

Adjudication of Socio-Economic Rights: One Size Does Not Fit All

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Any discussion of judicial adjudication of socio-economic rights must address three broad questions; (1) on what basis can judges pronounce on socio-economic rights (legitimacy), (2) how such adjudication should take place (workability) and most important in the real world, (3) how well do comparative adjudicative models secure such rights (efficacy). This essay will look first, in Part I, at arguments from legitimacy relating to socio-economic rights and the justiciability of such rights (question 1). Part II will then explore the practical viability of socio-economic rights adjudication - encompassing questions 2 and 3 - by surveying the real-life experience of a number of developed economies (Britain, Ireland and the United States) and of two developing economies, India and South Africa.

It will be argued that whilst in every case a satisfactory answer has to be given to all three of these fundamental questions, the treatment of socio-economic claims in a democratic society is not a case of one size fits all. The most appropriate model in any constitution is driven by contextual factors, of which three would seem particularly important; (i) the level of resources available for welfare provision relative to the needs of the population, (ii) the political consensus on wealth redistribution and (iii) the degree of legitimacy popularly accorded to judicial rights adjudication as opposed to legislative and executive action.

Although the South African and Indian populations suffer from some of the same problems with regard to poverty and are likely to display strong popular support for welfare transfers, in the case of India, the legitimacy of the legislature and executive has been tarnished by corruption and bureaucratic inefficiency¹ and this is likely to have helped shift the normative separation of powers 'line'² away from deference to the administration in favour of judicial activism.³ It is contended that, in the absence of a formal

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¹ See V. Sripathi, 'Towards Fifty Years of Constitutional and Fundamental Rights in India: Looking Back to See Ahead 1950-2000' [1998] 14 *Am Univ Int'l L Rev* 413, 450. See also J. Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 *Am J Comp L* 495, 515.

² See Cassels (n 1) 506-13 (India) and *Minister of Health v Treatment Action Campaign* (2002) (5) SA 721 para [98] (South Africa).

³ In South Africa, on the other hand, Kate O'Regan (a judge of the Constitutional Court) has pointed out that the new democratic settlement 'renders a quality of fundamental legitimacy to

democratic mandate for welfare entitlement, judicial intervention to sustain welfare rights will only be seen as legitimate where it reflects shared popular values which have been disappointed by the formal democratic process (for example, through corruption or extreme inefficiency).⁴

In practical terms it will be concluded that 'rich' western states, with well established welfare systems and popular confidence in majoritarian democracy, should combine a minimum core approach with a reasonableness approach to welfare entitlements, even if they do not expressly subscribe to enforceable enumerated socio-economic rights.⁵ In contrast, where there is large-scale poverty, it is argued that the pure reasonableness approach taken by the South African constitutional court is more likely to satisfy questions (2) and (3) than the minimum core advocated by the UN Committee on Social, Economic and Cultural Rights⁶ and as attempted by the Indian courts.

Part I: Legitimacy and Justiciability - Theoretical Background

Legitimacy: Rights as Consensus Values

Rights theory postulates that there are certain foundational values which must apply to all democracies; Dworkin justifies the entrenchment of civil and political rights against possible encroachment by a majoritarian government as a priori necessary for the very existence of a democracy (which he defines as government chosen through a process where each citizen has an equal ability to participate in the choice).⁷ However, as Schneider points out⁸ further justification is required before a welfare system can be axiomatically included in the canon of fundamental human rights norms. Dworkin argues that basic standards of subsistence are as essential to people's ability to participate in democracy on an equal basis as first tier rights.⁹ On the other hand others have argued that relying on Social

legislative and executive action which was absent in the past;' K. O'Regan, 'Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law' cited in C. Steinberg, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights' (2006) 22 *SALJ* 264, 270.

⁴ See, for example, *The Economist* (February 24, 2007) 84 suggesting that South Africa's local governments are failing to deploy resources to improve welfare as efficiently as might be hoped.

⁵ None of the four Western countries studied in this essay do so (save for Ireland's right to primary education, in the Irish Constitution 1937 Article 42.4. The latter does, however, specify statutory entitlements to welfare provision in detailed legislation and may also, as discussed below, in practice derive certain unenumerated welfare rights from common law or civil and political rights.

⁶ See Committee on Economic Social and Cultural Rights (CESCR) 'General Comment 13 - The Right to Education' (1999) UN Doc EC. 12/1999/10.

⁷ See C Schneider, 'The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy' (2000) *UCL Jurisprudence Review* 101 for a lucid summary.

⁸ *Schneider* (n 7) 110.

