsory schooling on a priority basis.

(2) Municipalities act on a priority basis in elementary and pre-school education.

Article 212 [Budget]

(0) The Republic shall each year apply not less than eighteen percent, and the States, the Federal District, and the Municipalities at least twenty-five percent of the tax revenues, including revenues resulting from transfers, in the maintenance and development of education.

(1) The share of tax revenues transferred from the Republic to the States, Federal District, and Municipalities or from the States to the respective Municipalities shall not be considered, for purposes of the calculation provided for in this article, as revenues of the government making such transfers.

(2) For purposes of complying with the main provision of this article, the federal, state, and municipal education systems and the funds employed pursuant to Article 213 shall be taken into consideration.

(3) In the distribution of public funds, priority shall be given to meeting the needs of compulsory education pursuant to the national education plan.

(4) The supplementary food and health assistance programs foreseen in Article 208 VII shall be financed with funds derived from social contributions and other budgetary funds.

(5) An additional source of funds for public elementary education shall be the education salary contribution paid, pursuant to the law, by companies, which may deduct from it the funds invested in elementary education for their employees and dependents.

Article 213 [Public Funds]

(0) Public funds are allocated to public schools, and may be channelled to community, religious, or philanthropic schools, as defined in the law, which:

- I. prove that they do not seek a profit and invest their surplus funds in education;
- II. ensure that their equity is assigned to another community, philanthropic, or religious school or to the Government in the event they cease their activities.

(1) The funds referred to in this article may be allocated to elementary and secondary school scholarships, pursuant to the law, for those who prove that they do not have sufficient funds, whenever there are not vacancies or regular courses in the public school system of the place where the student lives, the Government being required to invest, on a priority basis, in the expansion of its network in that place.

(2) Research and extension activities at university level may receive financial support from the Government.

Article 214 [National Plan]

The law shall lay down the pluriannual national education plan aimed at coordination and development of education at its various levels and at integration of Government action leading to:

- I. eradication of illiteracy;
- II. universalization of school assistance;
- III. improvement of teaching quality;
- IV. professional training;
- V. humanistic, scientific and technological development of Brazil.

As it can be seen, the minimum investment requirement in education is quite high, at 18% of all federal tax revenues plus 25% of all states, federal district and municipalities' tax revenue, yearly.

It should be noticed, finally, that the 1988 Brazilian Constitution does not include specific provisions related to the right to housing or food. Those rights figure only indirectly, when the constitution mentions policies in the field of agriculture and urbanism, and also as an indirect right derived from the right to a minimum wage, recognised in article 7:

“Article 7 [The Rights]

The following are rights of city and rural workers, notwithstanding any others that seek to improve their social condition:

- IV. a minimum wage nationwide, established by law, **capable of satisfying their basic living needs and those of their families with housing, food, education,**

health, leisure, clothing, hygiene, transportation, and social security, with periodical adjustments to maintain its purchasing power, it being forbidden to bind it for any purpose;”

South Africa

Let us see now how the constitutional provisions recognising social rights are worded in the South African constitution. Social and economic rights are to be found in Chapter 2 of the 1996 South African Constitution, named “Bill of Rights”. It starts with general principles such as sections 7 and 8, which define the state duties related to the rights included in the constitution and establishes some general rules for their application.

Rights

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfill the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Application

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required

by the nature of the rights and the nature of that juristic person.

It is worth noticing section 7(2), because it makes clear that the duties of the state as regards rights in general are not restricted to negative duties of respect, but include also *positive duties* of protection, promotion and fulfilment of rights. The Constitution has specific provisions on equality (s. 9) and human dignity (s.10). As regards specific social rights, sections 26, 27 and 29 are of interest:

Housing

26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, **within its available resources**, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Health care, food, water and social security

27. (1) Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, **within its available resources**, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Education

29. (1) Everyone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account equity; practicability; and the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that do not discriminate on the basis of race; are registered with the state; and maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

It is interesting to bear in mind, for the purposes of our comparative analysis of cases to be carried out later on, the provision that limits the duty of the state to the adoption of “*reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights*”, included in the South African constitution in regard to the rights to housing, health care, food, water and social security, which has no counterpart in the Brazilian constitution. This might explain to some extent, as we shall see later, the different approaches of each country in the judicial enforcement of social rights.

To finish this section, I must highlight another provision that, similarly to the Brazilian system, makes clear that social and economic rights are fully justiciable in the South African system.

Enforcement of rights

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
anyone acting in their own interest;
anyone acting on behalf of another person who cannot act in their own name;
anyone acting as a member of, or in the interest of, a group or class of persons;
anyone acting in the public interest; and
an association acting in the interest of its members.

Let us turn now, then, to the comparative analysis of cases involving social rights that have come before Brazilian and South African courts to decide after the adoption of their constitutions. My analysis will be mainly focused on the right to health care, given it seems to be the right that features most in social rights litigation.

South Africa – a more restrained role for the courts

Soon after South Africa adopted its new Constitution recognising many social and economic rights, a case came before the Constitutional Court involving the right to health care: *Soobramoney vs. Minister of Health (Kwazulu-Natal)*.²⁵⁸ In this case, as we have already seen in chapter 7, the South African judiciary was called upon to decide whether the **right to health care** (expressly recognised in the South African Constitution in section 27 as we saw above) had been violated by the refusal of a local state hospital to provide the plaintiff, Mr Soobramoney, with periodical renal dialysis treatment necessary to maintain his life. It is needless to say that a country the size of South Africa has many people in the same situation as Mr. Soobramoney, that is, in need of renal dialysis (palliative or in view of transplantation), and that the state's resources devoted to health care are not sufficient to provide everyone with that treatment.

