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in an Insecure World

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1397 Budapest,
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CEU Center for Human Rights
H-1051 Budapest
Nador u. 11.
Hungary

Street address:
1051 Budapest,
Október 6 utca 14
Hungary

Telephone: 36-1-327-3000
Fax: 36-1-327-3183

36-1-327-3000
36-1-328-3410

General e-mail:
ceupress@ceupress.com

Web: http://www.ceupress.com

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Re-thinking Socio-Economic Rights in an Insecure World

Edited by

NSONGURUA UDOMBANA

and

VIOLETA BEŠIREVIĆ

With an Introduction by

WIKTOR OSIATYNSKI

CEU Center for Human Rights

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PREFACE

From November 28 - 29, 2005, the Center for Human Rights ("the Center") of Central European University (CEU) organized a roundtable around the theme: *Re-thinking Socio-Economic Rights in an Insecure World*. The roundtable brought together scholars and human rights practitioners from different regions to reflect on the following questions relating to social and economic rights, particularly in the context of the global insecurity: If social rights are human rights, how does the failure to advance these rights undermine security? Are social rights human rights or do the claims they incorporate represent social needs? Are they moral or legal rights? Who has a duty to respect these rights? Is there a hierarchy among those who have such duties? How can these duties be fulfilled? What is an appropriate approach to social and economic concerns in developing countries? Is the argument for socio-economic rights an argument that overcomes the causes and legacy of conflicts? Do socio-economic rights deserve constitutional protection? What are the problems behind constitutional protection of such rights? Is the vagueness of social and economic rights an enough reason not to assign such rights to people? Is the rhetoric of social and economic rights helpful in protecting marginalized and neglected groups?

The papers collected in this volume are the outcomes of that roundtable.

The Center is a unit within CEU which unites and expands the rich array of teaching, research, clinical, internship, and publishing activities undertaken within CEU on human rights issues. The Center draws on the vast expertise of CEU faculty and research units and collaborates with related institutions or civil society groups. Located within a multi-cultural, English-based educational institution, the Center pursues activities that have global appeal, while remaining sensitive to the needs of Central and Eastern Europe. The Center seeks further research on human rights, promotes rights-based development, and advances human rights education. Its mission includes:

- developing policy-relevant research to inform stakeholders and policy-makers about the protection of human rights;
- re-examining accepted notions of human rights in order to promote continual re-evaluation of societal value systems;

- promoting and coordinating intercultural and interdisciplinary opportunities for research, education and training related to human rights and diversity issues;
- enhancing CEU's research capacity within the field of human rights;
- creating an environment where CEU human rights students can undertake internships;
- serving as a clearing house for local and international academic co-operation activities in the field of human rights.

The Center is grateful to all the participants for their constructive engagements during the roundtable and to those who revised their papers for this publication. The Center would like to thank Professor Wiktor Osiatynski for delivering the keynote at the roundtable, for writing the Introduction to this volume, and for his continued moral support to the Center. Our special thanks goes to the CEU Special and Extensions Programmes, for funding some of the participants to the roundtable, and to John Harbord—Director of the CEU Center for Academic Writing—who proofread the manuscript and made a number of useful suggestions.

We hope that this volume will serve to better inform all those who play significant roles in elaborating and applying the norms on social and economic rights and provoke further debates and research.

Nsongurua J. Udombana

Violeta Beširević

Part One

SOME CONCEPTUAL FRAMEWORKS

INTRODUCTION

Wiktor Osiatynski

Social, economic and cultural rights form somewhat confusing category, especially when we compare them with civil liberties and political rights. Social rights are benefits or services provided to the needy. But many social and economic rights included in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights are, in fact, freedoms rather than rights. The equality of children as guaranteed in Article 25 (2) of the Universal Declaration is actually a civil freedom of equality or a right to equality. The parent's right to choose the kind of education that shall be given to their children is a freedom rather than a social right. The right to free participation in the cultural life also is a freedom. The right to intellectual property as envisaged in Article 27 (2) of the Universal Declaration is, in fact, freedom of expression combined with property right. A number of constitutional lawyers in the United States and Germany believe that the right to education is a political rather than a social right. All these rights are in the International Covenant on Economic, Social and Cultural Rights not because of any internal logic but because there was no agreement to enforce these rights in the same way as civil and political rights are enforced, and because it seemed that education and participation in cultural life imply a more active role of the state than other freedoms. For clarity of the concept it would be useful to avoid using the term "socio-economic rights" and talk about social rights when benefits and services are provided to the needy or when conditions of work and other social relations are regulated by the state.

Here we face another confusion: only some social rights concern direct provision of benefits or services by the state or by other actors empowered by the state. Such is the right to social security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond one's control. But even here most states do not provide direct services to sick people or benefits to the old. The state regulates private relations by compelling private actors to insure against sickness and old age; such contracts are then enforced and guaranteed by the state. Free choice of employment and protection against unemployment

are not services but protective measures undertaken by the state. Just and favorable conditions of work and remuneration, equal pay for equal work, the right to rest and leisure, in fact, the majority of 'social rights' call for the regulatory role of the state. The state does not provide them, but regulates private relations between employees and employers. Some social rights deal with values and directives that can be the goals for social policy but are to be implemented by non-state actors or through international measures. Examples include social security as defined in Article 22 of the UDHR; the right to just and favorable remuneration ensuring for oneself and one's family a life worthy of human dignity; the right to a standard of living; protection of motherhood and childhood; participation in cultural life as well as the right to enjoy the arts and to share in scientific advancement and its benefits.

This confusion and lack of clarity create many problems in the perception of social rights, particularly when we think about their implementation. When we talk about the enforcement of human rights and when we claim them, we always need to think what kind of action we expect from the state. Is it regulation, protection, provision of services, or something else? For each of these roles different strategies are effective.

Ever since their inception in the 19th century, social rights have been the subject of constant debate. In fact, there are two debates: (1) are social rights human rights, (2) if they are - how should they be protected and enforced? These two debates are, in fact, one and very same debate for we tend to narrow the scope of rights if we want to attach to all of them the same constitutional enforcement. If all human rights should have constitutional protection, then many social rights and benefits have to be excluded from the concept of human rights. Conversely, when we acknowledge that there may exist diversified enforcement mechanisms, we can define human rights much broadly. This is precisely what I suggest: while insisting that all human rights are indispensable for dignity of a person I do not think that all human rights should have identical enforcement. Some of them cannot be enforceable at all. I consider as the most basic human right the right of every child to be loved. This right can never be enforceable; it will remain forever a human moral right.

At the other extreme are constitutional rights with strong enforcement. They provide protection from all kind of abuses by all arms of the state. They are defined by the framers and are implemented by courts. They can not be limited by legislators and they are exempt from political process. They offer an individual a kind of a veto power against all kind of political decisions, even when a majority acts in public interest. They are extremely strong rights and such protection cannot be given to all rights we can imagine.

Statutory rights are weaker; they grant protection against the executive power but are nevertheless subordinated to political process. Such rights are also imple-

mented by courts but legislators can take them away, redefine them, and limit them as well as add new ones.

There also exist constitutional and statutory provisions for rights without enforcement, as was the case with communist and some other constitutions; they did not have any enforcement mechanism. They nonetheless still have some value because they can provide moral arguments in political debates and can justify claims aimed at the fulfillment of such rights.

Finally, international human rights offer limited protection; primarily they are designed to guide governments to implement rights in legislation rights and then to protect them through domestic policies of the states.

This differentiation between constitutional and statutory rights is relevant for the discussion about social rights. Social rights are to be reconciled with the limits on any government on one hand, and the needs of public policy choices that include redistribution of resources through taxation and political decisions about public spending on the other hand. Social rights are most closely connected to the political process in which the will of the democratic majority decides to give special protection to some groups of citizens or some values.

The debate about social rights deals, then, with the issue of how to protect them when we agree that they are human rights at all. Some argue that they are not. Maurice Cranston made such a claim in 1973. A decade and a half later, Richard Epstein said: "Robin Hood was a bad man with good motives". By analogy, he considered government welfare programs as bad institutions with good motives. Epstein claimed that welfare decreases level of production that could be available for redistribution. When we look closely at the debate whether social rights are human rights at all, we see that it is primarily conducted on moral impulse with justifications in other, seemingly more 'objective' terms. Arguments for the thesis that what is called social rights are not or should not be rights are usually of economic nature, while justifications of the thesis that these are rights or should be rights are primarily of social or political nature.

I believe that social rights are human rights because they are indispensable for the dignity of a person. Dignity cannot exist without basic social security; without security people cannot have or claim other rights. Similarly, a person cannot benefit from other rights without having her basic needs met. In short, while there is no bread without freedom, there is also no freedom without bread.

In the debates about social rights, the issue of how they differ from other rights is often discussed. The differences that are pointed to are usually false. One is that social rights are positive rights while the others are negative. This simply is not true, all rights – including all political rights as well as many civil liberties – are positive in that they require action on the part of the government. Some freedoms are nega-

tive because the state is prevented from the action. But the enforcement of every freedom is a right that requires positive action of the state through police, courts and other agencies.

Another difference suggested is that social rights are costly while others supposedly do not cost money. Protection of every right costs, and the problem is how much money is spent on what. When we add the costs of the military, police and other agencies it may well turn out that protection of our personal liberty costs as much as social and economic rights. This debate is badly framed.

Others say that while civil liberties and political rights are vertical (because they regulate relations between an individual and the state) social rights are horizontal because they regulate relations between individual, market actors, private institutions, etc. In reality, civil liberties are also horizontal. To protect our liberties from other people the state issues and enforces penal codes, civil codes and other rules of behavior. The only difference is, perhaps, that in the case of civil liberties horizontality is implied and lies outside the basic contents of rights, while in the case of social rights horizontality is written into the very covenants and pacts.

When we discount superficial distinctions, we may see three peculiar characteristics of social rights. The first one concerns the impact of rights on the state and it powers. It seems that while civil liberties basically limit the power of the state, social and economic rights increase the power of the state. Through redistribution and other regulations, social rights intervene in the markets and, as a result, substantial power over economic decisions goes to the state. However, even in this respect the difference is problematic, for the protection of liberties, for example through police and army, also empower the state. It is true, nevertheless, that the power of the state is further increased because beneficiaries of social rights are dependant on the state.

A somewhat stronger argument is that of historical character. Civil liberties originally developed from rights that were claimed against the government. The right, or privileges of the nobility, preceded corresponding duties of the state not to limit arbitrarily personal liberty or to set up the jury system. Rights were first and duties of the state followed. Social rights are different – they originated from the duties of the government. More precisely, their roots are in the mutual obligations of all members of society in medieval Europe. As a result of these obligations, society was expected to take care of the needy. These obligations were taken over by absolute kings and states. With time, such duties were transformed into corresponding rights. There may be a discussion whether the first person to define social rights as rights was a German legal philosopher Rudolf von Ihering in the 1860s or William Blackstone more than a century earlier. In any case, this historical difference gives some basis for looking at social and economic rights from a slightly different per-

spective than civil and political rights. It seems that while in the case of civil liberties, rights cannot be made contingent upon the performance of any duties by a right-holder (the corresponding duty binds the state and other people), in the case of social rights the link between rights and obligations of the recipient is much stronger. The needy were supposed to contribute to the common good of a community to a degree they could and/or as soon as they could do so.

The third difference concerns the exceptional—and subsidiary—character of social rights. Civil and political rights involve mechanisms for protection and for delivery of services to all people. The state is the sole provider and has a monopoly in this respect. Civil and political rights are provided to all equally. We do not buy judicial protection or votes in elections on the markets and when it happens, we punish it as corruption. The market does not provide these goods. By contrast, social rights, especially in Western industrial societies, consist of benefits and services that most people earn by they own work or buy on markets. Only some people fail to do that because of certain reasons. If these reasons are beyond an individual's control—and sometimes even if they are within the individual's control— needy people deserve some basic level of protection that the state should provide either directly or through appropriate regulation. Thus, social security rights are in a sense exceptional—everyone is entitled to use them when in need, but there is no state monopoly on relevant services. In practice, they are provided for a minority of citizens. This difference results in tense moral debates about social rights; people who earn social security are often opposed to provide it for those who do not.

This distinction also needs a reservation. We talk here about earning services or buying them on markets, such as in the case of insurance policy. This basic difference fails to operate, however, where there exists no market, namely in a substitute economy, in a communist economy, or in large sectors of post-colonial economies. In the absence of a market, the expectation of some basic security provided by the state or by the community can be justified. Consequently, the whole idea that this basic security should be provided only to a minority that cannot buy their security on the market becomes doubtful. Nevertheless, it would be difficult to put on a state the obligation to take care of the basic needs of the majority.

These peculiarities of social rights lead to the following consequences:

1. Social rights are indispensable for the sense of security but they are not absolute. They depend on the situation of the claimant who needs to justify his or her claim by proving the lack of other means of subsistence and by a prior effort to take care of these needs before claiming rights. We do not ask people to provide such justification in relation to civil and political rights. Moreover, social rights are not unconditional; a claimant may be asked to make a contribution to community or larger society, whenever it is possible.

2. Social rights can be granted within limits that should be defined by what is considered as basic needs in a given society at a given moment within available resources. It means that social rights can be adjusted to resources, to changing character of needs, and to changes in the prevailing structures of economy or in the nature of employment.

Many practical problems with social rights result from the fact that they originated in a period dominated by a factory-based market economy. The structures, technologies and organization of work in the factory dominated the character and shape of many social rights. One example is paid holidays, which were ridiculed by Maurice Cranston and other opponents of social rights. However, in an early stage of the factory-based economy, holidays without pay were equal to unemployment and starvation and could not guarantee any rest. In an agricultural subsistence economy this right had no sense; similarly it has little sense in self-employed sectors more common today. Another example is work provided by women, since housework is not usually recognized as work implying future rights, for example to pension, health care and social security. Today this requires readjustment: a lot of useful activities and efforts are not considered socially valuable, are not compensated, give no rights and do not provide a person with self-esteem. This requires constant readjustment. Of course, civil liberties are also influenced by social and technological change, like the ones that permitted the current wave of terrorism. But technological change does not call for the readjustment of a very core of civil liberties or the revision in our understanding of political rights.

As noted, social rights are linked to political process. To see better this relationship it is worthwhile to reflect upon the core meaning of these rights. What are they about? Social rights are not about well being and prosperity; they are also not about material or economic equality. All rights and freedoms protect the security of a person; social and economic rights are about protecting socio-economic security. This means that a minimum should be established on the level of basic socio-economic security beneath which a fair and just society should not slide. More affluent societies can set social policies and benefits above this minimum if such be the will of majority reflected through political process.

With this in mind, we can return to the question whether social rights should be given constitutional or statutory protection. Most people agree that social and economic rights should not necessarily be constitutional. The desire to have them in a constitution had to do with particular historical circumstance of the late nineteenth century practice of the U.S. Supreme Court. When legislatures in a number of American states began to regulate in statutes the conditions of work in factories, the owners turned to the U.S. Supreme Court. In a series of decisions, the Court declared such statutes unconstitutional because they violated constitutional rights to

property and freedom of contracts. This practice, by the way, led European progressives to be skeptical about constitutional rights in general. The U.S. Constitution was perceived as an instrument for the protection of capitalists, used against the interests of the workers and of progress in general. To avoid such dangers, European social philosophers and activist lawyers demanded that social rights should be in a constitution to balance rights of property and contracts. The aim was that courts could not render social regulations and welfare legislation unconstitutional.

To achieve this aim separate chapters with detailed lists of social and economic rights were not indispensable. One general principle in a constitution could form sufficient foundation for welfare legislation. Consequently, there exist constitutions that do not include chapters on social rights. Sweden only mentions social goals in the Preamble of the Constitution, while the Basic Law of the Federal Republic of Germany defines the state of *Sociale Rechtstaat* (i.e. socially responsible state of the rule of law) and such formulations are sufficient to provide constitutional basis for social welfare policy. The largest welfare states were created in countries that do not include separate chapters on social rights in their constitutions.

This problem returned, in the 1970s, in Spain and Portugal - newly emerging democracies. In that period, constitutions were already to be treated seriously. The revolutions were directed against right-wing dictatorships and left-wing parties won. Since social rights were essential for the leftist identity there was a demand to put them into constitutions. But framers in both countries realized that they would not be enforced and, consequently, all constitutional norms, including civil liberties, would be devaluated. Therefore, they divided the subject matter of social and economic rights into two categories: some basic security-related rights are among enforceable constitutional rights. In addition, each constitution contains a separate chapter on social, economic and cultural tasks of the state; such tasks are left in the competency of the legislatures. Constitutions did not create enforceable rights that could be claimed by individual citizens but suggested that state tasks be realized through political process.

Early in the transition in Eastern Europe, Czechoslovakia adopted a slightly different solution to the same problem. It enacted, in 1990, the Charter of Rights, in which all rights were included. One special provision, however, stated that a number of enumerated articles about social rights would be protected within the limits defined by the statutes. Poland opted first for the Spanish-Portugal solution. The 1992 draft Bill of Rights included some enforceable rights to basic security while all other social obligations of the state were present in a separate chapter on Social and Economic Duties of the State. An additional provision aimed at giving these issues more weight in the political process: the government would have to make annually a detailed report on what they did about these duties and how effective their actions

were. Later, the draft Bill of Rights fell through and the Constitution of 1997 adopted the Czechoslovak solution.

South Africa included specific social rights in its 1996 Constitution but it was a series of important decisions by the Constitutional Court which gave life to these provisions. Perhaps the most significant was the *Grootboom Case* concerning the right to housing; the Constitutional Court demanded that the state develop housing policy. The Court said that it could not dictate policy to the state but it could demand and assess policy proposed by the state. When the government provided its policy, the Court declared it unconstitutional because it did not take proper care of the needs of the most vulnerable groups of population. The Parliament thus had to make a new policy which the Court accepted. This example testifies to both the large power of the Constitutional Court and the limits to this power: the court did not take over the government's tasks nor did it impose the policy itself.

At the end, let me suggest that many discussions and debates about social rights are of limited use. It happens particularly often when we claim as rights everything that we may wish in social and economic realm – well-being, prosperity, equality, and social justice. We cannot and should not claim as a right all we desire; we need to earn our well-being and economic prosperity. When we want more equality of social conditions and more social justice, we should focus on political instruments rather than on claiming rights in the courts. While almost all our needs are justified, not all legal claims to fulfill them are justifiable. Therefore, when we speak about social and economic issues it is probably better to focus on needs. Our needs can be fulfilled through various measures. We need to take care of most of them ourselves. Some needs we fulfill through exchange with other people on markets or outside the market. To satisfy some needs we require help, for example an action by the state to regulate markets, to define working conditions, to protect the environment, or to criminalize certain behaviors that are threatening the fulfillment of social, economic and cultural needs. In some cases our social needs may be implemented by the setting of public policy goals by the state and by appropriate allocation of resources. In some cases we need direct provisions of goods and services without which we are unable to meet our basic needs and live a dignified life. At times, we think that our social needs should be safeguarded as rights, or, in some more specific cases, even as constitutional rights. Overall, there is a broad range of mechanisms that may serve our needs. Take the example of the right to health. There is no such a thing as a uniform and comprehensive right to good health. Nor should there be one. True, we all need good health but to a large extent we satisfy this need by ourselves. We are responsible for our health and we take this responsibility through proper diet, exercise, lifestyle and avoidance of certain unhealthy substances. We also need some regulations by the state that promote our health. The ban on smoking in public

places, the restrictions in providing high-sugar sodas to children in schools, ban on sale of alcohol to minors, and even the four way stop signs are examples of such regulations. They all belong to public health policy rather than to rights. Public health measures do not create rights. On the contrary, they impose duties and restrict our freedoms. Even health insurance does not create rights that could be claimed against the state; it creates contractual obligations between private parties that can be implemented in civil proceedings. But there are health-related cases when we undoubtedly need enforceable rights. For example, anyone who falls unconscious in a public place should have the right to medical emergency treatment, regardless of who will pay for it and how. There are a number of other health-related services that should be claimed as rights. A fruitful discussion could focus on defining what in the health care belongs to personal responsibility, what to private contracts, what should be the subject of the public health policy and what can be claimed as a matter of rights. A similar exercise would help clarify the issues related to the right to work and compensation, to social security, and, in fact, to each issue covered today under the name of social and economic rights.

Accordingly, a constitution should protect basic social and economic security. But it seems that even constitutional social and economic rights may be made contingent upon the recipients' prior attempts to take care of their needs as well as upon the requirement that they contribute to welfare of the society. I am not saying that we should return to public works for the unemployed: perhaps yes, perhaps no. With the exception of the disabled, some non-coercive ways to ensure the recipients' contribution to society should be developed. The creation of conditions for such contributions should be a major task for public authorities, particularly at local levels. Unconditional rights should be granted to the vulnerable population. In other cases, social and economic rights could be granted by statutes because there should exist the possibility to limit or adjust them later on via democratic process. Of course, they should be also enforceable by the courts within the limits provided by the statutes. This, in fact, is what most countries do quite independently of theoretical debates on social and economic rights.

THE HORIZONTAL PRIORITY OF ECONOMIC RIGHTS

Filip Spagnoli

The thesis defended in this essay is that there are no good reasons to discredit economic rights. These rights must have the same standing as other types of rights, mainly because different types of rights are interdependent. It is equally wrong to give priority to economic rights or to violate other types of rights in order to respect economic rights (for the same reason, i.e. interdependence). The state is not the only party responsible for the protection of economic rights, and there is a hierarchy among the different parties responsible. Respect for economic rights should first and foremost be the horizontal responsibility of citizens towards each other. This is what I call the horizontal priority of economic rights. Both forbearance and involvement are necessary duties but the extent of these duties can vary according to the beneficiary. The free market does not independently promote respect for economic rights. Active measures such as assistance, development aid, political participation and free expression are also necessary.

The essay focuses on the following questions: (1) is the notion of economic rights, such as the right not to be poor, an oxymoron or does it have the same moral value as other types of rights? Or is it perhaps necessary and desirable to place economic rights at the pinnacle of our system of values? (2) If we assume that there are economic rights, who has the duty to respect these rights? (3) Is there a hierarchy among those who have such a duty? (4) For those who have such a duty, do they have more duties towards some than towards others? (5) What kind of duties do they have (forbearance or active involvement or both)? (6) How can these duties be fulfilled?

Two equivalent types of rights, or a difference between rights and aspirations?

Is it justified to use the word "rights" in the context of economic rights such as the right not to suffer extreme poverty? Are these rights comparable to classi-

cal freedom rights or are they an example of the way in which superficial reasoning destroys the meaning of words? Are they rights or are they mere aspirations or desires masquerading as rights? The claim that the expression "economic rights" is an oxymoron is based on the following reasoning. Rights have to be enforceable. There is no right without a remedy. If a right is violated, then it must be possible to redress the situation in a court of justice. It has to be possible to find somebody who is responsible for the violation and who can stop the violation. If nobody can be forced to respect a right because nobody has the power and duty to respect it, then it is useless and wrong to speak about a right. Take for example the "right" to have a climate in which the sun always shines and in which the temperature is constantly between 25 and 27 degrees Celsius. This can be a desire but it can never be a right because it is not enforceable. There is no remedy if it is violated; there is no way to redress the violation. A court of justice cannot decide that the government should take action to realise this "right". Nobody is responsible for a violation and nobody can stop a violation. Nobody can be forced to respect the "right" because nobody has the power to respect it, and hence there is no right. It is not uncommon to hear the same kind of reasoning in the case of economic rights, although in international law these rights enjoy a similar level of protection as classical freedom rights or civil rights.[1] What we do in the case of a violation of classical rights—ask a judge to force the violator, for example the government, to respect our rights—is often impossible in the case of economic rights. If there is no work, then a judge cannot force the government to give us work. If there is no money, then a government cannot have the duty and responsibility to provide social security and thereby eliminate poverty. Ought implies can. The rule that we should not impose a duty on someone who is unable to fulfil it, does not pose any problems in the case of freedom rights. If the government violates our right to free speech, then a judge can force the government to protect our right because this protection only requires that the government stop its actions.

Two types of duties, forbearance and active protection

This criticism of economic rights is based on an exaggerated distinction between forbearance and active protection. It is true that freedom rights often require forbear-

1 The International Bill of Human Rights, almost universally accepted as the international standard of human rights, contains both types of rights. The Universal Declaration of Human Rights (not really part of international law, but a mere "declaration", although perhaps part of international common law), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights together form this Bill. The two Covenants are legal documents (treaties) which elaborate freedom rights and economic rights respectively, two types of rights which were already present side by side in the Universal Declaration.

ance and economic rights active involvement and commitment. But things can also be the other way around. All human rights depend on judicial and police institutions that in turn depend on the protection of the state. Even a right such as free speech needs the active involvement of the judiciary and hence the state in order to be protected. If our right to free speech is violated, then we may need the help of a judge and perhaps even the police in order to force the violator to stop his actions. And for some states, it can be just as difficult to fulfil their duty to provide efficient judiciaries and police forces as it is to fulfil their duty to provide work and social security.

If freedom rights need as much active involvement as forbearance, then the same is true for certain economic rights. The right to food in an amount sufficient for survival is often better served by government forbearance than by government action. Look for example at the Great Leap Forward and its disastrous consequences for the people of China. All human rights need actions as well as forbearance. According to the circumstances, a right can be more or less positive or negative. The right to food in Mao's China was relatively negative and directed against state intervention. In many inner cities, it is relatively positive and directed at the passivity of the state.[2] All human rights require both intervention and abstention. And it is, therefore, unfair to dismiss economic rights on the grounds that they impose duties on the government that are different from the duties imposed by "real" rights.

Human rights in general are more than just a means to enforce state forbearance or a protective tool directed against the evil actions of the state. They are part of the state and the state must actively protect them. "That to secure these rights, governments are instituted among men" says the Declaration of Independence of 1776. Human rights are the "raison d'être" of the state. Of course, the state or some part of it can and does also violate rights, and protection against the state is therefore an important function of human rights and should not be neglected. But it is the state which protects our rights against the state. (International protection of human rights is still mostly ineffective). Power corrupts and that is why we need rights to limit power. However, without power or the state, rights are useless and mere words. Human rights limit the actions of the state, determine what a state is not allowed to do or should refrain from doing, and define those areas where the state is not allowed to interfere. But human rights also, and positively, determine what the state should do. They demand positive action and interference from the state. In many cases, this intervention takes place in another part of the state, because many rights violations are caused by the state. Hence, human rights require the separation of powers.

Human rights, all types of human rights, require "le droit à la résistance et à la défense" just as well as "le droit à l'obtention et à l'exigence". For example: the state

2 See also J. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca/London: Cornell University Press, 1996), at 33.

should avoid torturing its citizens, and we need human rights to defend ourselves against state torture. If necessary, the judiciary should force the police to stop torturing citizens. This means that forbearance is not enough; the state should also actively protect and help those citizens who are tortured, either by some part of the state or by fellow citizens, and we need human rights to claim and obtain this active protection from the state. There is not a lot of difference with economic rights: the state should not only avoid creating or maintaining poverty, it should also try to create a minimum level of equal prosperity for all.

The state must act in order to protect rights. And if human rights require that the state abstains, then the state should be actively engaged in enforcing this abstention. Every human right, not only the "modern" ones such as economic rights, but also those rights that primarily demand the absence of government intervention, require government intervention, for example intervention in the form of a judgment of a court of justice concerning an illegal government intervention, and the police measures enforcing this kind of judgment. The state should commit as well as omit, and prevent, provide, protect and engender as well as forbear.

The state, and primarily the justice system and the police, protect us against violations of rights. We only have rights thanks to the state. Human rights are therefore not only or even mainly anti-state, directed against the state, and intended to protect us against the state. Something merely negative, such as abstention, forbearance or a limited state, can never constitute a state, because then it would be better to have no state at all. There is a reason for having a state. The essence of a state can "never be derived from something which is a mere negative, i.e., constitutional limited government".[3] Only something positive, such as the protection of human rights, can be the essence and purpose of a state.

It follows that a state which does nothing violates rights. "[E]st un ennemi de la liberté celui qui non seulement s'élève contre elle, mais ne fait rien pour elle".[4] A state which does not create or maintain the judicial structures necessary for enforcing human rights or the administrative structures for managing social security, violates rights, just as much as a state which tortures its citizens or takes away their food and houses.

As a consequence, the state cannot fulfill its duty to act if it is not allowed to collect a sufficient amount of tax-revenues. All rights cost money, and therefore there are no rights without taxes. Globalization, for instance, threatens the power of the state and therefore also the effectiveness of human rights. The international economy limits the power of the nation state, in particular the power to tax big companies. Without taxes, the state can do nothing at all. In view of the role the state has to play

3 H. Arendt, *On Revolution* (Harmondsworth: Penguin Books, 1990), at 147.
4 J. Mourgeon, *Les droits de l'homme*, (Paris: PUF, 1996), at 91.

in the protection of human rights, globalization can therefore be considered as very dangerous, although it may be beneficial on other levels. However, this is not the place to examine this problem in more detail.

The claim that economic rights are not really rights at all cannot be based on the argument that economic rights require a completely different kind of obligation compared to freedom rights, because such an argument is false. On the contrary, we see that the obligations or duties imposed by both types of rights are essentially the same, although it may be true that economic rights in general require more intervention than abstention, and vice versa for freedom rights. But this is a matter of degree, not of essence. This leads to the prima facie conclusion that economic rights are rights and not just aspirations, rights moreover which are equivalent to freedom rights. This equivalence is also supported by the theory of the interdependence of different types of rights. In this essay, I can only give a short description of the way in which such a theory could be developed.[5] Freedom rights need economic rights in order to function adequately. It is obvious that freedom of speech, political participation, freedom of movement and so on can only be exercised in a meaningful way when some if not all economic rights are respected. Later on in this essay, I will argue that the opposite is also true: lasting respect for economic rights requires some measure of respect for freedom rights and political rights. This interdependence also gives a prima facie advantage to those who claim that economic rights are rights like any other rights.

Agents responsible and degrees of responsibility

Both abstention and protection are required for all types of rights. And these two types of duties are not only state duties. Fellow citizens as well should avoid actions which harm the rights - all types of rights - of other citizens, but should also, when possible, act in a positive way to protect the rights of others. For example, they should not only avoid taking a life, but also save a life when possible. They should not only avoid actions which make people poor, but also assist people who are poor. When possible, because ought implies can, also for individuals. If you cannot do something, e.g. if you cannot swim, then you cannot have the moral or legal duty to swim in order to save a person from drowning. If you do not have enough financial means of your own then you cannot be expected to share these means with others who are even worse off.

5 I have tried to construct this theory in more detail in *Homo Democraticus, On the Universal Desirability and the not so Universal Possibility of Democracy and Human Rights*, Cambridge Scholars Press, 2003, especially Part One. Some of the ideas developed in this essay have been taken from Part Two of this book.

This leads to the conclusion that can also implies ought, because those with more power tend to have more responsibilities. If you have invented a life-saving drug, then the human rights of those who can be saved by your drug impose on you the obligation to deliver it. You have a wider obligation than someone who does not have some particular knowledge of medicine because you can do more than such a person. Whereas forbearance is an equal obligation for all, states and individuals, active involvement is an obligation which comes in degrees. Our individual and active duties arising from economic rights are not the same towards everyone. In general, we have more active duties towards certain persons than towards other persons. Our own children, for example, take precedence. Closeness means that you can do more, and if you can do more, you ought to do more. Closeness, therefore, plays a part in the degree of duty, although not in the existence of duty. If we can help everybody, then we have to help everybody. This is especially the case for wealthy groups—for example a wealthy country or a group of wealthy countries—that can help many people and maybe even everybody. As a consequence, our duties are potentially of a global nature, notwithstanding the importance of closeness.

Hierarchy of duties

The possibility to fulfill a duty is a very important factor in establishing responsibility. This means that those who cannot, should not, and those who can do more, should do more. Wealthy individuals and wealthy countries should do more because they have more means to assist. They have no problems satisfying their basic needs; they even have more than is necessary and can easily do without a part of this surplus. Assistance is a duty, not a choice, and people have a right to assistance.

On the other hand, assistance should not become the rule. If possible, people should be self-supporting and independent. Your first duty is a duty to yourself. Dependence can be comfortable, but it is incompatible with freedom and autonomy. If freedom and autonomy mean anything to you, then you should try to be self-supporting. Our duties towards other people come into play only when these people cannot be self-supporting. One can be too serious about duties. Assistance can lead to a mentality of dependence and laziness. It can also be seen as paternalism, a lack of respect and unnecessary interference. Therefore, those who need assistance should be guided towards independence. Assistance is an option only if and as long as independence is impossible. We should try to create the circumstances in which people can satisfy their own basic needs (or at least we should not destroy these circumstances) and economic rights are necessary only when we fail to do this. When economic rights become necessary, then they do so first in a face-to-face situation

and then – on a larger geographical scale – in a situation where one person should help other and more distant persons (if the surplus is large enough). Only if all this fails can the state intervene. Duty is a bottom-up affair. It is first horizontal and only vertical when the horizontal system fails to operate adequately.

Economic rights should not be viewed as primarily the business of the state, otherwise we will lose both the benefits of self-support (i.e. autonomy) and the community spirit which results from spontaneous mutual assistance. Allowing economic rights to be realised at the level of citizens' relationships will strengthen the feeling of belonging. The fact that our economic rights are realised in part by our responsible fellow citizens enhances community feelings and again supports the statement that human rights are not individualistic and do not only deal with the relationship between citizens and the state. Focusing too much on the duties of the state will create a mentality of passive reliance on government support (for yourself and for others) and a mentality of dependence (state help kills self-help). Egoism, isolation, irresponsibility and helplessness will become the main features of society. We will only have rights and no duties, rights moreover which only the government should respect and realise. In order to avoid this, people should be allowed to act responsibly. They should be responsible for themselves and for others, and the state should not take away this responsibility without good reasons (for example the responsibility of parents to care for their children or the responsibility of individuals to find a job).

The state is responsible for economic rights only if everything else fails. Only those who are helpless and who have been forgotten by private philanthropy can call on the state for assistance. In this case, the state does not abstain or does not make laws which forbid something; it executes policies that result in an equal supply of those goods and services necessary for the satisfaction of basic needs. These policies are mainly taxation, redistribution and development aid and can be seen as the enforcement of citizens' duties. When the state forces you to pay taxes, it forces you to fulfil your duties arising from the economic rights of your fellow citizens (which is why tax fraud and tax evasion are particularly reprehensible crimes: the existence of taxes is already a stain on the reputation of mankind, because taxes exist as a consequence of the fact that people deny their responsibilities). It is the duty of the state to force the people to fulfil their duties, their duty to be self-supporting if possible and their duties towards each other if necessary. Government policies of this kind are commands and not prohibitions. But the same kind of commands exist in the field of freedom rights. Most municipal law systems contain an obligation to save the life of a person in danger, and punish a lack of respect for this obligation ("failure to assist persons in need").

Economic rights = big state?

This hierarchy of duties allows us to reject a kind of criticism of economic rights that is closely linked to the criticism based on the supposedly different nature of the obligations inherent in economic rights. If economic rights entail obligations of active involvement rather than passive forbearance (contrary to freedom rights), then, we are told, one has to reject economic rights because they cause an unacceptable increase in the size and power of the state and a corresponding and equally unacceptable reduction of freedom. A state which wants to protect economic rights has to build an enormous machinery to provide benefits and it has to invade people's private lives (it has to check their income, family situation, the state of their health etc.). This reduction of freedom is unacceptable as such, but it also defeats the purpose. An oversized state hinders the private economy and therefore hinders the creation of the very prosperity which it wants to redistribute in order to protect economic rights. It follows that economic rights are harmful because they lead to the exact opposite of what they want to achieve and because some other values such as freedom are sacrificed along the way. However, this argument is not as strong as it seems if the realisation of economic rights is first and foremost the responsibility of citizens. Economic rights can even counter the tendency of a state to increase its size and power. People whose economic rights are realised are in a position which allows them to resist illegitimate usurpation of power.