⁹ See the discussion of Rawls' Reich's and Michelman's theories of welfare rights, and the history of US welfare adjudication in W. Forbath, *Social Rights, Courts and Constitutional Democracy - Poverty*

Contract theory to provide legitimacy for law and rights inevitably makes inclusion of socio-economic rights more problematic.¹⁰ There is, it is said, no incentive to extend social protection to those, such as the elderly or severely disabled, who cannot contribute to the general well-being of society. A counter-argument is that the social contract can be regarded as a form of social insurance, whereby participants can rationally insure themselves - and their dependents, born and unborn - as much against old age and disability as against the threats of external violence or internal lawlessness which concerned Rousseau. However, in contemporary academic and judicial writing¹¹ it appears that the dominant thread of justification for basic welfare entitlements is the normative premise that a just society should respect and sustain human dignity of every member. Albie Sachs encapsulates this position:

‘...The very notion of entrenching rights is to provide a basic framework of constitutional regard for every human being. It is not the duty of courts to side with one section of society against another...But there is every reason why it should be incumbent on the courts to see to it that basic respect for the dignity of every person is maintained at all times. That is why we have fundamental rights.’¹²

Whichever political or moral theory is advanced to justify rights, it remains essential in a practical sense (to avoid popular insurrection or non-enforcement by the executive)¹³ that the governed should view any proposed rights as a matter of *consensus*. Fundamental (and tautologous) to

and *Welfare Rights in the United States* [2006].

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=845924> especially 20-40. See also G. Van Beuren, ‘Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act’ (2002) *PL* 464.

¹⁰ See the entries on Contractarianism and Contemporary Approaches to the Social Contract in the Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries> 2, 4-5.

¹¹ See C. O’Cinneide, ‘Socio-Economic Entitlements and the UK Rights Framework’ 18-19 Irish Human Rights Commission Conference (10 December 2005); *Van Beuren* (n 9) 1; *Forbath* (n 9) 32; *R (Limbuella) v Home Secretary* (2005) UKHL 56; [2006] 1 AC 396 (HL) para [54] (Lord Hope), para [76] (Baroness Hale: commenting that Articles 2 and 3 are the most important of the ECHR rights, reflecting ‘the fundamental values of a decent society, which respects the dignity of each individual human being’); numerous cases where the Indian Supreme Court based its extensive intervention to enforce human rights standards on citizens rights to a dignified life, summarised in H. Suresh, ‘Socio-Economic Rights and the Supreme Court’ <<http://www.ambedkar.net>, 7; *Khosa v Minister for Social Development* (2004) (6) SA 505 (CC) para [40], [80], [82].

¹² A Sachs ‘The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case’ 140 in Jones, Peris and Kristian Stokke (eds), *Democratising Development: The politics of socio-economic rights in South Africa* (Martinus Nijhoff Leiden 2005).

¹³ As happened following the imposition by the US Supreme Court of desegregation on schools in the southern states in *Brown v Board of Education of Topeka* (1954) 347 US 483. See comment in F. Cross, ‘The Error of Positive Rights’ (2001) 48 *UCLA L Rev* 857, 892.

the concept of democracy is that the legitimate authority of laws (including rights) derive from the consent of the governed.¹⁴ As Habermas argues, ‘democracy will only work if the addressees of laws feel like the authors of those laws.’¹⁵ This sense of popular allegiance to rights may be achieved in a number of ways, clearly including the adoption by a legitimate government or legislature with a democratic mandate (as for example the UK’s incorporation of the ECHR by the Human Rights Act 1998, or in ordinary statutory rights). Alternatively, a bill of constitutional rights may be derived through a Habermas-style process of public debate,¹⁶ in which all citizens feel they have been able to participate, or as the embodiment of a mass movement to a new, transformative constitutional settlement.¹⁷ Thus Pieterse concludes:

‘...It is often argued that judges should stray onto ‘political’ terrain only if they proceed on a moral premise shared by society...The clearer such a shared articulation of justice and the ‘common good,’ the less problematic becomes judicial review in the social terrain...In South Africa today, such a shared moral/political premise is embodied by the 1996 Constitution.’¹⁸

Justiciability of Socio-Economic Rights

It is however, equally important to remember that the opposite is also true. Consensus, and hence legitimacy, will not be achieved if the postulated rights are seen as created by judicial fiat, or as going substantially beyond the shared values of the community. Unelected judges may then be accused of imposing their own, un-mandated, political views¹⁹ and usurping the role of the elected branches of government, a classic breach of the separation of powers. The US Supreme Court’s striking down of employment protection regulations enacted by a democratic state legislature as an unconstitutional breach of freedom of contract, in *Lochner v New York*,²⁰ serves as a reminder of the dangers of assertive review by judges who may pursue their own counter-democratic political agenda.

¹⁴ *Stanford Encyclopedia* (n 10).

¹⁵ *Schneider* (n 7) 109.

¹⁶ C. O’Cinneide, ‘What a Bill of Rights Can and Cannot Achieve’ Northern Ireland Human Rights Commission Review (2006) Issue 2, 5 regarding a proposed Bill of Rights for Northern Ireland.

¹⁷ In Ackerman, ‘The Rise of World Constitutionalism’ (1997) *Virginia Law Review*. B. Ackerman gives examples of post-Independence India, post-apartheid South Africa, post-communist Eastern Europe and post-Nazi Germany. See also *Sripati* (n 1) 471-72.