The constitutional provision relied upon by Mr. Soobramoney in his claim, as we have seen in the previous section, states that “everyone has the right to have access to health care services” (s.27(1), but qualifies that provision affirming that “[t]he state must take reasonable

legislative and other measures, *within its available resources*, to achieve the progressive realization of each of these rights.”

That is, the constitution makes clear that the right to have access to health care is not a right to be provided by the state with *any treatment whatsoever, no matter how expensive*. On the contrary, it establishes a right to have access to health care services which the state, acting with reasonableness and within available resources, should provide. It also adds the concept of progressive realization, giving the idea (inadequate as I claimed in chapter 2), that one day it will be possible to provide everyone with all treatment needed. As I claimed in chapter 2, resource scarcity is not a passing circumstance, but a permanent feature of our world. There will always be insufficient resources for all the needs of individuals and society, because the former are finite whereas the latter are never so. The concept of progressive realization, thus, is better discarded.

It might be better to say, thus, that the right to have access to health care recognised in the South African constitution is what is sometimes called an *abstract*, or *prima facie* right.²⁵⁹ The distinction between *abstract* (*prima facie*) and *concrete* (definitive) *rights* has been explained by one of its proponents, Ronald Dworkin, in the following way:

“An abstract right is a general political aim the statement of which does not indicate how the general aim is to be weighed or compromised in particular circumstances against other political aims. ... Concrete rights, on the other hand, are political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions.”²⁶⁰

²⁵⁸ *Constitutional Court of South Africa, Case CCT 32/97, 27 November 1997*

²⁵⁹ Cf Robert Alexy, *op. cit.* at 490

²⁶⁰ *Taking Rights Seriously*, 1977, p 93.

Dworkin illustrates the distinction with the right to free speech. If we simply say that everyone has the *right to free speech* we do not mean that this right is absolute, but neither do we specify how it should be balanced against competing interests in specific cases. When we say however that “*a newspaper has a right to publish defence plans classified as secret provided this publication will not create an immediate danger to troops*”, this balance has already been done, and the right stated is a concrete one. Abstract rights “*provide arguments for concrete rights, but the claim of a concrete right is more definitive than any claim of abstract right that supports it.*”²⁶¹

Take, now, the social right to health care we are discussing in this section. The South African constitution establishes the general political aim that South African citizens should have access to health care services. This general political aim, then, has to be weighed against other competing political aims before it can become a concrete, more definite right to a particular kind of health care service. Unlike in Dworkin’s free speech example, however, the situation here is infinitely more complex, because the balancing exercise is not bilateral, i.e. publishing of defence plans versus safety of troops. As I have discussed at length in this thesis, we face here a “polycentric” problem. That is, given the fact of resource scarcity, to know if renal dialysis should be provided to Mr. Soobramoney or not (i.e. to decide if the abstract right to health care entails a concrete right to renal dialysis), one must balance the need to renal dialysis against all other needs competing for the scarce resources of the community. But those needs

²⁶¹ *Op cit*, p 94. See also, for the distinction, *Law’s Empire*, p 293. The same distinction can be put as a distinction between two different types of norms: principles and rules. Abstract rights are principle norms; concrete rights are rules. For this distinction, see also Dworkin, *Taking Rights Seriously*, and Robert Alexy, *op. cit.*

are endless, which makes the enterprise utterly complex. Indeed, this balancing judgement will inevitably involve complex matters of public policy and resource allocation intimately related to distributive justice issues.

It is those difficulties that unconditional supporters of social rights' justiciability tend to overlook when they insist that civil and political rights adjudication is similar to that of social and economic rights. It seems undeniable to me that it is far easier to balance freedom of the press against safety of troops than to decide if Mr. Soobramoney should be entitled to renal dialysis.

When one bears in mind those difficulties the heavily criticised opinion of the South African Constitutional Court in *Soobramoney* becomes much more understandable:

“[29] The provincial administration which is responsible for health care services in Kwazulu-Natal has to make decisions about *the funding* that should be made available for health care and *how* such funds should be spent. These choices involve difficult decisions to be taken at the *political* level in fixing the health budget, and at the *functional* level in deciding upon the priorities to be met. A court will be slow to interfere with *rational* decisions taken in *good faith* by the political organs and medical authorities whose responsibility it is to deal with such matters.”
[my emphasis]

The court restricted its role, therefore, to an assessment of the “*rationality*” and the “*good faith*” of political and technical decisions. This was due to a combination of legitimacy and institutional capacity concerns: the fear to overstep the boundaries imposed by the principle of separation of powers, and “*the danger of making any order that the resources be used for a particular patient, which might have the effect of*

denying those resources to other patients to whom they might more advantageously be devoted."²⁶²

One can easily understand the concerns of the South African court. But it must be recognised that such an approach runs the risk of rendering the highly acclaimed social rights provisions of the South African Constitution virtually redundant. Indeed, it is hardly necessary to invoke the right to health care at all to demand that governmental decisions be rational. The *rationality* test is a well established limit on the discretion of political agents to make decisions. But it is a very restricted test, for the very reason that it is applied to areas where the political branches are supposed to exert discretion. In the apt phrase of Lawrence Sager, it places the courts in the position of a "guard at a door that only a mad or a runaway legislature would lurch through."²⁶³

If the right to have access to health care is to have any *meaning* as a constitutional provision, thus, the Court must be able to review, in some degree at least, the correctness of the very political and technical decisions which led to the refusal of treatment to *Mr Soobramoney*.