Of course, the "big state" criticism of economic rights does not imply a neglect of the problems caused by poverty. It merely states that economic rights and state activity for the protection of economic rights are useless. A fair distribution of prosperity is supposed to follow automatically from freedom. Only free trade and the actions of the private sector can guarantee economic rights, not the actions of government. The latter will lead to unacceptable burdens on business and private initiative and will therefore undermine rather than promote economic rights because it will undermine the private creation of prosperity. Free trade, deregulated markets and minimum taxes will allow profits to increase. These profits will then be invested and these investments will increase economic productivity and therefore also prosperity. If low taxes lead to large profits and large profits lead to an increase in prosperity and growth, then this will benefit the poor because they will have a job and an income. All boats rise on a rising tide. Those making large profits will not only invest in production units and in labour; they will also spend money on consumption which again creates jobs and profits for "small" people. Furthermore, inequality is an encouragement to do well economically, because doing well economically is rewarded in an unequal society. Inequality therefore leads to economic growth which benefits everyone.

According to this view, there is no reason for state intervention in the economy or for redistribution of wealth. The state, looking for measures to promote economic rights, thwarts the free actions of businesses because it imposes heavy administrative and financial burdens on businesses, making it impossible for them to create and distribute prosperity. There is no reason to have economic rights. Everything will happen automatically.

Freedom versus Equality?

Between the lines of the big state criticism, one can read the story of the age old struggle between freedom and equality. But it is wrong to depict the struggle for economic rights as a struggle of equality against freedom. Freedom does not have to be sacrificed in the pursuit of economic rights, not if the hierarchy of duties described above is kept in mind. It is not even equality which is at stake in economic rights. Of course, the purpose of economic rights is the equal distribution of the material goods necessary for survival in a decent way. And in order to achieve such a distribution, some things have to be taken away from the rich. However, the problem that economic rights try to address is not that there is inequality or that some people have more than others or have too much of something. The problem is that some people do not have enough of certain necessities.[6]

Those who accept the importance of economic rights do not defend a policy that equalises all material resources. The policy they defend is one that guarantees a minimum of material means and protection to all people and that uses economic rights to achieve this. This minimum protection is necessary not only for decent survival but also for a meaningful and equal cultural and political life. Public communication and political participation are impossible if all efforts go into the struggle to survive. A certain level of detachment from the urgencies and necessities of nature, from basic biological needs and from the struggle to survive, as well as a certain predictable supply of food, a house, good health and so on are prerequisites for culture and politics.

The purpose of economic rights is the equal possession of a minimum supply of those fundamental material means which are necessary for the continuation of life in a decent way and for a meaningful culture and political democracy. If there are some people who have less than the minimum, economic rights will redistribute some of these means. In other words, these rights will take some things away from those who have enough and give it to those who do not have enough. This is pos-

6 J. Kekes, *Against Liberalism* (Ithaca/London: Cornell University Press, 1999), at 97.

sible because, globally or even nationally in some cases, there is enough for everybody. The only problem is the unequal distribution. Economic rights do not try to increase the total supply of material means of existence. Furthermore, their goal is a necessary minimum instead of a possible maximum; a decent way to survive instead of a life of comfort and luxury; things that are essential rather than things that are merely desirable; basic needs rather than frivolous extravagancies.

Everything that can be added to the equal possession of the necessary minimum can be unequal and falls outside of the competence of economic rights. These rights deal with the basic needs of the poor, not with the fact that some people are rich. However, wealth can perhaps influence political life even when economic rights are respected. Unequal wealth does not necessarily imply disrespect for economic rights, but it can affect the equal participation in political life. Rich people can benefit more from political life than people who are neither rich nor poor, and therefore it seems that some kind of redistribution, on top of the redistribution necessary for a decent life, is a prerequisite for political equality. Needless to say that this falls outside of the scope of this essay.

Invisible Hand?

The big state criticism can also be attacked because of its naive belief in economic mechanisms. It is wrong to believe that respect for the economic rights of individuals follows automatically from unhindered economic activity. The benefits of growth do not "trickle down" automatically to all persons who have a right to these benefits, not even when social privileges are abolished and a level playing field of equal opportunities or equal starting positions is guaranteed. The natural lottery will always leave some people in unacceptable situations, because of misfortune or lack of talent or ability. But, of course, the opponents of the big state will not even accept that equal starting positions are created. And if the situation at the outset is unequal, then free economic activity will only worsen the situation of the poor. The rich will profit more from growth than the poor. They have the education and the relationships, and they have the means to invest and to profit from the laws of economics. They will improve their situation, in most cases at the expense of the poor. "If the initial distribution in a trading situation is unequal, the result of trade will be similarly unequal".[7]

I admit that business has to play a part in the realisation of economic rights, just as everybody else. However, it will probably not do so automatically as a conse-

7 W.N. Nelson, *On Justifying Democracy*, (London: Routledge and Kegan, 1980), at 84.

quence of its normal activities, i.e. profit-making. It has to be conscious of its moral duties and act accordingly. If it fails to do so, the state has to intervene and has to redistribute what is not redistributed voluntarily or automatically. Of course, some things do indeed "trickle down" automatically (more flourishing businesses means more jobs for instance), although this is never enough to compensate for the many things "trickling up" (for example the "surplus-value" created by workers and expropriated by entrepreneurs who pay the workers only a part of the value that they create by working).

A free market can indeed help to release economic rights, whereas an oversized state can harm economic development and can therefore diminish the prosperity which must be redistributed. However, freedom is not enough, as is proven by experience. The policies of Reagan and Thatcher promoting the free market and trickle down economics have led to social catastrophes (their economies were in fact "trickle up economies"). Economic rights and state activity for the realisation of these rights are necessary. The state must intervene when free trade, trickle down economics etc. fail, and the state needs economic rights as the norms of its intervention or as standards of achievement.

How?

Something, however, remains unresolved. We know who has the duty to respect our economic rights. We even know that there is a hierarchy among those who have a duty and that we have more duties towards some than towards others. We know what kind of duties we have (forbearance and active involvement). And we know of a way in which these duties cannot be fulfilled (the free market). What is still relatively unclear is how these duties can be fulfilled. I have spoken about mutual assistance, caritas and redistribution. But what if there is nothing or not enough to redistribute? What if most people are poor and unable to assist others? I come back to the question of the beginning: what if there is no work? Is it useful then to ask a judge to give us work? Are we dealing here with aspirations rather than rights after all?

First of all, most of the violations of economic rights are not the consequence of insufficient resources but the consequence of an unjust distribution of resources, in which case economic rights can be applied immediately, even by way of judicial judgment. However, what can we do if this is not the case and if there really is a problem of insufficient resources? Let us not forget that in many countries, it is just as useless to ask a judge to enforce our right to free speech, but no one will claim that this right is not a right at all. Realising rights, turning words into facts, is often a difficult matter, and this may be true for all types of rights, including economic rights.

Even when the problem is not one of distribution but one of resources, this is only apparent. Indeed, governments cannot have a duty to do things that they cannot do. They cannot be forced to do things for which they do not have the resources. This lack of resources is the case in many developing countries. But once you take a global point of view, the problem is still one of distribution rather than the existence of resources. International redistribution can then solve the problem. Globally, there are enough resources to eliminate poverty altogether. If a single state is unable to eliminate poverty in its territory, then the same hierarchy as described above comes into play. Self-support is not possible, and thus there has to be mutual assistance. Other states or the international community have to help. Governments do not only have duties towards their own citizens and citizens do not only have duties towards their fellow citizens. Development aid on the basis of taxation is one way to fulfil international duties, although voluntary assistance and measures leading to self-support are again preferable, for the same reasons as those mentioned above.

Suprema Lex or Laws as All Other Laws?

At the other end of the political spectrum, one can find those who do not reject economic rights but instead embrace them as the supreme political value. All other values, including freedom rights, have to be sacrificed if this is necessary for the protection of economic rights. This is the ideology of the current Chinese leadership for instance. However, the economic rights of all citizens can only be protected in a democracy that protects the "classical" freedom rights and political rights, because economic rights depend on freedom rights and political rights. Freedom of opinion may seem useless when you have to struggle to survive. Economic rights then seem all-important and most urgent, but the struggle to survive cannot be settled if, at the same time, one does not have classical rights as a means to enforce economic rights. Classical human rights and democracy make it possible to show, challenge and change economic injustices. You can express and realise claims for the protection of economic rights if your freedom rights are respected and if you engage in democratic politics.

The squeaky hinge gets the oil. Only in a democratic society in which freedom rights and political rights are protected can an economic injustice be exposed and can claims for its abolition be heard and implemented. People can use rights in order to call on the government or the international community to fulfil its duties and to implement certain economic measures. Most governments, including democratic governments, act only when they are put under pressure. The freedom of expression, the freedom of assembly and association (associations such as pressure groups,

labour unions or political parties) and the right to choose your own representatives are instruments in the hands of the economically disadvantaged. They can use their rights and the democratic procedures in order to influence economic and social policy. Poverty must have a voice. It is true that without a minimum degree of prosperity, human rights and democracy lose a lot of their value. If you have to struggle to survive, then you do not have the time to form an opinion, let alone express it. *"Primum vivere, deinde philosophari"*; first you make sure you live, and only then can you philosophise. In a situation of poverty, it is indeed difficult to use rights and democracy, but without rights and democracy it is much more difficult to fight poverty.

If there are no free flows of information, no accountable government which needs to justify its actions in order to be re-elected, and no free press, then you are likely to have more corruption, more embezzlement of public funds and more people who acquire an unfair advantage from the proceeds of natural resources and other sources of prosperity. The rule of law and the openness of government, which are typical of democracy, limit not only corruption but also the ineffective management or outright squandering of natural or other resources by untouchable governments. Furthermore, there is a link between corruption and squandering. Corrupt governments will be more inclined to set up grandiose but foolish and wasteful megaprojects, because this gives them more opportunities for corruption. Corruption is also a tax on investment, which is why it hampers investment and economic growth. Especially the often all-important foreign investments (the import of technology and knowledge) diminish as corruption increases.

Economic rights of course promote classical rights because classical rights are of limited use when you have to struggle to survive. But classical rights can also promote economic rights. Both types of rights need each other, strengthen each other, are dependent on each other and are necessary conditions for each other. The full use of classical rights requires the realisation of economic rights, and vice versa. It is therefore nonsense to say that one type of rights should be sacrificed for another type, even if this is only temporary.

Conclusion

When thinking about economic rights, one must try to occupy a position between two extremes. These two extremes roughly correspond to the traditional distinction between right and left in politics. The right believes that economic rights are a nonsense, an oxymoron, a misuse of the word "rights", useless at best, harmful to the economy at worst. Forbearance, freedom, the free market, the invisible hand,

trickle down economics and so forth are the best and only measures to fight poverty. No moral obligations should be imposed on either the state or the citizens.

The left on the other hand tends to focus too much on economic rights, often at the expense of freedom rights. The big state is not a false problem and it is often tempting to violate freedom rights if you want to protect economic rights. However, freedom rights are perhaps the most useful means to protect economic rights, and vice versa.

Part Two

AN ACCOUNT OF CONSTITUTIONAL PROTECTION

SOCIO-ECONOMIC RIGHTS IN THE CONSTITUTION FOR EUROPE: BETWEEN SYMBOLISM AND LEGAL REALISM

Violeta Beširević

It is a commonplace that social and economic rights are controversial. The controversy most often relates to the character and force of such rights and the problem of (un)enforceability. It is also often claimed that social and economic rights are in essence undemocratic and that they create culture of dependency from the state which diminishes individual initiative. An alternative approach, less often debated, questions the effects of these rights from the perspective of universal human rights which suppose to bind all states.

This article follows an alternative approach and sets up the discussion within the framework of the EU and the norms of the recently signed Constitution for Europe. Several reasons motivate this chapter. First, the Constitution especially claims my attention because social and economic rights are for the first time included in a European document which is supposed to have a binding force. Second, some aspects of the Constitution which are relevant for the purpose of this chapter already figure in the EU context. However, for a long time it was not possible to have a European charter of rights due to differences in opinion among the Member States, mainly on the definition of the social and economic rights that were most relevant to the activities of the Community and now the Union.[1] Social and economic concerns have also largely contributed to the fact that at present we do not know whether or not we will have the Constitution. In a poll by the French Le Monde, 46% of those voting 'no' said fear of unemployment was the most important concern with the EU Constitution.[2] The same concerns also contributed to the Swedish "no" to the euro. There was huge opposition to the common European currency among the Swedish workers whose fear of insecurity is explained in the

1 See T.C. Hartely, *The Foundations of European Community Law*, third ed. (Oxford: Clarendon Press, 1994), at 147-148.

2 See Billy Hayes, *A Safe European Home?* at http://www.social-europe.org.uk/downloads/building.pdf

following sentence: "We always lose when decisions concerning our lives are taken so far away that we don't have any chance to influence them. Stockholm may be far away but it's damned closer than Brussels."[3] Third, because we might live tomorrow in the constitutional culture we are now speaking about and because security is "the most vital all of interests"[4], I am curious to see whether the Constitution brings more security to European people than is the case at present. What I mean by security here is the concept aimed at protecting individuals (as well as groups) not only from private and public violence but also from violent fluctuations in the market, as well as from poverty, illness or the caprices of family upbringing.[5]

I will limit my discussion to the following issues: (a) what qualifies the EU to deal with social issues; (b) which socio-economic rights are laid down in the Constitution and; (c) what are the effects of the recognition of these rights.

In my discussion I will mostly focus on the fact that the reach of social and economic rights guaranteed in the Constitution depend on a division of powers between the Union and the Member States, and omit all those issues which made socio-economic rights controversial in general.

The Inspiration for Constitutional Protection: Social Europe

It seems that one of the hardest tasks undertaken by the drafters of the European Constitution is reconciliation between the free market, now the main icon of modernization, and the socio-economic rights of those who are supposed to approve the project of constitution making – the citizens of Europe. As a result it is declared that the Union shall stand for a highly competitive social market economy[6], an objective which might remind constitutional lawyers of the one that aimed to establish laissez-faire capitalism in the mid-1930s at the core of the US Constitution. An American attempt to root a particular economic philosophy in a system of fundamental principles operating as the framework for the government of a nation resulted in a deep constitutional crisis which everlastingly talked the US Supreme Court out of making similar attempts.

The reference to social market economy in the Constitution for Europe should

3 See Stefan Carlén, *Protecting the Nordic Model*, at http://www.social-europe.org.uk/downloads/building.pdf

4 See John Stuart Mill, *On Liberty*, *Collected Works*, ed. J.M. Robson, vol. 18, *Essays on Ethics, Religion and Society*, (Toronto: University of Toronto Press, 1977) at 251.

5 For more on the relation between welfare and security see e.g. Stephen Holmes, *Passions and Constraint*: *On the Theory of Liberal Democracy*, (Chicago and London: The University of Chicago Press, 1995) at 243-247.

6 See Art. I-3 of the Treaty establishing a Constitution for Europe.

not necessarily produce the same effect, given the long-standing social democratic traditions in Europe. While in the US social and economic rights mostly lack constitutional protection and socio-economic concerns are typically left up to the free market forces[7], the constitutions of many European countries have included the idea of "social" by referring to the security and well-being of the individual in modern industrial society in terms of the social state or various socio-economic rights. For instance, the constitutions of France, Spain, Portugal, and Italy expressly recognize social rights. The provision of the German Basic Law, declaring a "social state", in combination with the reference to human dignity, resulted in a high level of constitutional social rights protection.[8] An example of constitutional welfare protection comes also from Hungary, whose Constitutional Court, in a series of fifteen decisions delivered in 1995, blocked the immediate implementation of the governmental act which specified cuts in the systems of child support, sick leave pay, maternity leave and other social programs.[9] Finally, some European countries like the Netherlands or Sweden are advanced welfare states without specifying social programs in their constitutions.

The story of socio-economic rights on the European level does not begin with the Treaty establishing a Constitution for Europe. The Treaty of Rome, which is one of the founding community documents signed in 1957, included rather modest yet acknowledged tasks of the former European Commission in the social field[10]. Although it is not an EU document and although it has been forever left in the shadow of the convention which protects civil and political rights, the European Social Charter of 1961, which contained nineteen articles on social rights, was the first document that gave Europeans a general sense that European policy was not anti-welfarist. In order

7 During 1960s the US Supreme Court in some cases was ready to interpret the American Constitution as if it included social rights (see e.g. *Shapiro v Thomson*, 394 U.S. 618 (1969)), but such ambition did not last too long. For more see Cecile Fabre, *Social Rights under the Constitution: Government and the Decent Life*, (Oxford: Clarendon Press, 2000) at 153 f. 1 In absence of any commitment to social dimension of democracy, for some commentators the US system of democracy is not much else than representative democracy plus + "shopping malls". See Christopher Pierson, *Hard Choices: Social Democracy in the 21st Century*, (Cambridge: Polity Press, 2001) at 2. For an American perspective see Cynthia L. Estlund, *An American Perspective on Fundamental Labor Rights*, in Bob Hepple, (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives*, (Cambridge: Cambridge University Press, 2005) at 192-214.

8 See András Sajó, *Social Rights: A White Agenda*, (2005) 1 European Constitutional Law Review, at 38.

9 For an extended discussion see Kim Lane Schepppele, *A Realpolitik Defense of Social Rights*, (2004) 82 Texas Law Review 1921, at 1945-1949.

10 Art. 118 of the Treaty of Rome envisaged: Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to: (1) employment; (2) labour law and working conditions; (3) basic and advanced vocational training; (4) social security; (5) prevention of occupational accidents and diseases; (6) occupational hygiene; (7) the right of association, and collective bargaining between employers and workers.

to take into account the fundamental social changes which have occurred since the text was adopted, the European Social Charter was revised in 1996 so as to include new rights aimed at improving the standard of living and social well-being.

While the Maastricht Treaty and the Amsterdam Treaty, mainly thanks to the opposition of the United Kingdom, referred to the social dimension in a symbolic way, the adoption of the Community Charter of the Fundamental Social Rights of Workers in 1989 and the EU Charter of Fundamental Rights in the year of 2000, should have given the message that the European political elite does care for the welfare of its citizens. Social rights of workers and rights and freedoms guaranteed in the EU Charter for the first time have been declared as "fundamental" to their holders and represented a "bottom floor" under which individuals or groups would not fall. Apart from the founding documents, the Community, and later the Union, have undertaken some other steps in order to show that social dimension matters, even though the common Europe has from the beginning been seen primarily as an economic project.[11]

Finally, the European Court of Justice, well-know as the court which does not avoid issues of basic principle, has also conceptualized the idea of social Europe, by holding that the EU is not merely an economic union, and that therefore in certain areas the economic goals are secondary to the social aims, which constitutes the expression of a fundamental human right.[12]

The EU social policy has produced tangible practical impacts in the Member States. In Ireland, for instance, membership transformed the world of work, in particular for women, and compelled the passage or modernization of legislation in a range of areas that laid down a basic framework of rights and minimum standards of social protection.[13] Examples of such areas include equal pay, equal opportunity, health and safety at work, protection in the event of insolvency, rights of part-time workers, and social protection and health service entitlements for EU workers working outside their own Member State.[14]

Accordingly, it is not that the reference to the social market economic model comes "out of the blue" in the Constitution for Europe - what is puzzling, rather, is whether the concept of security has been effectively allocated. The reactions to the drafters' endeavor to base Europe on the free market and at the same time to make it a socially conscious Union are far from being uniform. They range from the as-

11 See for example the Nice Social Agenda of 2000 which laid down EU priorities in the social field. It covers the issues of job creation, employee protection, gender equality and combating poverty and discrimination.

12 The Case C-50/99 *Deutsche Telekom v. Schroder*, Jugement of February 10, 2000, par. 57.

13 National Forum of Europe, Chairman's Report on the Second Phase of Work- February to March 2002, 21, par.39.

14 Ibid.

sertion that the Constitution for Europe enshrines more neo-liberal measures and makes any economic policy that tries to regulate market forces illegal[15], to the concerns that the Treaty establishing a Constitution for Europe creates new socio-economic rights detrimental to free market economy.[16] Some fear that socio-economic rights protected in the Constitution would require the Member States to include in their constitutional documents the social market economic model, which is a bad idea as national constitutions should not seek to impose a particular economic model, either that of Berlin or of Boston.[17]

Before I offer some answers to these dilemmas, let me first say a word about the catalog of socio-economic rights included in the Constitution.

The Catalog of Rights

In Part II, the Constitution includes the Charter of Fundamental Rights of the Union. The catalog embraces the classic civil and political rights as well as impressive guarantees of social and economic character. What is more, the concerns about the security and well-being of the individual are expressed not only in terms of rights and freedoms, but also in terms of objectives and values.

As to the objectives, the Constitution specifies that the Union commits itself to combat social exclusion and discrimination, to promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.[18] Additional policy objectives are full employment and social progress.[19]

The values of freedom, equality and solidarity serve as the basis for socio-economic rights. Under the heading of freedoms, one can find freedom of assembly and of association, right to education, freedom to choose an occupation and right to engage in work, freedom to conduct a business and right to property.[20] The value of equality enables non-discrimination in a variety of contexts, but places special emphasis on equality between women and men in the area of employment, work and pay.[21] Equality also works here to promote special concerns for the rights of the child, the elderly and persons with disabilities.[22]

15 See at http://www.socialistworld.net/eng/2005/05/24europe.html

16 See Eugene Regan, *What The Constitutional Treaty Means: Fundamental Rights in the EU*, The Constitutional Treaty Series (Dublin: The Institute of European Affairs, 2005) at 12.

17 See Gerard Hogan, *EU States Best Qualified to Deal with Social Issues*, Irish Times, February 20, 2003 at http://www.forumoneurope.ie/index.asp?locID=210&docID=491&COMMAND=PRINTER

18 See Art. I-3

19 Ibid.

20 See Art. II-72 and Art. II-74 to Art. II-77.

21 See Art. II-83

22 See Art. II-84 to Art. II-86.

Finally, the core cluster of rights protected under the value of solidarity, guarantees not only the rights of individuals (e.g. the right of access to placement services or some health care rights), but also specific rights of workers, (e.g. workers right to information and consultation, right of collective bargaining and action, including the right to strike, right to fair and just working conditions, to protection against unjustified dismissal), rights of the young (prohibition of child labor and protection of young people at work), the protection of the family and classical rights to social security and social assistance.[23]

Some commentators claim that the Charter included in the Constitution is not as complete a statement of social rights as the European Social Charter and that this may result in a lowering of substantive protection in certain areas of social rights despite the fact that the European Social Charter is not a binding instrument, unlike the Constitution is supposed to be.[24] Starting from the premise that individuals should be entitled to the rights to adequate minimum income, housing, education and health care because they need those resources in order to be autonomous and to achieve well-being[25], some omissions in the Constitution are indeed notable, including the right to a fair remuneration.

Yet it is also possible to question whether all social and economic rights included in the catalog deserved to be there. On the usual reading, only rights which cover significant moral claims enjoy constitutional protection. The right to education or to health care are undoubtedly important candidates for constitutional protection. By contrast, the right of access to placement services *prima facie* is not. While this seems to be a valid constitutional argument, especially having in mind the transformation of the EU from an international regime to a federalized polity, [26] it is not clear, as it will be seen later, whether the drafters wanted to create individual rights, which would be similarly enforceable as civil and political rights, or whether they wanted to have rights of the program nature that would guide the social policy of the member states. If the latter is true, then a rather more detailed catalog of social and economic rights would be a good reminiscent of a to-do list.

Although some of these objections may be justified, the catalog of rights is not an aspect of the Constitution for which the drafters should be faulted. The

23 See Art. II-87 to Art. II-95.

24 See Richard Burchill, *The EU and European Democracy—Social Democracy or Democracy with a Social Dimension?*, 17 Canadian Journal of Law and Jurisprudence 185, at 204. It has also been commented that although the European Social Charter is not legally enforceable, it requires periodical progress reports from countries that adopted the Charter. These reports often show substantial efforts on the part of signatory states to live up to the duties imposed on them under the Charter. See Schepppele, *supra* note 9, at 1922.

25 See Fabre, *supra* note 7, at 183.

26 See e.g. Alec Stone, *Constitutional Dialogues in the European Community*, (1995) EUI RSCAS Working Papers No. 95/38, at 1.

Constitution clearly states that the Charter of the Fundamental Rights does not extend the field of application of Union law beyond the powers of the Union or establish or modify any new power or task for the Union.[27] Accordingly, what the drafters did was to simply include in the Constitution the Union's Charter of Fundamental Rights, sticking to the political compromises which were made at the Nice summit in 2000. The value of the Constitution in terms of socio economic rights does not lie in the fact that it introduces new rights as promises for change in the market economy, education or health care. The novelty which it brings is that, if ratified, the Constitution would make the rights embodied in the Charter legally binding, which at present is not the case - the EU Charter of Fundamental Rights is hardly more than a solemn proclamation. Keeping in mind that not all Member States have yet signed or ratified the revised European Social Charter of 1996, this would mean a significant step forward.

Yet it remains reasonable to ask whether and to what extent this rights-laden political discourse will improve the lives of the European citizens. It may well be that whoever turns to the Constitution as a buffer against insecurity might be disappointed. Below I explain why.

Rights in Retrospect: An Empty Set of Rights?

First, of all the ideas one may have about social rights protection at EU level, the idea of substitutes for national social rights appears at this moment to be the furthest from reality. The Charter included in the Constitution is aimed predominately at binding the EU institutions and only in second place at binding the Member States and then only when they implement the Union law.[28] The Member States will not be bound by the Charter even when they act within the scope of the Community law, as earlier interpreted by the European Court of Justice.[29] An additional issue I have already mentioned is that the Charter does not extend the field of application of the Union nor does it establish any new power for the Union. This means that some of the socio-economic rights guaranteed in the Charter appear to be illusory since the Union has almost no competence to legislate in some fields. Take for example the right to education and the right to healthcare which are at the core of the social rights. Insofar as it applies to the Union, the right to education covered in

27 See Art. II-111(2).
28 Art. II-111 (1).
29 See eg. *ERT* Case C-260/89 (1991) ECR I-2925, para. 42 of the Judgment; *SPUC v. Grogan*, Case C-159/90, (19991) ECR I-4685, para. 31 of the Judgment.

the Charter means that, for example, in its training policies the Union must respect free compulsory education.[30] However, at present it is up in the air to what extent a member state is bound by this right, except for the fact that as regards compulsory education, each child has the possibility of attending a school which offers free education. Except of supporting, coordinating or complementary action, the Union has no competence in the area of education; this right is entirely regulated by national law and practices. As to health care, the right of access to preventive health care and the right to benefit from medical treatment are guaranteed under the conditions established by national laws and practices. If the citizens of Europe are left, as they are, without a guarantee of equal access to health care or free or subsidized health care, what then are the guarantees they are entitled to?[31] The answer is unclear. Arguably, they are entitled to the guarantees only when the equal and high level of human health protection in the Member States is affected by Union policies and activities.[32]

The problem is not limited just to these two mentioned rights. The horizontal provisions of the Constitution for example preclude a UK citizen from invoking Article II - 88 of the Constitution, which regulates the right to collective action, including the right to strike, and claiming that UK law does not adequately protect their right to strike, since EU does not have competence to legislate on this matter.

There is a lot of uncertainty even in the areas where the Union and the Member States share competence to legislate, like for example in the field of social security. The Constitution for Europe envisages that the Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.[33] The language places the Union and the national laws on an equal footing. What does this mean in case of a conflict? What if the Union law provides social benefits for asylum seekers but the law of some Member State does not grant such benefits to this group?[34] Arguably, the Union can claim the power to legislate under the principle of subsidiarity[35] but it is not

30 See Explanatory notes to Art. 14 of the EU Charter of Fundamental Rights.

31 See Sajó, *supra* note 8, at 41.

32 Ibid.

33 Article II-94 (1)

34 For more on social security and social assistance see Ronald W. Victor, *Social Security and Social Assistance in the Treaty Establishing a Constitution for Europe: Article 94, What is Really Protected*?, (2004) 18 Emory International Law Review, at 763.

35 Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Article I -11 (3).

clear whether the European Court of Justice would uphold such an action, since so far it has not struck down legislation on the ground of subsidiarity. What is clear is that the Union does not guarantee to its citizens a minimum level of social security protection.[36] Since there is no minimum standard, each Member State is free to set up the level of protection it chooses.

Finally, although it appears to be set up on higher standards than in national laws, the effects of the right to social housing benefits conceived in the Constitution are blurred.[37] Again, it depends on the imagination of the European Court of Justice whether, in order to combat social exclusion and poverty, the Union is entitled to adopt measures which would, for example, provide for rents to be controlled or for housing benefits to be given to the needy, and in such way "ensure a decent existence for all of those who lack sufficient resources" as it stands in the Charter included in the Constitution.

Accordingly, on closer inspection, namely if one combines the general provisions of the Constitution with its rights-conferring provisions, many of the social rights guaranteed in the Constitution symbolize little more than promises that the EU is still not capable to deliver.

However, the meaning and the scope of rights included in the Constitution do not depend only on the horizontal provisions of the Constitution but also on the expressed limitations of such rights. I will now address this issue.

Rights in Retrospect: Effects of Expressed Limitations

That the social rights protection envisaged in the Constitution is dubious becomes even more evident in the perspective of the different limitations the Constitution sets out on the scope and the manner of interpretation of the rights it guarantees. When we move in this direction, the content of socio-economic rights guaranteed on the EU level turns out to be again very contentious.

Apart from a general rule which endorses justified restrictions on fundamental rights needed to meet objectives in the general interest or to protect the rights of others,[38] a series of special rules may lead to the standard conclusion that socio-economic rights will hardly work either in theory or in practice. I will start with the issue of judicial enforcement.

A great deal of ink has been spilt arguing whether or not socio-economic rights

36 Ibid. at 793.
37 See Article II-94 (3).
38 Art. II-112 (1).

are enforceable by courts. However, even the firmest opponents to the idea of justiciable socio-economic rights have come to the conclusion that judicial protection in some cases could possibly be a good idea.[39] When it comes to this issue, the social and economic rights guaranteed in the Constitution are subject to rigorous qualification. To sharpen this focus, consider the following.

The Charter of Fundamental Rights included in the Constitution speaks in terms of rights, freedoms and principles. For example, when it refers to the educational field, the Constitution speaks about the right to education, in connection with occupation it refers to freedom to choose an occupation, while healthcare or social security rights are set up on the level of principles. The distinction in language is not limited just to terminology but has important legal effects. Thus, according to Article II-112 (4), the principles envisaged in the Constitution, as opposed to the rights, shall be subjected to judicial review only in the course of interpretation of the acts in which they have been implemented and in the ruling on the legality of such acts. In other words, principles will provide the basis for a judicial review only when the Union has legislated in the field of, let's say, protection of health care. Thus, principles do not ensure the basis for a free-standing claim for action by the Union's institutions.

But the difficulties do not finish here. Because the Constitution does not always clearly distinguish between rights and principles, the task of the European Court of Justice will also be to look at the explanations related to the Charter of Fundamental Rights attached to the Constitution in a declaration, in order to determine when the Constitution speaks about rights and when about principles.

By mentioning the explanatory notes, I have touched upon the issue of interpretation. The rights-conferring provisions of the Constitution are hardly self-explanatory, so their exact meaning has a lot to do with the manner and tools of interpretation. Besides the explanatory notes, the European Court of Justice is also bound to consider some other sources listed in the Constitution as the sources of the rights it provides for. To assess the exact meaning and the scope of rights one should also look at the existing Treaty conditions if a particular right is restated in the Treaty.[40] For instance, to examine the non-discrimination principle in terms of social policy, one should also consult the special provisions of the Treaty which pro-

39 For example in 1993 Cass Sunstein wrote against inclusion of socio-economic rights in the constitutions of the Eastern European countries vigorously arguing that it was a large mistake, possibly a disaster. See Cass Sunstein, *Against Positive Rights*, (1993) 1 East European Constitutional Review, at 35. However, almost a decade later, influenced by the practice of the South African Constitutional Court, he admitted, that, although the constitutional protection of positive rights in theory was controversial, it nevertheless could work in practice. See Cass Sunstein, *Designing Democracy: What Constitutions Do*, (Oxford/NY: Oxford University Press, 2001) at 221-237.

40 Art. II- 112 (2).

vide for example what equal pay without discrimination based on sex means.[41] In interpreting the rights embodied in the Constitution, the European Court of Justice is also obliged to pay due regard to the rights derived from the constitutional traditions of Member States insofar as the Constitution recognizes such rights.[42] Finally, if the Constitution contains rights which correspond to rights guaranteed by the European Convention on Human Rights and Freedoms, the meaning and the scope of such rights are to be the same as of the corresponding rights laid down by the said Convention. However, an important footnote to be added here is that the Union is entitled to provide more extensive protection than that provided by the European Convention regulating civil and political rights.[43]

All in all, if the rights are marks of an individual's claim, then the social and economic rights rhetoric of the Constitution for Europe is not so useful in describing the benefit. Obviously, these rights are not *prima facie* rights.[44] If ever the Constitution is to be ratified, it remains to be seen whether the European Court of Justice can make up for the severe qualifications on the reach of its rights-conferring provisions, which are the price paid for achieving the agreement that the EU Charter of Fundamental Rights should become legally binding. The Court is well known for its pro human rights orientation. Even before the Charter of Fundamental Rights has been adopted on the EU level, it has used fundamental human rights as independent sources of law to decide cases within its jurisdiction.[45] In addition, to enforce direct links between the EU and the individual, the Constitution for Europe provides an opportunity for the individual to challenge an EU act if it addresses her or is of direct and individual concern to her and against a regulatory act which is of direct concern to her and does not entail implementing measures.[46] Accordingly, rather than having to imply or create, the Court would be in a position to develop and flesh out the meaning of the rights included in the Constitution.[47] Willingly or unwillingly, this would bring Europe to the position similar to US style federalism in which the US Supreme Court is a driving force of social change.

41 See Art. III-214 (2)

42 Art. II-112 (4).

43 Art. II-112 (3).

44 Some claim that social rights are not aimed at taking effect as other rights: they do not consist of material norms from which one may mechanically draw intangible models of action. For more see Antoine Lyon - Caen, *The Legal Efficacy and Significance of Fundamental Social Rights: Lessons from the European Experience*, in Bob Hepple, (ed.).*Social and Labor Rights in a Global Context: International and Comparative Perspectives*, *supra* note 7, at 191.

45 For more see Hartley, *supra* note 1, at 139-149.

46 See Art. III-365 (4)

47 For more on the position of the European Court of Justice under the Constitution for Europe see e.g. Damian Chalmers, *Judicial Authority and the Constitutional Treaty*, (2005) 3 International Journal of Constitutional Law, at 448.

Conclusion

The best one can say about the socio-economic rights included in the Constitution is that they appear more like a wish list rather than firm guarantees against the vagaries of the free market. This is mainly due to the fact that socio-economic issues do not fall into exclusive competence of the Union.

Despite a variety of socio-economics rights offered in the Constitution, ranking from the most basic, such as the right to health, education, the various workers rights and classical rights to social security and assistance, to the most eccentric, including the right of access to placement services, there are some notable omissions in the Constitution, including the right to fair remuneration. But the chief business of the drafters was not negotiations over the rights provisions: the drafters simply included in the Constitution the text of the Union's Charter of Fundamental Rights, which had been approved by a previous Convention.

The trouble with socio-economic rights provided by the Constitution for Europe is not limited to standard criticisms. Apart from the fact that (a) social and economic rights are controversial in general and (b) that the rights-conferring provisions in any constitution are usually drafted in a vague and undefined manner, the main reason why it is hard to define their content, and the benefit they are supposed to provide for, is related to a division of competences between the EU and the Member States. Such a division of competence leaves socio-economic rights mostly to be determined at national level and only rarely will the individual's well-being and security in all important areas, including work, education, health and housing depend on the Union's action.

Yet even if not determined as classical rights, socio-economic rights provided by the Constitution may serve as guidance to the Member States in creating their own social policy. The fact that the Constitution is supposed to have a binding force further underscores their potential. In addition, if ever faced with a task of deciding on the violation, the role of the European Court of Justice would be to give a full meaning of the Union's understanding of an individual's well-being, which in turn might influence a more just reallocation of security in Europe than currently envisaged. But whether one should assign such a task to a non-elected body is already the subject of a different discussion.