¹⁸ M. Pieterse, ‘Coming to Terms with Judicial Enforcement of Socio-Economic Rights’ (2004) 20 *SAJHR* 383, 411-12.

¹⁹ *Sripati* (n 1) 451 states that the Court in India now plays a political role with unclear legislative and adjudicative functions. *Cassels* (n 1) 497-98. The public interest litigation jurisprudence of the Indian Supreme Court has been ‘informed by strong socio-political views and commitments.’

²⁰ *Lochner v New York* 198 (1905) US 45.

Thus, even if certain socio-economic rights are identified, it is necessary to look at how judges can legitimately decide on the *content* of the right; to whom welfare provisions extend and at what levels. This is the point at which many opponents of socio-economic rights argue that they are non-justiciable; unlike most fundamental civil and political norms, in the realm of socio-economic rights there is no firm popular consensus on welfare transfers. Thus there is no objective way for a judge to decide on the level of an individual's welfare entitlement, or the size or allocation of the public purse. These are inherently *political* decisions²¹ and must therefore be determined by the elected branches of government who are accountable to the electorate for the decisions they reach. This is the separation of powers approach which will be considered fully below in relation to the UK pre-ECHR. It is further pointed out that broad socio-economic rights (primarily referring to housing and subsistence, healthcare, education and environment) have the potential to impose *heavy financial costs* on society, involving enforced sharing of resources to a degree that civil and political rights do not.²² Many socio-economic problems, particularly those involving resource rationing²³ and environmental standards,²⁴ may in addition be described as *polycentric* in that they involve situations with complex and often unforeseeable repercussions on numerous parties. It has been powerfully argued²⁵ that traditional adversarial *court proceedings are practically unsuited* to determining such disputes and that administrative forums, such as public enquires and ombudsmen, or the parliamentary process, represent a better way to obtain the evidence needed and the representation of a wide number of interests. This argument may be rebutted by those who say that the processes of the court itself should be adapted to this form of litigation; through adopting a more inquisitorial judicial approach, as for example in the administrative law systems of France and Germany, and relaxing locus standi rules for public interest litigation. These adaptations find their supreme example in the public interest litigation (PIL) practices of the Indian Supreme Court, discussed below.

In most Western democracies²⁶ - with a high perceived legitimacy for the democratic electoral process and mature welfare states - socio-economic

²¹ *R. v Environment Secretary, Ex p. Hammersmith and Fulham LBC* [1991] AC 521 (HL) (Lord Nicholls) 593.

²² See A. Sachs, 'The Judicial Enforcement of Socio-Economic Rights' (2003) *Current Legal Problems* 579.

²³ *R v Cambridge Health Authority ex p B* [1995] 2 All ER 129, 137 discussed in Section 2 below.

²⁴ *Hatton v UK* App No 36022/97 (2001) the ECtHR gave a wide margin of appreciation to the British government to determine its own policy on aircraft noise.

²⁵ Originally by Lon Fuller: discussed in J. Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 *CLJ* 367.

²⁶ Including the UK, Canada, Ireland and the US, but not, however, Finland, which has followed the minimum core approach of the UN Committee on Economic, Social and Cultural Rights in including a minimum entitlement to care and subsistence in its Constitution: see Section 15 A of the Constitution Act of Finland 1995.

entitlements have been largely kept within the ambit of statutory regulation, as opposed to being enshrined as broadly enforceable rights in entrenched constitutions. This has the advantages of flexibility in response to changing circumstances and public values,²⁷ electoral accountability for measures taken, and allowing a high degree of specificity as to the scope of rights rather than leaving the content of rights to be determined by judges on a case by case basis. The arguments for this position were extensively canvassed prior to the drafting of the Irish Constitution²⁸ and led to socio-economic interests (generally)²⁹ being classed as non-justiciable Directive Principles of Social Policy.³⁰ The stated objections to broadly enforceable socio-economic rights as opposed to enforceable positive rights - which remain powerful ones today - included uncertainty, the problem of unanticipated consequences (the rights might 'recoil like a boomerang on the Government of some future day in circumstances not anticipated by the originators') and the serious danger of disaffection amongst the community if the state's implementation of socio-economic rights were subsequently to fall short of the promise held up by the Constitution.

Part II: Workability and Efficacy - Comparative Systems of Socio-Economic Rights Adjudication

This section will look at four variants of socio-economic rights protection in developed and developing economies; (i) the purist position in a number of western democratic welfare states with non-entrenched, non-statutory socio-economic rights including Ireland and the UK prior to the ECHR where the separation of powers doctrine is strongly invoked to confine determination of welfare entitlements to the executive branches of government; (ii) the moderating influence of the ECHR and increased judicial recognition of common law rights with regard to socio-economic rights in the UK (along with a comparison of Canadian court practice); (iii) the approach taken in India, where theoretically non-justiciable socio-economic rights in the form of Directive Principles have been judicially transformed into actionable rights and (iv) the South African Constitution - an instructive modern example of entrenched socio-economic rights.