But can courts legitimately and efficiently tackle those questions, or is the South African approach really all we can have?²⁶⁴ It should be

²⁶² *Soobramoney*, par [30], p 16. I do not agree, on this point, with Scott and Alston's analysis of the court's position. They argue that the court refusal to give Mr. Soobramoney priority was grounded on a kind of utilitarian position that sacrifices the individual "to an amorphous general good". See "Adjudicating social priorities in a transnational context: a comment on Soobramoney's legacy and Grootboom's promise", in *South African Journal on Human Rights*, v. 16, 2000, pp 206-268, at 252. I think it is clear from the passage quoted that the court, out of a concern of institutional capacity, in fact abstained to make any decision *at all* (utilitarian or not) as to the matter of priority. Moreover, to say that resources might be more advantageously devoted to other patients doesn't necessarily imply a utilitarian position. Indeed, one might well ground such a claim on the principle of equality, in the sense of equal concern we have discussed in this thesis.

²⁶³ *Plain Clothes*, 1993, at 413.

²⁶⁴ See Canotilho, *op. cit.* p 483, maintaining that "the legislator is not entirely free to comply with such impositions [social and economic constitutional norms] but has, however, freedom of conformation as to the concrete normative solutions and as to the organisation and graduality of concretisation." O controle judicial e' de razoabilidade, para verificar se ha' uma efetiva realizacao gradual e nao ha discriminacao. This is a very weak duty, in my view. See

clear from the discussion I developed in the previous chapters that the concerns of the South African Constitutional Court are genuine but exaggerated. It underestimates the possibility (which I have defended in this thesis) for the courts to perform a more meaningful role without unduly interfering in political questions or straining their institutional capacity.

As to *legitimacy*, once social rights are constitutionalised as enforceable norms (or even as directive principles), there is a necessary reduction on the sphere of discretion of the political branches. Indeed, the very idea of a constitutional right entails that some interests are so fundamental that they cannot be left to the exclusive discretion of the political majorities. The fact that rights to a positive action (or entitlements in the wide sense) are dependent on resources is not, *in itself*, a reason to bar judicial interference. It is true that resource allocation among competing political aims is *primarily* a political task, that is, one to be performed by the legislature and government. But it is not a fully discretionary task, otherwise it would make no sense to talk of rights whenever resource allocation is involved, which is the case of most rights currently recognised in democratic constitutions. The political branches have a *non-discretionary duty*, therefore, to allocate a certain amount of resources for the guarantee of the rights established in the constitution. The difficult question is, of course, how to determine the *correct (i.e. just) amount* to be allocated for the guarantee of each constitutional right. How much is to go for education, health care, housing, food, security etc is an intractable *distributive justice* matter. But here, it is important to emphasise, we are already in the realm of *institutional capacity, not legitimacy*. That

also Cass Sunstein, praising the South African decision *Grootboom* as the correct way of judicial enforcement without usurpation of powers, *op. cit.*, p235.

is, on the problem of which institution is better suited to make such decisions well.

There is no doubt, I submitted in this thesis, that the legislature and government are *in principle* better equipped to make such decisions. After all, it is primarily *their* duty to make them, and to carry out that duty they have departments to gather information, carry out analysis, develop policies etc which the judiciary obviously lacks. It is not surprising, thus, that some courts would prefer to take a deferential approach, and interfere only on the safe side of irrationality and good faith. But it does so at the high risk of abdicating its fundamental constitutional role of protecting rights.

I claimed in this thesis that there is scope for the courts to exercise a more meaningful role without risking undue interference with political decisions. This can be done through a particular version of the minimum threshold approach which I discussed and defended in chapters 6, which I call the insurance model. I have already tried to show in that chapter how the courts might have decided the South African cases *Soobramoney*, *Grootboom* and *TAC* if they used the equality approach I suggested.²⁶⁵

²⁶⁵ See chapter 7.

Brazil: health care as an absolute right

The approach in Brazil, where the right to health care has also been claimed in the courts, is different to the South African one in three main inter-related respects. Firstly, the courts are much *less deferential* to the political branches (if at all), never expressing concerns of legitimacy or institutional capacity. Secondly, they pay little regard, in particular, to the scarcity of resource defence usually raised by the State, as if it were a mere subterfuge to evade their duties. Thirdly, when they find a violation of the constitutional provisions, the remedy usually asserts an immediately claimable right (i.e. a subjective right) of the individual, which cannot be limited by any competing claim (an absolute, or concrete right).

I shall take legal suits claiming a constitutional right to HIV treatment, which have proliferated throughout South America, to illustrate with the right to health care what we might call the South American approach to justiciability.

Brazil is internationally recognised as a success story in the fight against AIDS due to its state funded drugs distribution programme set up by the federal government in the nineties. What is less well-known, however, is that many HIV infected Brazilian citizens were given HIV drugs due to court orders and not through the federal government programme, which is large yet not fully comprehensive. In this section I will describe and analyse a Brazilian case involving the right to receive HIV drugs from the state that reached the Brazilian Supreme Federal Tribunal (the highest tribunal of the country).

Before I proceed it is important to make a few comments on the Brazilian judicial system so that one can understand the real significance

of the decision I will discuss. The Supreme Federal Tribunal is composed by eleven judges, appointed by the President of Brazil among citizens with “notable legal knowledge” and “immaculate reputation”, who are older than 35 years and younger than 65 years. The Senate has to approve the President’s nominations. The Supreme Federal Tribunal judges usually sit in two fixed groups of five (called “ turmas”) to judge the cases. Their main competence of the SFT is to judge cases in third instance which have a constitutional question to be solved. That is, when a case is heard in first instance by a local judge, and then in appeal by a State’s tribunal (Brazil is a federative republic composed of 27 States), it can be furthered appealed to the Supreme Federal Tribunal, yet only if it involved a constitutional question. As we saw above, social and economic rights are expressly recognised in Brazil in the constitution, which renders any lawsuit involving one of those rights amenable, in principle, to be taken to the Supreme Federal Tribunal.