GRAND PROMISES IN THE FACE OF HIGH EXPECTATIONS: WELFARE RIGHTS IN HUNGARIAN CONSTITUTIONAL JURISPRUDENCE

Renata Uitz

The Hungarian Constitution proclaims social welfare rights (socio-economic rights) in sweeping terms. It boldly affirms the 'right to the highest possible level of physical and mental health' [Article 70/D(1)].[1] In its subsequent article the Constitution announces a 'right to social security' [Article 70/E(1)], entailing 'support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own.' [Article 70/E (1)]. These constitutional provisions are the most famous among many others on education [Articles 67, 70/F and 70/J], family and child protection [Articles 14 and 67], and workers' rights [Articles 4, 70/B and 70/C(2)]. Although some of these provisions appear to be mere declarations, many are phrased in the language of enforceable social welfare rights. The present study is devoted to analysing how this generous language served petitioners in welfare rights cases before the Hungarian Constitutional Court.

Knowing that the Hungarian Constitutional Court has been described as an activist body on more than one occasion, and bearing in mind that the Hungarian Constitution does not attach conditions to these provisions reminding interpreters of scarce resources,[2] some might expect to see the above provisions turn into the mightiest means of welfare rights protection. Instead, one finds a Constitutional Court struggling with the Constitution's promises concerning the welfare sector and refraining from turning these welfare-related constitutional provisions into real guarantees of socio-economic rights. Where the Constitutional Court appears to be

1 An English translation of the Constitution of the Republic of Hungary is available at http://www.mkab.hu/content/en/encont5.htm Unless noted otherwise, all translations from the Hungarian are mine. All websites referred to in this text were last visited on March 19, 2006.

2 Such reservations are routinely appended to the social welfare rights provisions in the South African Constitution.

on the trail of activism,[3] protecting petitioners from the diminution of welfare assistance imposed upon them by the government, constitutional justices appear to call other constitutional rights (e.g. property and human dignity) to the petitioners' aid.

Based upon the lessons of the Hungarian experience the chapter will not enter the rich and complex theoretical debate on the wisdom or utility of constitutionalising enforceable welfare rights. Instead, placing the Hungarian jurisprudence in a broader context, the chapter argues that the enforceability of welfare rights depends not so much on the language of a constitution's welfare rights provisions, but on the willingness of courts to accept welfare-related petitions as judicially enforceable claims. Once such a decision is taken, a court might give effect to such claims via invoking welfare rights, other rights or rationales. Promoters of enforceable welfare rights provisions might find such a finding discomforting, as it corresponds to the deepest fears about the broad discretion of courts in entrenching welfare rights. Human rights defenders might find some comfort in this discovery as it seemingly leaves several avenues of rights protection open before claimants of welfare benefits and services. At the same time, at least some of the cases might trigger worries among those dread government interference in or limitations to individual autonomy in the name of protecting the welfare of the polity at large.

On the Broader Context of Welfare Rights Protection in Hungary

Before engaging in an analysis of constitutional jurisprudence, a few cautionary remarks are required to orient the reader in the otherwise chaotic milieu of welfare rights protection under the Hungarian Constitution. This section opens with a reminder on the historical context in which welfare rights provisions found their way into the Hungarian Constitution. This is followed by a brief note on terminology and a short, technical account on the distribution of judicial competences in cases involving the enforcement of welfare rights.

3 Like in its decisions on the 'Bokros' austerity package, analyzed in detail in András Sajó, *How the Rule of Law Killed Welfare Reform*, 5(1) EECR (1996/97) at 44-49; András Sajó, *Social Welfare Schemes and Constitutional Adjudication in Hungary*, in J. Priban – J. Young (eds.), *The Rule of Law in Central Europe* (Ashgate: Dartmouth Publ., 1999) at 160-178. Cf. Kim Lane Scheppele, *Democracy by Judiciary, Or Why Courts can Sometimes be More Democratic than Parliaments*, available at http//law.wustl.edu/igls/Conferences/2001-2002/Constitutionalpapers/Scheppele%20Paper.pdf

Welfare Rights Finding Their Way into the Hungarian Constitution: Promises and Expectations

The Constitution's generous welfare rights language is best explained in the light of the context of its making, keeping in mind the promises and expectations lingering on in 1989. As András Sajó explains, such pompous provisions on welfare rights in post-communist constitutions reflect the image of the citizen as a recipient of state-supplied goods and services, an image and self-perception which – unfortunately for many – did not vanish with the arrival of constitutional rights in the constitutional overhaul of 1989.[4] In Wojciech Sadurski's accurate assessment:

> Omitting socio-economic rights from the new constitutions would have sent a signal to the 'ordinary people' in those societies, that the political elites which emerged after the fall of communism were insensitive to the plight of the common people who had been so drastically affected by the dire economic situation in these countries. Socio-economic rights have been a visible and highly symbolic, expression of numerous claims, demands and pressures upon social-policy making in a novel, and for many, highly dramatic situation, where social policy was used to compensate for the immediate social consequences of economic transformation.[5]

Thus, in addition to political rights and freedoms, in a new democracy a constitution protecting rights was expected to deliver welfare assistance and a variety of services. These constitutional norms commenced their operation on top of, or, better, within the confines of a welfare system inherited from the Communist era. Cass Sunstein's warnings about the inadequacies of constitutionalised welfare rights amongst the scarce resources of post-communist Hungary sound way too familiar and sadly appropriate.[6]

On the Veil of Terminology: When being on Welfare is not About the Poor

The term "social welfare rights" is a hazy one, with numerous approximations to its scope, yet without a settled definition. In academic settings, the term usually cov-

4 On the circumstances of social welfare rights finding their way to post-communist constitutions, see András Sajó, *Welfare Rights in the Post-Communist Constitutional Experience*, in Michaela Serban Rosen (ed.), *Constitutionalism in Transtition, Africa and Eastern Europe* (Warsaw: The Helsinki Foundation for Human Rights, 2003) at 42-50.

5 Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Post Communists States of Central and Eastern Europe* (Dordrecht: Springer, 2005) at 171.

6 Cass Sunstein, *Against Positive Rights*, in András Sajó (ed.) *Western Rights? Post-Communist Application* (The Hague: Kluwer, 1996) at 225-232.

ers anything from workers' rights to social assistance, from unemployment benefit to heath care services, including also education, old-age pensions and widowers' assistance. The present chapter does not intend to set the limits on the scope of the magic concept of welfare rights any tighter. Still, for the purposes of the present discussion, it is important to remind the reader that the discourse on social welfare rights is all too often not about poverty, nor about the rights of the feeble and the needy.[7]

In modern welfare states, receiving social welfare benefits (payments or services) regularly does not translate as 'being on welfare' for the majority of the beneficiaries. Hungary (and for that matter, any other post-Communist democracy in Central Europe) is no exception to this phenomenon. As was established in a 1997 report for the World Bank on social transfers in Hungary "[l]ooking at the social safety net in its entirety, 91% of Hungarian households receive one or more transfers... The social safety net in Hungary represents 54% of the expenditure of an average household, and provides 38% of its income. This is a very high figure, even for a post-socialist economy …"[8] Thus, when old-age pension and health care benefits, family and child support schemes, education and workers' rights are at issue, the mainstream discourse presents welfare assistance, and welfare rights yielding these payments and services, as a generous set of governmental grants benefiting the middle classes.

Meanwhile, unemployment, one of the most pressing welfare problems of the old member states of the European Union, is still not a leading item in the welfare rights discourse in post-Communist Central Europe, despite the fact that transition to democracy and market economy brought unemployment throughout the region.[9] The overwhelming social welfare problem of political and economic transition is the overhaul and slimming of welfare structures and institutions supplying the above mentioned services. To be sure, once post-communist countries (with Hungary among them) decide to reform their health care or pensions systems, many recipients will be affected by the changes and among them those close or under the

7 Note that in the English language literature analysis on post-Communist welfare payments authors emphasize the large-scale redistributive impact of these payments and not their effect, if any, on alleviating poverty.

8 Christiaan Grootaert, *Poverty and Social Transfers in Hungary*, 1997, available at http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1700series/wps1770/wps1770.pdf Note that the dataset used for this paper predates the Bokros austerity package of 1995.

9 According to the Labor Force Survey, 2005 conducted by the Hungarian Central Statistical Office, in 2005 Hungary had an average 410.000 registered unemployed persons. (Under the ILO definition 303.000 qualified as unemployed during the respective period.) Compared to data from 2004, the rate of unemployment grew from 6.1 % (of 2004) to 7.2 % in 2005. The age group of 15-24 has a markedly high rate of unemployment at 19.4 %. Note that the latter figure includes persons graduating from institutions of higher education. Data available (in Hungarian) at http://portal.ksh.hu/pls/ksh/docs/hun/xftp/idoszaki/munkerohelyz/munkerohelyz05.pdf

poverty line will unquestionably suffer the most and for the longest. The reform of social welfare systems or their smaller subsystems, however, is not to be taken for, nor is it intended as a government-led, systemic reform to wipe out poverty.[10]

Ironically, this particular aspect of terminology preserves and replicates the Communist *status quo* whereby poverty was supposed to be a non-issue.[11] Such a deep-seated feature of terminology is worth pointing out to expose the paradoxes of the wordgame of human rights advocacy, especially when talking about contexts where the transformation of welfare systems is halted in the name of protecting acquired rights or interests. When cut-backs introduced by a welfare reform are assessed, it is useful to pause for a second and remember that the recipients of allegedly 'acquired' welfare benefits are more likely to belong to the mainstream of the polity whose interests are represented by elected office-holders in democratic institutions, and not to the few who were marginalized and *de facto* disenfranchised by poverty.

Welfare Claims before Courts: On Sources of Law and Distribution of Competences in the Welfare Context

When compared with civil and political rights, in the field of welfare rights international and regional instruments and mechanisms of rights protection seem less demanding and make a lighter impact on national regulation. This observation is

10 For an English language income-based analysis of poverty in Hungary, using data from 2003 (i.e. pre-EU accession) see András Gábos and Péter Szivós, *Poverty in Hungary on the Eve of Entry to the EU*, in Tamás Kolosi, György Vukovich and István György Tóth (eds.), *Social Report 2004* (Budapest: TÁRKI, 2004) at 93–116. For an income-based analysis of poverty by the Hungarian Central Statistical Office in Hungarian see *A jövedelem mint az anyagi jólét és a szegénység mérőszáma* (Income as a quantitative indicator of material wellbeing and poverty), KSH Társadalomstatisztikai füzetek no. 43 (Budapest: KSH, 2005), available at http://portal.ksh.hu/pls/ksh/docs/hun/xftp/idoszaki/pdf/jovedelem.pdf See also Júlia Szalai, *Poverty and Social Policy in Hungary in the 1990s*, in Éva Fodor and János Ladányi (eds.): *Szelényi 60, A Festrschrift in Honor of Iván Szelényi*, available at http://hi.rutgers.edu/szelenyi60/szalaij.html

On trends in the post-communist hemisphere see also the World Bank's poverty report on the region: Alam Asad, Mamta Murthi and Ruslan Yemtsov, *Growth, Poverty, and Inequality: Eastern Europe and the former Soviet Union*, World Bank 2005, available at http://siteresources.worldbank.org/INTECA/Resources/complete-eca-poverty.pdf

Note that in Hungary children and the Roma minority are more heavily burdened with poverty than the rest of the population. A recent report for the UNDP offers insight into how large a segment of the Hungarian population living in poverty are among the Roma minority (in English). See *Faces of Poverty, Faces of Hope*, *Vulnerability Profiles for Decade of Roma Inclusion Countries* (Bratislava: UNDP: 2005), 35/42, available at http://vulnerability.undp.sk/DOCUMENTS/hungary.pdf Due to its limitations of the chapter does not reflect on the situation of children and the Roma in detail.

11 On this point and research on poverty during the Communist era see Jeffrey Henderson, David Hulme, Richard Phillips and László Andor, *Economic Governance and Poverty in Hungary*, December 2001, available at http://www.gapresearch.org/governance/Hungary%20Econ%20Gov%20%20Poverty%20Dec%202001.pdf, at 5 et seq

in line with Philip Alston's remark that regarding social welfare rights the principal level of engagement is the national level, while international instruments and monitoring mechanisms established therein are to serve as catalysts for domestic developments.[12] This marginal, remote practical impact of international and regional instruments remains true for post-Communist countries that transported the words of such international instruments into their very constitutions in the course of the transition to democracy.[13]

The Hungarian Constitution is rather generous in its treatment of social welfare rights: it has numerous constitutional provisions on a wide range of welfare rights, and the language of these constitutional articles is devoid of internal limitations or references to the confines of available resources. Despite the wealth of potentially relevant constitutional provisions, as in most developed modern welfare states, in Hungary the bulk of legal regulation concerning social welfare rights, legal rules with specific language concerning the availability of entitlements, rights and procedures are contained not in the Constitution, but in acts of parliament and lower level legal norms – many of the latter enacted at city-level – regulating specific issues in the social welfare sector.[14] All that legal adjustments surrounding a welfare reform entail is the creation of a new or the amendment of an existing statutory framework within the language of the constitutional provisions surveyed above. Furthermore, while the Constitutional Court has made numerous decisions on social welfare rights affecting the rights and life of members of the Hungarian polity, the Hungarian Constitutional Court is not an ordinary court of law (or of appeal), and it is not entrusted with enforcing statutory welfare rights.[15] Therefore, before entering into a detailed discussion of the Constitutional Court's welfare rights jurisprudence in Hungary, it is useful to situate these constitutional decisions in their broader context.[16] This detour aims to shed light on the impact of constitutionalized

12 Philip Alston, *Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System*, in Gráinne de Búrca and Bruno de Witte (eds.), *Social Rights in Europe* (Oxford: Oxford University Press, 2005) 45-67, at 60. The present chapter will not analyze international and regional enforcement and monitoring mechanisms in detail.

13 Note that the revised European Social Charter is not particularly popular among Central Europe's post-Communist democracies. Most of these states have not submitted themselves to the ESC's collective complaints procedure either. See http://www.coe.int/t/e/human%5Frights/esc/1%5FGeneral%5FPresentation/Overview.pdf

14 The confines of the present chapter do not allow for an overview of these legal rules. Note also, as the following analysis reveals that transition to democracy brought with it numerous reforms of the pension or the health care sector, further increasing the number of potentially relevant legal norms.

15 The issue of distribution of competences is closely connected with the enforceability (justiciability) of welfare rights. On justiciability, see Cécile Fabre, *Social Rights in European Constitutions*, in Gráinne de Búrca and Bruno de Witte (eds.), *Social Rights in Europe*, *supra note* 12, at 15-28, 21-23.

16 This chapter focuses on the jurisprudence of the Hungarian Constitutional Court and does not cover the jurisprudence of ordinary courts.

welfare rights on the distribution of welfare benefits, thus contributing to the always vivid exchange on enforceable welfare rights and on enforcement strategies.

In Hungary, ordinary courts, under the direction of the Supreme Court, are crucial instruments for protecting social welfare rights in statutory cases. Ordinary courts are to provide recourse against illegal administrative action, an avenue which has great significance in the sphere of welfare rights, where statutory rights are so numerous. In terms of sheer numbers, such cases on social welfare rights decided by ordinary courts on a daily basis far outnumber decisions of the Constitutional Court concerning social welfare rights. Cases in which statutory welfare rights are claimed, challenged or enforced pertain to administrative procedure and ordinary courts operating are under the supervisions of the Supreme Court. It is important to emphasize, however, that the Constitution's provisions on social welfare rights and the Constitutional Court's welfare rights jurisprudence play little role in ordinary courts', or – for that matter – in the Hungarian Supreme Court's jurisprudence. Although the Hungarian Constitution provides that 'claims arising from infringement on fundamental rights and objections to the decisions of public authorities regarding the fulfilment of duties may be brought before a court of law' [Article 70/K] and it does exempt welfare rights from among fundamental rights, in practice this provision of the Hungarian Constitution making constitutional rights enforceable in court has scarcely ever been applied.[17]

Furthermore, where the Constitutional Court's decisions on welfare rights make an impact is not in individual cases brought by welfare recipients, but in instances where a systemic challenge is brought in abstract terms, resulting in the unconstitutionality of the challenged legal norm. The Hungarian Constitutional Court is entrusted with a broad jurisdiction over a wide variety of cases, including abstract constitutional interpretation, abstract *a posteriori* review of legal norms, preliminary review of legislation and abstract constitutional interpretation. Abstract *a posteriori* review of the constitutionality of legal norms might be initiated by anyone (*actio popularis*).[18] In addition, grievances affecting private individuals in a particular case may be brought before the Constitutional Court by the trial court before which the matter is pending in the form of judicial referrals[19] and by individual constitutional

17 Art. 70/K of the Hungarian Constitution empowers ordinary courts to entertain claims concerning the violation of constitutional rights, while constitutional review of legal norms remains the exclusive jurisdiction of the Constitutional Court. On the significance of this distinction, see Gábor Halmai, *The Third Party Effect in Hungarian Constitutional Adjudication*, in András Sajó and Renáta Uitz (eds.), *The Constitution in Private Relations, Expanding Constitutionalism* (The Hague: Eleven Publishing, 2005) at 99-114, 105 et seq.

18 Art. 1(b) and 21(2) of Act no. 32 of 1989 on the Constitutional Court. The Act on the Constitutional Court is available in English at http://www.mkab.hu/content/en/encont5b.htm

19 Art. 38 of Act no. 32 of 1989 on the Constitutional Court.

complaint.[20] In such cases the Constitutional Court may prescribe individualised remedies which shall apply in a particular case.[21]

Due to the shortcomings of the Hungarian legal regulation of individual constitutional complaint, and the Hungarian Constitutional Court's lack of enthusiasm about individuals claims (whether for judicial referral or via constitutional complaint), – with the exception of a few very special instances where judicial referrals bring unmatched success[22] – abstract review upon *actio popularis* has become the main form of constitutional review in Hungary.[23] As far as the impact and efficiency of bringing individual complaints about welfare rights via *actio popularis* is concerned, the influence of the Constitutional Court's jurisprudence on individual cases decided by ordinary courts is most often marginal. Ordinary courts do not defy the Constitutional Court once it declares a legal norm unconstitutional. Problems might arise, however, in cases where the Constitutional Court sustains legal norms, keeping them in force on condition that in the course of its application certain criteria are met.[24] In such cases the availability of efficient judicial protection ensuring enforcement of such criteria defined by the Constitutional Court – which makes the act constitutional in the reading of the Constitutional Court – comes into question in such individual cases where a legal norm is to be applied. Thus, as its most important practical limitation, *actio popularis* resulting in abstract review is unlikely to yield remedies responding to the needs and circumstances of particular individuals in unique cases.

20 Art. 1(d) and 48 of Act no. 32 of 1989 on the Constitutional Court. Unlike in Germany (Cf. Art. 93 (1)(4a) of the German Basic Law), at present in Hungary individual constitutional complaints may be filed only against the application of an unconstitutional norm by a court of law. The constitutionality of particular judicial interpretations of legal norms which are otherwise in conformity with the Constitution cannot be challenged before the Constitutional Court: constitutional justices do not supervise the jurisprudence of the ordinary judiciary. Although most recently the Constitutional Court found unconstitutional a resolution for the uniform application of the law issued by the Supreme Court, this decision still does not make judicial interpretations of otherwise constitutional (or convention conform) legal norms handed down in individual cases actionable in the Constitutional Court. 42/2005 (XI. 14.) AB decision.

21 Art. 43 (3) and (4) of Act no. 32 of 1989 on the Constitutional Court

22 Note that upon judicial referral the Hungarian Constitutional Court is willing to review the constitutionality of legal norms which are not in force any more. In a legal environment where amendments to rules allowing access to or denying welfare benefits (e.g. in relation to retirement or pension) are frequent, ordinary courts often get to see individual cases where the legal norms applicable in a particular case are not in force anymore. E.g. 56/2001 (XI. 29.) AB; 16/2002 (III. 29.) AB; 64/2002 (XII. 3.) AB decisions.

23 For a more detailed analysis on this see Renáta Uitz, *Individual Claims in the Jurisprudence of the Hungarian Constitutional Court*, in Gábor Halmai (ed.), *The Constitution Found?, The First Nine Years of the Hungarian Constitutional Review on Fundamental Rights* (Budapest: Indok, 2000) at 186-211.

24 The German federal Constitutional Court also established similar criteria known as *verfassungkonforme Auslegung*. The same technique is seen in the jurisprudence of the French Constitutional Council when it allows legislation to pass, provided that certain conditions are met during its application ['*sous réserve*'].

Actio popularis is better suited for challenges against system-wide violations of welfare rights in decisions where the inquiry does not always allow (and definitely does not mandate) the justices to look into the particulars of welfare recipients' circumstances. In cases reaching it upon *actio popularis* the Constitutional Court might reach rich conclusions concerning the scope and grip of various constitutionalised welfare rights. As the forthcoming analysis will reveal, very often constitutional justices decide about the (re)allocation of welfare benefits with reference to rights other than welfare rights, or with reference to such systemic ('institutional') considerations as would be difficult to discern from the language of constitutional provisions. More often than not, constitutional jurisprudence in the form of such general, abstract language appears somewhat detached from the issues and arguments put forth before and by ordinary courts in cases concerning access to welfare benefits. This latter comment might prompt one to display some understanding for the reluctance of ordinary courts to refer to constitutional jurisprudence. At the same time, however, this comment can be a source of considerable discomfort to proponents of enforceable welfare rights.

What is Enforceable in Constitutional Cases Prompted by Claims for Welfare Benefits?

The following overview of Hungarian constitutional jurisprudence on social welfare rights does not aspire to provide a systematic introduction to the protection of social welfare rights under the Hungarian Constitution. Instead, a close reading of social welfare rights jurisprudence is offered, exploring the main themes of constitutional argument in these cases.[25] The section shows how the Hungarian Constitutional Court's welfare rights jurisprudence is inhabited by numerous competing rationales, which span from paying considerable deference to the legislator to filling the Constitution's welfare rights provisions with enforceable rights claims, and to sustaining claims for welfare benefits by calling other constitutional rights in aid.

Minimum Sustenance or Enforceable Constitutional Rights?

In the early years, justices of the newly established Hungarian Constitutional Court were not in agreement on the proper construction of one of the most sweeping welfare rights provisions of the Constitution, the right to social security [Article

25 The analysis does not cover such cases which although affected the availability of social welfare services, were decided on procedural or separation of powers grounds, and without a substantial discussion of social welfare rights.

70/E].[26] This division of the Constitutional Court in its first years is relevant, as it opened such rifts in reasoning which came to affect constitutional jurisprudence on social welfare rights in the years to come.[27]

Some justices were convinced that the Constitution provided for no more than minimum sustenance. This view also entailed that the Court should display deference towards the legislature's policy choices in the field of welfare rights, especially at a time when the social security sector was to be transformed within the practical confines of limited resources. Under this view, the rule of law and legal certainty attach low expectations to changes in the welfare system, if those changes be to the detriment of welfare recipients. In this construction, the right to social security does not guarantee a secured minimum income, nor does it prevent a decline in the standard of living.[28]

This stance was explored fully in an early case where then-Chief Justice László Sólyom explained in a concurring opinion why various constitutional provisions, among them Article 70/E on the right to social security and Article 2(1) on the rule of law, are irrelevant for assessing the constitutionality of the government's plan to raise the interest rates of government-subsidised mortgages in the housing sector. The Chief Justice said that the right to social security – like the social welfare right contained in the Constitution – is not an individual right, but expresses a governmental obligation. As an illustration, he referred to Article 17 of the Constitution, pronouncing that the state shall 'provide support for those in need through a wide range of social measures'.[29] Thus, the Constitutional Court cannot review the constitutionality of legal measures affecting social security, for lack of judicially manageable standards.[30] Furthermore, he pointed out that although the governmental measure at issue might affect many citizens and impose on them considerable financial burdens (in the form of raising interest rates), the Constitution's declaration on Hungary being a rule of law state [Article 2(1)] is irrelevant to this problem. As the Constitution does not declare Hungary to be a *social* rule of law state, Hungary is

26 Decisions 772/B/1990; 31/1990 (XII. 18.) AB; 24/1991 (V. 18.) AB; 26/1993 (IV. 28.) AB. See then-Chief Justice László Sólyom reflecting in detail on the Constitutional Court's division in László Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* [The Beginnings of Constitutional Review in Hungary] (Budapest: Osiris, 2001) at 658 *et seq.*

27 Such a rift on the bench was not characteristic about the Hungarian Constitutional Court in other matters. It has been pointed out by numerous commentators. See e.g. András Holló and Zsolt Balogh, *Az értelmezett alkotmány* (The Interpreted Constitution) (Budapest: Közlöny- és Lapkiadó, 1994) at 191; Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon*, *supra* note 26, at 658 and more recently Zsolt Balogh, *Paradigmaváltás lehetőségei a szociális jogok védelme terén* (Opportunities of a Paradigm-Shift in the Protection of Social Welfare Rights), Jogtudományi Közlöny (September 2005) at 363-371.

28 772/B/1990 AB decision. ABH 1991. 519, 520.

29 See the concurring opinion of Chief Justice Sólyom in 31/1990 (XII. 18.) AB decision. ABH 1991. 136, 141.

30 31/1990 (XII. 18.) AB decision, per concurring Chief Justice Sólyom. ABH 1991. 136, 142.

meant to be a rule of law state in a 'formal' sense.[31] This moderate, if not minimalist, stance has been traceable in numerous Constitutional Court decisions ever since.

In the early days, however, other justices in dissent were convinced that the right to social security is a positive right and has to be construed in the same fashion as political rights.[32] In their views the Constitution imposes clear obligations on the government to provide certain services and the Constitutional Court is the proper agent to remind political decision-makers thereon. When carrying this understanding to effect, the justices argued that the previous regime prevented the retirees (pensioners) of today from accumulating savings which could have become a basis for their financial security during retirement. As a substitute, people were made to rely on the Communist welfare system to secure their well-being. It follows, therefore, that these people have an acquired right to social security which cannot be withdrawn even by a rule of law state. Here the dissent likens these acquired rights to the right to property.[33]

Acquired Rights and Property Protection Enter Welfare Jurisprudence as the Safeguards of Individual Autonomy

These intellectual barricades of constitutional reasoning were abandoned suddenly (but, as turns out, only temporarily) when in 1995 the central measures of the first comprehensive post-Communist austerity package were challenged before the Constitutional Court. Also called the 'Bokros package', after Minister of Finance Lajos Bokros introducing it, the austerity or stabilizing package seriously cut back on social welfare benefits under the aegis of a large scale public finance reform, withdrawing welfare benefits which were previously conceived by the political forces as untouchable.[34] Among other measures, the austerity package entailed layoffs in higher education and the introduction of a monthly tuition fee, requiring contributions to various health care services, restrictions on maternity and child support, limiting sick leave payments of employees, and required higher contributions from employers.

31 The concurring opinion refers to Germany, France and Spain as social rule of law states. ABH 1991. 136, 141.

32 See especially justices Kilényi, Szabó, Vörös and Zlinszky dissenting in decisions 24/1991 (V. 18.) AB (joint dissent) and 26/1993 (IV. 28.) AB (separate dissenting opinions). In 24/1991 (V. 18.) AB decision the majority dismissed claims concerning welfare benefits and pensions, as the Constitutional Court did not wish to interfere with the ongoing, system-wide reform of the welfare sector.

33 E.g. in 24/1991 (V. 18.) AB decision, dissent at ABH 1991. 311, 316.

34 For a description of legal and economic developments see J.J. Dethier and T. Shapiro, *Constitutional Rights and the Reform of Social Entitlements*, in L. Bokros and J.J. Dethier (eds.), *Public Finance Reform during the Transition, The Experience of Hungary* (Washington D.C.: The World Bank, 1998) at 323-345; also available at <www1.worldbank.org/wbiep/decentralization/library1/Dethier.pdf> 330 et seq.

To the surprise of many, in its lead decision on the Bokros package[35] the Constitutional Court departed from the lines of argument expected in the light of previous jurisprudence, and without resolving the controversy about the proper interpretation of the right to social security, the Court held that individual contributions to welfare schemes (such as buying an insurance policy) give rise to acquired rights. According to the Constitutional Court, such acquired rights shall then be protected along the lines of property protection. The Constitutional Court said that such an inclusion of social welfare (social security) benefits in the right to property is in line with the Court's understanding of property as a safeguard for individual autonomy. According to the core of the Constitutional Court's argument, to the extent that a welfare scheme is not based on prior contributions (i.e. where property protection does not apply), but is supplied as pure welfare aid upon considerations of solidarity, the rule of law and legal certainty protect welfare recipients from unexpected diminution of entitlements.[36] This reasoning, relying on the language and constitutional standards of property protection (acquired rights) and the requirements of legal certainty and the rule of law, was used by the Constitutional Court to invalidate the central provisions of the government's austerity package seeking to revoke welfare benefits.

Note that the concept of acquired rights used by the Constitutional Court in 1995 differs substantially from the understanding of acquired rights exposed by those justices who advocated a rich reading of the right to social security in the early cases. True, when explaining their conception of acquired rights those justices drew a – maybe an unfortunate – parallel between property rights and acquired rights to social security, but did not equate the two. When acknowledging welfare benefits as acquired rights, the new democracy was supposed to admit that real acquired rights (i.e. contributions to a savings-based insurance plan securing pensions) were out of the question due to the Communist government's policies. In the 1991 decision the dissenters make it clear that, in their understanding, these acquired rights open access to the proceeds or returns of state property, and do not seek to root it in petitioners' private property. In contrast, in the 1995 decision the majority used the concept of acquired rights to protect petitioners' contributions to the governmental pension plan in the fashion of the protection of private property. What is closest to the conception of acquired rights as it was first introduced in 1991 by the dissenting

35 Concerning the measures contained in the austerity package the Constitutional Court passed a series of decisions in the second half of 1995. For a detailed analysis see Sajó, *How the Rule of Law Killed Welfare Reform*, *supra* note 3; Sajó, *Social Welfare Schemes and Constitutional Adjudication in Hungary*, *supra* note 3; also Pál Sonnevend, *Szociális jogok, bizalomvédelem, tulajdonvédelem*, in: Halmai, *The Constitution Found*, *supra* note 28, at 354-379.

36 43/1995 (VI. 30.) AB decision. ABH 1995. 188, 192-193.

justices is the treatment of solidarity-based payments in the 1995 decision.[37]

In the lead decision on the Bokros package, the Constitutional Court said that in cases where there is no individual contribution to a scheme, safeguards stem not from property protection, but from the requirements of legal certainty.[38] It is not entirely clear from the Constitutional Court's decisions whether property protection is triggered by the individual's prior contributions to the scheme, or by the fact that welfare benefits fulfil the same function in peoples' personal finances that normally (i.e. in a non-post-Communist reality) would be met by savings. Inserting some explanation on this point could have clarified the justices' stances towards the positions undertaken by the dissenting justices in the early cases on how the Constitutional Court was to take into account, if at all, the basic operational philosophies of underlying the Communist welfare state.

Related to this, the scope of property protection relevant in the field of welfare rights remained uncertain. These loose ends were then picked casually in subsequent cases, contributing to a rather colourful jurisprudence. In 1997 the Constitutional Court said that contributions to the health insurance scheme amount to a deprivation of property, although the justices went on to say that until such contributions are in connection with an insurance principle, the Court would not find such contributions unconstitutional.[39] In a more recent case in which petitioners challenged the alteration of the indexing of old-age pensions to their detriment, the Constitutional Court said the new, and clearly disadvantageous indexing of pensions did not amount to a deprivation of property.[40] The Court invoked the rationale of acquired rights in 2000, when the justices found unconstitutional a legal regulation which did not include unemployment benefits among income relevant for setting the amount of pensions.[41]

Since the late 1990's, the rhetoric of acquired rights and property protection has not been followed by the Constitutional Court in social welfare jurisprudence.[42] In subsequent judgments, traces of arguments from the pre-Bokros package era seem to surface with noticeable frequency. This conclusion also supports the view that Hungarian constitutional jurisprudence on welfare rights became inhabited by

37 László Sólyom, Az alkotmánybíráskodás kezdetei *Magyarországon*, *supra* note 26, at 669 is affirming this distinction.

38 43/1995 (VI. 30.) AB decision. ABH 1995. 188, 196.

39 36/1997 (VI. 11.) AB decision, quoting 64/1993 (XII. 22.) AB decision on the concept of deprivation of property in the affirmative.

40 39/1999 (XII. 21.) AB decision.

41 16/2002 (III. 29) AB decision. The line of cases mentioned in the affirmative to this point included 43/1995 (VI. 30.) AB decision (the lead decision about the Bokros package) and 39/1999 (XII. 21.) AB decision (on indexing pensions).

42 László Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon*, *supra* note 26, at 675 et seq. Also Balogh, *Paradigmaváltás lehetőségei a szociális jogok védelme terén*, *supra* note 27, at 366 and 370.

competing strategies of reasoning: one approach, based on a strong individual rights language using the toolkit of property protection, and another approach relying on a weak and deferential stance, which leaves the institutional arrangements in the welfare sector largely at discretion of the political branches.

Human dignity and Social Welfare Rights

In more recent years another line of reasoning seemed to have been emerging in Hungarian welfare rights jurisprudence. This new line attempted to invoke the protection of human dignity [Article 54(1)], bringing the Constitutional Court one step closer to a minimum sustenance rationale.[43] At the outset this approach might even have looked promising, as in its earliest decisions the Court understood human dignity as a mother right, construing it as a right to self-determination (autonomy).[44] According to the Court this subsidiary right to personal autonomy might be invoked in cases where a particular right worthy of constitutional protection is not mentioned expressly in the Constitution. In such cases the right to dignity and subsidiary rights derived therefrom are subject to a limitation analysis under a necessity-proportionality test such as any other fundamental right. Note also, that one of the premises upon which the Constitutional Court admitted to providing protection to certain welfare benefits with reference to property was the understanding that property protection also safeguards personal autonomy.

Using a line of reasoning not previously deployed in welfare rights cases, in 1998 the Constitutional Court declared that the Hungarian Constitution protects a minimum livelihood.[45] Referring to its prior decision[46] the Court repeated that the

> State is deemed to have met its obligation specified in Article 70/E by organising and operating a system of social institutions including welfare benefits. Within this, the legislature can itself determine the means whereby it wishes to achieve its social policy objectives. The obligations of the State in respect of the social security of its citizens are defined in a general manner by the provisions of Article 70/E(1) of the Constitution.
> . . .

43 32/1998 (VI. 25.) AB decision on minimum livelihood; 42/2000 (XI. 8.) AB decision on the right to shelter; 70/2002 (XII. 17.) AB decision on the rights of squatters.

44 8/1990 (IV. 23.) AB decision.

45 32/1998 (VI. 25.) AB decision on minimum livelihood. The English translation of the decision is available with the website of the Constitutional Court via http://mkab.hu/en/enpage3.htm

46 Reference was made to 32/1991 (VI. 6.) AB decision.

> [In a subsequent decision][47] the Constitutional Court established as a general constitutional requirement that the right to social security contained in Article 70/E of the Constitution entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation of the right to human dignity. The legislature has relatively great liberty in implementing such constitutionally-mandated state goals and it may define the minimum amounts of certain benefits by reference to the percentage of other types of income (prevailing minimum amount of old age pension, minimum wage etc.).[48]

Two aspects of this reasoning are worth pointing out. First, the Constitutional Court seems to make a clear move to identify what could be understood as a minimum core of the right to social security, with reference to the constitutional protection of human dignity. This is the first case in Hungarian constitutional jurisprudence where a reference to human dignity is being used successfully to this effect. Moreover, the Court appears to resurrect a trail of reasoning essentially abandoned in major cases following the lead decision on the Bokros package. It does not take an unduly vivid imagination to see the minimum livelihood decision as a key opening the gate of a jurisprudence on the minimum core of the right to social security.