²⁷ In King, 'Constitutional Rights and Social Welfare: A Comment on the Canadian Chaoulli Health Care Decision' (2006) 69 *MLR* 631, 641-43 J. King emphasises the need for courts to take the need for administrative flexibility seriously in framing remedies for breaches of welfare rights.

²⁸ See Memorandum by J. McElligott (Secretary of the Department of Finance March 23 1937) summarised in G Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 *Irish Jurist* 174, 176-9. The Irish approach was followed in the Indian Constitution 1950 (Part IV Directive Principles of State Policy) drafted just over a decade later see *Ibid.* at 179.

²⁹ *Sripati and Cassels* (n 1).

³⁰ Article 45 of the Irish Constitution 1937.

Western Welfare States without a Charter of Socio-Economic Rights

i) United Kingdom (pre ECHR)

The view that socio-economic rights involve ‘difficult and agonising judgments’ on the allocation of a limited budget between competing priorities thereby being purely a matter for the administrative authority to determine and are inherently non justiciable was exemplified in *R v Cambridge Health Authority ex parte B*³¹ (concerning whether a health authority should be ordered to fund expensive and unproven cancer treatment). In a classic application of the separation of powers, Sir Thomas Bingham MR was clear that the court’s role was not to be ‘arbiters as to the merits of cases of this kind’ (i.e. polycentric cases involving public spending priorities). This would involve straying too far from the court’s proper constitutional sphere which was to confine themselves to the lawfulness of decisions (applying the highly deferential standard of *Wednesbury* unreasonableness to the exercise of executive discretion). Bingham MR consequently did not expect the health authority to produce evidence justifying its spending priorities. This purist position has, however, arguably been moderated to some extent by the incorporation of the ECHR into UK law, and an increased judicial willingness to identify certain common law rights (as discussed below).

Ireland

The separation of powers theory was endorsed even more explicitly by Costello J in the Irish case of *O’Reilly v Limerick*³² (approved by the Irish Supreme Court in *Sinnott v Minister for Education*).³³ Travelling groups had argued that the state’s failure to provide them with sites with basic sanitary and water services amounted to a breach of an unenumerated constitutional right to ‘a certain minimum standard of basic material conditions to foster and protect his or her dignity and freedom as a human being.’³⁴ In declining to adjudicate on the alleged constitutional right to serviced sites, Costello J invoked both of the classic reasons for deferring³⁵ to the local authority’s housing policy; (i) the constitutional principle that only the elected branches of government could legitimately decide on the allocation of public funds, and (ii) the fact that the courts did not have the institutional capacity to assess the competing claims on resources and their wider implications. Costello J’s reasoning was subsequently reflected in the views of the Constitution Review Group³⁶ set up in 1996 to consider afresh whether

³¹ *R v Cambridge Health Authority ex parte B* [1995] 1 WLR 898. This case, and other UK cases relating to rationing of welfare resources, are helpfully reviewed by E. Palmer, ‘Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law’ (2000) *OJLS* 63.

³² *O’Reilly v Limerick Corporation* [1989] ILRM 81.

³³ *Sinnott v Minister for Education* SC [2001] 2 IR 545 (Hardiman J).

³⁴ *O’Reilly* (n 32) 192.

³⁵ See J. Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ (2003) *PL* 592.

³⁶ Report of the Constitution Review Group (Dublin 1996).

enforceable socio-economic rights should be entrenched in the Irish Constitution. The Group concluded that:

‘...The main reason ...why the Constitution should not confer personal rights to freedom from poverty, or to other specific economic or social entitlements, is that these are essentially political which, in a democracy, it should be [for] the representatives of the elected representatives of the people to address and determine.’³⁷

In this context, Hogan³⁸ finds that the Directive Principles of Social Policy of the Irish Constitution have thus been largely worthless in terms of delivering social progress.

The United States

The historical trajectory of welfare rights adjudication in the US clearly illustrates the close tie between prevailing political values and the fate of claims to welfare entitlement. Summarising his article on this theme, Forbath observes that:

‘...The rise and fall of constitutional welfare rights in the US Supreme Court seems to confirm the old American adage that the Court *follows the election returns*. As the national polity shifted rightward, so did the constitutional outlook of newly appointed justices [nominated by the President and confirmed by Congress], and so did the court’s welfare jurisprudence.’³⁹

Thus Supreme Court decisions ‘historically, have seldom strayed far from what was politically acceptable.’⁴⁰ Certainly during the Democratic presidencies of the 1960s, the Warren Court came close to recognising a welfare right of the poor, as advocated by Professor Charles Reich.⁴¹ This stance duly changed after the newly elected Republican President Nixon appointed Warren Burger as the new Chief Justice, and after him three more conservative judges. In *Dandridge v Williams*⁴² the court gave the Maryland legislature a wide margin of discretion to impose a ceiling on child benefit for large families,⁴³ stating that ‘the intractable economic, social and even

³⁷ *Constitutional Review Group Report* (n 36) 235.

³⁸ *Hogan* (n 28).

³⁹ *Forbath* (n 9) .