It is important to note, however, that the decisions of higher courts are not binding either on themselves or on other lower courts. It is quite common, for instance, that one “turma” of five judges at the SFT reach a completely opposite decision to that reached by the other “turma” on an identical case. Even the same “turma” might change its position through the change of mind of a single judge, or the replacement (through retirement) of a single judge.²⁶⁶ A first instance judge, as I said, is also free to take a different decision to that reached in the higher courts. That makes it quite common for questions already decided by the SFT to keep being brought to justice. There is always a chance of a change of position in the SFT. Moreover, not all cases reach the SFT. We might have the situation, thus, in which an identical case is

²⁶⁶ For instance, if a position was originally held by a majority of 3 to 2 judges, it takes only one turn to change the position of the whole “turma”.

judged one way in the SFT and another in the first instance, in a decision that becomes definitive through lack of appeal to the SFT.

Those explanations are necessary for one to understand the real significance of the case I will now discuss. Although it could be taken, today, as the majoritarian position in all courts in Brazil, there is always the chance of that position changing, or of a different position to be taken in a new case that never reaches the SFT.

The case was brought to the courts by *Dina Rosa Vieira* against the *Municipality of Porto Alegre*, which is the capital of the southernmost State of Brazil, Rio Grande do Sul. The plaintiff claimed that she was entitled to receive free HIV drugs from the local government as a corollary of her right to health care established in article 196 of the Constitution. The local government of Porto Alegre claimed that there were no resources in the budget of the municipality to afford such treatment. The Supreme Federal Tribunal rejected the defendant's argument and ordered the State to provide all treatment needed by the plaintiff on the grounds that failing to do so would indeed constitute a violation of the rights to life and health care guaranteed in the Brazilian constitution. The grounds of the judgment have been clearly exposed in the following passage:

“Between the protection of the inviolable rights to life and health, which are subjective inalienable rights guaranteed to everyone by the Constitution itself (art. 5, caput and art. 196), and the upholding, against this fundamental prerogative, of a financial and secondary interest of the State, I believe – once this dilemma occurs – that ethical-juridical reasons compel the judge to only one possible solution: that which furthers the respect of life and human health ...”²⁶⁷

²⁶⁷ My translation from the original in Portuguese, which reads as follows: “entre proteger a inviolabilidade do direito à vida e à saúde, que se qualifica como direito subjetivo inalienável assegurado a todos pela própria Constituição da República (art. 5º, caput e art. 196), ou fazer prevalecer, contra essa prerrogativa fundamental, um interesse financeiro e secundário do Estado, entendo - uma vez configurado esse dilema - que razões de ordem ético-jurídica

The Brazilian Federal Supreme Tribunal, therefore, sees the case as a *conflict* (or dilemma) between two competing interests. On one side, there is an individual's right to life and health care; on the other side, there is an interest of the state to maintain its financial situation in good order. It performs then a balancing exercise and concludes that the right of the individual must prevail. If the premises of the balancing exercise were correct, there would be nothing wrong with the conclusion reached by the court. Indeed, as we have already discussed above, the very idea of a right entails that it should prevail even against the common interest expressed by political majoritarian decisions.

It should be clear by now, however, that the premises of this balancing exercise are not correct. Indeed, what the SFT calls a "financial and secondary interest of the State" is not an end in itself. The State does not seek to spend less with health care in order to have more money in its bank account simply to make it look better. As it should be obvious for anyone but seems particularly difficult for the judiciary to grasp, resources are scarce and, as a consequence, any resource spent on one thing (such as HIV treatment), means that there will be less resources to spend on other things. The real question to be asked, thus, is whether the decision of the State not to spend resources from its budget on HIV treatment for the plaintiff is just. That, as we saw, is a complex normative polycentric question, since it involves analyzing the whole distribution of resources in society from the perspective of justice.

As I claimed in chapter 6, the equality conception of the minimum threshold approach might be able to help judges to make those decisions. They might try and determine if, given a fair initial

impõem ao julgador uma só e possível opção: aquela que privilegia o respeito indeclinável à vida e à saúde humana ...” The decision is available in Portuguese at the SFT webpage, at

distribution of resources in society, individuals would insure against the risk of being HIV positive. I did not claim that my approach would lead to an exact answer in all cases, or that it won't be dismissed as unfeasible by most judges. If that is the case, as I claimed, a better solution would be to adopt what Alexy calls "epistemic discretion".²⁶⁸ That is, judges should defer to the political branches decisions on the grounds that, being impossible for an adequate answer to be reached, the decisions taken through the political process should prevail.

Some might claim that this is too deferential to the political branches and risks devaluing the whole idea of human rights. There is no doubt such a risk, but we must weigh it up against the opposite risk of courts taking inadequate decisions that in the end create more injustice. The Brazilian case is very illustrative of this point. It is simply *impossible*, given the present availability of resources and the skyrocketing costs of complex medical procedures and drugs, for any country (let alone Brazil) to provide everyone with all health care services needed, however costly. The Court's approach, therefore, runs the risk of creating more inequality. In fact, when the courts ignore that resources are scarce they privilege some (namely those who have the means to access the judiciary, or those who do it first) at the expense of others.²⁶⁹ This was, as we have seen above, the justified worry of the South African Court in *Soobramoney*: "*the danger of making any order that the resources be used for a particular patient, which might have the*

www.stf.gov.br . The number of the decision is RE-271286.

²⁶⁸ See chapter 4.

²⁶⁹ According to an article in one of the leading Brazilian broadsheet newspapers, in 2002 80% of the budget allocated for AIDS was diverted to individual patients through judicial decisions. From 1996 to 2002 this type of decision has grown from 80 a month to over 600 a month, achieving 6% of the total health budget in the State of Sao Paulo. *Folha de Sao Paulo*, 18.8.2002, "DIREITO À SAÚDE - Número de sentenças que obrigam o Estado a fornecer remédios a doentes cresceu seis vezes e meia de 1996 a 2002. Justiça faz política de medicamentos em SP"

effect of denying those resources to other patients to whom they might more advantageously be devoted.” The prevalent position in the Brazilian courts to regard social rights as if they were absolute, thus, is to be rejected.