In two years, however, when the Constitutional Court responded to the ombudsmen's request for abstract constitutional interpretation, seeking to establish a constitutionally protected right to shelter, constitutional justices launched a markedly modest reading on the demands of human dignity in the context of social security.[49] The Constitutional Court said that

> [i]n order to protect the right to human life and dignity specified as the constitutional requirement of the minimum livelihood according to Article 70/E(1) of the Constitution, the State shall secure the preconditions for human life. Accordingly, in case of homelessness, the State obligation to provide support shall include the provision of a shelter when an emergency situation directly threatens human life. The State obligation to provide shelter does not corre-

47 In this paragraph the Constitutional Court refers to 43/1995 (VI. 30.) AB decision. The words following the reference to the case however are not contained in this particular decision, nor did the Constitutional Court establish such a sweeping constitutional requirement in the case.

48 Note that in the case the Constitutional Court suspended its proceedings concerning the constitutionality of the challenged act, 'in order to allow – by taking into account the study results expected from the organisations that had participated in the preparations of the legislation – a decision to be made on whether in the present system of welfare benefits, the minimum amount of regular social aid becoming due under the Welfare Act to a person of active age who is not employed can – together with other benefits – secure the minimum livelihood necessary for the realisation of the right to human dignity in line with the constitutional requirement specified in the holdings.'

49 42/2000 (XI. 8.) AB decision.

spond to guaranteeing the "right to have a place of residence". Thus, the State shall be responsible for securing a shelter if homelessness directly threatens human life. Therefore, only in case of such an extreme situation is the State obliged to take care of those who themselves cannot provide for the fundamental preconditions of human life.

. . .

Although no constitutional fundamental right to have concrete benefits follows from Article 70/E of the Constitution, the State shall – on the basis of its general obligation to provide support – strive for securing the widest possible range of social benefits. This is necessitated by the international obligations of the State, too.[50]

Reading these words, one might have the impression that the drive to protect human dignity usually takes constitutional courts farther in the game of rights protection.

In the light of the above words it should not come as a real surprise that in a subsequent case when deciding on the constitutionality of various legal provisions aiming to wipe out squatting, the Constitutional Court said that the "state is required to provide shelter for evicted squatters only when their life is exposed to imminent danger."[51] The decision on how to provide squatters with shelter falls in the state's discretion. The Constitutional Court continued by saying that the state enjoys great discretion in providing evicted squatters with shelter, and that the state shall not exercise its discretion to the detriment of the property rights of others. All in all, the Court found that procedures for the eviction of squatters do not violate the right to social security.[52] Still, one is left to wonder what happened to the autonomy rationale familiar from the lead decision on the Bokros package: the protection of autonomy which was associated with the need for property protection seems to have vanished once the protection of welfare rights is approached with the aim of protecting human dignity.

Around the time when the Constitutional Court accepted the right to shelter on such restricted terms and when the justices were so unwilling to protect squatters from eviction, the Court consistently reaffirmed its stance exposed in the minimum livelihood decision on the importance of construing the right to social security in

50 42/2000 (XI. 8.) AB decision. The English translation of the decision is available with the website of the Constitutional Court via http://mkab.hu/en/enpage3.htm.
51 71/2002 (XII. 17.) AB decision. ABH 2002. 417, 431.
52 71/2002 (XII. 17.) AB decision. ABH 2002. 417, 431.

light of the demands of protecting human dignity.[53] The squatters' case seems to indicate that, in Hungarian constitutional jurisprudence, a dignity-based approach to the right to social security did not bring higher standards of protection for the vulnerable and the needy than the rationale advanced by the supporters of the most deferential minimum sustenance line. One might even say that the government's obligation to provide some minimal assistance to its inhabitants in situations where their life is in danger could be justified without even entering the zone of welfare rights. The limitations of the dignity rationale were further confirmed in a subsequent case where the Court found it constitutional that the health insurance scheme does not cover treatments for infertility for male patients over 60. The constitutional justices were of the view that the right to social security secures assistance for livelihood, and procedures for human reproduction fall outside this sphere.[54]

The Constitutional Court Protecting Institutions in the Welfare Sphere

So far the chapter has covered cases where the Constitutional Court assessed the constitutionality of legal rules on access to welfare benefits and services with reference constitutional rights, some of which were welfare rights, while the others were civil rights.[55] In cases involving claims related to welfare rights, the Court does, however, take into account considerations which are not translated into rights claims. In the maze of rights arguments, references to systemic (or so-called 'institutional') considerations are scattered around the Constitutional Court's reasoning. What makes the Court's references to institutional arrangements worthy of special attention is a shift in reasoning whereby the justices appear to infuse constitutional jurisprudence with strong value preferences via invoking the right to health - a right which was almost unnoticeable in the first decade of the Constitutional Court's operation. In these decisions of a more recent vintage, slowly but surely the Constitutional Court started to color its welfare rights jurisprudence with surprisingly strong value prescriptions, while seemingly talking about necessary institutional arrangements in the welfare sector.

53 This line of cases on minimum livelihood was subsequently referred to by the Constitutional Court in the affirmative in decisions 7/2000 (III. 23.) AB; 17/2000 (V. 26.) AB and 56/2001 (XI. 29.) AB.
54 18/2001 (VI. 1.) AB decision on denying access to human reproductive treatment to male patients above 60 years of age, reaffirming decision 750/B/1990 on the availability of human reproduction services. Note that this was a case on the right to social security [Art. 70/E] and not on the right to health [Art. 70/D].
55 The analysis did not cover cases where the Constitutional Court decided on equal protection grounds.

A Deferential Stance Towards the Institutional Arrangements of the Welfare Sector

The Constitutional Court has routinely referred to institutional aspects of the right to social security [Article 70/E]. In an early decision from 1993 the Court said that the right to social security does not automatically entail a constitutional right to unemployment benefit. Such a benefit is, after all, only one of many benefits in the welfare support scheme.[56] In another case in 1993, when facing claims for a particular welfare benefit or contesting the withdrawal or diminution of a specific payment or service, the Constitutional Court has submitted on more than one occasion, that as long as the overall service level does not drop substantially, the government's decision to withdraw or reduce certain welfare benefits and services does not violate the right to social security [Article 70/E].[57] The Court has not, however, defined in abstract terms what would constitute the 'minimum core' of the right to social security. It preferred to resort to a case-by-case approach.[58] In a more recent case regarding a reduction of spousal benefits[59] the Court said that the right to social security does not give rise to a right to regular income.[60] Instead, the Constitution only guarantees that the benefit will be set in a manner which is not arbitrary, objective and is not discriminatory.

Over the years the Constitutional Court has deferred to the legislature's wisdom (or minute decisions) on the (re)regulation of various subsystems of the welfare sector, saying that the Constitution does not mandate a particular service or arrangement. Typical in this genre is a decision from 1998, where the Court affirmed an adjustment to the administration of the social security system (which did have a democratically elected component at the time), saying that the Constitution does not prescribe a democratically-elected format for the operation of the social security administration; the government's obligation stemming from the Constitution is to establish a social security administration.[61]

In the cases mentioned above, the Constitutional Court's discussion was focusing on various institutional arrangements connected with the right to social security. Why does the Constitutional Court talk about institutions and exactly what types of institutions are meant by the Court? This question is not so easy to tackle as it might

56 31/1993 (V. 21.) AB decision. ABH 1993. 243.

57 On this justices take 26/1993 (IV. 28.) AB as the leading case, discussed at note XXX, above. See e.g. in decisions 39/1999 (XII. 21.) AB on indexing pensions and 42/2000 (XI. 8.) AB.

58 On this phenomenon see Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon*, *supra* note 26, at 667-668.

59 7/2000 (III. 23.) on spousal benefits.

60 Here the Constitutional Court affirmed its decision in 5/1998 (III. 1.) AB decision.

61 16/1998 (V. 8.) AB decision.

at first seem. Article 70/E(2) of the Hungarian Constitution expressly provides that the state shall 'implement the right to social support through the social security system and the system of *social institutions*' (emphasis added). While some might say that these illustrative references in Article 70/E(2) are so vague that they might not even have normative force, it is hard to overlook that the words of the Constitution do expressly mention 'institutions' as such.

Nonetheless, the very inclusion of the word is not too revealing as to its proper construction in constitutional adjudication, as the Hungarian Constitution also proclaims that it protects the "institution of marriage and family" [Article 15].[62] Moreover, in Hungarian constitutional doctrine one might simply mention the protection of the 'institution of' property.[63] Although sometimes a little awkward, the term 'institution' in these decisions might fit in the exceedingly technical language of constitutional doctrine. Indeed, when talking about particular arrangements in the welfare sector, the word institution fits somewhat better than in cases where family or marriage are talked about as institutions of society.

Using this terminology, the Constitutional Court established an interpretation of the right to health in 1995 which for an extended period became the standard construction of Article 70/D.[64] There the Court stressed that the right to the highest possible physical and mental health is not an individual constitutional right, but expresses the duty of the state to establish within available resources such an economic and legal environment as guarantees a healthy life. In particular, the state shall establish health care institutions and organize medical services. The justices noted that it does not follow from the Constitution that particular health care services should be free of charge, adding that the political branches enjoyed broad discretion as far as the systemic arrangements of the welfare sector were concerned.[65] In a subsequent decision the Constitutional Court said that a violation of the right to health [Article 70/D] may only be ascertained in extreme situations, such as if the government were

62 See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham - London: Duke University Press, 1997) at 49, explaining that institutional protection of constitution rights focuses "on guaranteed rights associated with organizations or communities such as religious groups, the media, universities (research and teaching), and marriage and the family."

63 E.g. András Holló, *Az Alkotmánybíróság, Alkotmánybíráskodás Magyarországon* (Budapest: Útmutató Kiadó, 1997) at 79-80. Cf. "like the marriage provision of Art. 6 (1), Art. 14 (1) is understood to guarantee the existence of private property as an institution". [References are to the German Basic Law] in: David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: The Chicago University Press, 1994) at 291.

64 56/1995 (IX. 15.) AB decision. ABH 1995. 260, 269.

65 56/1995 (IX. 15.) AB decision. ABH 1995. 260, 269. Affirmed in 54/1996 (XI. 30.) AB decision, more recently in 37/2000 (X. 31.) AB decision on the prohibition of tobacco advertising; 16/2003 (IV. 18.) AB decision; 54/2004 (XII. 13.) AB decision on the criminal prohibition of use and trafficking of narcotics; 30/2005 (VII. 14.) AB decision on voluntary sterilization.

not to establish any health care service in a particular region.[66]

These pronouncements do neatly fit in the above explanation, according to which the word 'institution' is used by the Constitutional Court in a most technical sense, referring to the service providers in the health care sector. After all, Article 70/D(2) of the Hungarian Constitution on the details of the right to health requires the state to "implement this right through institutions of labour safety and health care, through the organisation of medical care and the opportunities for regular physical activity, as well as through the protection of the urban and natural environment."

Institutional Protection of Constitutional Rights as an Aid in Constitutional Interpretation

In addition to the above, rather technical, usage of the terms institutions, Hungarian constitutional scholarship, as well as Hungarian constitutional jurisprudence, has been familiar with a different, much more complex conception of (constitutional) 'institutions,' which slowly but efficiently has been flavouring the Constitutional Court's take on welfare rights. This more comprehensive conception known as the 'institutional protection of constitutional rights' is rooted in the distinction between negative/subjective and positive/objective rights.[67] In short, a negative right is a freedom or a subjective right to liberty. A negative or subjective right refers to the entitlement of the individual to be respected by the state in the exercise of individual freedoms, to participate in the political process. A positive or objective right, however, refers to the claim of an individual towards the state for the effective realization of the individual's freedoms embodied by negative rights. Thus, positive or objective rights describe the relationship of the state vis-à-vis individuals.[68]

66 54/1996 (XI. 30.) AB decision, where the Constitutional Court also said that access to welfare services provided via the social security system fall within the right to social security [Art. 70/E] and are covered by the scope constitutional property protection. This move enabled the Constitutional Court to uphold a legal regulation on sick leave benefits which was essentially similar to the one invalidated with other parts of the Bokros package in 56/1995 (IX. 15.) AB decision on the ground that it amounted to an unconstitutional deprivation of property and, also, as a violation of the right to social security.

67 For a concise review of the basics see Donald P. Kommers, *German Constitutionalism: A Prologomenon*, (1991) 40 Emory Law Journal 837, at 861-863. Also Bernhard Schlink, *German Constitutional Culture in Transition*, in: Michel Rosenfeld, (ed.) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham-London: Duke University Press, 1994) at 197-211, 199 *et al*, 205-208.

68 In contemporary literature making a case for enforceable social welfare rights, it is claimed with considerable force that social welfare rights cannot be distinguished from first generation human rights with saying that the latter do not have an objective or positive side, or that the institutional dimensions of first generation rights are less expensive. See e.g. Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, (2004), 82 Texas Law Review 1895-1919, at 1896-1897.

Institutional protection of social welfare rights might be especially problematic due to the redistributive decision the judicial prescription of such remedies entails, and there is no agreement on the legitimacy of providing institutional protection to social welfare rights.[69] The Constitutional Court appears to have been mindful of this problem. In an early decision on the right to housing the Court made it clear that the housing aspect of the right to social security does have an institutional aspect. From this institutional aspect, however, there does not follow a constitutional right to state support for housing, nor does it give rise to a state duty to establish a housing assistance scheme. In the Court's understanding the right to social security as phrased in the Constitution sets policy objectives.[70]

Note, however, that in its more recent jurisprudence the Hungarian Constitutional Court did engage in providing institutional protection to various constitutional rights which affect access to health services. It is important to emphasize that some of these decisions prescribe institutional arrangements to be made available in the health care sector not with reference to the right to health, but as safeguards attached to other constitutional rights, i.e. right to life or human dignity. Therefore, in order to fully grasp the dynamics of the Constitutional Court's involvement in these cases, it is important to have a brief look at the basics of institutional protection jurisprudence in Hungary.

The present chapter restricts itself to introducing those key moments of the Constitutional Court's jurisprudence on institutional protection that are relevant to understanding most recent developments concerning welfare rights. Requirements of institutional protection of a constitutional right were defined by the Court for the first time in a full-fledged manner in the first abortion decision.[71]

> On the one hand, Article 54(1) of the Constitution guarantees 'everyone's' right to life, while - in accordance with Article 8(1) - it establishes the protection of human life as the 'primary obligation of the state.' When invoked in connection with subjective constitutional rights the duty of the state 'to respect and to protect' fundamental rights is not fulfilled by abstaining from breaching these rights, [the duty] also involves that the state shall provide means for the exercise of these rights.[72]

69 For a discussion see e.g. Christian Starck, *Constitutional Definition and Protection of Rights and Freedoms*, in: Christian Starck (ed.), *Rights, Institutions and the Impact of International Law according to the German Basic Law*, (Baden-Baden: Nomos Verlagsgesellschaft, 1987) at 40-44 [comparing the positive aspect of freedoms and of social rights].

70 731/B/1995 AB decision, delivered on 19 December, 1995.h

71 64/1991 (XII. 17.) AB decision on the rules on termination of pregnancy.

72 64/1991 (XII. 17.) AB decision, ABH 1991, 262. Compare with the reasoning of the German Constitutional Court in the first Numerus Clausus case with respect to the right of education [33 BVerfGE 303 (1972)] in Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, *supra* note 62, at 284-285.

Speaking in general terms the Constitutional Court held that

> (f)rom the perspective of the state the protection of fundamental rights is only an aspect of the protection and operation of the entire constitutional system… As the interests and duties of the state and of the holders of individual rights differ, the subjective and objective sides of the fundamental rights do not necessarily coincide with each other. The state - stemming from its general and objective perspectives - may determine the objective, institutional scope of protection of a fundamental right beyond the scope of protection offered by the subjective fundamental right.[73]

Due to the highly abstract character of sections of the reasoning, the Court could refer to this decision without difficulties in its subsequent jurisprudence, in relation to, among others, the freedom of speech, freedom of religion, and on the right to a healthy environment.[74]

At times the Court provided a rather detailed description of institutional safeguards required by the Constitution. In the second abortion decision the Court described its expectations concerning the contents and message of the mandatory consultation to be provided to pregnant women seeking a voluntary abortion in the following terms:

> Neutral information is not sufficient to achieve that. It is the constitutional obligation of the State to open up for the mother the perspectives of giving birth to and bringing up the child.
>
> . . .
>
> In principle, such a consulting service would not unduly restrict the mother's privacy or violate her freedom of conscience... The consulting service must support the mother-to-be in making a responsible decision on giving birth to her child or having an abortion. All information related to the abortion must also be accessible. The State may not compel anyone to accept a situation which sows discord within, or is irreconcilable with the fundamental convictions which

73 64/1991 (XII. 17.) AB decision, ABH 1991, 262-263.

74 For references to the first abortion decision see e.g. 30/1992 (V. 26.) AB decision on the breach of the peace [racial incitement], ABH 1992, 171; 34/1992 (VI. 1.) AB decision on non-material damages, ABH 1992, 201; 4/1993 (II. 12.) AB decision on the act on the settlement of ownership in respect of former estates of churches [funding for state operated and church operated schools], ABH 1993, 53-54, 55; 996/G/1990 AB order upon request for the interpretation of environment protection related provisions of the constitution; 28/1994 (V. 20.) AB decision on the settlement of agricultural lands, ABH 1994, 137; also 48/1998 (XI. 23.) AB decision on the protection of the life of the fetus (second abortion decision). Schlink, *German Constitutional Culture in Transition*, *supra* note 67, at 199-200 on how institutional protection is usually provided to free speech, family and marriage, and academic freedom.

mould that person's identity.

. . .

As the consulting service – supporting the pregnant woman in passing a responsible decision by offering help in the management of her conflict – should not exercise any pressure, the woman must be protected from a contrary pressure by her environment, too. Such an influence by her environment can damage the positive impacts of the support given by the consulting service and counteract the State's means of protecting the foetus, which is a constitutional condition of legal regulation.

. . .

It results from the life-protecting duty of the State that criminal sanctions must be applied to everyone who forces a pregnant woman to have abortion by threatening her, violating an obligation of sustenance or in any other way.[75]

Further traces of an approach and interpretation which made a startling career in the welfare rights jurisprudence in most recent years are also found in the Constitutional Court's decisions on the right to a healthy environment [Article 18].[76] The Court first provided an interpretation of the right to a healthy environment in conjunction with the right to health upon a request for abstract constitutional interpretation.[77] According to the Court "the duties of the state include the protection of the natural fundaments of life, and the duty shall cover the creation of the institutions of the management of limited resources, the service of information and the participation of those concerned in the decision making process".[78]

In a subsequent decision on environmental protection, the justices emphasized that the right to environmental protection is not an individual right in the traditional sense.[79] Thereupon the Court found that the right to environmental protection is "a form of self-contained and *sui generis* institutional protection, that is it is a specific fundamental right, the characteristic and dominant features of which is its objective,

75 48/1998 (XI. 23.) AB decision; available in English via http://mkab.hu/en/enpage3.htm.

76 Art. 18, Hungarian Constitution: The Republic of Hungary recognizes and shall implement the *individual's right to a healthy environment*. (emphasis added)

77 996/G/1990 AB order. The relevance of the Constitutional Court's environment protection jurisprudence for welfare rights cases was mentioned most recently in Balogh, *Paradigmaváltás lehetőségei a szociális jogok védelme terén*, *supra* note 27, at 371. Zsolt Balogh appears suggests that the institutional protection rationale familiar from environment protection cases could be a catalyst for strengthening the protection of welfare rights.

78 996/G/1990 AB order, ABH 1993, 533.

79 28/1994 (V. 20.) AB decision, ABH 1994, 138. According to the Constitutional Court the real beholder of the right to environment protection would probably be 'nature' or 'mankind'.

institutional protection-aspect."[80] The Court said that the right to environmental protection was a specific, objective aspect of the right to life. Following this reasoning, the right to environmental protection stands for the "duty of the state to preserve the natural fundaments of life."[81] The Constitutional Court added that these "objective duties of the state are broader than the aggregate of the individual rights to life".[82] Furthermore, the Court noted that it provides institutional protection not only to fundamental rights, but also to constitutional rights of a lower stature (i.e. duties of the state and social rights), in regard to which the legislative is relatively free to determine the means and extent of legal regulation.[83]

When struggling with the proper construction of the right to a healthy environment the Constitutional Court turned it into a set of constitutionally mandated requirements surrounding the right to life [Article 54(1)]. At the time this construction – although definitely not compelled by the constitutional text – fit very neatly within the logic of institutional protection.[84] Indeed, it was on account of protecting the right to life in that more comprehensive sense that the Constitutional Court started prescribing requirements about rather specific institutional guarantees in health matters, in cases going well beyond the abortion context.[85]

From Institutional Arrangements Protecting the Right to Health to Promoting Public Health above Individual Autonomy

In 2000, the Constitutional Court rejected a challenge which submitted that a partial (and not complete) ban on tobacco advertising violated the right to health and the right to a healthy environment.[86] The Court repeated that the right to a healthy environment is not a right but constitutes *sui generis* institutional protection. It was also added that the right to health and to healthy environment do not prescribe standards in the light of which a court could discern the specific duties of the state regarding tobacco advertising. In addition to this standard deferential line of

80 28/1994 (V. 20.) AB decision, ABH 1994, 138. Most recently reaffirmed in 37/2000 (X. 31.) AB decision.

81 28/1994 (V. 20.) AB decision, ABH 1994, 139. Also: "In its current form the right to environment is not an individual right, still it is not only a duty of the state, or state aim, the means of achievement of which pertain exclusively to the state". 28/1994 (V. 20.) AB decision, ABH 1994, 137.

82 28/1994 (V. 20.) AB decision, ABH 1994, 139.

83 28/1994 (V. 20.) AB decision, ABH 1994, 140.

84 At the time, the most problematic aspect of the right to a healthy environment was the remedial component. This is best illustrated in 29/1995 (V. 25.) AB decision on the Act on Mining [foundation of natural preserves].

85 The present chapter will not discuss the second abortion decision (48/1998 (XI. 23.) AB decision) in detail. The full text of the decision is available in English via http://mkab.hu/en/enpage3.htm

86 37/2000 (X. 31.) AB decision.

reasoning, familiar from previous welfare rights cases, the Constitutional Court also discussed the state's potential duties to establish institutional safeguards protecting the right to life.[87] While the Court said that a complete ban on tobacco advertising cannot be derived from the state's complex duties of institutional protection regarding the right to life, it was also pointed out that restricting tobacco advertising was only one of many such means at the state's disposal.

This decision on tobacco advertising might seem very similar to the previous judgments on the right to health, due to the deference it pays to the government's policy stance. Nonetheless, it should be noticed how the Court infuses the deferential stance on the right to health with a much more interventionist line of argument, calling for means safeguarding the right to life. An example was seen in a 2000 case concerning the right of persons with limited disposing capacity to consent to medical procedures. [88] In this case, the Court said Article 54(1) protecting the right to human dignity gives rise to a number of safeguards protecting the autonomy of patients obtaining health care services, including the right to informed consent and the right to refuse treatment.[89] Cautious as it is, this type of judicial stance is still at the heart of the institutional protection approach familiar from the abortion and environmental protection cases.

The Constitutional Court seems to have sensed that an institutional protection rationale in cases where the right to life is implicated in close connection with access to health care services might critically expose the decision-makers' value preferences. It is not by accident that when the Court handed down its judgment on physician-assisted suicide available to terminally ill patients,[90] the majority opinion emphasized that

> [a] legal system based on ideologically neutral constitutional foundations may not reflect either a supporting or a condemning view about one's decision to end one's life; this is a sphere where, as a general rule, the State has to refrain from interference. The role to be played by the State in this respect is limited to the absolutely necessary measures resulting from its obligation of institutional protection concerning the right to life.[91]

87 Here the Constitutional Court referred to the second abortion decision (48/1998 (XI. 23.) AB decision).

88 36/2000 (X. 27.) AB decision. An English translation of the decision is accessible via http://mkab.hu/en/enpage3.htm

89 Note that in reaching this conclusion the constitutional justices did not refer to the right to health [Art. 70/D].

90 22/2003 (IV. 28.) AB decision. Hereinafter referred to as the 'euthanasia decision.'

91 22/2003 (IV. 28.) AB decision; available in English via http://mkab.hu/en/enpage3.htm

Although the Court did not find euthanasia *per se* unconstitutional in the case, a unanimous Court rejected the claim for active euthanasia.

In the euthanasia decision, when defining the state's duties of institutional protection, the Constitutional Court did not rely on its own construction of the right to health; the justices took the case as one on the right to life and human dignity. In the case the Court explained the relationship of right to life and human dignity, and the permissible limitations thereof. As for the unity of the right to life and dignity, the Court said that such unity applies in cases when one's life or dignity is threatened by another person. A claim for active euthanasia is not a claim for the deprivation of life by another person, but in essence is a decision to commit suicide, even though carrying this decision into effect might take another person's (here, a physician's) assistance. In such a situation, the right to life collides with human dignity; the right to life and human dignity thus cannot be seen to form a unity. Thereupon the Constitutional Court distinguished its decisions made in the capital punishment case[92] and in the two abortion decisions which all rested on the premise of the inviolable (absolute) nature of the unity of right to life and human dignity. Consequently, the Court found that in the context of euthanasia the right to self-determination (autonomy) is not inviolable and could be subject to the same limitations as any other constitutional right.

In the case of assisted suicide, limitations imposed on the right to self-determination (autonomy) derive from the obligation of the state to protect human life [Article 8(1)]:

> in the case of terminally ill patients, the obligation of the State to protect life is to be enforced with special emphasis, having due regard to the situation (state of health) of such patients. This is justified by the fact that persons in an advanced phase of a terminal illness, being generally worn by the sufferings caused by the illness and, therefore, having limited capacity to enforce their own interests, are especially exposed to influences from their environment in making a decision on life or death. The family, relatives, friends and acquaintances, the healthcare staff, as well as the fellow patients may influence the patient's decision on requesting his physician to give him aid-in-dying.[93]

The Constitutional Court said that the appropriateness of the procedure established by law depends on the current state of human medicine, the overall quality of health care infrastructure and the availability of well-trained professionals to examine the patients' decision and to carry it out. This conception is based on the vi-

92 Decision 23/1990 (X. 31.) AB on the unconstitutionality of capital punishment.
93 22/2003 (IV. 28.) AB decision; available in English via http://mkab.hu/en/enpage3.htm

sion of an individual who needs to be protected from the consequences of her own decisions by the state – acting in the individual's best interest. Indeed, in the light of these court-approved safeguards one might wonder whether any understanding of state neutrality could harbor such a conception of individual autonomy which forms the backbone of this judicial stance.

In a very recent decision concerning medical interference with one's integrity and quality of life, the Constitutional Court acted on similar paternalistic premises. Unlike in its decision in the euthanasia case, in the 2005 decision on voluntary sterilization the Court referred not only to the right to life and human dignity [Article 54(1)], but also the constitutional protection of children and youth [Articles 16, 67(1) and (3)], and the state's duties of health care [Article 70/D].[94] The provision of the act which ultimately was found unconstitutional made voluntary sterilization available to persons above 35 years of age or to persons with three or more biological children. Of interest here are the Court's findings concerning the construction of Article 70/D. It is striking how instead of taking this provision as a reference for the right to health article, in this case the Constitutional Court emphasized its institutional aspect - the state's duties of health care. In this light of this shift in rhetoric it is all the more telling that the Court identified the aim of the legislation as the protection of physical and mental integrity, i.e. the protection of personality.

Although in the above case the Constitutional Court found the challenged rule unconstitutional, the dicta seasoning the reasoning indicate how reluctant the constitutional justices really were about this petition. The justices stressed that it is constitutionally acceptable for the legislator to prohibit such unreasonable medical procedures as result in irreversible medical impairments. Moreover, when reviewing the rule concerning persons with three of more biological children the justices submitted that, the Constitutional Court remarked that as an exception, the duties of the state to protect public health might prevail over the decisional autonomy of private individuals - although voluntary sterilization was not such a decision in the view of the Court. One might wonder how much room is left for individual autonomy (self-determination) in a context where rules on informed consent are transformed into hurdles meant to protect the general public's confidence in medical professionals.

Institutional considerations about the right to health are not so difficult to turn into judicial rhetoric about constitutionally mandated missions on public health policy, as the Constitutional Court's 2004 decision on the constitutionality of the Criminal Code's prohibition of use and trafficking of narcotics also demonstrates.[95] According to the basic premises of the decision, Article 70/D of the Constitution

94 43/2005 (XI. 14.) AB decision

95 54/2004 (XII. 13.) AB decision. Hereinafter referred to as the 'narcotics case.'

on the right to health imposes a general duty on the state to take active measures of institutional protection in order to safeguard individuals' personal integrity. The Constitutional Court said that using narcotics is not a gesture of self-determination; instead, it is as a result of using narcotics that an individual's autonomy is relinquished. In this context the state steps in against the use of narcotics as a protector of human dignity. The infringement of human dignity stems from the fact that a person under the influence of narcotics might imperil the health and physical integrity of her own self, and of others. Since according to the Constitutional Court in Hungary there is no culture or tradition of the enjoyment of narcotics, there is no societal knowledge on their effect and impact, thus, a private individual cannot take an informed decision.

In the narcotics decision the Constitutional Court seems to have launched the most recent developments of its jurisprudence on limiting constitutional rights via safeguards of institutional protection promoting public health. Moreover, the departure from the unity of human life and dignity, and the discovery of permissible constitutional limitations of self-determination were further expanded in the case. While it is important to emphasize that this judgment was rendered a year before the one on voluntary sterilization, its premises put the careful dicta summarized above in perspective, as it illustrates the elasticity of a public health rationale in a context where a constitutional court uses it to undermine individual autonomy.

It is clear from this short summary of the basic premises of the Constitutional Court's reasoning in the narcotics case, that the Court merged the technical language of institutional protection of the right to health with the more comprehensive doctrinal line on institutional protection, with strong references to the human dignity and self-determination. The Court's decision on principles underpinning the state's interference with private individual's actions via establishing institutional safeguards protecting private autonomy reflect value judgments, distinguishing exercises of liberty which are respectable from ones which are undesirable upon grounds, which are not discernible from the Constitution. In giving effect to these value preferences, the language of institutional protection of health becomes an active ingredient of a magic potion enfeebling the constitutional protection of individual autonomy.

Conclusion

Is it possible to formulate constitutional provisions on social welfare rights in a manner which would make constitutional provisions efficient means of enforcing the "minimum core" of welfare rights via judicial action in face of resistance

from the political branches? This question hides behind any treatise, small or grand, exploring the theoretical underpinnings of the constitutional protection of social welfare rights. Those who believe that enforceable welfare rights do not belong in a constitution like to say that such a constitutional arrangement is undesirable, if not for other higher reasons then because it leaves major strategic decisions on the allocation of resources in the hands of courts. These concerns are even more intense at times where an emerging democracy is struggling to pay the welfare bill from its markedly limited resources, in a polity where past and potential future welfare recipients have their hopes set high – at least in part due to the promises made in the constitution of the new democracy.[96] Those who hold that social welfare rights belong as enforceable rights in modern constitutions struggle to find a balance between a formulation which reads as a provision explicitly providing protection from some rights, and which also admits to the fact that resources to be allocated for welfare purposes are scarce and the political branches enjoy considerable discretion in reaching a decision.[97]

The present chapter does not aspire to put this controversy on a new footing. Yet, referring to the Hungarian experience, it hopes to remind the participants of this discourse that while all the approaches outlined above do fit with the textual arrangement of welfare rights in the Hungarian Constitution, neither of these interpretive approaches is compelled by the Constitutional text.[98] The Hungarian Constitutional Court's jurisprudence of welfare rights provides a more than satisfactory illustration on this point.

In the cases from the early days of the Hungarian Constitutional Court some constitutional justices insisted on defining the minimum core to welfare rights. Other justices were more intent on calling other rights provisions (e.g. the right to property) to the aid of welfare rights claimants. An alternative trail also followed by the constitutional judiciary left welfare rights' claimants with vague judicial pronouncements about desirable institutional arrangements furthering the protection or promotion of welfare rights. In other decisions, a more powerful and value-laden judicial rhetoric invoking a public health rationale was used to seriously curb individual autonomy in defence of public health. It is also striking that in some cases

96 See Sunstein, *Against Positive Rights*, *supra* note. 6. Based upon his assessment of the South African experience, Sunstein reiterated these views in his more recent *Designing Democracy, What Constitutions Do* (Cambridge University Press, 2001).

97 For an elegant assessment of understandings weak (minimal) and strong social welfare rights provisions in constitutions, with insight into the post-communist context see Sadurski, *Rights before Courts: A Study of Constitutional Courts in Post Communists States of Central and Eastern Europe*, *supra* note 5, at 173-176

98 Wiktor Osiatynski, *Social and Economic Rights in a New Constitution for Poland*, in Sajó (ed.), *Western Rights? Post-Communist Application*, *supra* note 6, at 233.

where constitutional courts did enforce a claim for welfare services it did not necessarily happen with reference to welfare rights.

At the same time, while the web of terms and concepts in which the Constitutional Court captures legislative measures regulating access to social welfare benefits and services is pretty comprehensive, not all legal measures affecting access to welfare related measures have become entangled in it. In 2003 the Court invalidated an entire act of parliament on health care services on formal grounds, finding that parliament had passed the act following the president's veto without reconsidering the vetoed bill on its merits.[99] The government's hospital privatization strategy contained in the bill was not an issue in the Court's decision. Similarly, in 2004 the Court reviewed numerous legislative rules and executive regulations seeking to fix the prices of drugs for human consumption.[100] The impact of these rules on the consumer prices of humane medication unquestionably affects the accessibility (and quality) of health care services. Despite this, the case was decided not upon welfare rights grounds, but essentially as a violation of constitutional rules on delegated legislation. Indeed, welfare rights considerations did not seem to be on the mind of petitioners, either. The material aspect of the issue overshadowing the decision was price fixing, not access to health care.

Such a jurisprudential diversity would not be welcome in any field of law, and is especially discomforting in the universe of welfare rights, where courts are always likely to be harshly criticised for being too activist or too deferential, once they take up a case. When a constitutional court decides in a case on formal or procedural grounds, without touching the merits, many might be inclined to conclude that the court has been deferential as it stayed outside the thick of the dispute. Other observers, who like to situate court decisions in their broader context, might rush to point out that if a court rules against the government, it is unimportant whether it was on formal or material grounds. For such observers in the above cases, the Hungarian Constitutional Court might appear as an ardent opponent of the government's health care revitalization strategy. Yet, in a context where a constitutional court is more than willing to prescribe what types of institutional arrangements are mandated in the health care sector by a loose constitutional text, it is hard to tell who is yielding to whom.

Although the Hungarian Constitutional Court does not follow a doctrine of precedent, its most influential Chief Justice took pride in engaging in a jurisprudence building project.[101] Therefore, it would not have been unreasonable to expect

99 63/2003 (XII. 15.) AB decision

100 19/2004 (V. 26.) AB decision

101 László Sólyom, *The Role of Constitutional Courts in the Transition to Democracy, With Special Reference to Hungary*, 18 (1) International Sociology (2003) 133-161, at 133.

a resolution of at least the major obvious tensions in the jurisprudence of the Court. What makes tensions and inconsistencies problematic is not that they display a lack of judicial philosophy in the Hungarian Constitutional Court's welfare rights jurisprudence. It is an important practical aspect of these inconsistencies that they make the Court's welfare rights jurisprudence appear principled in any single case, while various competing themes of reasoning seem to undercut any attempt at predicting the Constitutional Court's take on a future case. By now uncertainties in social welfare jurisprudence have reached such proportions that their inconsistencies are slowly but noticeably starting make an impact, impairing the enforcement of other rights and liberties, and, ultimately, further endangering the already tarnished legitimacy of constitutional review.

SOCIAL AND ECONOMIC RIGHTS IN THE JURISPRUDENCE OF THE BULGARIAN CONSTITUTIONAL COURT

Daniel Smilov

From a theoretical point of view, the case-studies in this paper raise two distinct types of problem. First, how should constitutional judges reason in areas involving complex economic issues, intertwined with fundamental problems of social justice? Secondly, how should a constitutional court treat problems involving "tragic choices"?[1] Tragic choices occur when all courses of action facing a decision-maker lead to a significant loss of value. Classic tragic choices and dilemmas, such as the choice of Antigone, are well known from ancient times. Below I will demonstrate that contemporary judges as well may face similar dilemmas.