⁴⁰ G. Rosenberg, ‘*The Hollow Hope: Can Courts Bring About Social Change?*’ 340 (2nd edn American Politics and Political Economy Series 2003) also cited in *Cross* (n 13) 888.

⁴¹ *King v Smith* 392 US 309 (1968) striking down an Alabama ‘man-in-the-house’ welfare eligibility rule, and commentary in *Forbath* (n 9) 9-20.

⁴² *Dandridge v Williams* 397 US 471 (1970).

⁴³ M. Tushnet, ‘Social Welfare and the Forms of Judicial Review’ 82 *Texas L Rev* 1895, 1902.

philosophical problems presented by public welfare assistance programmes are not the business of this Court.⁴⁴ The Court was not prepared to intervene to overturn the legislature's political decisions on the limits and level of welfare entitlements,⁴⁵ even to the extent of requiring the legislature to provide minimum levels of basic subsistence for all Americans, as this would involve encroaching upon 'the jealously guarded power of the purse' (a critical part of American political culture which was, after all, embodied in the famous rallying cry of the struggle for American Independence).⁴⁶

In short, American courts are unlikely to assert expensive welfare rights unless they would command broad political support, especially in view of the fact that they depend on the co-operation of the executive branch in order to implement any mandatory orders.⁴⁷ The validity of this concern was clearly demonstrated in the *Brown v Board of Education*⁴⁸ debacle, where school desegregation was only actually implemented when the President and Congress took action a decade later. A failure of implementation could in turn jeopardize the standing of the Court and lead to public disillusionment in the Constitution itself.⁴⁹

ii) The Impact of the ECHR and Common Law Rights on English Welfare Provision

The *ex parte B* Case discussed above was decided before the Human Rights Act 1998 incorporated the ECHR into English law. Building on a prevailing judicial and academic momentum towards the incorporation of common law constitutional rights,⁵⁰ Laws J in *ex parte B* had at first instance sought to invoke the importance of preserving life, in that case, by reversing the burden of proof and placing the onus on the health authority to justify alternative spending priorities (an approach rejected by the Court of Appeal as noted above). This begs the question as to how the courts would deal with such a problem if faced with it now that ECHR Article 2 (right to life) is part of English law, placing the burden of justification squarely on any

⁴⁴ *Dandridge* (n 42) 487.

⁴⁵ S. Holmes and C. Sunstein, 'The Cost of Rights; why Liberty depends of Taxes' (2003) 114 *Public Choice* 121: 'The level of protection welfare rights receive is determined politically, not judicially.'

⁴⁶ 'Taxation without representation is tyranny' (quotation by James Otis 1725-1783); See also D Beatty 'The Last Generation: When Rights Lose their Meaning' in Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (Nijhoff 1994) 352: 'The courts have never challenged the sovereignty of the people to maintain control of the purse... They have never disputed the levels at which any government programme of social welfare has been set.'

⁴⁷ *Cross* (n 13) 887-93.

⁴⁸ *Brown* (n 13).

⁴⁹ *Beatty* (n 46) 355.

⁵⁰ *R v Home Secretary ex parte Leech* (No. 2) [1994] QB 198. See also J. Laws, 'Law and Democracy' [1995] *PL* 72; S Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110 *LQR* 270.

public authority interfering with the right to life and requiring a high level of judicial scrutiny as regards the proportionality of such interference.⁵¹ Interestingly, obiter comments of the Court of Appeal in the *Herceptin Case*,⁵² seem to suggest that, even with Article 2 in place, and applying a rigorous proportionality test which balances the patient's need for potentially life-saving treatment and other calls on health authority funds, the court would find it 'difficult, if not impossible, to say that such a policy was arbitrary or irrational.'

The Court of Appeal did, however, recognise a common law constitutional right in *Joint Council for the Welfare of Immigrants*,⁵³ holding that the withdrawal of income support to asylum seekers who failed to claim asylum immediately on entry to the UK was ultra vires due to a common law constitutional right not to be made destitute. This was a bold decision (which was subsequently reversed in Section 11 of the Asylum and Immigration Act 1996) whereby the Court effectively identified its own minimum core standard of welfare,⁵⁴ in a manner unlike the post Warren US Supreme Court.

ECHR incorporation in 2000 provided the firmer ground of enumerated rights, which although viewed primarily as civil and political rights, provided judicial recognition of welfare deprivation⁵⁵ in extreme cases. Thus in *Bernard*,⁵⁶ Sullivan J held that the extremely unsuitable accommodation provided for a family where the mother was severely disabled meant that she was unable to play any part in family life and thus violated Article 8 (right to home and family life). In *D v UK*⁵⁷ the ECtHR found that a decision to deport an AIDS sufferer back to St Kitts, where he had no family and would not receive adequate medical treatment, would amount to inhuman and degrading treatment under Article 3.