In most South American countries cases involving the right to receive free HIV drugs from the State have ended in a similar way, i.e. with the courts determining that the State provides such drugs to the citizens. The same conclusion was reached, for instance, by the Colombian Constitutional Court in *Alonso Munoz Ceballos v. Instituto de los Seguros Sociales* (Sentencia n.o T-484-92) and *Diego Serna Gomez v. Hospital Universitario del Valle “Evaristo Garcia”* (Sentencia n.o T-505/92); by the *El Salvadorian Supreme Court of Justice* (Sentencia de la Sala de lo Constitucional de la Corte Suprema de 4 de Abril de 2001).

Although the outcome of those decisions is the same, the reasoning that grounds them present some differences worth analyzing, especially in the way they deal with the issue of resource scarcity raised by all defendants. In the Brazilian case, as we saw, the Supreme Federal Tribunal simply dismissed, without much discussion, the resource scarcity argument.

The same approach was taken in El Salvador:

“The high cost of a medicine cannot be validly raised to justify not treating, or treating incompletely a patient. If it is proven that the administration of a drug is capable of, if not curing or saving, making life better for a while, it should be given.”²⁷⁰

²⁷⁰ Debe entonces entenderse que el alto costo de un medicamento no puede ser argüido válidamente para justificar una desatención o una atención insuficiente en un enfermo. Si se ha probado que el suministro de una sustancia es capaz de permitirle sino bien curarse ni salvarse, sí vivir momentáneamente mejor, debe proporcionársele. La Sala Constitucional de la Corte

It is even understandable that Courts in Latin America, where corruption is widespread and the political branches have a low reputation for diligently carrying out their duties, are sceptical of the resource scarcity defence. But this does not release them from carrying out a serious scrutiny, in order to avoid, as we saw above, doing injustice to other competing and pressing needs that have to be furthered with the scarce resources of society. It is simply impossible, it bears repeating, to provide all health care treatment available, however expensive, to a whole population. Even diligent and honest authorities, therefore, will have to make decisions on how to spend scarce resources.

But the outcome of the decisions in the Brazilian and El Salvadorian cases could have been more plausibly justified if they used the equality conception of the minimum threshold approach I defended in this thesis. This seems to be the rationale of the two Colombian constitutional cases regarding the same subject (provision of AIDS treatment). Indeed, the Colombian Constitutional Court reached the same outcome as their Brazilian and El Salvadorian counterparts but through a better reasoning. It does not dismiss scarcity of resources as a “secondary interest of the State”. On the contrary, it acknowledges it, and emphasises the duty of the administration and its doctors to make an ethical judgement as to whom should receive priority. Unlike in *Soobramoney*, though, the Colombian Court goes on to assert that the criteria to make such allocation are in the Constitution itself and therefore is reviewable by the Court. The priority of resources for the

Suprema de Justicia de Costa Rica, en la resolución pronunciada a las dieciocho horas y nueve minutos del día veintitrés de septiembre de mil novecientos noventa y siete, en el amparo 5778-V-97, dejó dicho en un caso semejante a éste que “(...) De todos modos si lo que precisa es poner el problema en la fría dimensión financiera, estima la Sala que no sería menos atinado preguntarnos por los muchos millones de colones que se pierden por el hecho de que los

treatment of HIV infected poor patients is then justified by the following reasons: allocation of scarce resources should prioritise i. *minorities traditionally discriminated and marginalized from the benefits of society*; ii. *medical problems which carry a risk of epidemics*; iii. *medical problems which carry a risk to the life of the patient.*” (Sentencia No. T-505)

This seems to me a much more adequate justification than that adopted by the Brazilian and El Salvadorian decisions. The Colombian court did not recoil from tackling the difficult issue of resource scarcity. Its decision might well be seen, I submit, as in line with the equality approach I suggested. In fact, if we take the three criteria put forward by the Court to assess the distribution of resources made by government we can identify a strong egalitarian verve. To allocate resources to “minorities traditionally marginalised from the benefits of society” is a clear redistributive measure. Problems which carry a risk of epidemics or a threat to life can also be safely assumed as part of an insurance chosen by individuals who possess a fair amount of society’s resources. The Colombian decisions, thus, although not as precise as one might wish judicial decisions involving social rights to be, goes at least in the right direction of facing the distributive justice issue usually ignored in other South American jurisdictions.

It can still be claimed, of course, that even in the Colombian approach there is a high “*danger ... of denying those resources to other patients to whom they might more advantageously be devoted.*” I do not think, unlike many social rights partisans, that these arguments are unimportant. But they might be one-sided. By avoiding the risks taken by the Colombian Court, the South African Court is taking risks on the

enfermos no puedan tener la posibilidad de reincorporarse a la fuerza laboral y producir su parte, por pequeña que sea, de la riqueza nacional. (...)”.

other side. Mr *Soobramoney* is dead. And so might be thousands of South African children whose condition was declared prioritarious by the Constitutional Court, but no immediately claimable right was recognised. What if Mr *Soobramoney* did have a right, based on the correct allocation of resources, to receive renal dialysis?

I am not saying, it is worth repeating, that the risks of the Colombian approach are negligible. The point I am trying to make is that there are risks on the other side as well, and just as important.