One of the major tasks of the welfare reforms from the 1990s was the establishment of economically efficient pension and healthcare funds, separate from the Bulgarian state budget. Such funds were set up only in 1998 and became operative as late as 2000. Paradoxically, such a central issue as the extent and the quality of the welfare system had not been in the focus of party politics and ideological confrontation in Bulgaria for the first eight years of transition. The reasons for this broad "consensus" are numerous, but two are worth mentioning – the preoccupation with "symbolic" conflicts (e.g. about the significance of the past), and the lack of expert knowledge about the workings of a modern, efficient welfare system.

As a result, the major institutions of the socialist state in the welfare area (clinics, hospitals, and schools) were left to deteriorate, pensions reached embarrassingly low levels (at around USD 30-40 on average), and maternity benefits shrank beyond the point of significance. Responsibility for this situation should be shared by all political actors in the country, but the Bulgarian Socialist Party (the ex-communists) should be given special "credit" for these developments. In the period 1991-1997, the Socialists were the major obstacle to the reform of the welfare system: they tried

1 On tragic choices see Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost Benefit Analysis*, in M. Adler & E. Posner (eds.), *Cost-Benefit Analysis*, (Chicago: Chicago UP, 2001); Moon, J. D. , *Constructing Community: Moral Pluralism and Tragic Conflicts*, (New Jersey: Princeton UP, 1993).

hard to preserve the institutions from the communist period intact and, in addition, their 1994-1996 Videnov government led the country into a severe financial crisis, which heavily affected the capacity of the state to provide welfare.

The collapse of the welfare system did serious damage to the interests of particular groups of the population: the pensioners, the Roma, and the young who had not begun their careers. All three groups, as a rule, have a time-horizon which is biased in favour of the present. For them, it is often unacceptable to invest heavily in the future while making sacrifices in the present. The third group, young people, enjoyed an option not open to the two others – that of emigration. As a result, massive emigration of people in their twenties and early thirties took place in Bulgaria during the last decade.

Part of the problem with those three groups was the lack of substantive political representation: none of the governments since 1989 managed to address their concerns in a meaningful way. Unfortunately, the Bulgarian Constitutional Court (BCC) was not much of a re-enforcer of their representation either: its jurisprudence on relevant issues, as shown below, was deferentialist and devoid of practical ideas. Yet in 1998, the Court gradually started to awaken, and this is the time when its first major decisions on the welfare and social security system were delivered. At that time, the conflict of different time-horizons became apparent and the judges faced very difficult choices.

I argue that, overall, the BCC either adopted wrong policies, or failed to live up to its duty of impartiality – a duty which requires that the interests, the world views and comprehensive doctrines of minority groups of the population are not systematically marginalised. More specifically, I argue that the judges failed to take on board the interest of groups whose time-horizons did not favour significant present sacrifices for the sake of future benefits.[2] Instead, the BCC tried to elaborate a scheme of justice as solidarity that systematically and consistently endorsed the logic of the governmental austerity measures. I show that the CC could have been more accommodating of the concerns of excluded and neglected groups without necessarily blocking the welfare reforms in Bulgaria.

Early Jurisprudence on Social Justice: Tax Law

As far as issues of distributive justice are concerned, during the period 1991-1998, the CC dealt mainly with the tax-policy of the state, where the primary con-

2 On the policy-relevance of the different time-horizon of the Roma see M. Rudozemska, *Таборът отива към Филибето*, *Капитал*, weekly n. 8, February, 2002; and G. Alexandrova, *Със социална политика на парче държавата предопредели проблема с ромите*, *Капитал*, weekly, n. 8, February, 2002.

cern of the judges was the equal treatment of economic subjects. In a relatively small number of cases, the CC ruled on the problem of tax privileges for small businessmen (individual merchants),[3] small companies,[4] and the so-called mutual-insurance companies.[5] Exemptions from taxes of the amortisation funds of companies also came for consideration before the judges. [6]

In general, the Court was completely deferential to the will of the legislature on this matter and tried to be reasonably tolerant to certain tax benefits for small companies and businessmen. On all occasions, the judges in fact declined to apply the equality clauses of the Constitution [Article 6 and Article (19,2)] against decisions of parliament. Privileges introduced or denied by the legislature were deemed constitutional, as long as they had been introduced by law. In other words, the Court dealt with the issue mainly from the point of view of the separation of powers doctrine, and understood its role essentially as a defender of the exclusive prerogative of the National Assembly to set taxes. [7]

Despite these deferentialist precedents, in 1997-1998 the Court took two decisions which struck down particular tax-burdens designed to enhance the interests of the young people and the handicapped – groups adversely affected by the deterioration of the welfare state programmes.

Decision 8, 1997: Law on Physical Culture and Sport[8]

In the first case, the CC considered a law obliging persons having pre-tax income from gambling to contribute 3% of this income to the State Fund for the Support of Physical Culture and Sport (SFSPCS). The Prosecutor General challenged these provisions as a tacit introduction of a tax-burden discriminating against a specific group of economic actors. (Violation of Article 18,4 – state monopoly, and Article 19,2 – equal economic conditions).

The CC struck down the provision, ruling that the Constitution did not allow for the state to impose such duties on physical and corporate persons for income from legal activities. This must be done only through a special tax law adopted by Parliament (Article 60). The Constitution obligates the state to direct collected taxes to the state budget, argued the judges: therefore, it was a constitutional violation to

3 Decision 12, 1994.
4 Decision 19, 1998.
5 Decision 9, 1997.
6 Decision 2, 1997.
7 The following string of cases illustrates the point: Decision 3, 1996; Decision 9, 1996; Decision 6, 1998.
8 Official Gazette 58, 96.

impose *de facto* taxes for the benefit of other funds, such as the SFSPCS. Such funds could be created only on a voluntary basis, or through internal administrative arrangements, not imposing burdens on citizens.

Judge Hadjistoichev disagreed with his colleagues. He claimed that there was no constitutional prohibition for the creation of special-purpose funds by non-tax laws. Even if these funds involved the imposition of *de facto* tax-burdens, it was sufficient, in his view, that these burdens had been imposed by a law. After all, Articel 60(2) of the Constitution does not require that laws imposing taxes should be designated expressly as "tax laws". Moreover, the Constitution itself declares that the state should encourage the development of physical culture and sports [Article 52(3)]. Moreover, he argued, the special-purpose funds were intimately related to the state budget, and were envisaged by the Law on the State Budget[9]: this showed that parliament's prerogatives in the setting up of taxes were by no means undermined.

The majority of the Court reaffirmed its position on the creation of special-purpose funds a year later in Decision 31, 1998: *Law on the Protection, Rehabilitation and Social Integration of Handicapped Persons.*[10] The case involved the imposition of a "hidden" tax-burden on companies carrying out insurance activities: they were obligated to contribute 1% of all compulsory (civil liability) insurance premiums on motor vehicles to the Fund for Rehabilitation and Social Integration. Based on its ruling in Decision 8, 1997, the CC struck down the provision upon the application of the Prosecutor General. The judges advanced a new argument, claiming that the state could not discriminate among economic actors in the imposition of what they called hidden tax-burdens:

> The state is obliged to finance the citizens with damaged health – Article 51(3) of the Constitution. However, when it transgresses the limits of voluntary support from its citizens for the fulfilment of its constitutional duties …the legislators cannot discriminate among its members.[11]

Judge Stalev dissented. He argued that the law was in accordance with the principle of social justice proclaimed in the Preamble of the Constitution, without violating any of its other provisions. He further argued that there were specific constitutional provisions which required special care for handicapped persons [Article 51(3)]. He also attacked the general principle that the state should not impose such hidden taxes, unless they were used for fiscal purposes. He argued that the state had always imposed similar burdens in the form of excise and customs duties. As to the

9 Official Gazette 67, 1996.
10 Official Gazette 112, 1995 with amendments.
11 *Decision and Resolutions of the Constitutional Court 1998*, (Sofia: Marin Drinov, 1999) at 225.

allegation of discrimination among economic actors, he argued that the legislators had in mind the fact "that without any special efforts, the insurance companies collect considerable funds…which excessively benefit them in comparison with other economic actors."[12]

These two cases show, in my view, that the Court had adopted a controversial constitutional policy in the period 1991-1998, which in fact marginalised and imposed burdens on particular groups of the population whose time-horizon was different from that of the others. Special funding for mass, non-professional-sports would have benefited the young, while, in the second case, the interests of the handicapped people were at stake.

Probably disciplined budgeting and tax policy resulting in uniform tax legislation will be beneficial to the Bulgarian economy in the long run: it could be argued that part of the constitutional provisions on tax law pursued exactly this goal. However, in the meantime it would have been much fairer from the point of view of the young people interested in the opportunity to practice sports, and that of the handicapped, to have the special-purpose funds advancing their interests. This would have guaranteed that these interests would be addressed in a timely manner and would not have been put indefinitely on hold in the long queue for support at the door of the general state budget. Put another way, from the point of view of John H. Ely's theory of "reinforcement of representation" in *Democracy and Distrust,* the BCC failed to perform its duty properly, and left certain interests and certain views of social justice systematically underrepresented.

Had the Court acted otherwise, its decisions, although contrary to the majority view, would have been an expression of the special concern and the special responsibility of the state for these groups of the population whose time horizon is centred on the present. This special concern is declared in the Constitution. Both groups have special needs whose satisfaction cannot be delayed for the sake of investments in future economic performance. The Court clearly failed to realise this problem.

It may appear that deferentialism to the legislature on economic policy is justified: economic policy is seen as almost the exclusive domain of the government and the legislature, not only in Bulgaria, but in many established democracies as well. Yet economic policy issues are crucial for the prevention of the marginalisation of particular comprehensive doctrines, endorsing views of social justice different from that of the political majority.

12 Ibid. at 227.

Table 1: Tax Law and Social Policy[13]

Constitutional provisions: Article 60 (1) Citizens are obliged to pay taxes and fees, set by law in accordance with their income and property. (2) Tax privileges and burdens can be introduced only by law.			
Dissenting opinions Cases:	Right-wing	Left-wing	Judiciary
Decision 12, 1994: *Law on General Income Tax, Official Gazette 38, 1994* The CC dismissed a challenge of the Prosecutor General against amendments to this basic tax law, which, in his view, violated the requirement for equal conditions for economic actors (19,2). The amendments introduced tax privileges for individual merchants (they could deduct from their taxable income the acquired state and commune obligations, shares of state and communal enterprises, and state treasury bonds.) The Court upheld the law, reasoning that it was within the legislature's jurisdiction to create tax privileges for particular groups of economic actors – it was constitutionally prohibited only to discriminate among actors within such groups. Jurisprudence…, pp. 167-171. Judges Grigorov and Todor Todorov wrote dissenting opinions arguing that the law discriminated against private companies, because it connected the benefits for individual merchants only to the purchase of state obligations, bonds and company shares.		1	1
Decision 3, 1996: *Law on Local Taxes and Fees* The CC struck down a provision of the law on local taxes authorizing the government to determine the tax value of immovable urban property. The CC argued that only the National Assembly had the right to determine the taxes. Since the determination of the taxable value of property in fact is constitutive element of the determination of the tax, the judges declared the provision unconstitutional. Jurisprudence…, pp. 301-302.	–	–	–

13 In Table 1 and 2 I list and summarise some decisions of the Bulgarian Constitutional Court in the area of social and economic rights and principles. I also list the dissenting opinions of the judges after dividing them into three groups according to the manner they have been appointed. Two thirds of the 12 judges on the BCC are appointed by parliament and the president (four judges each). These judges are in fact appointed by party dominated political bodies, therefore I call them left-wing or right-wing judges in accordance with the political identification of the party controlling the presidency or the parliament at the time of appointment of judges. The last four judges are elected by the judiciary, which is supposed to be depoliticised according to the Constitution.

Decision 9, 1996: *Amendments to the Law on Local Taxes and Fees* The CC considered challenges against several provisions of the law and its amendments. Firstly, they empowered the local councils to collect fees for services from persons who had received property as a donation, through purchase or exchange, and, secondly, set the date of entering into force of this arrangement at the beginning of the already begun year, thus raising questions about retroactivity. The CC accepted the arguments against retroactivity, and held that the arrangement could be applied only prospectively. The judges further dismissed the argument that the authorisation for the councils to collect fees violated the requirement that only the National Assembly could levy taxes. The petitioners argued that the "fee" was in fact a hidden tax, because there were really no services to be offered by the councils to the persons acquiring property. Nevertheless, the CC recognised the right of the state to introduce fees (different from taxes), and to delegate their collection to its local bodies, as a compensation for services performed by them. Finally, the most intriguing issue considered by the judges in this case was one provision of the challenged legislative acts, according to which the tax value of buildings or parts of buildings not used for living was increased five times. The CC struck down this provision as unconstitutional, violating the equality of economic conditions. The technical reasoning of the Court included an analysis of the nature of property taxes: the judges argued that the way a property is used could not be an element of its (tax) value. The right to property, which remains the same after the change of use, is the real basis of property taxes: if the change of use leads to a change in the income of the owner, this could be a target of income taxes. The judges grounded this interpretation on Article 60(1), which distinguishes between income and property for the purposes of tax law. (The CC struck down the provision even in relation to non-residential buildings, such as industrial, administrative, and others.) Jurisprudence…, pp. 302-307. The CC further approved a retroactive increase of the tax value of urban property, which led to a retroactive increase of tax for garbage and property taxes. Five judges dissented from this decision of the Court, arguing that this amounted to a retroactive increase of taxes, prohibited by the Constitution. They argued that no pragmatic considerations could outweigh the principle of non-retroactivity of tax norms.	4	3	3
Decision 2, 1997*: Law on Tax on the Profit, Official Gazette 59, 1996.* The CC dismissed a challenge against the introduction of tax benefits by this law. The effects of inflation on tax law were one of the issues raised by this case. The legislature had exempted from taxes the amortisation funds of companies by fixing the maximum amount for such funds for the different businesses. The challengers argued that inflation had in fact eaten away the amortisation reserves of the enterprises. The CC accepted this argument, but ruled that it had no constitutional force: it was the task of the National Assembly to resolve the problem by law.	–	–	–

Decision 8, 1997	1		
Decision 9, 1997*: Law on Tax on Profit* The CC upheld the granting of tax privileges for mutual-insurance co-operations. (The challenge was based on a mistake by the group of deputies, who argued that the term "mutual-insurance co-operations" had no roots in Bulgarian law.)	–	–	–
Decision 6, 1998: *Law on Income Tax of Natural Persons* The CC struck down a provision of the law, authorising local councils to determine the precise amount of the patent tax (fixed licence tax), within a range specified by the law. The judges reasoned that it was the National Assembly that was constitutionally empowered to set the taxes [Articles 60(1) and 84(3)]; this right could not be delegated. The law also violated the requirement for equal conditions for economic activity [Article 19(2)]. Judge Manov disagreed with the majority. He believed that the Constitution required that taxes be determined by the National Assembly not in absolute terms, but with maximum and minimum, in order to take into account the differences in the income of citizens and companies.			1
Decision 19, 1998: *VAT credit for small firms and merchants* The Prosecutor General challenged the constitutionality of amendments (Official Gazette 51, 1997 and 111, 1997) to the Law on VAT, which introduced new restrictions on the use of VAT credit for smaller firms. (In order to be eligible for the credit, a firm should have taxable turnover of up to 75,000,000 levs [75,000 DM], but only if it had export deals worth more than 50,000,000 levs for the last twelve months.) The CC unanimously dismissed the challenge, and argued that it was within the discretion of the National Assembly to determine the tax policy of the state – there was no violation of equality before the law. Decision and Resolutions of the Constitutional Court 1998, "Marin Drinov", Sofia, 1999, pp. 141-143.	–	–	–
Decision 31, 1998	4		1
Total	9	4	6

More Recent Jurisprudence: Healthcare, Pensions and Social Security Reform

In the recent jurisprudence of the BCC on issues concerning the reform of the welfare system, the judges had to deal with a clash of different understandings of solidarity and social justice. The problem was that the setting up of an efficient healthcare and social security system required the imposition of significant burdens on the working generations, when the benefits they were supposed to receive were generally decreasing.

On the one hand, monthly contributions for healthcare and social security funds were introduced, which constituted a significant percentage of the income of both employees and employers. On the other hand, the age of retirement was increased (for a number of categories sharply), the conditions for obtaining a pension were tightened, many medical services ceased to be accessible for free, and their quality generally deteriorated.

Even if we assume that all these measures were unavoidable in view of the economic condition of the state, and were necessary for the future establishment of a functioning welfare system, the fact was that the reform imposed significant burdens on the generations in their thirties, forties, and fifties, and required of them serious sacrifices for the sake of future generations. However, those in their sixties and over were particularly disadvantaged, because they received meagre pensions and poor public services in return for their lifetime contributions to the socialist state budget.

Probably the best interpretation of the history and the future of the Bulgarian community justified the imposition on the elderly of an obligation to make such sacrifices. Most probably the legislature and Kostov's (Union of Democratic Forces) right-wing government were right in introducing these (arguably) much-needed reforms. Yet there was a degree of irreducible unfairness, which the Constitutional Court should have taken into account in its jurisprudence: the comprehensive doctrines of whole generations of Bulgarians were being compromised for the sake of the communal future.

The analysis below is not a call for the judges to block necessary reforms, nor is it a call for substantial judicial intervention in the process, which would have radically changed its direction. After all, the CC did not have the expertise to assess all economic issues at stake in these decisions, and could not compete with the government and the legislature in the area of economic policy. Yet very often economic complexity is taken as a justification of complete deferentialism and abdication by courts from their duty to do justice.

Below I demonstrate that the Court could have tolerated reasonable compromis-

es of the general philosophy of the reform to a much higher degree than the judges actually did. In most of these compromises minor economic objectives would have been at stake, rather than the general direction of the welfare reform. By choosing to maximise efficiency rather than protect rights, the CC created a questionable economic policy even from a utilitarian point of view. It is not clear whether the alienation and the exclusion of whole groups of the population could be outweighed by relatively minor improvements of overall efficiency and consistency of the welfare system.

In developing its policy on the issue, the Court elaborated a particular scheme of justice based on an interpretation of "solidarity", which required special sacrifices by some groups of the population for the sake of others. The consistent application of this scheme in fact alienated further the "losers" of the transition period and contributed to the general feeling of dissatisfaction with the reforms.

Healthcare Reform

The reform of the healthcare services, as already mentioned, required a transition from a system fully financed by the state budget, to one financed by a special healthcare fund formed on the basis of monthly insurance instalments (paid by employers and employees). A law introducing this major change was passed in 1998 and the new system became operative only in 2000. Before the new healthcare system became operative, however, the legislature provided an opportunity for the introduction of paid medical services.

Citizens could pay in order to save time, choose a particular medical establishment for which they were not eligible under the general public healthcare rules, or use services not included in the scope of free medical aid. This measure was meant to secure another source of much needed funding for doctors and medical establishments.

Yet its introduction before the entering into operation of the new diversified system of public funding created the risk of the further deterioration of free public services , because doctors would have an incentive to direct more and more patients to the paid range of services. At first glance, the interests of the doctors were clashing with the interests of broader sectors of the public. But the more precise formulation of the problem was that the introduction of market-based relationships, which would (in the long run) secure a diversified and efficient healthcare system, was clashing with the short-term interests of particular generations of Bulgarians, whose

health would suffer due to the (at least) temporary deterioration of the free medical services.[14]

Decision 8, 1998: Law on Healthcare and Interpretation of Article 47(2) and 52(1) of the Constitution

The Prosecutor General initiated the proceedings in the first case on the healthcare reform dealt with by the CC; he challenged the introduction of *paid* medical services in the *Law on Healthcare*, in advance of the establishment of a healthcare insurance system for citizens. He argued that the right to accessible healthcare was an inalienable right, which could not be restricted or withheld by a law.

The Court first interpreted Article 52(1) of the Constitution and observed that although there was no new law on healthcare insurance, the old *Law on Healthcare* guaranteed a wide range of free medical services.[15] Payment was required only for healthcare not covered by those services. Therefore, the introduction of paid medical services did not require the prior introduction of a healthcare insurance system, since the state was fulfilling its constitutional duty under the old system anyhow. The introduction of paid aid did not restrict or alienate the constitutional right to free and accessible healthcare at all, in the view of the Court.[16]

On the basis of this interpretation, the CC dismissed the challenge of the Prosecutor General against the Law on Healthcare. The judges argued that there was no constitutional restriction on the introduction of paid medical services, parallel to the free, public ones.[17]

A few months later, the Court took a major decision which completed the di-

14 It would be incorrect to assume that the CC defended the corporate interests of the doctors – for a case in which the judges ruled against the interests of the medical profession see: Decision 29, 1998.

15 Emergency medical aid, abortions for medical reasons or in cases of rape, free consultations and treatment upon doctor's or dentist's prescription from the units of primary and specialised medical aid, including hospital and sanatorium treatment in public hospitals and specialised medical establishments. Mandatory immunisations and other medical services prescribed by state authorised bodies were also free of charge.

16 Petitioned by the Prosecutor General, the Court also interpreted Art. 47(2) of the Constitution. The Prosecutor argued that natal medical assistance should be always and unconditionally free. The CC interpreted only the requirement for free midwifery assistance, and did not elaborate on the other parts of the provision (not referred to in the application of the Prosecutor). The Court ruled that free midwifery assistance should be provided for every woman during the period of her pregnancy, the giving of birth, and the after-birth period. If necessary, women could use such services in all medical establishments, and may be helped by all sorts of medical specialists, not only gynaecologists. The judges further held that the free medical assistance under Art. 47(2) should include also spontaneous abortion, abortions on medical grounds, abortions of pupils, students and under-age girls, as well as abortions in cases of rape. The availability of free medical aid, however, did not preclude the possibilities of paid aid in public establishments (of the choice of the patient) or in private establishments.

17 *Decision and Resolutions of the Constitutional Court 1998*, *supra* note 11, at 93-99.

lution of the constitutional commitment to "free use of medical services" [Article 52(1)]. The judges were completely deferential to the political solutions of the legislature: solutions which required present-day sacrifices for future stabilisation and economic recovery.

Decision 32, 1998: Law on Healthcare Insurance[18]

The long awaited major law on healthcare reform was finally passed in 1998. The CC was petitioned by a group of opposition (Bulgarian Socialist Party) deputies who challenged the introduction of certain fees for the use of medical services by payers of public health-insurance instalments. There were fees for every visit to a dentist or a doctor (1% of the minimum wage), and for every day of hospitalisation (2% of the minimum wage). The deputies argued that this violated Article 52(1), (requiring "free use of medical services"), and led to "double-payment" for one and the same service. Further, they attacked the provision that the member of the family with highest income should pay insurance instalments for under-age children and non-working dependants not registered as unemployed. The petitioners argued that this violated the duty of the state to protect children and their health (Articles 14, 47, and 52).

The CC firstly dismissed the argument that the payments (admittedly small) violated the right to accessible, and, more controversially, free healthcare. The judges reasoned that the funding sources of the public healthcare system might not be limited only to insurance instalments and the state budget, but could resort to "other sources" as well [Article 52(2)]. They further held that since the Constitution did not contain any restriction on the character of these other sources, it was within the discretion of the legislature to determine them, as well as the ways of their collection – an interpretation, which rendered "free use of medical services" empty of content.

The judges also argued that the payments required were reasonably low, and therefore did not deprive citizens from accessible healthcare. "Accessible" was interpreted to mean "open to all under fair conditions and equal opportunities". The arrangement, the judges claimed, was consistent with this reading of the provision: it was in accordance with the principles of equality and solidarity, because the payments were equal for all insurance-paying persons, and did not reflect their health condition. The treatment they should receive was not dependent on the size of these payments, but entirely on their health condition. Moreover, the law envisaged that the payments for hospitalisation were due only for a maximum of 20 days a

18 Official Gazette 70, 1998.

year per person, and many categories of people were exempted from these payments altogether on grounds of age, financial standing, or the nature of the disease.

In practice, the judges held, all people who could be burdened by those payments were exempted, and their access to medical services was not denied. Finally, the CC dismissed the claim that the arrangement amounted to "double payment" for the same service: they claimed that the payments were small and could not cover the cost of medical services anyway.[19]

Secondly, the CC dismissed the allegation that payments of parents for children and non-working dependants violated provisions of the Constitution proclaiming the duty of the state to protect children and the family. This duty did not entail state support covering every expense connected with the raising of children, in the view of the judges. The state could provide different forms of support for families: monthly financial support for parents, financial inducements for having children, support for parent-less children, the maintenance of public schools and kinder-gardens, and so on. However, the existence of these forms did not exclude the responsibility of parents for the raising of their children. Moreover, the reduced instalments for children fulfilled the duty of the state for special care. In general, the judges argued that the duty of the state involved support, not full care and maintenance of families.

Although the judgement of the Court defended a plausible position on healthcare, some of the arguments it used were rather controversial: the rendering of Article 52(1) (free use of medical service) empty of content was an obvious problem, which was not fully justified by the judges. After all, the Constitution did include a commitment to free medical services for all, and did not provide for such a broad legislative discretion in the specification of the conditions under which these services were to be provided. Moreover, the dilution of Article 52(1) provided a precedent for raising the amount of the required fees in the future: if the payments were just symbolic, why were they necessary in the first place? The interpretation of Article 52(2) – that the public healthcare system might rely of "other" funds as well, meaning funds from paid services – clearly opened the door to the possibility of non-symbolic medical fees within the public healthcare system.

The judges were right to claim that special care for children could take different forms, not necessarily including exemption of their parents from additional contributions to the healthcare funds. But the problem was that most of the other expressions of special state concern for children (such as maternity support, child benefits, etc.) had been abolished or become symbolic. The Court in fact failed to address

19 Judge Todorov wrote a dissenting opinion, arguing that the payments, regardless of their size, constituted a violation of the right to free and accessible healthcare services. He claimed that the law violated the principles of the rule of law, and justice, and in this way, violated the Constitution as a whole. Furthermore, the arrangements violated principles of civil law (*nemo debet ex alieno damno lucrari*).

in a meaningful way the issue whether the state had fulfilled its constitutional duty to take special measures for the protection of children and motherhood. All these "positive rights", in the view of the judges, were more like political declarations whose fulfilment was within the discretion of the legislature.

This amounted to a tacit revolution of the judges against the positive commitments in the basic law: this demonstrated neglect of interests and views shared by many in the country, the majority of whom were losers from the welfare reform. The disregarding of their views was a further encouragement for the UDF government to maximise long-term economic efficiency regardless of social cost. This constitutional policy contributed, in my opinion, to the alienation of large sections of the population from the UDF reform-oriented government. It also created a politically volatile atmosphere in which people became ready to follow populist, charismatic leaders promising easy economic prosperity without appreciation of the complexity and the difficulties of the reforms. The stage was ready for the return of Simeon II, the former king of Bulgaria, who became Prime Minister in 2001 riding the tide of people's frustration with the burdens of the reforms whose benefits were being indefinitely postponed for the future - at least from the point of view of significant parts of the Bulgarian population.

Table 2: Healthcare and social security reforms

Constitutional provisions:

Article 14

The family, motherhood, and children are under the protection of the state.

Article 52

(1) Citizens have the right to public healthcare, guaranteeing accessible medical aid, and free use of medical services under procedures and conditions established by law.

(2) The healthcare system is financed by the state budget, by the employers, by individual or collective instalments and other sources under procedures and conditions established by law.

(3) The state protects the health of citizens and encourages the development of sports and tourism.

Article 47

(2) Mothers are under the special protection of the state, which is obliged to provide them with paid leave before and after giving birth, free natal medical care, appropriate work conditions, and other forms of social support.

Article 51

(1) Citizens have the right to public security and social support.

Article 57

The basic rights of citizens are inalienable.

Dissenting opinions Cases	Right-wing	Left-wing	Judiciary
Decision 12, 1997	1		1
Decision 8, 1998	-	-	-
Decision 21, 1998	1	2	2
Decision 29, 1998*: Law on the Professional Organisations of the Doctors and Dentists* For the purposes of the healthcare reform, it was necessary to adopt a law on the professional organisations of the doctors and dentists. These organisations were supposed to bargain with the National Health Insurance Fund for the price of medical services. The law, passed by the National Assembly, envisaged mandatory membership of doctors in the professional unions. The petitioners in the present case argued that the arrangement violated the right of association - Article 44 [and more precisely, the requirement that the associations of citizens should protect their interest – Article 12(1)], as well as the right to labour and the right to privacy. In a lengthy decision, the CC dismissed these claims and upheld the law. The basic argument of the majority was that the professional organisations of doctors were not purely civic associations, but were authorised to perform governmental (public law) functions as well. Therefore, the state could regulate these organisations more strictly than other purely civil society associations: this was even required by the Constitution for the fulfilment of the state duty to protect the health of citizens [Article 52(3)]. The CC took into account rulings of the ECHR, interpreting Article 11(1) (freedom of association) of the European Convention of Human Rights. See Decision of May 27, 1981 – Belgium, in which the ECHR held that a doctors' organisation with compulsory membership does not fall under the protections of associations ensured by Article 11(1). The CC took into account also cases from the practice of the German Federal Constitutional Court, referring to Maunz Durig, Kommentar, Grundgesetz, Bd.I, Auflage, Munchen, 1990, Article 9, Abs.1, RN, 88 and Sachs M (Hsg), Grundgesetz, Munchen, 1996, Article 9, Abs.1, RN 21).	1	2	2
Decision 32, 1998		1	

Decision 5, 2000 The Court dealt with a challenge against the general philosophy of social security reform, and the compulsory character of social security payments, in particular. The petitioners argued that the Constitution grants to the people a right to pension [Article 51(1)], not a duty to ensure themselves against inability to work due to old age. The judges dismissed the argument in favour of optional social insurance, firstly by arguing that historically, social security schemes have been compulsory both in pre-communist and in communist Bulgaria. Secondly, the Court pointed to the fact that many countries have adopted similar social security arrangements. Finally, the judges argued that the Constitution granted the right to the legislature to determine the scheme according to which the state could fulfil its obligations in relation to the protection of positive rights. Based on these considerations, the Court dismissed various requests for exemption of particular groups from the duty to pay social security installment fees as a percentage of their income. Lawyers, journalists, and working pensioners were the affected groups. People with additional incomes (from honoraria or second work contracts) were also not allowed to pay social security fees only on part of their income. The Court exempted only two groups of the population from compulsory social insurance: working self-employed pensioners (artisans) and doctoral candidates. As to working (but not self-employed) pensioners, the CC held that their exemption would create an unfair advantage to them in the labour market.	1	2	1
Total	4	7	6

Social Security Reform

Social security reform is another area where the BCC has become more and more active since 1998. Yet the position of the judges has been again largely deferential to the legislature. Arguments from positive entitlements and the principles of social justice were as a rule discarded by the Court. Or, when taken to have some constitutional relevance, they were given the interpretation preferred by the government: most commonly, requiring significant present-day sacrifices for the sake of future benefits.

The Court was probably right that in circumstances necessitating austerity measures the best interpretation of the legal history of the Bulgarian community would have anyhow imposed heavy burdens on at least some generations and groups of the population. Yet it is not clear why the best communal viewpoint should systematically override all other possible viewpoints that are incompatible with it. In other words, endorsing consistently the best vision of the Bulgarian community may disregard the fact that individuals are not just elements of a larger whole, but are an

independent source of value, and one which should be constitutionally respected. Sometimes the individual and the communal perspectives do clash, and it is unwarranted optimism to believe that such clashes can be resolved without significant losses of value.

In certain circumstances even the best overall solution, the best legal interpretation of communal history may be unfair and unjust from the point of view of parts of the community. If we borrow a hero from Ronald Dworkin, Hercules is a constitutional judge who is always looking for the best overall interpretation of the legal communal history, which is supposed to give a single right answer to all legal disputes. Herculean jurisprudence is hardly suited for "tragic"[20] circumstances, however – circumstances in which all open courses of action are unappealing. After all, Hercules is a hero who emerges triumphant out of any predicament. Apparently, constitutional courts are ill-advised to use coherentist, Dworkinian reasoning in circumstances of tragic choices.

My argument is that social security reform in Bulgaria could be depicted as a situation of "tragic choice", in which no matter what course of action was taken, significant groups of citizens would be put at a disadvantage. The formula of social security reform chosen by the government was negotiated with a number of influential foreign donors like the IMF, the WB, and the EU. Since the agreement of these donors was secured, and since no major financial policy decisions could be carried out without them, the government argued that the proposed reform was the best and only possible solution for the mounting problems in the social security sector. The complexity and the political nature of the issue was another reason for judges simply to endorse the principles of the governmental programme and the scheme of justice illuminating it; after all, they did not have the necessary expertise to assess all its intricacies.

Yet exactly in such circumstances, I believe, a court should be most alert to the possible significant and long-term damages to the interests of a particular group of citizens.

The Bulgarian judges started their jurisprudence in the social security area on a rather positive, heroic note, by proclaiming that the right to pension was inalienable – something, which was questioned by the governmental plans.

20 See M. Nussbaum, *Tragic Conflicts*, (1989) Radcliffe Quarterly. See also M. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost Benefit Analysis,supra* note 1 : "…sometimes we also face, or should face, a different question, which I call the "tragic question": is any of the alternatives open to us free from serious moral wrongdoing?" Dworkin believes that such situations never occur in political (public) life. On his positions see Dworkin, Lilla, Silvers (eds.), *The Legacy of Isaiah Berlin*, (NY: New York Review of Books, 2001).

Decision 12, 1997: Law on Pensions I[21]

Upon an application by the Prosecutor General, the CC struck down one of the traditional principles of Bulgarian pension law: pensioners who had taken a job stopped receiving their public pension. Citizens had to choose whether to receive a public pension, or to begin/continue work. Yet the 1991 Constitution proclaimed the right to pension without similar qualifications.

The judges acknowledged that this had been a stable principle of the legal system, which had been re-affirmed by the adoption of the Law on Pensions three years after the new Constitution entered into force. However, the CC argued that the right to pension was constitutionally protected in Article 51(1). Since the challenged arrangement provided for the reduction or forfeiture of pension allowances for persons entitled to public pension, there was a violation of a constitutional right, in the view of the Court. The judges held that:

> Infringement [of a right] is unacceptable when the right as a whole is affected, or some of its components [the size of the pension allowances, for instance]… Only the Constitution can permit such a restriction…of an acquired right.

Further they argued that the Constitution contained no provisions justifying such a restriction: moreover, it expressly protected the right to labour, which was directly threatened by the arrangement as well. In so far as there was no constitutional ground for restricting the right, any policy considerations based on demographic and other pragmatic reasons were held irrelevant. The same was true of the argument regarding the established character of the unconstitutional principle.[22]

21 Official Gazette 49, 1994.

22 Finally, the CC dismissed the argument that international commitments of Bulgaria allowed for such a reduction of pension payments (namely, Convention No. 35 of the International Labour Organisation of 1933, ratified by Bulgaria, Official Gazette 44, 1997). The judges argued that this was not a ground for a restriction of a constitutional right: the restriction should be based on the Constitution itself.

Judges Kostov and Arabadjiev wrote a lengthy dissenting opinion arguing that the basic principle of pension law was that there should be public support in cases of loss of the ability to work: because of age, health problems, maternity or other reasons. They argued that this principle had permeated Bulgarian law throughout its existence. They also argued that the present system of social security in Bulgaria was based on the principle of solidarity and was not dependent fully on the individual contribution of citizens to the public security funds. Thus, the system, in their view, was based on the principle of compensation for inability, rather than on personal insurance on the basis of individual payments. Therefore, when the person was able and willing to find work, his or her pension allowance could be legitimately reduced.

Furthermore, they claimed that the right in Art. 51(1) was a positive, not a negative right, therefore its scope could be legitimately restricted by the state, and did not presuppose absolute protection, since the Constitution did not provide a firm set of rules for its realisation. Finally, the dissenting judges challenged the holding of the Court that the pension right was already "acquired" – they argued that since the right to pension was dependent on the ability to work, permanent "acquiring" of this right was impossible, in the general case. The two judges also argued, that the size of pension should vary with the ability to work, and not with other factors, like additional income or the size of property. *Decisions and Resolutions of the Constitutional Court of Bulgaria 1998*, *supra* note 11, at 89-98.