It is clear from both domestic and Strasbourg jurisprudence that, outside these extreme cases, the scope of ECHR rights to found socio-economic claims is extremely limited. In *Chapman v UK*⁵⁸ the ECtHR held that Article 8's guarantee of home life did not impose on states a positive obligation to provide a home for every citizen; and in *Connors v UK* the Court stated that 'in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide.'⁵⁹ As O'Conneide argues,

⁵¹ Compare *R v Ministry of Defence ex parte Smith* [1996] QB 517 (reasonableness review) to *Smith and Grady v UK* (2000) 29 EHRR 493 (proportionality).

⁵² *R (Rodgers) v Swindon NHS Trust* [2006] EWCA Civ 392; (2006) 1 WLR 2649 (Sir Anthony Clarke MR).

⁵³ *R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

⁵⁴ *O'Conneide* (n 16) 5.

⁵⁵ *O'Conneide* (n 16) for a full review of social deprivation cases.

⁵⁶ *R (Bernard) v London Borough of Enfield* (2002) EWHC 2282 (Admin); (2003) HRLR 4.

⁵⁷ *D v UK* (1997) 24 EHRR 423.

⁵⁸ *Chapman v UK* [1997] (App no 27238/95) ECHR para [99].

⁵⁹ *Connors v UK* [2004] (App no 66746/01) ECHR.

the minimalist level of the welfare protection afforded by Articles 2, 3 and 8 of the ECHR is consistent with the minimum core approach advocated by the UN Committee on Economic Social and Cultural Rights, and with notions of basic human dignity, which have become today's central rationale for human rights (see Section 1). At this level they are both affordable for developed western democracies and likely to command the popular consensus necessary to achieve democratic legitimacy. Although there will always be some measure of subjectivity in deciding precisely what level of provision (of housing, education or healthcare etc) constitutes a minimum core necessary for human dignity, both the ECtHR and the UK courts have demonstrated a high degree of caution so as not to risk accusations of judicial over-reach; thereby giving credibility to Dworkinian claims that this dignity-based minimum can be adjudicated as a matter of principle rather than policy.

As has been pointed out by Jowell,⁶⁰ and expressly approved by the House of Lords in *A v Home Secretary*,⁶¹ the Human Rights Act 1998 imposes a *duty* on the court and not just a mandate to protect the rights in the ECHR, and to avoid undue deference. Similar statements have been made in relation to the obligations placed on the Canadian courts to uphold express constitutional rights. In *Chaoulli v Quebec*⁶² the Canadian Supreme Court struck down Quebec legislation prohibiting private medical insurance as violating constitutional rights to life, liberty and personal security. Deschamps J stressed that courts 'should not hesitate to assume their [rights review] responsibilities. Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch.'⁶³ Notwithstanding the fact that it had in fact been persuasively argued that the Canadian Supreme Court did in fact trespass too far into the realm of healthcare policy in that case.⁶⁴

iii) India: Directive Principles Treated as Enforceable Rights

The Indian Supreme Court's creative transformation of India's non-justiciable Directive Principles of Social Policy (DPSP) into actionable rights - through reading these Directive Principles with the enforceable right to life in Article 21⁶⁵ is well documented.⁶⁶ In doing so the Court did not shy from elaborating ambitiously on the content of such actionable rights. For example, in *Francis Coralie*, Bagwati J held that the right to life is not limited

⁶⁰ Jowell (n 35).

⁶¹ *A v Secretary of State for the Home Department* [2004] UKHL 56; (2005) 2 AC 68 (HL) (Lord Bingham) para [42].

⁶² *Chaoulli v Quebec* [2005] 1 SCR 791.

⁶³ *Ibid.* at 837.

⁶⁴ *King* (n 27) 619-43.

⁶⁵ Article 21 of the Constitution of India 1950.

⁶⁶ *Suresh* (n 11) 7; *Cassels* (n 1) 501-05; S. Dam, 'Vineet Narain v Union of India: A Court of Law And Not Justice – Is the Indian Supreme Court Beyond the Indian Constitution' (2005) *PL* 239.

to protecting life and limb but imports a comprehensive 'right to live with human dignity and all that goes along with it;' this included not only the bare necessities of life (food, clothing and shelter) but also facilities for expressing oneself and mixing with others.⁶⁷ In *Shantistar Builders*,⁶⁸ the right to shelter was held to require a 'decent environment' and 'suitable accommodation which would allow [a human being] to grow in every aspect - physical, mental and intellectual.' In *Olga Tellis*,⁶⁹ it was held that the right to life included a right to livelihood, so that squatters could not be evicted from the city of Mumbai, where they had come to find work, without alternative sites being found for them. In order to enforce the rights of the poor, the Court developed a liberalised procedure for public interest litigation (PIL)⁷⁰ including relaxed standing rules, a more inquisitorial judicial approach often involving fact-gathering commissions, mandatory remedies and detailed supervision of enforcement.