BIBLIOGRAPHY

Abramovich, Victor and Courtis, Christian, *Apuntes sobre la exigibilidad judicial de los derechos sociales*, <http://dex1.tsd.unifi.it/jg/es/surveys/latina/courtis.htm>

Alexy, Robert, *A Theory of Constitutional Rights* (Oxford, 2003)

Alston, Philip and Quinn, Gerald. "The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly* 9 (1987), 156-229

Amar, Akhil Reed. "Forty Acres and a Mule: A Republican Theory of Minimal Entitlements", 13 *Harvard Journal of Law and Public Policy* 37 (1990)

Andreassen, Bard-Anders, Skalnes, Tor, Smith, Alan G., and Stokke Hugo, "Assessing Human Rights Performance in Developing Countries: The Case for a Minimal Threshold Approach to the Economic and Social Rights", *Human Rights in Developing Countries 1987/88, A Yearbook on Human Rights in Countries Receiving Nordic Aid*, Andreassen, Bars-Andres and Eide, Asbjorn (eds.), Akademisk Forlag, 1988.

Arango, Rodolfo. "Basic Social Rights, Constitutional Justice, and Democracy", *Ratio Juris*, vol 16, no2, June 2003, pp 141-154.

Baybrooke, David, *Meeting Needs*, (1987).

Berger, Eric "The Right to Education under the South African Constitution", 103 *Columbia Law Review* 614 (2003).

Bilchitz, David, "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance", (2002) 118 *The South African Law Journal*, 484,

_____, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence", *South African Journal of Human Rights* (forthcoming),

_____, "Placing Basic Needs at the Centre of Socio-economic rights jurisprudence", *ESR Review*, vol 4, n.1, March 2003.

Campbell, Ewing & Tomkins (eds), *Sceptical Essays on the Human Rights Act 1998* (Oxford, 2001)

Canotilho, J.J. Gomes, *Direito Constitucional e Teoria da Constituicao*, Coimbra,

Cappelletti, Mauro. "Judicial Review in Comparative Perspective", 58 *California Law Review* 1017 (1970)

Chakalson, Arthur, "From Wickedness to Equality: The Moral Transformation of South African Law", *I.CON*, Volume I, Number 4, 2003, pp. 590-609.

Chayes, Abram, "The role of the judge in public law litigation", 89 *Harvard Law Review* 1281.

Comparato, Fabio, *O MINISTÉRIO PÚBLICO NA DEFESA DOS DIREITOS ECONÔMICOS, SOCIAIS E CULTURAIS* (2001).

Copp, David, "The right to an adequate standard of living: Justice, Autonomy, and the Basic Needs", *Ethical Investigations, Rights and Duties*, vol 5 (Welfare Rights and Duties of Charity), Carl Wellman (ed).

Cranston, Maurice, "Human Rights, Real and Supposed", *Political Theory and the Rights of Man*, DD Raphael (ed), (London, 1967), pp 43-53.

Craven, Matthew, "The Justiciability of Economic, Social and Cultural Rights", *Economic, Social and Cultural Rights: their implementation in the United Kingdom*, R Burchill, D Harris and A. Owers (eds), 1999.

Denninger, Erhard. "State Tasks and Human Rights", *Ratio Juris* vol 12, n 1, March 1999 (1-10)

Diez-Picazo, Luis Maria and Ponthoreau, Marie-Claire, *The Constitutional Protection of Social Rights: Some Comparative Remarks*, European University Institute, Florence, 1991.

Dworkin, Ronald, *Taking Rights Seriously* (London, 1977),
_____, "Rights as Trumps", *Theories of Rights*, Waldron J. (ed.), (Oxford, 1984),

_____, "Equality, Luck and Hierarchy", *Philosophy and Public Affairs* 31, n.2, 2003, pp 190-198,

_____, "Response to Overseas Commentators", *The International Journal of Constitutional Law*, vol. 4, issue 1, pp 651-662,

_____, *A Matter of Principle*, (Oxford, 1986).

_____, *Freedom's Law, The Moral Reading of the American Constitution*, (Cambridge, MA, 1996),

_____, "Objectivity and Truth: You'd better believe it", *Philosophy & Public Affairs* 25, no. 2 (Spring 1996),

_____, *Sovereign Virtue, The Theory and Practice of Equality* (Cambridge, MA, 2000).

The Economist, August 16th, 2001, “The Politics of Human Rights”.

Eide, Asbjorn, “Realization of Social and Economic Rights and the Minimum Core Approach”, *Human Rights Law Journal*, vol. 10, n. 1-2, 1989, pp 35-51.

Ely, J. H., *Democracy and Distrust: A Theory of Judicial Review* (1980).

Ewing, Keith, “The case for Social Rights”, in *Protecting Human Rights: Instruments and Institutions*, Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds), 2003,

_____, “Social Rights and Constitutional Law”, *Public Law* 1999, SPR, 104-123.

Fabre, Cecile, *Social Rights under the Constitution* (Oxford, 2000),

_____, “Constitutionalising Social Rights”, *The Journal of Political Philosophy*: vol 6, n 3, 1998, pp 263-284.

Feldman, Jonathan, “Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government”, *24 Rutgers Law Journal* 1057 (1993).

Folha de Sao Paulo, 18.8.2002, “DIREITO À SAÚDE - Número de sentenças que obrigam o Estado a fornecer remédios a doentes cresceu seis vezes e meia de 1996 a 2002. Justiça faz política de medicamentos em SP”

Foot, Philippa, "The Problem of Abortion and the Doctrine of Double Effect.", *Killing and Letting Die*, Bonnie Steinbock (ed.), (New Jersey, 1980), pp. 156-165.

Frankfurt, H., “Equality as a Moral Ideal”, *Ethics*, 98 (1987), pp. 21-43,

Fried, Charles, *Right and Wrong*, (Cambridge, 1978),

_____, Charles Fried, “Distributive Justice”, 1 *Social Philosophy and Policy* (1983), pp 45-59.

Frug, Gerald, The Judicial Power of the Purse, *University of Pennsylvania Law Review*, vol. 126, n.4, (1978).

Fuller, Lon, “The Forms and Limits to Adjudication”, 92 *Harvard Law Review* 353 (1978).