This judgement created the impression that the Court was ready to adopt a more interventionist approach concerning the welfare reform, especially regarding the reinforcement of the rights of the elderly generations of Bulgarians. For the first time the Court had acknowledged the special burdens the reforms placed on them. Without creating an overall theory of social security reform and the principles of justice embedded in it, the judges kept a particular, threatened group of citizens on board, without radically changing the direction of the communal enterprise.

Yet the positive, brave stance of the majority of the Court lasted for less than a year. In fact, the actual restrictions on the right to pension, which the judges approved in their subsequent jurisprudence, condemned the group of pensioners as a whole to equality in misery.

Decision 21, 1998: Law on Pensions II [23]

The Prosecutor General initiated proceedings before the CC by challenging an amendment to the law which restricted the size of pensions to no more than three times the (minimum) social pension. (The social pension is determined by a decree of the Council of Ministers). The CC upheld the arrangement as constitutional and dismissed challenges based on Articles 51(1) and 57(1) of the Constitution. The judges reasoned that:

> The right to a pension, as a kind of social security measure, is covered and protected by [the Constitution]…The constitutional provisions, however, do not determine the procedure and conditions for the establishment and realisation of [this right]. It follows that the drafters of the constitution have left these questions, among which is the question of the size of the pension, to the law. The legislators have the jurisdiction to adopt the necessary policies and regulation, in so far as they do not violate other provisions of the basic law.[24]

As to the argument that this logic was in contradiction with the previous pension decision of the CC, the majority argued that the analogy was inappropriate. This was so because Decision 12, 1997 referred to a right which had "already been acquired under conditions set by the law" (right to pension). The present case, in the view of the CC, did not concern an already acquired right (to an unrestricted size of the pension). The judges acknowledged that under this arrangement a group of citizens would have the size of their pensions reduced irrespective of the size of their social insurance instalments. However, this would not amount to a violation

23 Amendments to the law – Official Gazette 22, 1996.

24 *Decisions and Resolutions of the Constitutional Court of Bulgaria 1998*, *supra* note 11, at 156.

of Article 6 (equality), since it did not discriminate on the basis of "race, nationality, ethnicity, personal and social standing, or wealth".

The constitutionality of the arrangement was additionally justified by the CC on the basis of international documents. Finally, the judges argued that the social justice principle from the Preamble required such a restriction; it was also instrumental for the solidarity-based Bulgarian pension system, which did not reflect fully the individual instalments of citizens.[25]

Not surprisingly, five judges filed dissenting opinions. Their major argument was that the right to pension was an inalienable right, and its restriction was inadmissible. They also argued that this arrangement created unconstitutional equalisation, which prevented the taking into account of individual contributions of citizens to the social security fund.[26]

Not only did this decision require sacrifices from the generation of the pensioners (since the pensions secured by the system were miserable), but also it obliged them to show solidarity as a group. Solidarity should be sought in society at large, and especially from the groups which have been more fortunate in one way or another. To ask for solidarity within the group of losers in the process of reforms has little to do with social justice, or even common sense.

Be that as it may, probably the most controversial decision of the BCC on social security issues was Decision 5, 2000 (See Table 2). There, not only did the judges uphold additional burdens on working pensioners imposed by the social security legislation, but also attempted to construct a Herculean theory justifying and endorsing the scheme of justice illuminating the governmental programme. The judges used both historical arguments and arguments from political morality to justify the "solidarity-based" governmental scheme as the best interpretation of the welfare provisions in the Bulgarian Constitution.

Even if we assume that the government, given the concrete circumstances, had adopted the best possible solution in its welfare reform policy, it would not mean that the principles of justice and fairness illuminating it were worth enshrining in the constitutional foundations of Bulgaria. The solution, no matter whether it was best in the given circumstances, was still a result of a tragic choice between equally unappealing options.

Consider for instance, the exemption for the working pensioners from compulsory social security instalments denied by the government (Decision 5, 2000). The legislators had rightly reasoned that such an exemption would have damaged the prospects of the young unemployed people in the labour market: employers would

25 On the basis of similar arguments, the CC dismissed the claim that the amendments contradicted the International Covenant on Economic, Social and Cultural Rights.

26 *Decisions and Resolutions of the Constitutional Court of Bulgaria 1998*, *supra* note 11, at 154-159.

prefer pensioners so as to save on social security contributions. This does not mean, however, that the governmental decision to favour young people, although probably right in the circumstances, exhibited a scheme of justice worth perpetuating through coherentist adjudication. There is nothing valuable in a society which is ready to sacrifice regularly the rights and interests of elderly generations for the sake of the young. If a society adopts such a principle as an established (normal) constitutional principle, it is difficult to see how it will preserve all of its heroes on board, how it can create a genuine feeling of communal obligation.

For this reason, "tragic" choices should not be allowed to perpetuate their logic in the legal system; rather their consequences and implications should be limited as much as possible. Any reasonable interpretative strategy used by judges in tragic circumstances should allow for tragic choices to be "marked" as exceptional, one-off events and compromises, which should be treated as an aberration of communal history, rather than as "flowing" from its structure of principle. Tragic choices should be justified by a local interpretation of as few norms as possible, without searching for far-reaching normative implications that would entrench the logic of the "tragic choice" and perpetuate it in future in other areas. In other words, tragic choices should be kept apart from the global interpretation of the legal system in order to underline the fact that policies should be designed in such a way in future that similar "tragic" situations are being avoided.

Conclusion

In this paper, I have argued that considerations of economic complexity should not necessarily excuse judges from addressing questions of social justice. Even in circumstances where economic policies are set within rigorous (internationally imposed) constraints, judges have enough room to manoeuvre so as to ensure that the interests of particular groups of the population are not neglected.

The policies of the BCC in this area have been more controversial and less successful, in my judgement, than the jurisprudence of the court in other areas. Yet the risks of constitutional adjudication again seem to be reasonable. No major damage to Bulgarian democracy or economic prosperity has resulted from the adjudicative practices of the CC. This is evidence that constitutional adjudication is a secondary area of governance in a constitutional democracy, which is not in competition with the major arenas of policy-making: the legislature and the executive. Constitutional adjudication may contribute to the quality of governance, but even if unsuccessful it would hardly do irreparable damage to a constitutional regime. Therefore, the risks of the "government of judges" seem grossly exaggerated.

Adjudication on social and economic rights raises particularly severe problems for the justification of constitutional review. On the one hand, these rights are heavily dependent on governmental policies for their implementation. This might be used as an argument for judicial deference. Yet if governmental policies systematically marginalise and disregard the interests of groups of citizens for the sake of the common good, constitutional courts should interfere to "reinforce" the representation of these groups. Especially difficult is the situation of a "tragic choice", in which *some* group of citizens is bound to lose. There are no easy answers to such dilemmas. One conclusion which could be drawn, however, is that in such circumstances courts should act more like foxes rather than hedgehogs, to use Isaiah Berlin's famous metaphor. Courts should try to look for compromises, for temporary compensation for affected groups. They should avoid the construction of grand theories of social justice which single out one interpretation of the communal legal history as the best one; they should try to avoid entrenching some such theory in all their decisions, because this might lead to further marginalisation of certain groups of citizens. After all, the point of social rights is that there are no excluded, no systematically disadvantaged groups in society.

LITIGATING FOR SOCIO-ECONOMIC RIGHTS ON NATIONAL AND INTERNATIONAL LEVEL: PROBLEMS OF STANDING AND LEGAL STRATEGIES

Anita Soboleva

The attitude of policy makers, legal scholars and judges to socio-economic rights in post-communist countries is frequently affected by economic considerations and not so often discussed in terms of moral obligations or social justice. For many years after the collapse of the "socialist system" it was a kind of *mauvais ton* in liberal circles to discuss the mere existence of such rights as intrinsic to human dignity, never mind to attempt to insist on their defendability in courts. These rights were considered as a part of communist ideology and propaganda and as something incompatible with market economy and private initiative. However, in the last few years even democratically-oriented scholars have begun to focus on socio-economic rights to look for their justification in the moral obligations of the state, solidarity of social groups, and the principles of equality, dignity and justice. I would add that socio-economic rights can also originate from fear of a revolt, and that at present the governments of post-communist countries rather "tolerate" socio-economic rights than consider them a moral duty of the state; that is why they allow them to exist only to the extent necessary to support social peace and avoid disobedience.

Unfortunately, Russia has not managed to find a proper balance between market economy and social security, and this has led to a situation where many people are ready to trade liberty for social security. For the older generation, but also for many middle-aged people, socio-economic rights are valued higher than, for instance, free speech or the right to free elections. This is quite understandable, taking into consideration the fact that living conditions in Russia are very poor for many people. The UN Economic and Social Council mentioned as areas of its main concern limitations on employment rights, social security, health services and education for people not registered in their place of residence; the high rate of unemployment in some regions (ranging from 32.4 to 56.5 %); the decreased level of employment for people with disabilities, the high level of illegal migration of labor, which results in a large number of people working without legal and social protection, a growing

number of orphaned children and children deprived of parental care, and growing homelessness. It also drew the attention of the Russian authorities to the precarious situation of indigenous communities; the sizeable number of children who do not attend school due to migration, homelessness and neglect; the low level of wages (with an estimated 32.8 percent of workers earning wages equal to or below subsistence level). The minimum wage is insufficient to provide workers with a decent living for themselves and their families, which is a violation of Articles 7 and 11 of the Covenant on Economic, Social and Cultural Rights. [1]

Any NGO involved in free legal aid and legal counseling has its own statistics concerning character of complaints, and most can confirm that in general most people approach lawyers with problems in the fields of labor law, housing law, pension rights, social benefits and welfare. Initially, the JURIX litigation center did not plan to handle cases involving socio-economic rights, but it received so many applications for assistance in cases related to social benefits that was not able to ignore them any more. JURIX's cooperation with the federal and regional ombudsmen revealed a similar picture: complaints about violations of social security rights are the second most common after complaints about police violence.

From the other hand, socio-economic rights are hardly defendable in courts because, firstly, their formulation in the Constitution has a very general wording and, secondly, rights and policies are not separated. For instance, Article 7 proclaims that the Russian Federation is "a social state, whose policies shall be aimed at creating conditions which ensure a dignified life and free development of man", but the notion of "social state" (similar to "law-based state" or "separation of powers") is difficult to use to build arguments in court because it is not clear what kind of obligations this declaration imposes on the state: such wordings can be both legal terms and concepts of law.

Article 7(2) provides the obligation for the state to provide support for the family, motherhood, fatherhood and childhood, to develop a system of social services, and to establish benefits and other social protection guarantees. According to Article 38, motherhood, childhood and the family are under state protection. Can these provisions be used, for instance, to challenge the government regulation which established the limitations on payments for sick leave, which also affected pregnant women with high salaries who as a result started to receive no more than 200 USD per month for their maternity leave instead of their full salary?

Article 41, which is becoming more and more frequently employed in political and social discourse after the enactment of a new Housing Code in 2004, provides

1 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation. 12/12/2003. e/c.12/1/Add.94. http://www.seprava.ru/cgi-bin/library.pl?id=99&action=show

everyone with a right to housing. It imposes an obligation on the state and local government to encourage house construction and create conditions for the realization of the right to housing. It also states that low-income citizens who are in need for housing shall be housed free of charge or for affordable rent out of government or municipal housing funds. The most frequent application we received was from people who sold their apartment or refused their share in privatization of the flat in favor of their wives and children, and then applied for a new apartment from the state. Does constitutional language support their claims?

The Russian Constitution also guarantees the right to education and free education in pre-school facilities, primary secondary and professional secondary school (Article 43). Should this be interpreted as also including free textbooks? Does the plan of the government to cover from budget sources only 75% of the subjects (constituting the so-called "basic program") and to charge 25% for "additional subjects" from parents comply with this constitutional provision? As can be seen, except for labor rights, which are supported by the detailed regulations in the special statute, that is the Labor Code, attempts to define the scope of any other rights involve a great deal of confusion. The judicial practice, which, by creating precedents, can theoretically help in interpretating the general wording in which these rights are formulated, does not help much, because courts of general jurisdiction in Russia traditionally exercise a positivist approach and look into Codes and by-laws rather than into Constitution, interpret all the provisions in a narrow literal sense, and deny the right if there is no direct and clear requirement to grant it in a particular case.

Justice of the Constitutional Court, Nikolay Bondar, in one of his official presentations provided statistics showing that the Constitutional Court during the ten years of its existence reviewed more than thirty federal acts on social protection and social insurance, which constituted approximately a quarter of all the acts reviewed. Issues of social benefits and compensations were considered in more than forty rulings. In most cases, the complaints were submitted by individuals, and only a few by trade unions or legal entities. Most concerned social benefits and compensations, and the Constitutional Court, in trying to approach the problem of socio-economic rights in their constitutional context, considered them in accordance with requirements of social justice, equality and freedom. The Court supported social rights "to the extent, to which it was necessary for the support of social peace and did not lead to the excessive limitation of classical individual and political rights and freedoms", as Justice N. Bondar stated.

The data for 1995-2003 adduced in the book of decisions of the Constitutional Court, published in 2004, show that social protection issues constituted the highest amount of all complaints, totalling 14 825 applications; medical care issues were

raised in 366 complaints, education in 141, and labor rights in 2939. By comparison, issues of equality were raised only in 639 complaints, and complaints regarding violation of all other constitutional rights in 1731 complaints. These figures show that the importance of socio-economic rights outweighs that of political and civil rights for the Russian people in the current moment, and this cannot be accounted only for the still existing Soviet psychology of dependence on the state. It is also a reflection of people's feeling of tremendous social injustice inherent in Russian society and absence of clear social policy. And the most provocative issue turned out to be the issue of social security and social welfare.

The Constitutional Court and other courts have tried to create some standards and find common approaches to interpretation of social rights in response to numerous claims of the citizens. First of all, while adjudicating cases involving social rights, the Court tried to provide interpretation of the social protection clause.

Article 7 of the Russian Constitution: Social State, Dignified Life, Free Development of Man

In 1999, the State Duma approached the Constitutional Court of the Russian Federation with a request to give an interpretation to the words "dignified life" and "free development of man" from Article 7 of the Constitution. They inquired, in particular, whether there was an obligation of the state to establish certain social standards corresponding to these constitutional principles. The Constitutional Court responded that the interpretation of these words would entail interference in the powers of the legislature, which is responsible for enacting laws, regulating social sphere, including labor, pensions and education. To provide an interpretation of these words would mean providing a preliminary review of the constitutionality of bills such as those on the minimum living standard, government pensions, social support for elderly people, the protection of disabled persons, the protection of health, children's rights in the Russian Federation, and so on, which were under discussion in the federal legislature at the time of the request.[2]

As for the definition of "social state", the Constitutional Court stated that political goals to be a social state "determine the obligation of the state to take care of the welfare of its citizens, their social security, and if by reasons of age, health conditions, or other reasons, which do not depend on a person, this person cannot work and does not have a source of income to support the minimum standard of living for themselves and their family, this person can account for receipt of relevant assistance, material support from the part of the state and the society".[3]

2 Ruling of the CC of July 1, 1999 # 98-O.
3 Ruling of December 16, 1997.

Positive Obligations of the State in the Social Sphere: Do They Exist?

In one of its rulings the Constitutional Court stated that many social rights (such as the right to housing) have been formulated as declarations and required concretization in laws and by-laws. The Constitution is silent about the preferential rights of certain groups to free education, or the right to be provided with accommodation in the students' dormitory, or the size of government scholarships, so any laws which reduce such benefits or do not provide for such benefits cannot be subject to constitutional review (Refusal for consideration of July 3, 1997). For the same reason the court refused to check the constitutionality of acts establishing the size of payments for sick leave or the maximum size of compensations for meals in schools for schoolchildren.

There are no court decisions in Russia requiring the state to undertake specific measures, and at the moment the prospect of initiating such cases looks quite problematic, though the UN Committee on Economic, Social and Cultural Rights in its concluding observations to the Russian Federation recommended strengthening the efforts of the state to promote gender equality by adoption of the federal Law on State Guarantees of Equal Rights and Freedoms, and Equal Opportunities, for Men and Women in the Russian Federation, to take effective measures to raise wages, to promote the integration of persons with disabilities in the labor market, including by strengthening the system of job quotas for them or by providing penalty payments for non-employment, to intensify the measures to combat domestic violence by enacting specific legislation criminalizing domestic violence, and to prevent child neglect by increasing assistance rendered to families with children, including by increasing the level of family benefits[4]. It also contains other positive measures that the state is recommended to undertake, however, these recommendations are not enforceable in courts.

Not only positive measures, but also entitlement to social benefits and welfare are hard to defend in courts. The difficulty of their defense can be accounted for by the prevailing views of judges and legal scholars that these rights are somehow "donated" by the state as act of its utmost generosity, and thus the government can decide when and how it may restrict, substitute or postpone them. Domestic courts, correspondingly, interpret the statutes, entitling people to pensions or benefits, very narrowly, and try to deny these rights where possible (and also where not possible).

4 Concluding Observations of the Committee on Economic, Social and Cultural Rights, *supra* note 1, at page 42-46.

Constitutional Principles in Protection of Social Rights and Providing Social Benefits

The courts need to decide in each particular case, whether the case concerns social welfare, compensations, benefits and other social payments, established by law, or payments to people who have lost their health or ability to work as a result of harm caused by an employer or the state. In its jurisprudence, the Constitutional Court has been constantly trying to draw a line between social rights and social benefits, and has been firm in its position that introduction of benefits (for instance, tax reductions), their scope, and groups of people entitled to them should be referred to the sole discretion of the legislature, while compensation for harm is different by its nature and could not be regarded as a "donation" from the state.

Social support includes different kinds of assistance, such as pensions, benefits, in-kind payments, and social services. The main goal of all these measures is to provide material support, means of subsistence. Protection from unemployment, which is guaranteed by Article 37 of the Constitution, is provided, alongside other means of social support, for persons who have no job and source of income. The aim of unemployment benefit is to provide a temporary source of subsistence, but payments to unemployed persons for temporary loss of health is another means of support for such persons, and the fact that such payments are provided from the unemployment fund, not from the social insurance fund, does not change their nature, namely to compensate the loss of income caused by inability to work due to some temporary incapacity. In so far as unemployed persons do not receive unemployment welfare when they are ill, they should receive support for the loss of ability to work. The requirement of Law on Unemployment, which restricted this right, was considered unconstitutional.[5]

In adjudicating cases, the Court also followed certain principles which can be used as tests for future cases: 1) the equality principle should not be violated; 2) the statute or its implementation should not reduce the scope of existing obligations of the state; 3) social benefits should be distinguished from compensations for the loss of health or work ability; 4) principle of trust of people to the state should not be ignored.

Equality

The Constitutional Court in several decisions pointed out that, while applying statutes entitling people to social benefits or providing for free social services, the

5 Ruling of December 16, 1997.

ordinary courts should pay attention in each and every case that the constitutional right of people to be treated equally in equal situations is observed. Most complaints to district courts on calculation of pensions and social benefits concerned the refusal of social welfare agencies or the pension fund to acknowledge the entitlement of persons to certain payments just because their profession, or legal entity, or position they held during employment was not listed in some by-laws.

One statute established compensations and benefits for persons who were "evacuated (relocated) or voluntarily moved from contaminated communities". Following a literal interpretation of the law, the courts refused to grant benefits to a citizen who was evacuated (moved) to another, newly built, street, since he "didn't move from the contaminated community". The Cheliabinsk Oblast court held that the law does not apply to persons who are moved within the same community. The Constitutional Court disagreed with the literal construction, considering that it "does not correspond to the purpose and meaning of the statute appealed against, as stated in its preamble", which was to protect the rights and legal interests of citizens who found themselves within the area of influence of adverse factors. The application of the statute put citizens in an unequal position, depriving some of them of their right to favorable environment and the protection of their health. In para. 4 of its ruling the Constitutional Court noted that, following the literal meaning of para.3 of Article 1 of the statute, the law enforcement agencies, guided exclusively by a formal criterion, deprived one part of the population of an opportunity to protect their rights and legal interests.

The principle of equality was also violated when payments to social funds were increased for self-employed persons. The Court ruled that new amendments establishing new, higher rates of insurance payments to pension funds, social insurance funds and employment funds for self- employed persons, such as individual entrepreneurs, defense lawyers and notaries, were unconstitutional, because payments at the proposed rate of 28 percent "are becoming for these people, in fact, not so much the financing of their labor pensions, but rather the unjustified deprivation of their legally earned money". They found themselves in a position where they were obliged to pay more than employees, and thus their right to non-discrimination on professional grounds was violated.[6] The principle of equality was also employed by the court in other decisions.

The position of the Constitutional Court was quoted by JURIX lawyers in one of the cases before the district court. Ms.Romanova, a kindergarten teacher, applied to "Dragomilivo" regional Pension Fund for a professional pension, to which she was entitled. She was denied the professional pension because "Dragomilovo"

6 Ruling of February 14,1998.

Pension Fund's Commission refused to include her work in kindergarten No 156 in her record of service. The decision was based upon the fact that this kindergarten was not an independent legal entity but a department of an enterprise – Badaev's Moscow Brewery. The Commission made reference to the Law on the Education in the Russian Federation that defined the educational institute as a legal entity. Thus, Ms. Romanova's constitutional right to equal treatment and social security was violated.

According to Articles 3 and 4(10) of the Law on Pensions, a professional pension is provided to workers on basis of unfavorable or harmful conditions caused by the character and specific nature of the job. Article 28(1) provides for the right to professional pension to individuals who have worked at schools and other educational institutions for children as tutors, teachers or similar. However, the law did not specify that the pension should be granted only to the teachers of state or municipal institutions with the status of legal entities.

The court decision was made in favor of our client. It was based on the position of the Constitutional Court, who made it clear that the right to a pension could depend on labor conditions, term in service, age, professional functions, character of job, and other objective criteria, but it could not be stipulated by such factors as the form of ownership of the place of work, or the department in which a person had been working.[7]

Unfortunately, clients need to address the court in each and every particular case where they have similar problems, because the social welfare agencies and departments of the pension fund consider that they have no discretion in interpreting the rules, by-laws, or instructions of the Ministries or administrative agencies. For instance, if the list of professions approved by the Regulation of the Government, states that the right to bonus pension is provided to medical workers who have been working in the departments of "ophthalmology", a person who has a labor record that he/she has been working in the "eye-treatment department" (the old name for the same place) can only prove his/her right to such bonus through a court decision, notwithstanding the fact that it is obvious for everybody that this is the same place.

The principle of equality, however, cannot come into contradiction with the principles of social justice, market economy, right to property and other rights. The size of pensions cannot be equal for all people. The same concerns social benefits. Benefits are provided by the state to rectify inequality or to alleviate the position of some less favorable groups. Provisions establishing some benefits for certain groups do not violate in themselves individual rights and freedoms. The norms establishing the benefits for certain groups cannot be considered as violating the rights of others.

7 Ruling of the Constitutional Court of December 06, 2001 # 310-O4; of March 6, 2003.

Similarly, failure to provide some benefits to certain groups cannot be considered as violation of the rights of these groups either. In 1996 the Constitutional Court stated that "elimination or cancellation of benefits does not mean the elimination or derogation of the constitutional rights, because this status secured just the more preferable procedure for the realization of the rights".[8]

Ban on Reduction of Existing Obligations

In reviewing the new Law on Social Protection of Persons Suffering from Radiation as a Result of the Chernobyl Catastrophe, the Court held that the compensation for the harm should be appropriate, and cannot be reduced by future legislative acts. The new act for social protection of people suffering from Chernobyl reduced the level of compensation of harm paid in the form of social benefits or additional payments to those suffering, or eliminated the right to such compensation for certain groups who were previously entitled to such payments, or abolished the payments for lost health and property. The Court ruled that any changes in legislation, reducing the payments should be applied only to persons who were going to move to the contaminated areas after the law had been enacted, and should not affect those who had already been awarded such payments, because any reduction of the size of payments aimed at compensation of harm would mean reduction of the scope of obligations the state had previously imposed on itself. On the same grounds, the Court proclaimed as unconstitutional new provisions of the law, which deprived some groups of children of additional payments for meals, imposed an obligation on people entitled to new housing to leave their old apartments to the state, and established differential scale of compensation to people based on the years for which they had been leaving in contaminated areas.[9] The Court also stated that some of these provisions also violated the right of people to equal treatment.

Benefits and Compensation of Harm

The above mentioned Law on Social Protection of Persons Suffered from Radiation as a Result of the Chernobyl Catastrophe also deprived military servicemen of payments for harm to their health if they received a long-service pension bonus. The Court formulated its position by saying that it was necessary to distinguish between compensation for loss of work ability and health, on one hand, and

8 Ruling of November 1996, # 96-O.
9 Ruling of the CC of the RF of December 1, 1997.

labor pensions, on the other. "The rights of persons in the domain of retirement guarantees are derived from employment or other socially useful activities. Bonuses to pensions of military servicemen for long service are deserved by their former military service. They have a character of labor pensions, and they cannot be assigned a meaning inconsistent to their social and legal nature, that is they cannot be considered as a payment aimed to compensate the harm to health, caused by Chernobyl nuclear power-station catastrophe", stated the Court.

Trust

The most controversial problem concerns the deprivation of certain social benefits donated to certain groups by some law and then changed or abolished by the state. In 2001 the Russian Constitutional Court stated that a legislator had the right to amend the previous rules on providinyg such benefits as housing subsidies. However, these changes, which would worsen the position of the people affected by law, should be made in such a way as to secure the principle of trust of people to the state and its actions, stability of legal regulation, and establishment of some transition period for people to adapt to such changes.[10]

Procedure of Payment and Scope of Payments: Tricks to Reduce the Payments

As distinct from proclaimed policy on social support for vulnerable groups, in practice the government looks for each and every opportunity to derogate from its commitments. One of the most frequently used tricks played by the executive in order to reduce the social security payments from the budget supported by district courts is the issuing of by-laws: regulations and orders. In most cases the by-laws created by the ministries acting in realization of the powers delegated to them for prescribing a procedure of payments significantly change the scope of rights, reduce the circle of beneficiaries, or create such obstacles in realization, as practically eliminate the proclaimed right. Though in one of the earliest decisions[11] the Constitutional Court stated that provisions which established the order of realization of a certain social welfare right could not be construed as defining the group of persons entitled to the right, further in its rulings it did not develop any strategy or test that would help in checking the constitutionality of the by-laws created by the

10 Ruling of May 24, 2001 # 8-п.
11 Ruling of June 15, 1998.

executive in order to resolve the technical problems of how the payments should be made in practice.

Plaintiffs – rehabilitated persons suffering from repressions - applied to court in 2002 with a claim that the rights of victims of repressions to use once a year a free railway roundtrip ticket was violated by the government's regulation according to which the free ticket was replaced by reimbursement upon presentation of the tickets bought. The procedure has deprived senior citizens of the ability to travel because the price of a railway ticket exceeds the size of the monthly pension they receive. Moreover, reimbursement after the trip was not paid automatically to all the applicants: some of those who applied to court received it according to individual court decisions, while others were denied reimbursement due to the lack of funds in the budget. In 2002, Mr. Sukhanov applied to the Supreme Court challenging section 5 of the Regulation No 419 on the Procedure of Granting Benefits to Rehabilitated Persons and Persons Acknowledged as the Victims of Political Repressions, approved by the Government on May 3, 1994, and lost the case. He did not appeal. The plaintiffs, represented by JURIX lawyers, asked to review the decision, because the Supreme Court did not consider the arguments concerning the scope of the right itself. The Supreme Court said that in Sukhanov's case the difficulty of realization of the right, which was caused by a regulation, did not deprive the plaintiffs of the right itself, and that government had a delegated power to regulate the procedure of payments. The fact that the procedure according to which the applicants had to buy a ticket first, and then receive money for it, was established for the purpose of reducing the number of people using this benefit, was indirectly confirmed by the Ministry of Social Protection in its letter in response to the complaint of the pensioners. However, this argument was not taken into account because absence of money allocated in the state for this purpose was considered a due justification for the imposed restrictions. Thus, indirectly, the Supreme Court confirmed that creating obstacles in obtaining benefits for the purpose to reduce the number of beneficiaries should be considered as a legitimate means to meet a legitimate aim.

JURIX in its trial strategy sought to prove that in the present case the government did not "prescribe the procedure for granting benefits" but, instead, substituted one type of benefit ("free" service) with another one (reimbursement). JURIX obtained expert reviews – both from linguists and law professors, teaching social protection course – in which the leading specialists in the area confirmed that the meanings of words "free" and "reimbursement" were not synonymous either in their ordinary or terminological (legal) sense. "Free" means "without payment at all" (right to free medical service, to free education), provided in kind (by providing service without payment for this service), provided in full extent ("free education" cannot mean education for which you pay only 50%). "Reimbursed" means "provided for pay,

when money is given back after some period of time", provided in a monetary form, can be covered in full extent or in part. However, the Supreme Court refused to consider these expert reviews and confirmed its former decision.

Interestingly enough, in 1998 the Russian Constitutional Court wrote in one of its decisions: "the procedure for payments of pensions in accordance with this law is established by the Government of the Russian Federation in coordination with the Pension Fund of the Russian Federation. Such wording presumes that a by-law issued in pursuance of this provision should not content any rights-and-duties-establishing norms with respect to the conditions with which the right itself to receive the pensions should comply, because the legislator empowers only to define the procedure of their payment".[12] However, a few years later, in 2003, the Constitutional Court, while reviewing the above mentioned regulation of the government, refused to make a judgment on constitutionality of this regulation, because, in its view, the right to such benefit could not be derived from the Constitution and thus was in the sole discretion of the legislator. In the Court's view, the above mentioned regulation, issued as a by-law to a federal law, took into consideration the specific nature of this particular benefit, and in so far as it "guaranteed the final free nature of travel" (let us note that the Court is very cautious in trying to avoid the word "compensation"), it could not be considered as unconstitutional. The question why in practice the state did not return money to people even upon submission of the ticket was waived by the Constitutional Court as not falling within its jurisdiction.[13]

European Court: Cases against Russia

In the European Court of Human Rights socio-economic rights have been defended in numerous cases against Russia, but all these cases were considered on the grounds of Article 6 (access to justice) and Article 1 of Protocol 1 (property) and concerned the failure of the state to fulfill its socio-economic obligations, such as payment of pensions or benefits after the domestic courts had made decisions entitling people to such payments. Violation of Article 6 and Article 1 of Protocol 1 were found in cases *Burdov v. Russia* (recalculation of payments for loss of health during liquidation of Chernobyl, 2002), *Gorokhov and Rusyayev v. Russia* (2005), *Makarova v. Russia, Plotnikovy v. Russia* (indexation of the amount of pensions due to delay in their payment, 2005), *Gasan v. Russia, Petrushko v. Russia, Koltsov v. Russia* (compensation for loss of bread-winner-military serviceman in Chechnya (2005), *Gizzatova v. Russia* (compensation for harm caused by injury during work in a municipal en-

12 Ruling of June 15, 1998.
13 Ruling of July 10, 2003.

terprise). In all these cases the state failed to provide social benefits to people, when they were entitled to them by law, and the domestic courts confirmed their entitlement to them in judicial decisions in their favor.

Reasons for this failure were various: absence of funds in the state and municipal budgets 1999-2002, confusion in administration, unclear distribution of functions and powers among different governmental bodies and agencies, and unwillingness of the state to fulfill the social obligations undertaken by previous political players.

JURIX tried to resolve the issue of failure of the state to pay the social benefits within the system of domestic courts. The case was initiated approximately at the same time, when a similar case – *Makarova v. Russia* – was submitted to the European Court. We initiated the lawsuit against the Pension Fund, the Ministry of the Finance of the Russian Federation and the Federal Treasury for failure of the state to enforce judicial decisions and make payments to the pensioners of Boguchary town.

In 1999-2001 pensioners of town of Boguchary sued the Regional Social Welfare Agency for delay in payments of their pensions made in 1998-1999, and asked to index the payments according to the inflation rate. The court ruled in their favor but the Social Welfare Agency refused to pay compensations due to the absence of funds in the budget for these purposes and because their powers concerning payments of pensions were transferred to the Pension Fund. The Pension Fund signed an agreement with the regional administration of Voronezh, stating that it would be an assignee of the agency on the pension matters, excluding payments of debts, imposed by the judicial decisions.

The bailiff arrested the assets of the Pension Fund, but the court released the Pension Fund's assets from arrest on grounds that assets were designated for other purposes. So far Court's decisions in favor of pensioners have not been enforced. The writs of execution, directed to bailiffs once again, came back with remark "returned due impossibility of execution".

In May 2005 a new case was initiated against the Pension Fund and Ministry of Finance. The preliminary proceedings were held on July, 25, hearings took place on September, 28, November 16, November 21 and December 2, when the court finally ruled in favor of the pensioners and obliged the Ministry of Finance to make the payments. Interestingly enough, the proceedings in the European Court took less time. However, it is important to test the domestic judicial system and find a strategic way to obtain the enforcement of judicial decisions within the national legal system so as to make the state to fulfill its social obligations without addressing international bodies.

Conclusion

It is obvious that state made so many commitments in the social security sphere that these became a significant burden for the budget. In addition, the numerous acts contradicted each other or overlapped, and this created difficulties in implementation. Instead of far-reaching social policies and clear action plan in the area of social protection, the ruling political circles used distribution of social benefits as an argument in their electoral campaigns. No structural reforms were made until 2005, but the reform of 2005 nearly failed, because it was badly prepared and the course of its administration evoked serious public disagreement and social explosion.

In order to find a proper balance between social security and successful economic development of the state, it is necessary to define strategically the main starting points which should underlie any developments in legislation providing for social and economic rights. It is also necessary to work out a firm judicial practice, which would be predictable and consistent, and would not depend on subjective criteria such as political expediency or incapability of the state to observe it commitments. The legislature and the executive should take care to create such rules guaranteeing social security to people as, while not contradicting the principles of market economy, at the same time create conditions for decent life and free development of every person.

Definitely, in order to avoid the problem of defendability of social rights in courts, it would be desirable to have in the Constitution only social policies or economic rights, while referring social rights, especially entitlement to benefits and welfare, to statutory regulation. In so far as new constitutions are not on the agenda, at least in Russia, we need to concretize the declarative constitutional language on the social state in clear principles and standards created by judicial practice of the Supreme Court and the Constitutional Court.

Part Three

SOCIO-ECONOMIC RIGHTS AND DEVELOPING COUNTRIES

THE PATRIMONIAL STATES AND SOCIO-ECONOMIC RIGHTS IN AFRICA

Nsongurua J. Udombana

Introduction

Post-colonial African states have striven to fashion themselves in the image of Western liberalism with very little success; too frequently, they have succumbed to authoritarian, usually military, rule. "The gyration from democracy to authoritarianism", says Okechukwu Oko, "has left most African nations in deep turmoil as no African government has significantly advanced the welfare of its citizens."[1] The advancement of human rights, including socio-economic rights, requires effective national institutions: functional and efficient ministries and units for civil service delivery, labor relations, health-care delivery, educational developments, etcetera. A vibrant, independent, media is also a necessary institution in promoting socio-economic rights through human right reporting and education.

This paper examines why and how the patrimonial and weak African states have impeded the realization of human, in particular socio-economic, rights in the continent. This is a necessary inquiry, given that a state is not simply an "inert abstraction" but "a collective agent of macropolitical process."[2] A state's ability to deliver economic and social goods depends largely on the historicity of its formation and the imperatives that govern its behavior. The root of Africa's inability to fulfil the basic needs of its citizens is historical, largely the product of colonial experience. Reforming the patrimonial, predatory, and vampire states in Africa is the first real step towards realizing the socio-economic rights of the citizens. As a background, the paper examines the normative and institutional framework on socio-economic rights in Africa, proceeds to discuss the nature of post-colonial African state, and

1 Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa,* (2000) 33 Vanderbilt Journal of Transnational Law 575.