The Supreme Court's activist stance can be criticised on two fronts. Firstly it may be said that the Court is pursuing its own political agenda, in breach of the separation of powers and of the express intention of the Constitution.⁷¹ Thus critics have observed that the courts are usurping the function of the executive and entering into the fields of policy and resource allocation. This has at times led the Court to make orders which represent micro-management of state agencies⁷² such as the closure of polluting factories⁷³ and the management of the Agra Women's Refuge and Bihar prisons. The Court's supporters have justified this activity as being necessary in order to compensate for the state's own disregard for the law and the Constitution⁷⁴ and have pointed to the 'popular moral support' which the Court enjoys at a time when 'other social and political institutions are facing a legitimisation crisis.' As Cassels points out, the principle of the separation of powers 'presupposes that the executive and the legislature are themselves vested with legitimacy and popular support.'⁷⁵

Of greater practical concern, however, is the allegation that in ordaining the implementation of welfare rights the Court is, as Cassels queries, attempting the impossible. Abstract orders without the will or ability on the part of the administration to enforce such orders risk an erosion of the Court's authority. The Court may be successful in cutting through

⁶⁷ *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746.

⁶⁸ *Shantistar Builders v Narayan Khimalal Tatome* AIR 1990 1 SCC 520.

⁶⁹ *Olga Tellis* AIR 1986 SC 18.

⁷⁰ *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802 especially paras [10]-[14] and *Cassels* (n 1) 497-507.

⁷¹ This is the point made by *Dam* (n 66).

⁷² U. Baxi, 'Judicial Discourse: The Dialectics of the Face and the Mask' 35 *Journal of the Indian Law Institute* 1 (1993) 7.

⁷³ *MC Mehta v Union of India* AIR 1987 1086.

⁷⁴ *Baxi* (n 72) and *Sripati* (n 1) 449-50.

⁷⁵ *Cassels* (n 1) 515.

bureaucratic obstacles or malfeasance to achieve satisfactory outcomes in some individual cases. For example, the judgment in *Samity*,⁷⁶ suggests that while the claimant was denied emergency medical treatment by hospital officials because he was unable to make payment, the court may have successfully sanctioned this unlawful behaviour. However, in the majority of PIL cases where solutions require additional resources on a vast scale, or radical social or economic change, the practical impact of judicial pronouncements has been minimal; slums have not disappeared, bonded and child labour⁷⁷ persists and pollution continues. Thus Cassels rightly points out that, on the Indian model of review (which purports to give content to welfare rights and effectively holds up such rights as justiciable), the value of socio-economic rights adjudication must primarily be assessed in terms of its use in drawing attention to unacceptable welfare standards and creating public pressure on the authorities to act. On this measure, the effort and resources involved in PIL may not be well spent. It is accordingly suggested that the South African approach to socio-economic rights represents a more realistic and probably more constructive model of review in a country where resources are inadequate to meet the basic needs of all citizens.

iv) South Africa

In *Treatment Action Campaign v Minister for Health (TAC)*⁷⁸ (requesting orders to enforce a constitutional government obligation to make the anti-HIV drug Nevirapine available and to roll out a national programme to prevent mother-to-child transmission of HIV), the South African Supreme Court⁷⁹ reiterated the justiciability of socio-economic rights⁸⁰ and emphasised that the primary duty of courts is to the Constitution and the law. If state policy is inconsistent with the Constitution the courts are obliged to say so, and ‘In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion that is mandated by the Constitution itself.’

However, the Court in *TAC* realistically went on to confirm that the ‘the socio-economic rights of the Constitution [referring in particular to the Article 26 right to adequate housing and the Article 27 rights to healthcare, nutrition and social security] should not be construed as entitling everyone to demand that the minimum core be provided to them it is impossible

⁷⁶ *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) SCJ 25.

⁷⁷ *MC Mehta v State of Tamil Nadu* [1996] 6 SCC 756 where the Court made a detailed structural order concerning child labour but see R Ramesh ‘Between a Rock and a Hard Place – How UK Patios Rely on Child Labour’ *The Guardian* (February 13, 2007) which reports that, a decade later, laws prohibiting child labour are still not being enforced. See also *Cassels* (n 1) 515-17 and *Suresh* (n 11) 16, 18.

⁷⁸ *Treatment Action Campaign v Minister for Health (TAC)* (2002) (5) SA 721 (CC).

⁷⁹ *Ibid.* paras [25], [99].

⁸⁰ Established originally in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).

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 in a progressive basis.⁸¹ As had been similarly reasoned in the previous cases of *Soobramoney*⁸² (relating to a claim for kidney dialysis) and *Grootboom*⁸³ (relating to housing provision), the rights stated in Articles 26 (1) and 27(1) had to be read in conjunction with the qualifying provisions in Article 26 (2) and Article 27 (2) which provide that 'the state must take reasonable legislative and other measures, within all available resources, to achieve the progressive realisation of each of these rights.' This is similar to the progressive realisation doctrine of the UN Committee on Economic, Social and Cultural Rights, and also recognises, (unlike the Indian Supreme Court jurisprudence) that the level of available resources is a factor that can legitimately be weighed in assessing the reasonableness of state policy.