Galligan, D J., *Discretionary Powers* (Oxford, 1999).

General Comment No. 3, in Report on the Fifth Session, U.N. ESCOR, Comm'n on Economic, Social and Cultural Rights, 5th Sess., Supp. No. 3, Annex 3, at 85, U.N.Doc. E/1991/23, E/C.12/1990/8 (1990)

Glendon, Mary Ann. "Rights in Twentieth-Century Constitutions", 59 *University of Chicago Law Review* 519 (1992)

Griffin, James, "Welfare Rights", *The Journal of Ethics* 4: 27-43, (2000).

The Guardian, 3.11.2003 "Long queue at drive-in soup kitchen".

Guest, Stephen, *Ronald Dworkin, 2nd edition* (Edinburgh, 1997).

Habermas, Jürgen, *Between Facts and Norms*, (Harvard, 1997),
_____, "Human Rights and Popular Sovereignty: The Liberal and Republican Versions", *Ratio Juris* vol 7, n 1, March 1994 (1-13)

Hare, Ivan, "Case Analysis – Minister of Health v. Treatment Action Campaign: The South African AIDS Pandemic and the Constitutional Right to Healthcare", [2002] *European Human Rights Law Review*, Issue 5, pp 625-630.

Hershkoff, Helen, "Positive Rights and State Constitutions: the Limits of Federal Rationality Review", 112 *Harvard Law Review* 1131 (1999),
_____, "State Courts and the 'Passive Virtues': Rethinking the Judicial Function", *Harvard Law Review*, May, 2001, p 1833.
_____, "Rights and Freedoms under the State Constitution: A New Deal for Welfare Rights", 13 *Touro Law Review* 631 (1997)

Hirschl, Ran. " 'Negative' Rights vs. 'Positive' Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Order", *Human Rights Quarterly* 22 (2000), pp 1060-1098.

Holmes and Sunstein, *The Cost of Rights – Why Liberty Depends on Taxes* (New York, 1999).

Horowitz, Donald L., *The Courts and Social Policy* (Washington, D.C., 1977)

Kant, E., *Groundwork of the Metaphysics of Morals*, (Cambridge, 1997)

Kymlicka, Will, *Contemporary Political Philosophy: An Introduction* (Oxford: 1990).

Kurland, Philip B., The Rise and Fall of the "Doctrine" of Separation of Powers, 85 *Mich. L. Rev.* 592, 593 (1986)

Lamarque, Lucie "The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights", *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Chapman and Russel (eds), Intersentia, 2002, pp 87-114,

Luban, David. "The Warren Court and the Concept of a Right", 34 *Harvard CR-CL Law Review* 7 (1999)

Madrick, Jeff, "Health for Sale", *New York Review of Books*, Volume 50, Number 20 · December 18, 2003.

Manso, Bruno Paes, "Homicides: Why so many executions in São Paulo's Periphery?", *Braudel Papers*, number 25, 2000, <http://www.braudel.org.br/paping25c.htr>.

Marshall, T. H., *Citizenship and Social Class* (1950)

Michaelman, Frank I., "Foreword: On Protecting the Poor Through the Fourteenth Amendment", 83 *Harvard Law Review* 7, (1969);
_____, "The Constitution, Social Rights, and Liberal Political Justification", *International Journal of Constitutional Law*, vol 1, number 1 (2003), pp 13-34.

Mill, John Stuart. *Utilitarianism*, Mary Warnock (ed.), Fontana Press, (1962).

Monaghan, Henry Paul. "The Constitution goes to Harvard", 13 *Harvard CR-CL Law Review* 117 (1978)

Mureinik, Etienne, "Beyond a charter of luxuries: economic rights in the constitution", *South African Human Rights Journal*, vol. 8 (1992), p467.

Nardini, William J. "Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court, 30 *Seton Hall Law Review* 1 (1999).

Nussbaum, Martha C., "Introduction to Comparative Constitutionalism", 3 *Chicago Journal of International Law* 429 (2002)

Parfit, Derek, "Equality or Priority", *The Ideal of Equality*, Matthew Clayton and Andrew Williams (eds), (Macmillan, 2000), pp. 81-125

Philips, Anne, "Defending Equality of Outcome", *UCL Colloquium of Legal and Political Philosophy of 2002/2003*, Centre for Law, Politics and Society of the School of Public Policy (manuscript)

Piovesan, Flavia C., *Protecao Judicial contra Omissoes Legislativas, Acao direta de inconstitucionalidade por Omissao e Mandado de Injuncao* (São Paulo, 1995).

Pogge, Thomas W., "How should human rights be conceived?", *Jahrbuch fur Recht und Ethick*, 3 (1995), pp 103-120.

Randal S. Jeffrey. "SOCIAL AND ECONOMIC RIGHTS IN THE SOUTH AFRICAN CONSTITUTION: LEGAL CONSEQUENCES AND PRACTICAL CONSIDERATIONS", *Columbia Journal of Law and Social Problems*, Fall, 1993, p. 1.

Rawls, John, *Political Liberalism* (New York, 1996),
_____, *A Theory of Justice*, (Cambridge, MA, 1971, 1999)

Raz, Joseph, "Professor Dworkin's Theory of Rights", XXVI *Political Studies* 123 (1978).

Redish, Martin H., "Judicial Review and the "Political Question"", 79 *Nw. U. L. Rev.* 1031, (1984-1985).

Reich, Charles, "The New Property", 73 *YALE L.J.* 733, (1964)

Rosenn, Keith S., "Judicial Review in Brazil: Developments under the 1988 Constitution", 7 *Southwestern Journal of Law and Trade in the Americas* 291 (2000)

Roux, Theunis. "Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court", www.law.wits.ac.za/cals/lt/publications/pdf/norway-papers.pdf

Sachs, Albie. "Social and economic rights: can they be made justiciable?", 53 *SMU Law Review* 1381 (2000)

Sadursky, Wojciech, "Judicial Review and the Protection of Constitutional Rights", *Oxford Journal of Legal Studies*, vol. 22. n. 2, 2002, 275-299.