2 Crawford Young, *The African Colonial State and Its Political Legacy*, in Donald Rothchild & Naomi Chazan (eds.), *The Precarious Balance: State & Society in Africa* (Boulder (Colo.): Westview Press, 1988) at 25, 29 [hereinafter *The Precarious Balance*].

finally reflects on what need to be done to overcome the current deficits in order to realize the human rights aspirations of Africans.

The Legal Framework on Socio-economic Rights in Africa

This section examines the legal framework relating to socio-economic rights in Africa and reflects on the yawning gap between vision and reality.

Treaty and Constitutional Guarantees

Most states in Africa have made formal commitments to several human rights instruments at the global and regional levels. Some of these instruments, like the International Covenant on Economic, Social and Cultural Rights (ICESCR),[3] guarantee socio-economic rights. Among others, the ICESCR guarantees to everyone the right to "an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions."[4] It guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"[5] and the right to education, which "shall be directed to the full development of the human personality and the sense of its dignity."[6] There are currently forty-six African States Parties to the ICESCR,[7] representing 30.8% of the 149 States Parties globally. Three African states—Liberia, Sao Tome and Principe, and South Africa—have signed the ICESCR but have not yet ratified. Six others—Botswana, Comoros, Mauritania, Mozambique, and the United Arab Emirates—have neither signed nor ratified.[8]

The African Charter on Human and Peoples' Rights[9] remains the most significant human rights treaty in Africa, in terms of its normativity and formal commitments by states. It guarantees civil and political rights as well as their economic, social and cultural counterparts. It secures these rights to individuals and peoples, "without distinction of any kind such as race, ethnic group, colour, sex, language,

3 See International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, *entry into force* Mar. 23, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

4 Ibid. Art. 11(1); *cf.* Universal Declaration of Human Rights, Art. 23, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR] (guaranteeing the right to an adequate standard of living).

5 ICESCR, *supra* note 3, Art. 12((1).

6 Ibid. Art. 13(1).

7 See *Status of Ratifications of the Principal International Human Rights Treaties, available at* <www.unhchr.ch/pdf/report.pdf> [hereinafter *Status of Ratifications*] (for ratification status of universal human rights treaties).

8 Ibid.

9 See African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, *entry into force* Oct. 21, 1986, Doc. OAU/CAB/LEG/67/3/Rev.5 (1982), 21 I.L.M. 59 [hereinafter African Charter or Charter].

religion, political or any other opinion, national and social origin, fortune, birth or other status."[10] Five of the Charter's articles are devoted to typical socio-economic rights, including the right to property, which may only be encroached upon in the interest of public need or in the general interest of the community;[11] the "right to work under equitable and satisfactory conditions;"[12] and "the right to enjoy the best attainable state of physical and mental health."[13] Others are the right to education, including the individual's participation in cultural life;[14] and the protection of the family, regarded as "the natural unit and basis of society."[15]

Although the African Charter omitted the right to housing, the African Commission on Human and Peoples' Rights—the Charter's implementing mechanism—has found a right to housing through an integrative interpretation of the Charter. In the *Social and Economic Rights Action Center v. Nigeria*,[16] the Commission inferred a right to shelter or housing from the combined effect of the right to enjoy the "best attainable state of mental and physical health," the right to property, and the protection accorded to families, which forbids the destruction of property.[17]

All African countries, except Morocco, are parties to the African Charter. Many countries have also incorporated the Charter (including its socio-economic guarantees) into their constitutions, while others have transformed it into municipal law through domestic legislation. Namibia and Nigeria are examples of the two poles—monism and dualism. The Constitution of Namibia provides that "[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."[18] *A contrario,* the Constitution of Nigeria provides that "[n]o treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."[19] Thus, while the African Charter became part of the law of Namibia through incorporation, Nigeria transformed the Charter into domestic law through a local enactment—the African Charter (Ratification and Enforcement) Act.[20] The Act urges all authorities and persons exercising legislative,

10 Ibid. Art. 2.
11 Ibid. Art. 14.
12 Ibid. Art. 15.
13 Ibid. Art. 16.
14 Ibid. Art. 17.
15 Ibid. Art. 18.
16 See *Socials & Economic Rights Action Center v. Nigeria*, Comm. No. 155/96, *reprinted in* Fifteenth Ann. Activity Report of the African Commission on Human and Peoples' Rights 2001–2002, Annex V.
17 Ibid. at para. 60.
18 Constitution of Namibia 1990, § 144.
19 Constitution of Nigeria 1999, § 12(1).
20 See African Charter (Ratification and Enforcement) Act, Cap. A9 Laws of the Federation of Nigeria 2004.

executive or judicial powers in Nigeria to give full recognition and effect to the African Charter.

In 2000, African leaders adopted the Constitutive Act of the African Union (AU Act)[21] in order "to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world."[22] The AU Act is revolutionary in a number of respects, in particular its emphasis on economic development and human rights. The Act promises to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments;[23] to "[p]romote cooperation in all fields of human activity to raise the living standards of African peoples;"[24] and to "[w]ork with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent."[25] Clearly, the AU Act reinforces the socio-economic rights guaranteed in the African Charter. All African States are parties to the AU Act, except for Morocco.

Furthermore, most national constitutions in Africa contain generous provisions on socio-economic rights.[26] All but four African constitutions (DR Congo, Guinea-Bissau, Somalia, and Swaziland) guarantee the right to property.[27] Several others guarantee the rights to education,[28]

21 Constitutive Act of the African Union (AU), *adopted* July 11, 2000, *entry into force* May 26, 2001, AU Doc. CAB/LEG/23.15 (as amended by the Protocol on Amendments to the Constitutive Act of the AU, *adopted* July 11, 2003) [hereinafter AU Act].

22 Ibid. pmbl.

23 Ibid. Art. 3(h).

24 Ibid. Art. 3(k).

25 Ibid. Art. 3(n).

26 This overview is based on constitutional extracts in 2 HUMAN RIGHTS LAW IN AFRICA (Christof Heyns ed., 2004).

27 These are, alphabetically, Algeria (§ 52), Angola (§ 10), Benin (§ 22), Botswana (§ 8), Burkina Faso (§ 15), Burundi (§ 36), Cameroon (pmbl.), Cape Verde (§ 68), Central African Republic (§ 14), Chad (§ 17&41), Comoros (pmbl.), Congo (§ 17), Cote d'Ivoire (§ 15), Djibouti (§ 12), Egypt (§ 32&34), Equatorial Guinea (§ 27(d)&29), Eritrea (§ 23), Ethiopia (§ 40), Gabon (§ 1(10)), Gambia (§ 22), Ghana (§ 18,20&36), Guinea (§ 13), Kenya (§ 70&75), Lesotho (§ 4&17), Liberia (§ 11&22), Libya (§ 7&8), Madagascar (§ 34), Malawi (§ 28), Mali (§ 13), Mauritania (§ 15), Mauritius (§ 3&8), Morocco (§ 15), Mozambique (§ 86), Namibia (§ 16), Niger (§ 21), Nigeria (§ 43&44), Rwanda (§ 23), Sao Tome & Principe (§ 46), Senegal (§ 8&15), Seychelles (§ 26), Sierra Leone (§ 15&21), South Africa (§ 25), Sudan (§ 28), Tanzania (§ 24), Togo (§ 27), Tunisia (§ 14), Uganda (§ 26&237), Zambia (§ 11,16&17), and Zimbabwe (§ 16).

28 These are, alphabetically, Algeria (§ 53), Angola (§ 28(2)&49), Benin (§ 12), Burkina Faso (§ 18&27), Burundi (§ 34&44), Cameroon (pmbl.), Cape Verde (§ 49&77), Central African Republic (§ 6&7), Chad (§ 35), Comoros (pmbl.), Congo (§ 23), Cote d'Ivoire (§ 7), Egypt (§ 18,19&20), Equatorial Guinea (§ 23), Eritrea (§ 21), Ethiopia (§ 41&90), Gabon (§ 1(16)), Gambia (§ 30&217), Ghana (§ 25&38), Guinea (§ 21), Lesotho (§ 28), Liberia (§ 6), Libya (§ 14), Madagascar (§ 23&24), Malawi (§ 13&25), Mali (§ 17), Mozambique (§ 52&92), Namibia (§ 20), Niger (§ 11&19), Nigeria (§ 18), Rwanda (§ 26), Sao Tome & Principe (§ 30&54), Senegal (§ 22), Seychelles (§ 33), Sierra Leone (§ 9), South Africa (§ 29), Sudan (§ 12,14&28), Tanzania (§ 11), Togo (§ 35), and Uganda (§ 30).

to work,[29] to social security,[30] to health,[31] to housing,[32] and to food.[33] These guarantees clearly fortify the assertion that socio-economic rights are normative standards and amenable to adjudication, though some constitutions treat them as "directive principles of state policy." The South African Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights"[34] and empowers the Court to grant appropriate relief for the infringement of any right entrenched in the Bill of Rights.[35] The *Certification* case affirms the justiciability of socio-economic rights under the South African Constitution,[36] as did the *Grootboom* case, which held that "the courts are constitutionally bound to ensure that they [socio-economic rights] are protected and fulfilled."[37]

On the other hand, Chapter II of the Nigerian Constitution of 1999 is titled "Fundamental Objectives and Directive Principles of State Policy" and contains provisions similar to those in basic instruments guaranteeing socio-economic rights. Among others, the Constitution enjoins the state to direct its policy towards ensuring that the material resources of the nation are harnessed and distributed as best as

29 These are, alphabetically, Algeria (§ 55), Angola (§ 46(1)), Benin (§ 30), Burkina Faso (§ 18&19), Burundi (§ 45), Cape Verde (§ 60), Central African Republic (§ 9), Chad (§ 32), Congo (§ 24), Cote d'Ivoire (§ 16&17), Djibouti (§ 15), Egypt (§ 13&15), Equatorial Guinea (§ 25), Ethiopia (§ 41(2)), Gabon (§ 1(7)), Ghana (§ 24,34(2)&36), Guinea (§ 18), Guinea Bissau (§ 46), Lesotho (§ 29(1)), Liberia (§ 18), Libya (§ 4), Madagascar (§ 27), Malawi (§ 24&29), Mali (§ 19), Mauritania (§ 12), Morocco (§ 13), Mozambique (§ 88(1)), Namibia (§ 21(1)(i)), Niger (§ 25&30), Nigeria (§ 17(3)(a-e)), Rwanda (§ 30), Sao Tome & Principe (§ 41), Senegal (§ 8&25), Seychelles (§ 35), Sierra Leone (§ 7&8), South Africa (§ 22), Swaziland (§ 23), Tanzania (§ 11,22&23), Togo (§ 37), and Uganda (§ 14(b)&40).

30 These are, alphabetically, Algeria (§ 59), Angola (§ 47&48), Benin (§ 26), Burkina Faso (§ 18), Cameroon (pmbl.), Cape Verde (§ 69), Chad (§ 40), Congo (§ 30), Cote d'Ivoire (§ 6), Egypt (§ 16&17), Eritrea (§ 21), Ethiopia (§ 41&90), Gabon (§ 1(8)), Gambia (§ 216), Ghana (§ 37(2)(b),6(b)), Guinea (§ 17), Liberia (§ 7), Libya (§ 6), Madagascar (§ 30), Malawi (§ 13), Mali (§ 17), Mozambique (§ 95), Niger (§ 19), Nigeria (§ 16(2)), Sao Tome & Principe (§ 43&53), Seychelles (§ 36&37), Sierra Leone (§ 8), South Africa (§ 27), Sudan (§ 11), Tanzania (§ 11), Togo (§ 33), and Uganda (§ 7&14).

31 These are, alphabetically, Algeria (§ 54), Angola (§ 47), Benin (§ 8), Burkina Faso (§ 18&26), Burundi (§ 39), Cape Verde (§ 70), Comoros (pmbl.), Congo (§ 30), Cote d'Ivoire (§ 7), Egypt (§ 16&17), Equatorial Guinea (§ 22), Eritrea (§ 21), Ethiopia (§ 41&90), Gambia (§ 216(4)), Ghana (§ 30&36(10)), Guinea (§ 15), Lesotho (§ 27), Liberia (§ 8), Libya (§ 15), Madagascar (§ 19), Malawi (§ 13), Mali (§ 17), Mozambique (§ 54&94), Niger (§ 11&49), Nigeria (§ 17), Sao Tome & Principe (§ 49), Senegal (§ 8), Seychelles (§ 29), Sierra Leone (§ 8(3)), South Africa (§ 27), Sudan (§ 13), Tanzania (§ 11), Togo (§ 34), and Uganda (§ 20).

32 These are, alphabetically, Burkina Faso (§ 18), Cape Verde (§ 71), Ethiopia (§ 90), Mali (§ 17), Nigeria (§ 16(2)), Sao Tome & Principe (§ 48), Seychelles (§ 34), South Africa (§ 26), and Uganda (§ 14).

33 These are, alphabetically, Ethiopia (§ 90), Gambia (§ 216(4)), Ghana (§ 36(e)), Malawi (§ 13), Nigeria (§ 16(2)), Sierra Leone (§ 7), South Africa (§ 27), and Uganda (§ 21&22).

34 See Constitution of South Africa 1996, § 7(2).

35 Ibid. § 38.

36 See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 para. 78 (CC).

37 See *Government of the Republic of South Africa v. Grootboom & Ors* [2000] 11 BCLR 1169 para. 20 (CC).

possible to serve the common good;[38] that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group;[39] and that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, unemployment and sick benefits and welfare for the disabled are provided for all citizens.[40] The Constitution, however, provides that the judicial powers shall not extend to any issue or question covered by Chapter II.[41]

Although "directive principles" continue to perpetuate the misconception that socio-economic rights are non-justiciable, the truth is that non-justiciable rights need not be legally irrelevant.[42] They could be used to support interpretations that ordinarily would not be natural ones according to accepted standards of statutory interpretation or to interpret "hard cases" in the Dworkinian sense. They could also be invoked to explain a court's refusal to recognise other rights, where their recognition would impair the government's ability to implement the non-justiciable rights.[43] The Indian Supreme Court has also demonstrated that considerations of economic complexities should not necessarily excuse judges from addressing questions of social justice. In *Paschim Banga Khet Mazdoor Samity v. West Bengal,*[44] the Court held that the provision of medical facilities for citizens is an obligation of the state. Though acknowledging the existence of financial constraints, the Court insisted that the state is not discharged from its obligation merely by pleading such constraints.

Between Vision and Reality

The international and domestic recognition of socio-economic rights as normative standards, with mechanisms for their safeguards, is one of Africa's major contributions to the development of human rights norms. These developments have laid foundations for the human rights movement and mobilisation in Africa, providing rallying points for those concerned with promoting human dignity and well being. These instruments have jolted some states to adopt some poverty alleviation policies. Kenya, for example, has also launched a poverty reduction strategy, outlined

38 Constitution of Nigeria 1999 § 16(2)(b).
39 Ibid. § 16(2)(c).
40 Ibid. § 16(2)(d).
41 Ibid. § 6(6)(c).
42 See Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review,* (2004) 82 Texas Law Review 1895, at 1898.
43 Ibid.
44 See *Paschim Banga Khet Mazdoor Samity v. West Bengal* (1996) 4 S.C.C. 37.

in the short-term Poverty Reduction Strategy Paper and the long-term National Poverty Eradication Plan.[45] The strategy seeks to reduce the incidence of poverty by 50 percent by 2015; empower the poor to earn income; reduce most major forms of inequalities; and increase productivity through human capital development, by investing in education and health.[46]

For now, there is still a great gulf between vision and reality, as debilitating and grinding poverty continue to afflict the majority of Africans and shows no signs of abating. There has been a sharp decline in the quality of life, with food production falling in proportion to the expanding population.[47] At the risk of generalization, it may be said that the majority of Africans are today poorer than they were twenty years ago. Many live in extremely poor conditions and some, as the facts of *Grootboom* case revealed, live in squatter camps:

> The conditions under which most of the residents of Wallacedene lived were lamentable. A quarter of the households of Wallacedene had no income at all, and more than two thirds earned less than R500 per month. About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare.[48]

Empirically, various sources put the figure of Africans living on the less than $1 a day threshold at the dawn of the millennium at between 340 million[49] to 600 million,[50] with an average income of $0.65 a day (calculated on the basis of Purchasing Power Parity (PPP).[51] Nearly three-fifths of the population of Sub-Saharan Africa lives in the Least Developed Countries (LDCs)[52] and the proportion of those living on less than $1 a day in these countries has increased continuously, from an average of 55.8% in 1965–1969 to 64.9% in 1995–1999.[53] Overall, Africa's share

45 See Ministry of Finance and Planning, Government of Kenya, Interim Poverty Reduction Strategy Paper (2000).

46 *Ibid.* at paras. 5(1)–7(2).

47 Cf. OAU, Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World, AHG/Decl 1 (XXVI) (July 1990) para. 6 [hereinafter Declaration on the Political and Socio-Economic Situation in Africa].

48 See *Government of the Republic of South Africa v. Grootboom & Ors*, *supra* note 37, at para. 7.

49 See OAU, New Partnership for Africa's Development (Oct. 2001), para. 4, *available at* http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/keydocs/NEPAD.pdf [hereinafter NEPAD].

50 See AU Commission, *Africa Our Common Destiny: Guideline Documents* (2004) 8 [hereinafter *Africa Our Common Destiny*].

51 Ibid.

52 Ibid. at 4.

53 See United Nations Conference on Trade and Development (UNCTAD) *Economic Development in Africa: From Adjustment to Poverty Reduction: What is New?* UNCTAD/GDS/AFRICA/2 (2002) 2.

of people living in extreme poverty in the world[54] rose to 30% in 2000, from the initial 25 %.[55]

An empirical understanding of Africa's peculiar situation is crucial to the task of advancing socio-economic rights in the continent. A major problem for the gully and pothole indexes in Africa is that states have failed to address the structural problems that could reduce dependence on social safety nets. Spending on public health, housing and education and other social services has been severely curtailed over the years, as the defunct OAU admitted in 1990.[56] Africa's poverty is compounded by a sluggish growth in a globalized world, an unmanageable debt and debt repayment burden, declining net resource flows, unfavourable external commodity markets and deteriorating terms of trade.[57] The problem, however, goes deeper; its root lies in the patrimonial or inherited state structures, a problem that the next section examines.

The Patrimonial States in Africa

Classical international law enumerates a permanent population, defined territory, government, and independence or the capacity to enter into relations as the criteria of statehood.[58] Ian Brownlie amplifies this enumeration by adding criteria of permanence, willingness to observe international law, a certain degree of civilization, and sovereignty.[59] Recognition constitutes the acknowledgement of the satisfactory fulfilment of these criteria—an essentially empirical test[60]—though state practice does not show a uniform and consistent pattern in relation to their application.[61] The government of this "modern state" usually comprises three indepen-

54 Half of the world's population lives on less than US $2 per day, while a fifth live on less than US $1 per day. *See* NEPAD, *supra* note 49, at para. 36.

55 See *Africa Our Common Destiny*, *supra* note 50, at 8.

56 OAU, Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, OAU Doc. AHG/Decl.1 (XXVI), para. 6 (July 1990) [hereinafter Declaration on the Political and Socio-economic Situation in Africa].

57 Sadiq Rasheed, *Africa at the Doorstep of the Twenty-First Century: Can Crisis Turn to Opportunity*, in Adebayo Adedeji (ed.), *Africa Within the World: Beyond Dispossession and Dependence* (London: Zed Books, 1993) 41, at 41.

58 See Montevideo Convention on Rights and Duties of States signed on Dec. 26, 1933 art 1, 28 Am J. Int'l L 75 (1934).

59 Ian Brownlie, *Principles of Public International Law* (Oxford: OUP, 5th ed., 1998) at 70 – 77.

60 See Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden : M. Nijhoff Pub. 2004) 109. See generally C. J. R. Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications Ltd. 1987); and James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979).

61 Kreijen, *supra* note 60, at 18 (noting that claims of statehood have to be judged in the light of the particular circumstances).

dent organs—the legislature, the executive, and the judiciary—functioning within a territory that is unambiguously defined.[62] The Western system also presumes that a state will have a fully functioning civil society and a free press, with "organic" constitutions grounded on the soil and clearly defining the powers, rights, and responsibilities of all participants. Other criteria include the protection of human rights, meaning, "an entity unwilling or unable to respect human rights, especially the right to self-determination, should be barred from statehood."[63]

African and Western states are superficially similar but fundamentally different. Although the colonial societies absorbed certain Western values and institutions of statehood, most states possess juridical characteristics without the empirical and institutional features of statehood.[64] What today is called Africa is primarily what Europeans decided was Africa.[65] Africa's "modern states," says Benedict Anderson, are nothing but "imagined communities,"[66] where "members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."[67]

Europe could not plant a tropical version of the late-nineteenth-century nation-state in Africa because the organisation of the colonial state was a response to the native question – how best a foreign minority could rule over an indigenous majority.[68] One answer to this question was to divide up ethnic or tribal groups so as to complicate the emergence of a unified opposition to imperial rule.[69] This "divide and rule" tactic is still prevalent in majority of African states today. Another answer to the "native question" was the ideology of segregation, invented to give Europeans and 'civilized' natives citizenship and rights while 'uncivilized' natives were sub-

62 See J. Ojwang, *Legal Transplantation: Rethinking the Role and Significance of Western Law in Africa*, in Peter Sack & Elizabeth Minchin (eds.), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (Canberra: Law Department, Research School of Social Sciences, 1986) at 99; cf. Brownlie, *supra* note 59, at 71 (writing that "the existence of effective government, with centralized administrative and legislative organs, is the best evidence of a stable political community").

63 Kreijen, *supra* note 60, at 23 (citing in support of this criterion, the demand of the then European Community that respect for certain human rights was a precondition for the recognition of the claims to independence of the states that integrated from the former Soviet empire; *see Ibid.* at 24).

64 Ibid. at 1-2 ("[T]he legal revolution that facilitated the decolonization of sub-Saharan Africa emphasized the juridical elements of statehood, while neglecting the empirical element").

65 See Ali A. Mazrui, *The Africans: A Triple Heritage* (Boston: Little, Brown, 1986) at 101.

66 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991) at 16 (explaining that a nation is always "a deep horizontal comradeship", notwithstanding the actual inequality and hierarchy that may prevail within it).

67 Ibid. at 6.

68 See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996) at 16 (arguing that Europe created multicultural and multiethnic states in Africa; *Ibid.* at 287).

69 See Henry Kissinger, *Does America Need a Foreign Policy? Toward a Diplomacy for the Twenty-first Century* (London: Free Press, 2002) at 203.

jected to "an all-round tutelage"[70] in the interests of social comfort and convenience. Lord Lugard explained the segregation policy:

> On the one hand the policy [of segregation] does not impose any restriction on one race which is not applicable to the other. A European is strictly prohibited from living in the native reservation, as a native is from living in the European quarter. On the other hand, since this feeling exists, it should in my opinion be made abundantly clear that what is aimed at is a segregation of social standards, and not a segregation of races. The Indian or the African gentleman who adopts the higher standard of civilization and desires to partake in such immunity from infection as segregation may confer, should be as free and welcome to live in the civilized reservation as the European, provided, of course, that he does not bring with him a concourse of followers. The native peasant often shares his hut with his goat, or sheep, or fowls. He loves to drum and dance at night, which deprives the European of sleep. He is sceptical of mosquito theories. "God made the mosquito larva," said a Moslem delegation to me, "for God's sake let the larva live." For these people, sanitary rules are necessary but hateful. They have no desire to abolish segregation.[71]

Segregation is still today the dominant ideology in Africa and manifests itself in various forms; like their colonial masters, the inheritance elite – rich, black rulers – continuously taunt and look down upon the poor people they rule. The post-colonial African state is "rooted in authoritarianism and ethnic divisions, widespread illiteracy, and extreme marginalisation of African peoples."[72] It employs the jural doctrine of sovereignty only as "a hidden potential for expansion of hegemony,"[73] with few or no checks and balances, constitutional or otherwise. As this segment will further demonstrates, African states themselves represent the strongest and most apparent example of the unwavering reliance on colonial European political forms.[74]

The transfer of power to the colonised African peoples has generally been equated with the application of the rules of decolonisation according to the procedures of international law. This is a lie: decolonisation produced an anti-thesis of denial

70 Mamdani, *supra* note 68, at 17 (stressing, "a propertied franchise separated the civilized from the uncivilized").

71 F. D. Lugard, *The Dual Mandate in British Tropical Africa* (London: Frank Cass & Co. Ltd. 1965) at 149-50.

72 Algiers Declaration, OAU Assembly 35th Ord. Sess. Res. AHG/Dec.1(XXXV) OAU Doc. DOC/OS(XXVI)INF.17a (1999) [hereinafter Algiers Declaration].

73 Young, *The African Colonial State, supra* note 2, at 30.

74 See Art Hansen, *African Refugees: Defining and Defending their Human Rights*, in Ronald Cohen *et. al* (eds.), *Human Rights and Governance in Africa* (Gainesville: University Press of Florida, 1993) at 139, 161.

and alienation. It was a transfer of rudimentary political powers to the formerly colonised with no real transformation in the structures of domination.[75] As Kreijen argues, "decolonisation, or rather the morally instigated legal revolution on which it was premised, constituted a sudden swing from effectiveness to legality in international legal thought that was too much to handle for the essentially decentralised international legal order."[76] A patrimonial state, according to Max Weber, "is the juxtaposition of traditional prescription and arbitrary decision-making, the latter serving as a substitute for a regime of rational rules."[77]

In Africa, the thesis of colonialism and the anti-thesis of nationalism produced a synthesis of "nation-statism [that] looked like a liberation."[78] Though relevant internationally, the post-colonial state was "not authorised and empowered domestically."[79] The inheritance elites did not have the capacity to discharge the functions associated with national sovereignties, such as the maintenance of the rule of law, regulation of borders, and provision of social services.[80] The state today is still deficient in the legitimate exercise of coercion within its boundary, in financial self-sufficiency, in leadership of national political communities, and in the provision of basic services. It has been reduced to a lame but partisan Leviathan,[81] suspended above society, omnipresent but hardly omnipotent in terms of meeting the basic needs of citizens.[82]

75 Siba N. Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (Minnesota: University of Minnesota Press 1996) at 2 (analysing the inadequacies of international law to meet the desire of colonised to achieve true sovereignty and self-determination.); cf. Okwudiba Nnoli, *Ethnicity and Development in Nigeria*, (Aldershot: Avebury, 1995) at10, (arguing that post-colonial political and administrative structures subverted hitherto traditional structures, institutions, and values or make them subservient to the economic and political needs of the imperial powers).

76 Cf. Kreijen, *supra* note 60, at 2. See also ibid. at 141 (arguing: "Due to their rapid emergence as independent states many of the former colonies were extremely week, from both an institutional-political and an economic perspective").

77 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California, 1978) at 1041.

78 Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (London: James Currey, 1992) at 10.

79 Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press, 1991); and Robert H. Jackson & C. G. Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood* (1982) 35 World Politics. 1.

80 Cf. Louis Emmerij, *Co-responsibility versus Double Standards, in* Adebayo Adedeji (ed.), *Africa Within the World: Beyond Dispossession and Dependence* (London: Zed books, 1993) at 97, 106 ("Sharply divided ethnic groups, little or no education for the majority of the people, and virtually no trained African administrators were but a few of the problems faced at independence").

81 See passim Thomas M. Callaghy, *The State as Lame Leviathan: The Patrimonial Administrative State in Africa*, *in* Zaki Ergas (ed.), *African States in Transition* (London: Macmillan, 1987) at 87.

82 See generally Christopher Clapham, *Africa and the International System: The Politics of State Survival* (Cambridge: Cambridge University Press, 1996); Makau Mutua, *Putting Humpty Dumpty Back Again: The Post-Colonial African State* (1995) 21 Brooklyn Journal of International Law 5055.

Colonialism could not build institutions of statehood because it was a historic disruption of the normal evolutionary process, with the old order shattered with most of its binding institutions. Colonialism was "the cradle of contemporary forms of fragmentation in Africa," though it had, as its material, "the pre-existing, pre-colonial sets of identities and relationships."[83] Colonialism left no valid structures for the future or for the immediate advancement of human rights but built empty shells of representational politics erected on foundations of oppressive and alienating states.[84] In some places, colonialists tried to re-invent the wheel; in others, their intervention constituted a truly revolutionary restructuring of the political process. However, as soon as the euphoria of decolonisation and the delegitimation of self-determination ebbed, the new political elites were confronted with the profound incompleteness of state formation and consolidation. The so-called "first liberation" in Africa[85] did not lead to "a restoration of Africa to Africa's own history, but the onset of a new period of indirect subjection to the history of Europe."[86]

The post-colonial African state is a realm of "free, arbitrary action and discretion of personally motivated favour and valuation."[87] Legal-rational modes of governance, which rely on impersonal bureaucracies, are still the exception rather than the rule.[88] Politics has remained largely that of personal networks of obligations and exchange. Men steeped in the logic of guns and wealth routinely cart off peoples' mandates and public officials serve particular, sectional, religious, interests rather than the common good.[89] Africa today is a shackled continent because many men (and women) with values of vultures and ethos of snakes have dominated its public space for most of its post-colonial history, diverting national resources into private zones of selfish desire. Politics in Africa has remained that of patronage, what Jean-Francois Bayart terms the "politics of the belly."[90]

83 See Obinna C. Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa*, (The Hague: Martinus Nijhoff, 2000) at 98.

84 See Tade Akin Aina, *Reflections on Democracy and Human Rights*, African Topics Jan–Mar 2000 30 (arguing also that the institutions erected by colonialism had no real roots in the society in which they operated and that even "in the case of so-called traditional institutions, these had been invented and/or perverted).

85 Africa's "first liberation" generally refers to the transition from colonial to independent rule that swept the continent between 1957 and 1964, except in the south.

86 Davidson, *supra* note 78, at 10.

87 Weber, *supra* note 77, at 979.

88 See Victor Le Vine, *African Patrimonial Regimes in Comparative Perspective* (1980) 18(4) Journal of Modern African Studies 657, at 659.

89 *See* Crawford Young, *Ethnicity and the Colonial and Post-Colonial State in Africa, in* Paul Brass (ed.), *Ethnic Groups and the State* (Totowa: Barnes and Noble 1985) at 104; and generally Michael Bratton & Nicholas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (Cambridge: Cambridge University Press, 1997).

90 See passim Jean-Francois Bayart, *The State in Africa: The Politics of the Belly* (New York: Longman, 1993) (providing a view of African inequality in which the African ruling class is given full marks for agency and defining "politics of the belly" as "the rush for spoils in which all actors—rich and poor—participate in the world of networks").

Patrimonialism drives an expansion of state economic activity, leading to a deterioration of economic performance and the erosion of public employees' pay, which induces further extortion and embezzlement.[91] Corruption is the outcome of the supremacy of patrimonialism over civil society. Nigeria's slide towards economic bankruptcy deepened when President Shehu Shagari (1979-83) introduced the 'import license' scheme as "a party patronage economic policy."[92] Mandani has argued that that clientelism is more an effect of the form of power than an explanation of it.[93]

The post-colonial state is predatory, with its institutions geared towards crushing opposition in order, supposedly, to forge a national unity and facilitate economic development.[94] In most states, "hard, repressive conduct on the part of the police is regarded as legitimate" by many, and such an attitude "increases the likelihood of police violations of human rights."[95] The predatory state adopts strict licensing and registration laws and retain draconian powers of deregistration, in an effort to avoid strong opposition.[96] Weak states allow dictatorships to thrive; raw assertions of personal power become a form of legitimacy where the institutional concept of legitimacy is absent.[97] The patrimonial and predatory nature of African states allowed such economically illiterate kleptocrat like Mobutu Sese Seko to rule Zaire – deceptively renamed Democratic Republic of Congo – with brutal force for thirty-two years. Mobutu, who unashamedly claimed that "democracy is not for Africa,"[98] made no distinction "between his personal finances and those of the state."[99]

Most states in Africa, including those professing federalism, are centrally directed with uneven development.[100] Their coercive character has "effectively trumped its ability to secure genuine widespread allegiance among the majority African popula-

91 *See* D. Rimmer, *Aid and Corruption*, (2000) 99 African Affairs 121, at 124.

92 Wole Soyinka, *The Open Sore of a Continent: A Personal Narrative of the Nigerian Crisis* (Oxford: Oxford University Press 1996) at 65.

93 See Mamdani, *supra* note 68, at 337.

94 See M. Carbone, *Weak Civil Society in a Hard State: Lessons from Africa,* (2005) 1(2) Journal of Civil Society 170.

95 See Niels Uldriks & Piet van Reenan, *Human Rights Violations by the Police,* (2001) 2 Human Rights Review 64, at 72.

96 See Wachira Maina, Kenya: *The State, Donors and the Politics of Democratisation*, in Alison Van Rooy (ed.), *Civil Society and the Aid Industry* (London: Earthscan Publications Ltd., 1998) at 137.

97 See Kissinger, *supra* note 69, at 204.

98 George Ayittey, *Africa Betrayed* (New York: St Martin's Press, 1992) at 65.

99 Janet MacGaffey, *Economic Disengagement and Class Formation in Zaire*, *in The Precarious Balance*, *supra* note 2, 171, 173. Cf. Thomas M. Callaghy, *The State-Society Struggle: Zaire in Comparative Perspective* (New York: Columbia University Press 1984) at 142 (characterising the Zairian state as a mixed patrimonial-democratic and authoritarian in which the president's increasingly centralized authority is highly personalized).

100 See Nnoli, *supra* note 75, at 10 (arguing that colonialism laid an economic infrastructure that was "geared exclusively to satisfying the needs of the colonial metropolis").

tion."[101] Their institutions have largely been incapable of delivering public service works or implementing vital obligations of governments, including those on socio-economic rights. The civil service is deeply politicised, leading to a diluted credibility and integrity and a diminished sense of professional prospects, loss of motivation by workers, and apathy.[102] It lacks the human and material resources to effectively discharge its functions;[103] indeed, "financing patrimonial state apparatuses creates special problems because the political requirements of control and reward undercut the rational prerequisites of economic activity."[104] The weakening of the civil service has led to many unauthorised absenteeism, lateness, idleness, and, of course, poor output. The mentality of a typical civil servant tends to be: "It is not my father's work. Work or no work, I must collect my salary."[105]

Patrimonialism is one of the main causes of ethnic and civil conflicts in Africa, enabling warlords to collude with greedy Western corporations to loot Africa's resources that could have been deployed to wage the war against hunger and destitution. During the 1990s, Charles Taylor – currently standing trial at the Special Court in Sierra Leone for war crimes and crimes against humanity – relied entirely on non-institutional channels to prosecute his mindless war against his people. A consortium of North American, European and Japanese mining, timber and rubber companies colluded with Taylor and paid him staggering sums in order to maintain unimpeded access to the iron ore mining consortium on the Liberia-Guinea border.[106] In 1991, in particular, Taylor reached an agreement with the manager of Firestone's rubber plantation to cooperate in rubber production and marketing and, in return, he was paid US $2 million annually.[107]

Predictably, solid economic development has failed to materialize in Africa, despite numerous development plans and resource flows from international financial

101 Okafor, *supra* note 83, at 99 (discussing the historical development of contemporary forms of socio-cultural fragmentation within African states).

102 See Mohammed Salisu, *Incentive Structure, Civil Service Efficiency and the Hidden Economy in Nigeria, in* Steve Kayizzi-Mugerwa (ed.), *Reforming Africa's Institutions: Ownership, Incentives, and Capabilities* (New York: United Nations University Press, 2003) at 170, 171 [hereinafter *Reforming Africa's Institutions*].

103 See Jose A. Sulemane & Steve Kayizzi-Mugerwa, *The Mozambican Civil Service: Incentives, Reforms and Performance*, *in Reforming Africa's Institutions, supra* note 101, 199, 200.

104 Nelson Kasfir, *Relating Class to State in Africa,* (1983) 21 Journal of Commonwealth & Comparative Studies 14.

105 Sefiya T. Ajayi, a former Nigerian Civil Service Commissioner, quoted in Salisu, *supra* note 102, at 170.

106 William Reno, *Reinvention of an African Patrimonial State: Charles Taylor's Liberia*, (1995), 16(1) Third World Q. at 115.