This approach has led to varying outcomes in the socio-economic case law of the Constitutional Court. In *Soobramoney* the Court held that a policy rationing the use of short supply dialysis machines which prioritised patients whose renal failure was reversible, unlike that of the claimant's, was rational in adopting a 'holistic approach to the larger needs of society;' thus the claimant's own right would not in this case act as a trump card.⁸⁴ In *Grootboom* the state's policy regarding access to the housing stock was held to fall short of the progressive aspirations of the Constitution in failing to give sufficient priority to the poor and vulnerable, although the Court may have shown a naive degree of deference in restricting itself to a merely declaratory order.⁸⁵ In *TAC* itself the Court emphasised its duty 'to give effective relief' and proceeded to make a mandatory rather than a merely declaratory order, reflecting perhaps the gross unreasonableness of government policy in failing to dispense medicine when it was actually free. However, this order too has been criticised⁸⁶ for failing to include a supervisory element, especially in view of the urgency of the situation, with the result that implementation was seriously delayed. It is submitted that, in this aspect the South African Courts can learn from the heavily supervisory approach of the Indian courts.⁸⁷ Unlike the Indian courts, the South African reasonableness approach gives an appropriate degree of deference to the

⁸¹ *TAC* (n 78) paras [26]-[39].

⁸² *Soobramoney v Minister for Health, Kwa Zulu Natal* [1997] 12 BCLR 1696 (CC).

⁸³ *Government of South Africa v Grootboom and Others* [2000] 11 BCLR 1169 (CC).

⁸⁴ *Soobramoney v Minister for Health, Kwa Zulu Natal* [1997] 12 BCLR 1696 (CC) para [31].

⁸⁵ This has been criticised in e.g. Swart, 'Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 *SAJHR* 215, 219-22, likening the subsequent failure of the claimants to obtain any tangible relief to the disappointment suffered by the claimants in *Brown* (n 14).

⁸⁶ *Swart* (n 85) and *Pieterse* (n 18).

⁸⁷ *MC Mehta v Union of India* (1996) 4 SCC 750 (orders relating to the relocation or closure of polluting industries).

administration in delimiting the right. However, Swart⁸⁸ and Davis⁸⁹ are persuasive in their arguments that the courts should consider carefully the full range of remedies at their disposal (including damages, structural interdicts and contempt proceedings against recalcitrant officials), so as to avoid the empty promise of actions such as occurred in *Grootboom*.

The progressive realisation/reasonableness approach, whilst allowing a degree of flexibility to government policy, does not equate to letting the government off the hook. Firstly as described in relation to ECHR law, the existence of the constitutional right places the burden of justification on the public authority. Then, as Steinberg describes, the standard of scrutiny is an intense one, involving a proportionality exercise (as opposed to the deferential *Wednesbury* style test in traditional administrative law, exemplified by the Court of Appeal in *ex parte B*), where fundamental values such as dignity and equality may be heavily suitably weighted against one another.⁹⁰ Refuting the institutional competence argument, Steinberg points out that ‘scrutiny is not the same as engaging in policy-making or budgeting. Courts are ill-equipped in engaging in respect of the latter, not the former.’ This echoes a similar statement made by G Davidov, quoted by Deschamps J in *Chaoulli*:

‘Courts do not have to ...create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding.’⁹¹

Conclusion

This review has revealed a number of differing approaches taken to the judicial determination of non-statutory socio-economic rights. As postulated at the outset the appropriate solution for a state - which is legitimate, workable and efficacious - will vary according to the prevailing political and economic conditions. I agree, however, with Forbath’s view that ‘a liberal society that prizes the dignity of the individual, if it is an affluent one that can afford a guaranteed income that protects all against desperate want, must do so.’⁹² This reflects both a normative protection of basic human dignity and a general consensus in wealthy societies that people should not be left to starve on the streets. Nonetheless, to preserve consensus approval, and hence, legitimacy - as well as important economic incentives for able-bodied people to aspire to more than the guaranteed income - any non-

⁸⁸ Swart (n 85).

⁸⁹ D. Davis, “Adjudicating the Socio-Economic Rights in the South African Constitution: Towards ‘Deference Lite?’” (2006) 22(2) *SAJHR* 301.

⁹⁰ Steinberg (n 3) 276-83.

⁹¹ *Chaoulli* (n 62) 837; G Davidov in “The Paradox of Judicial Deference” (2001) 12 *NJCL* 133, 143.

⁹² Forbath (n 9) 32

legislated safety net provision must be kept to the minimum necessary to preserve human dignity (as exemplified by the ECHR jurisprudence). The impact of entrenched rights is to place a heavy burden on authorities to justify any denial of such rights - to be assessed, taking into account available resources, on the ECHR or South African models of proportionality.

Moreover, it must regrettably be accepted, as South Africa does (see *TAC*), that in many countries even the minimum core is not immediately practicable; and in such cases the approach should be confined to the South African proportionality/reasonableness model. If this flexible approach is taken to the *scope* of the rights entitlement, courts should then consider it their duty to ensure that their orders are carried through using all appropriate remedies at their disposal.

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