Sager, Lawrence G., "Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law", 88 *Nw. U. L. Rev.* 410, (1993).

Scanlon, T. M., "Preference and Urgency", *The Journal of Philosophy*, Vol. 72, No. 19, Seventy-Second Annual Meeting American Philosophical Association, Eastern Division. (Nov. 6, 1975), pp. 655-669.

Schuck, Peter, *Suing Government. Citizen remedies for official wrongs*. (New Haven and London, 1983).

Scott and Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992), 141 *University of Pennsylvania Law Review* 1-148.

Scott, Craig and Alston, Philip, "Adjudicating social priorities in a transnational context: a comment on Soobramoney's legacy and Grootboom's promise", in *South African Journal on Human Rights*, v. 16, 2000, pp 206-268.

Scott, Craig. "Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights", *Human Rights Quarterly* 21.3 (1999) 633-660

Sen, Amartya, "The right not to be hungry", *The Right to Food*, P Alston and K Tomasevski (eds), Martinus Nijhoff Publishers, pp 69-81,

_____, "Equality of What?" , *Choice, Welfare and Measurement* (Oxford, 1982), pp 353-369

Sheffler, Samuel, "What is egalitarianism?", *Philosophy and Public Affairs* 31, n.1, 2003, pp 5-39,

_____, "Equality as the Virtue of Sovereigns: A Reply to Ronald Dworkin", *Philosophy and Public Affairs* 31, n.2, 2003, pp 199-206.

Shelton, Dinah L., "Private Violence, Public Wrongs, and the Responsibility of States", 1 *Fordham International Law Journal* (1989/1990), pp. 27-8.

Shue, Henry, *Basic Rights Subsistence, Affluence and US Foreign Policy*, (New Jersey, 1996),

_____, "Rights in the Light of Duties", Brown and Maclean (eds.) (1979)

Skogly, Sigrun I. Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights? *The International Journal of Human Rights*, 2002, issue 5.1

Soubbotina, Tatyana P. and Sheram, Katherine, *Beyond Economic Growth: Meeting the Challenges of Global Development*, World Bank, 2000, pp 110-121.

Steiner, Hillel. "The Structure of a Set of Compossible Rights", *The Journal of Philosophy*, vol 74, issue 12 (dec 1977), 767-775.

Sumner, L. W., *The Moral Foundations of Rights*, Clarendon Press, Oxford (1987)

Sunstein, Cass R., *The Partial Constitution* (Cambridge, MA,1993)

_____, *Designing Democracy: What Constitutions Do* (Oxford, 2001),

_____, "State Action is always present", 3 *Chicago Journal of International Law* 465 (2002)

Teera, Joweria M., *Tax Performance: A Comparative Study*, 2002, <http://www.bath.ac.uk/cpe/workingpapers/paperconferencebristol.PDF> .

Toebes, Brigit, "Towards an Improved Understanding of the International Human Right to Health", *Human Rights Quarterly*, vol. 21, 1999, pp 661-679.

Tushnet, Mark, "Non-Judicial Review", 40 *Harvard Journal on Legislation* 453, 2003;

_____, "State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations", 3 *Chicago Journal of International Law* 435 (2002).

van Bueren, G., "Alleviating Poverty through the Constitutional Court" (1999) 15 *SAJHR* 52.

van Hoof, G.J.H., "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views", *The Right to Food*, P. Alston and K. Tomasevski (eds.), Martinus Nijhoff Publishers, (1982),

Vierdag, E. W., "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights", 1978, pp 69-105,

Waldron, J, "John Rawls and the Social Minimum", *Journal of Applied Philosophy* 3 (1986), pp. 21-33,

_____, *Law and Disagreement* (Oxford, 1999).

Walzer, Michael, "Philosophy and Democracy", *Political Theory* 9, (1981).

Wolff, Jonathan, "Fairness, Respect and the Egalitarian Ethos", *Philosophy & Public Affairs*, vol. 27, n.o 2 (Spring 1998), pp 97-122.

World Bank's World Development Indicators 2003, available at <http://www.worldbank.org/data/wdi2003/index.htm>.

Cases mentioned:

South Africa:

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

Government of the Republic of South Africa and Others v Grootboom and Others (1) SA 46 (CC);

Treatment Action Campaign & Ors. v. Minister of Health & Ors. (Constitutional Court).

Brazil:

Dina Rosa Vieira against the Municipality of Porto Alegre, Supremo Tribunal Federal, RE-271286

Colombia:

Alonso Munoz Ceballos v. Instituto de los Seguros Sociales (Sentencia n.o T-484-92), Colombian Constitutional Court;

Diego Serna Gomez v. Hospital Universitario del Valle "Evaristo Garcia" (Sentencia n.o T-505/92);

El Salvador:

El Salvadorian Supreme Court of Justice (Sentencia de la Sala de lo Constitucional de la Corte Suprema de 4 de Abril de 2001).

USA:

*STATE OF NEW YORK COUNTY OF NEW YORK : I.A.S. PART 25 X
CAMPAIGN FOR FISCAL EQUITY, et al. : Index No.:111070/93*

Marbury v. Madison 5 U.S. 137, 1 Cranch 137, 1803 WL 893,
(U.S. Dist. Col.), 2 L. Ed. 60

DeShaney v. Winnebago County Department of Social Services 109 S. Ct.
998 (1989),

Inter-American Court of Human Rights:

Velásquez Rodríguez Case. Series C No. 4. I/A Court H.R., Judgment of July
29.