107 See Philippa Atkinson, *The War Economy in Liberia: A Political Analysis* (London: Overseas. Development Institute, 1997) at 14. Cf. Luca Renda, *Ending Civil Wars: The Case of Liberia,* (1999) 23 Fletcher Forum of World Affairs 59, at 66 (stating, alarmingly, that the British-owned African Mining Consortium Ltd paid Taylor US $10 million a month to ship stockpiled ore on an existing railroad).

institutions (IFIs). The failure of governments to empower their peoples has led to revolts in some states. Suppressing these revolts has required authoritarianism, thereby further alienating the states' constituency and eroding their legitimacies.[108] As states became enemies of the citizens, harsh governments or primitive dictatorships became the norm, with one dismal tyranny always giving way to a worse one.[109] Reflecting on these problems, Abdullahi An-Na'im cautions, "it is unrealistic to expect the post-colonial African State to effectively protect human rights when it is the product of colonial rule that is by definition the negation of these rights."[110] Any serious efforts at realizing socio-economic, indeed all human, rights in Africa must begin with a restructuring of the institutions of governance. The next section briefly examines this issue.

Institutional Reforms for the Realization of Socio-economic Rights

This section is based on four assumptions. First, all human rights are realizable, that is to say, "peoples everywhere can have three meals a day for their bodies, education and culture for their minds, and dignity, equality and freedom for their spirits."[111] Second, "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and … the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."[112] Third, problems associated with socio-economic rights are those of applicability, not validity,[113] a distinction that is vital for clear and logical reasoning. The economic indigence and the social and political vulnerability of rights-holders sometimes make the realization of socio-economic rights, indeed all rights, difficult. This is a different inquiry altogether from the question whether or not those rights are valid. The fourth and last assumption is that the human entity is endowed with intelligence and vision to regulate its conduct and constantly recreate

108 See Grovogui, *supra* note 75, at 181.

109 See Davidson, *supra* note 78, at 9.

110 Abdullahi An-Na'im, *The Legal Protection of Human Rights in Africa: How to Do More With Less*, *in* Austin Sarat and Thomas Kearns (eds.), *Human Rights: Concepts, Contests, Contingencies* (Ann Arbor: University of Michigan Press 2001) at 89, 98.

111 Martin Luther King Jr., *Acceptance Speech*, Dec. 10, 1964 (on the occasion of the award of the Nobel Peace Prize in Oslo), *available at* http://nobelprize.org/peace/laureates/1964/king-acceptance.html

112 African Charter, *supra* note 9, pmbl., *cf.* Algiers Declaration, *supra* note 72, at para. 17 (emphasizing "the indivisibility, universality and interdependence of all human rights, be they political and civil or economic, social and cultural, or even individual or collective").

113 See Martin Scheinin *Economic and Social Rights as Legal Rights,* in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (Boston: Martinus Nijhoff Publishers, 1995) at 41.

its existence;[114] or, as Robert Guest puts it, "[a]ny country inhabited by human beings has the potential to grow rich."[115]

The present writer begins with the last of the above assumptions and argues that, given Africa's abundant resources, including capital, technology and human skills, the continents governments can conveniently realize the socio-economic rights of their citizens. As an illustration, twenty percent of Africa's total area is made up of forests, making it "the planet's second lifeline with fabulous bio-diversity (flora and fauna)."[116] The continent is endowed with immense mineral and energy resources such as petroleum, gas, uranium, and hydroelectric basins. Its mineral reserves account for about thirty percent of global mineral resources.[117] What Africa needs to mobilise its resources and implement socio-economic rights is good and accountable governance.[118]

Good governance has been defined as "the responsible use of political authority to manage a nation's affairs."[119] The yardsticks for its measurement include effective leadership, technical policy competence, and administrative efficiency.[120] As a policy framework, good governance encompasses an effective state that possesses an enabling political and legal environment for economic growth and equitable distribution of social goods; representation of civil societies and communities in policy-making processes; and allowing the private sector to play a meaningful role in the economy.[121] Adherence to good governance principles is essential for sustained development and the capacity of African states to effectively complement the market and implement policy reforms.

Africa must dethrone personal rule and enthrone the rule of law, since "[e]conomic development stalls when governments do not uphold the rule of law;" and "upholding the rule of law requires institutions for government accountability."[122] Governments should promote integrity, transparency, accountability, and proper management of public affairs for the common good. Socio-economic rights

114 See Nsongurua J. Udombana, *The Summer Has Ended and We are Not Saved! Towards a Transformative Agenda for Africa's Development,* (2005) 7(1) San Diego International Law Journal 5, at 56.

115 Robert Guest, *The Shackled Continent: Africa's Past, Present and Future* (London: MacMillan, 2004) at 7.

116 *Africa Our Common Destiny, supra* note 50, at 5.

117 Ibid.

118 NEPAD, *supra* note 49, at para. 6.

119 Clarence J. Dias & David Gillies, *Human Rights, Democracy, & Development* (Montréal: International Centre for Human Rights and Democratic Development, 1993) at 4.

120 See Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, (2003) 24 Michigan Journal of International Law 1209, at 1231.

121 See Abdalla Hamdok, *Governance and Policy in Africa: Recent Experiences, in Reforming Africa's Institutions, supra* note 101, at 15, 17.

122 United Nations Development Programme [UNDP] Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* 31 (2005) [hereinafter *Investing in Development*].

will remain more aspiration than actuality until public officials see public power as a responsibility to be deployed for national equilibrium rather than a repository of spoils.

Governments should create effective institutions to combat corruption, which undermines accountability and transparency in the management of public affairs[123] and makes many states fall short in their commitments to meet the basic needs of their peoples. At present, most governments pay lip service to the war on corruption. Their anti-corruption commissions are dead horses; at best, they are discriminatory in those they apprehend and arraign. Efforts at combating corruption should be equally distributed among preventive, enforcement and prosecutorial measures. The state should also involve civil society organizations (CSOs) in the anti-corruption campaign, since these organizations are the forces for societal resistance to state excesses and are organizationally, materially, and ideologically centerpieces of the civil movements and protests for reform and change.[124]

Democracy probably offers the best hope for Africa's future stability, but Africa is till largely a continent in transition, despite many pretensions to plural democracy. As Claude Ake observed in 1993, "the politics of the present leadership, far from offering any prospect of relief from underdevelopment, has deepened it immensely."[125] Ake called for a decentralized system of government, with equal emphasis on individual and communal rights, insisting that democracy that follows the line of least resistance to Western liberalism will only lead to alienation.[126] His suggestion still holds true today, given the slow progress in the implementation of Western models of democracy in Africa. Besides, the majority of Africans have yet to enjoy dividends of democracy and if the concept is to have any meaning, then it must go beyond periodic elections. Democracy must deliver basic goods to the majority of Africans, all those things that fall under the rubric of socio-economic rights: nutritional food, affordable housing, clean drinking water, effective and affordable drugs, reliable electricity and telecommunications, functional educational systems, and efficient transportation networks. The ballot box is meaningful only to the extent that it puts food on the table of those who hunger and provides shelter to those who are exposed to the elements.

Governments should pay greater attention to infrastructural development, including roads and a regular power supply, which makes economic activity and entrepreneurship flourish. The AU and its Member States should begin the process

123 Ibid. para. 22 (noting, *inter alia*, that corruption and bad governance in many countries have hampered the development of accountable governments across Africa).

124 See Michael Bratton, *Beyond the State: Civil Society and Associational Life in Africa*, (1989) 41 World Politics 407, at 411–12.

125 Claude Ake, *The Unique Case of African Democracy,* (1993) 69(2) International Affairs 239, at 239.

126 Ibid. at 244.

of connecting the entire continent by rail in order to facilitate movement of goods and persons. A country does not have to be rich to possess a system that functions properly. Botswana's economic successes demonstrate that prudent economic management and political stability are critical to Africa's renaissance and development,[127] standards that are presently lacking in most other countries. Botswana not only has transparency in decision making but also offers an example of "'input that continually recharges the batteries' of government, and that the 'doors of government are open.'"[128] Botswana's elections have been relatively honest and the government has largely kept its promises, with the opposition acting as "a loyal opposition, believing sincerely in the possibility of alternation."[129] It is not surprising that Botswana's development record stands in sharp contrast to most other African countries: "With a population of about a million people in the 1960s, the country sustained an average per capita economic growth rate of 10% from 1960 to 1980, exceeding that of South Korea or Hong Kong."[130]

Conclusion

To recap, almost all states in Africa guarantee socio-economic rights in their basic laws, though few states treat them as "directive principles" of state policies. States have also generally adopted some legislative measures towards crystallizing these rights. But it is not the normative perfection of legislative instruments that matters in the final analysis but their effects on the real enjoyments of human rights. Appropriate, well-directed policies and programmes aimed at expeditiously and effectively actualizing socio-economic rights must support constitutional and legislative measures.[131] These policies depend, for their successes, on true reforms of the institutions and infrastructures of governance in Africa.

Africa's persistent poverty demands positive action by states that have bound themselves to numerous human rights instruments. Poverty is not merely the lowness of incomes; it is the deprivation of basic capabilities. Deep poverty excludes its victim from full participation in the life of society. It assaults human dignity

127 See, e.g., *Botswana: Africa's prize democracy,* The Economist Nov. 6, 2004 52 (noting how good governance and sound economic policies have made Botswana a prosperous country, where its "1.8 m people are among the continent's wealthiest").

128 *Panel on Issues in Democratization* in Sahr John Kpundeh (ed.), *National Research Council Democratization in Africa: African Views, African Voices*, (1992), at 47.

129 Ibid.

130 Paul Clements, *Challenges for African States*, (2001) 36 Journal of Asian & African Studies 295, at 303 (noting also that "[w]hile per capita private consumption throughout Sub-Saharan Africa declined at 2.1% a year from 1980 to 1997, in Botswana it increased at 2.3%").

131 *See Government of the Republic of South Africa v. Grootboom & Ors*, *supra* note 37, at para. 42.

and increases desperation. It tempts the poor into taking the law into his hands or turning into prostitution or crime in order to escape destitution. Such inglorious actions devalue not only the actor but also the entire society. Africans are looking for a future that restores the ordering of their existence. Their governments must move beyond mere periodic, sometimes sham, elections and commence the process of regeneration of a dying community of people. Fortunately, Africa is not a mere flotsam on the river of life, unable to influence its destiny.

SOCIO-ECONOMIC FACTORS OF CONFLICTS – COUNTERING THE RISKS

Vidan Hadži-Vidanović

Introduction

The year 2006 will be crucial in the process of the preparation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. During this year, the newly established United Nations Human Rights Council will decide whether to renew and extend the mandate of the UN working group on the Optional Protocol. If it delivers a positive decision, the mandate of the existing open-ended working group will finally include the competence to start drafting an Optional Protocol.

The purpose of this paper is to examine the importance of the justiciability of socio-economic rights from the conflict-prevention perspective and in such a way as to contribute to the discussion of whether the Optional Protocol is needed and why. My principal thesis is that there is strong determinism between socio-economic circumstances in society and conflict situations. It should be noted that conflict is understood in its widest sense, that is, not only as the state of war, whether interstate or civil, but as every actual situation which leads to repression and to massive and systematic violations of fundamental human rights.

Socio-economic causes of conflicts are discussed in the first part of this paper. In the second part, it is shown how justiciability of socio-economic rights could contribute to the efforts to control and to some extend neutralise socio-economic factors of conflict and consequently to contribute to the prevention of violence. Finally, certain political solutions for eradication of poverty are examined.

Socio-Economic Motives and Conditions as Sources of Conflicts

Numerous studies have elaborated the significance of socio-economic causes of wars, examining the entire spectrum of alternative solutions, from Marxist views at

one end, to the standings of Codbenite liberals at the other. The idea can be traced to ancient times; however, the first analytical efforts were made only after World War I, and subsequently the idea became almost a mainstream proposition. This has left significant traces in world policy and international relations, and still plays an important role in controlling and preventing conflicts.[1] However, if extreme voices are excluded, all authors agree that the causes of wars are numerous, and that they can act simultaneously and in fact do so in the large majority of cases.

Irrespective of the importance of socio-economic factors, the significance of numerous other elements should not be neglected when determining the causes of wars. The important role of the international order and existing (weak) mechanisms for prevention of conflicts, the important role of religious and ethnically based motives, and even psychological elements should not be discarded simply because they are deemed to be irrational or subsidiary.[2] In addition, some *prima facie* rational socio-economic motives can also turn to irrationality.[3]

Obviously, there is no single cause of war. A very complex set of circumstances has to be present for the outbreak of a violent conflict. But even the presence of an entire spectrum of different objective factors which could be described as security risks sometimes does not suffice to lead nations or groups to hostilities. Particular subjective aspects have to be present. Some may argue that the will and motives for

1 One of the major motives for the creation of the International Labour Organisation was the awareness that without an improvement in the social order, the workers, whose numbers were increasing as a result of industrialization, would create social unrest, and even revolution, as had happened in Russia. Thus, Part XIII of the Treaty of Versailles, which brought about the ILO Constitution, started with the words: "Whereas universal and lasting peace can be established only if it is based upon social justice; and whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled…" The ILO is the only creation of the Treaty of Versailles which survived WWII. Principles of social justice have found their place in the United Nations Charter as well, and a great number of UN specialized agencies deal exclusively with socio-economic tasks. The importance of economic interrelatedness for preserving peace was recognized most of all by European countries, thus eventually leading to the creation of the European Communities.

2 The intensity of inter-state conflicts diminished after WWII due to international mechanisms for the prevention of international use of force and maybe even more because of the nature of international relations during the Cold War era. As far as psychological and highly subjective elements are concerned, many examples support the claim that sometimes even individuals may change the course of history. All objective conditions were met for predicting a violent post-apartheid conflict in South Africa, but exceptional leaders prevented it by steering public opinion on a pacifist course. Conversely, there are numerous historical examples where dictators and charismatic leaders played a key role in leading their nations into wars.

3 Though socio-economic factors may appear to be "rational", it should not be overlooked that violent conflict is not a rational act in the vast majority of cases. Predictions of its outcome are often highly inaccurate, and desired goals are overstated to such an extent that its price may in the end be much higher than the expected benefit. See S. Van Evera, *Causes of War Power and the Roots of Conflict* (Ithaca: Cornell University Press, 1999) at 30-34.

entering into conflict as subjective factors are determined by objective conditions. But many examples, such as the South African post-apartheid society show that this does not necessarily have to be true. Both subjective causes as motives of action and objective conditions have to be met for conflict to occur.

It is not the goal of this paper to argue that only socio-economic conditions are relevant in researching the causes of violent conflicts, but to examine their importance and correlation with other conditions in establishing an environment favorable to violence.

Motives of Conflicts – the Will to Gain and to Dominate

Unlike in previous ages, when war was recognized as the natural state and peace as a short period of rest needed to recharge canons and muskets, WWII, together with all its atrocities, brought to the pedestal the idea of peace as the ultimate condition and outlawed the conception of war as the "continuation of policy by other means". Has this resulted in significant change in international relations? The answer, although some may disagree, is yes. Did it result in significant changes in basic goals and aspirations of states? The answer here is much closer to the negative.

Military means were exchanged for diplomatic, although not entirely. But even in the world of diplomacy and a collective security system, one attribute of the state has remained central – its power. Power positions the state in the arena of equals, and greater power gives a state the opportunity to defend its interests and to achieve its objectives more efficiently than others. In an international system with no firm monopoly on power, individual strength is still of the greatest importance. Under these circumstances, the ultimate goal of every sovereign state is to at least preserve its power or, if possible, to increase it.

Power consists of many elements, from natural resources, through wealth, military, trade and diplomatic capacity, to public attitudes and the solidity of state institutions. All of these elements are directly or indirectly related to the economic potential of a society. The notion that power depends on resources and that national power rests on economic factors[4] is almost universally accepted, although there is room for contrary arguments. The example of a new nuclear power – North Korea – shows that even a state with a ruined and isolated economy and with an eleven-year-long famine can play a significant role in international relations and become

4 See L. Robbins, *Economic Causes of War* (London: Jonathan Cape, 1939) at 61; A.C. Pigou, *The Political Economy of War* (New York: The Macmillan Company, 1941) at 29-47; A. Watson, *Diplomacy: The Dialogue between States* (New York: Rutledge, 1991) at 53.

one of the most arrogant members of the international community. The miserable economic conditions of North Korea are largely attributable to its enormous military expenditures, and the international position of the country is almost entirely based on its military strength. In addition, the political conditions and social order established in the country allow Pyongyang to pursue its policy of force, both on the international and the internal level. In a democratic society, however, this kind of practice is practically unfeasible. In a modern state, where sovereignty belongs to the people, it is an obligation of its elected representatives to secure the wellbeing of those who have elected them. All of the elements needed for securing the power of the state at international level have to be fulfilled in order to secure the wellbeing of the people at national level. Accordingly, it could be stated that the internal potential for welfare is proportional with the international power of the state, and that these two elements are just the two sides of the same coin.

Just like at international level where different states pursue their diverse interests, at national level different social groups do the same thing. But contrary to the international community where there is no monopoly of force, in most modern democratic states the democratically and freely elected governments are stable mediators of diverse interests. But what if a society is not founded on the principle of equality or if that principle is not entirely implemented? What if not all groups have the same or at least similar influence in deciding on who the mediator will be? In that case the power of a particular group becomes as important as does the power of the state in the international community.

As power depends on economic factors, the aspiration to preserve and improve socio-economic conditions could be regarded as one of the root causes of violent conflicts. It could be expressed both through the desire for socio-economic domination or through the quest for the essential resources. According to Pigou, the causes of war lie "behind the assembling of the power. In the last analysis these are two in number, the desire for domination and the desire for gain."[5]

While the desire for socio-economic domination is by its nature a synonym for the quest for power, the desire to gain essential resources could not be *prima facie* characterised in such a manner. This is particularly true when the quest for resources is in reality the liberation of these goods from a usurper. It should be noted that usurpation does not have to be necessarily the result of conquest and occupation. Unequal redistribution between different groups within the same society based on discriminatory grounds could also be seen as usurpation. In such circumstances, there is no motive for gaining a superior position, but only to accomplish just redistribution and secure favourable conditions for equal development. Obviously, the accomplishment

5 A.C. Pigou, *supra* note 4, at 19.

of these goals will eventually lead to the increasing of power of the "liberators", but it is only a secondary result. As long as this change in distribution of power does not become a mere swap of positions of those who dominate and those who are dominated, gaining of power could not be seen as an ultimate goal of the campaign.

One could observe that the aspiration for socio-economic advancement is common to all societies and that it can be better achieved by other means than conflict. International trade and cooperation, international aid and internal redistribution of goods to the poorest regions are only some of the instruments which can help to a country to develop. It is clear then that an aspiration for development can not lead to conflict by itself. This is even more so because of the nature of modern warfare. Every armed conflict is an expensive adventure, which in most cases cannot be economically justified on a short-term basis.[6] Every side engaging in such an adventure has to count on severe losses and economic instability. Thus, certain conditions have to be met in order to create an environment favourable for setting events in motion.

Main Socio-Economic Security Risks – Poverty and Inequality

Security risks frequently mentioned in the literature are widespread poverty and inequality in distribution of resources, goods and power among different groups within certain societies and among the nations. While these could be seen as the most common factors which lead to internal conflicts, it is much more difficult to establish their relation with inter-state wars.

As a rule, the modern technology of war does not allow poor nations to enter into inter-state clashes. Although the obstacle of insufficient finances could be overcome through alliances with wealthier nations, or by redistribution of the available goods from other sectors to the military, poverty is rather a constraint than the fuel of inter-state conflicts.[7] However, poverty should not be excluded as an international security risk. Poverty directly influences the level of education of the people and their interaction with others, and creates conditions conducive to chauvinistic and fundamentalist attitudes. These attitudes can easily be manipulated by governments of poor countries in their efforts to gain popular support for violent conflicts, and to justify redistribution of scarce resources for the purposes of military expenditures. Furthermore, numerous authoritarian governments do not have to search for ex-

6 Neither WWI nor WWII started during recessions. On the contrary, both began after recovery and stable economical growth. Some distinguished authors draw from this the conclusion that the major economic cause of war is economic recovery, which affects the revenues and expenditure of governments. See: Geoffrey Blainey, *The Causes of War* (New York: The Free Press, 1988) at 91.

7 See Morris Miller, *Poverty as a Cause of War*, (2001) 3, 50th Pugwash Conference: *Eliminating the Causes of War, Pugwash Occasional Papers*, at 79-107

cuses for any action they take in order to gain popular support. Internal social order and political system allows them to conduct their policy without any justification.

In addition, modern terrorism shows that a state such as Taliban-controlled Afghanistan does not have to be an active party in violent undertakings, but only a factor of support. Unlike in conventional warfare, terrorism is based on the activities of well-organised groups of individuals which recruit men and women predominantly from very poor fundamentalist environments. Terrorist methods allow the poorest to escape the restraint of poverty and threaten even the wealthiest nations in pursuing their goals.

Although national poverty and inequality between the nations cannot, as a rule, be regarded as a pro-active factor of international violence, they still can present serious passive international security risks. Entirely different conclusions can be drawn when internal conflicts are in question. Inequality and poverty can be the central causes of internal conflicts. However, it appears that the simple existence of inequality or poverty, even in combination, is not sufficient to create tension and open conflict.[8]

In societies where the entire system is based on inequality, a high level of repression is needed to preserve the established social order and to prevent conflict between the diverse groups.[9] However, the ability of repression to prevent conflicts is limited. While in the beginning repression can give satisfactory results in controlling social disturbances, it ultimately becomes counterproductive, and actually can be, and often is a trigger for the outbreak of conflicts. Historical examples show that the duration of repression and the ultimate increase of its intensity weaken its efficiency and finally lead to the collapse of the system. When a certain level of severity is reached, decision makers are easily deprived of their legitimacy on one side, and of their monopoly of power on the other. Inability or unwillingness to provide even basic services to larger groups in the society on a non-discriminatory basis is a certain path to the collapse of authority and a breaking point in the evolution of conflict behaviour.[10]

8 Nevertheless, inequality and poverty can lead to individual violent behaviour, and even the most powerful states with large gaps in social and economic distribution are faced with serious problems of crime and unrest. On the other hand, numerous examples from the near past which indicate that mass disturbances in a society where poverty is based on inequality should not be neglected either. Riots in Los Angeles in the early nineties, and the 2005 riots in France and other European countries are some of the examples.

9 Then again, such conditions could be considered a state of conflict in itself.

10 Real-socialist states are the best examples for this. Authoritative regimes derived their legitimacy from the notion that they are able to provide social security to vast majority of their citizens. Although deprived of almost all civil and political rights, the "working people" of these states were "willing" or at least "highly indifferent" to this status in exchange for guaranteed social security. When the state lost the capacity to buy freedom for social security, it lost it legitimacy and consequently the entire system collapsed.

The fact that the grounds for inequality are to be found in the majority of cases in racial, national, religious or ethnical diversities of groups within the society can (and often does) lead some to the erroneous conclusion that the conflicts which derive from these circumstances are motivated by ethnicity or other similar causes. The truth is, however, that these elements are often used for the justification of social divisions, to sustain and preserve those divisions, and ultimately to stimulate and justify the conflicts. Ethnicity, religion and national identity could be observed as strong instruments for mobilizing numerous members of certain groups, but whether this mere fact is sufficient to mark these characteristics as central causes of violent conflicts, or at least as security risks, is an open question. Is cultural diversity, present in almost every society, an important or even a key instability factor and central element in the majority of modern local conflicts? A strict deterministic approach could lead to an affirmative answer. Effective nationalism (chauvinism, ethnocentrism etc.) is possible only in societies where there is more than one distinguished group. As nationalism can lead to violence, social diversity is a primal cause of conflict. However, this vastly oversimplifies the reality.

The presumption that nationalism occurs only in multinational societies is far from the truth. While effective nationalism and ethnocentrism can do much greater damage in such environment, there is a greater probability of xenophobic behaviour in closed societies which do not have significant interactions with others. By the same token, though it would be excessive to state that xenophobia is unheard of in multicultural societies, it can be observed as an abnormality. Constant interaction between the diverse groups within a society prevents the existence of the most prominent cause of xenophobia – lack of knowledge about other groups. However, numerous examples testify that xenophobia is not only a possible, but is an extremely dangerous element, which can be used as a trigger in multicultural societies. Irrational feelings can be easily produced. This is why propaganda has played such a significant role in various conflicts which took place in the XX century.[11] Thus, the truth is that if inequality in distribution of goods and power is based on ethnical, national, racial or religious diversities of groups within one

11 For propaganda in Yugoslavia see: M. Thompson, *Forging War: The Media in Serbia, Croatia, Bosnia and Herzegovina* (Luton: University of Luton Press, 1999); for the Rwandan case see: Jean-Pierre Chrétien et al, *Rwanda: Les médias du génocide* (Paris: Karthala, 1995). The role of Der Stürmer and its editor Julius Streicher in the Holocaust has been discussed in numerous books and articles: M. Mills, *Poisoning Young Minds in Nazi Germany: Children and Propaganda in the Third Reich*, (2002) 66 Social Education, at 228; A. J. Edelheit, H. Edelheit, *History of the Holocaust: A Handbook and Dictionary* (Boulder: Westview Press, 1994); J. R. Fischel, *The Holocaust* (Westport: Greenwood Press, 1998); H. Hoffmann, *The Triumph of Propaganda* (Providence: Berghahn Books 1996); L. Fraser, *Propaganda*, (Oxford: Oxford University Press, 1957); on Julius Streicher see R. P. Archer et al, *The Quest for the Nazi Personality: A Psychological Investigation of Nazi War Criminals*, (Mahwah: Lawrence Erlbaum Associates, 1995) at 145-172.

society, and if that inequality leads to the severe poverty of one of the groups and its exclusion from social life, the possibility of conflict will be greater than if the same circumstances of poverty exist, but without these divisions.

The Rwandan conflict is perhaps the best example for testing this hypothesis. Although this conflict was undisputedly inspired by ethnic hatred, it is not clear that this was the only or central cause of the genocide which took place there. All Rwandans share the same language, the same culture, and they shared the same religion before colonization. The division of Hutu and Tutsi was made during the colonial period, and had nothing to do either with "racial science" or ethnography, but with the socio-economic status of the two groups.[12] No significant conflict between the two castes was reported before Rwanda was colonized by the Germans and subsequently Belgians. In fact, the colonizers invented the division of the two classes as they thought that it would make governing the country much easier. The Tutsis, because of their better social status, were favoured by the two colonial powers, which led to the intensifying hatred between the two castes.[13] While the Tutsis were integrated into the colonial administration, the Hutus were excluded from social life.[14]

The struggle for independence which took place during the fifties was presented by the colonial power as an ethnic conflict between the two groups. Many Tutsis were killed or sent into exile, the remainder being marginalized in Rwandan society. As the host countries where the Rwandan refugees settled were faced with serious economic and social problems and thus could not afford to continue keeping the large number of refugees within their territory, at the beginning of nineties a rebellion was organized, and a great number of Tutsis undertook an armed invasion of Rwanda. Subsequently, the massive genocide of those Tutsis who were settled in Rwanda took place.[15]

The Rwandan conflict could be described in the following way: the very notion of ethnicity was highly connected with the socio-economic status of two different

12 The Hutus were farmers while the Tutsis were cattle keepers. The greater value of the Tutsi business led to their better social status.

13 It should be noted that the ethnic division of the colonized people was a standard practice of colonizers. It had been conducted under the influence of the so-called "Hamitic thesis". According to this thesis, "everything of value in Africa had been introduced by the Hamites, supposedly a branch of the Caucasian race". See E. Sanders, *The Hamitic Hypothesis: Its Origin and Functions in Time Perspective* (1969) 10 Journal of African History, at 524-526

14 See G. H. Stanton, *Could the Rwandan Genocide Have Been Prevented*?, paper presented on 27 January 2002 in London, England at a conference, "Generations of Genocide" (available at http://www.genocidewatch.org/COULD%20THE%20RWANDAN%20GENOCIDE%20HAVE%20BEEN%20PREVENTED.htm)

15 For more details on Rwandan conflict see B. D. Jones, *Peacemaking in Rwanda: The Dynamics of Failure*, (Boulder and London: Lynne Rienner, 2001).

groups; the colonialist policy, and later the policy of the free Rwandan government led to segregation and socio-economic collapse of one of two groups over a period of time.[16] Ultimately, the rebellion led by the Tutsi refugees was initiated by the poor socio-economic conditions present in the host countries. Ethnic hatred was at first invented for the purpose of establishing colonial power, and then used in order to preserve it. The object of desire was always the same, only the subjects were changing places.

Numerous other conflicts described as ethnic or religious could be fitted into a similar framework. South African apartheid was established to preserve white supremacy over the rich diamond fields, and there are serious analyses which point out the significance of the cheap labour force provided by the native Africans.[17] The civil war in Sudan, the longest African war, has its roots in the political and economic northern domination of the southern Sudanese.[18] The conflict in Ivory Coast started after the fall of the price of cocoa on the world market[19] and one of the direct causes of the outbreak of conflict were disputes on land reform.[20] This does not mean that ethnicity, religious animosity or nationalism did not have any role in these hostilities. But they should be regarded rather as instruments and triggers than the root causes of the war.

The truth is that nationalists often use socio-economic arguments in order to justify their policies. But these arguments cannot be used where there is no socio-economic crisis. In the years of Hitler's rise to power, there were over five million unemployed Germans, severe economic depression, a heavy burden of reparation, and only one political party which offered revolutionary economic solutions and unhidden aggressiveness toward the Treaty of Versailles. The NSDAP used democratic mechanisms in the atmosphere of chaos and the despair of the German people to seize power and later, with massive propaganda, gained popular support for the monstrous deeds that marked the middle of the twentieth century. Nazi propaganda as well as Hitler himself made significant efforts to legitimise the Holocaust with a

16 Certain authors take Rwanda as an example that inequality in distribution of resources may not be an important factor for great atrocities. As the proof they point to the fact that in Rwandan society one fifth of the entire population possess about 40% of total income (The Economist, June 12th, 1999). What is neglected is the fact that 90% of the Rwandan population before the genocide occurred were Hutus and that a considerable number of Tutsis originally Rwandans were banned from Rwanda.

17 See G. Seidman, *Is South Africa Different? Sociological Comparisons and Theoretical Contributions from the Land of Apartheid*, (1999) Annual Review of Sociology, at 419.

18 See D. Johnson, *The Root Causes of Sudan's Civil Wars*, (Bloomington and Indianapolis: Indiana University Press, 2003).

19 Ivory Coast is one of the largest exporters of cocoa crops

20 See F. Akindes, *The Roots of the Military-Political Crises in Côte d'Ivoire* (Uppsala: Nordic African Institute, 2004).

socio-economic rationale.[21] Similar events happened in former Yugoslavia, where nationalist elites took advantage of an economic depression to justify the dissolution of the state.[22]

It is hard to determine where manipulation of socio-economic factors ends and instrumentalisation of exclusive nationalism begins. However, it is certain that the correlation between the two is in majority of cases the most powerful setting for the outbreak of violence and initiation of conflicts.

Prevention of Conflicts – Countering Socio-Economic Causes of Wars

The syllogism is very simple. If the socio-economic causes of wars play a major role in outbreak of conflicts, it could be reasonably stated that wars could be prevented by providing possibilities for the peaceful achievements of socio-economic goals and the changing of such socio-economic conditions as lead to violence. However, as has been shown in the first part of this paper, establishing the correlation between socio-economic conditions and conflicts is not that simple.

The causes of conflicts are many. Socio-economic factors do play a significant role; in many cases they could be seen as even crucial, but it seems that it would be fairly utopian to conclude that war would be forgotten if the aforementioned motives and conditions could be wiped off the face of the earth. One more utopia is hiding behind this statement. Can poverty really be beaten? Some optimists would argue that this is possible, but even if it is true, it is not going to happen in the life-

21 In his very first writing on anti-Semitism, Hitler writes: "His power is the power of money, which multiplies in his hands effortlessly and endlessly through interest, and which forces peoples under the most dangerous of yokes. Its golden glitter, so attractive in the beginning, conceals the ultimately tragic consequences. Everything men strive after as a higher goal, be it religion, socialism, democracy, is to the Jew only means to an end, the way to satisfy his lust for gold and domination." (*Hitler's letter to Adolf Gemlich*, September 16, 1919, in E. Jäckel, *Hitler. Sämtliche Aufzeichnungen 1905-1924*, (Stuttgart: Deutsche Verlags-Anstalt, 1980) at 88-90. For further discussion on methods of legitimization of holocaust see: D. Cesarani, *The Final Solution: Origins and Implementation* (New York: Rutledge, 1996).

22 The memorandum of the Serbian Academy of Sciences and Arts was the first document to challenge the socio-economic order in Yugoslavia, claiming that Serbs were disadvantaged and that Serbia was exploited by other Yugoslav republics. The memorandum started with the words: "There is deep concern in Yugoslavia because of stagnating social development, economic difficulties, growing social tensions, and open inter-ethnic clashes. A serious crisis has engulfed not only the political and economic arenas, but Yugoslavia's entire system of law and order as well." The memorandum claimed that "the guiding principle behind this policy ("tendency to keep the Serbian nation under constant supervision") has been "a weak Serbia, a strong Yugoslavia" and this has evolved into an influential mind-set: if rapid economic growth were permitted the Serbs, who are the largest nation, it would pose a danger to the other nations of Yugoslavia. And so all possibilities are grasped to place increasing obstacles in the way of their economic development and political consolidation."

time of this generation. It is sufficient to invoke the first of the eight Millennium Development Goals (which could be observed as highly achievable, but serious doubts could be raised about the time-frame and dedication of the states to accomplish them) in support of this fact:

> "Reduce *by half* the proportion of people living on less than a dollar a day
> Reduce *by half* the proportion of people who suffer from hunger"

This means that after 2015, there will still be 9 million deaths per year due to poverty related causes, that every six seconds a child will die from hunger and that some 500 million people will continue to live on less than $1 a day. In addition, more wars will occur that have poverty as one of their root causes. Can this really be seen as the eradication of poverty?

At the same time, would it not be a great success for international community to reduce the number of conflicts from twenty-nine, as was the case in 2003[23] to ten or fifteen? Even one conflict less could be seen as a small step forward. Thus, to say that improvement of socio-economic conditions in countries of the Third World would not make a change in this area is far from the truth. It could be even said that significant change could be observed almost instantly.

Legal remedies for poverty and inequality

Justiciability of Socio-Economic Rights

Can complaints by individuals or groups on breaches of their economic and social rights bring about changes? It may seem more than optimistic to state that the right of an individual to pursue his socio-economic interests through the courts can contribute to the efforts of countering violent conflicts. Both socio-economic conditions and violent conflicts are regularly considered from the perspective of the collective. It is the collective that may be the subject of war and only if socio-economic conditions are unbearable for a certain group may they present a security risk.

The correlation between the enjoyment of human rights and peace is indisputable. It is well described in the preamble of Universal Declaration and never has any major scientific dispute arisen to challenge what has been stated there. Here, it is

23 Human Development Report 2005: *International Cooperation at a Crossroads* (New York: United Nations Development Programme, 2005) at 153.

sufficient just to recapitulate: the purpose of establishing international bill of rights was to protect "inherent dignity" and to maintain "freedom, justice and peace in the world" of which the "inherent dignity" and the "equal and inalienable rights of all members of the human family" are the foundations. It came from the recognition that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" and that it is "essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". Thus, it is a common notion that respect for human rights is a *condicio sine qua non* for the maintaining and establishment of peace. As human rights are "universal, indivisible and interdependent and interrelated" there is no reason to believe that what has been said can not stand for both sets of rights, civil and political, and economic, social and cultural rights.

It is obvious that not every individual case of human rights violation will lead to a mass scale conflict. However, if there is no instrument which will outlaw and "punish" such acts, they can, and often do, become systematic and widespread. This is even more true for socio-economic rights. Their violation is often only a reflection of general socio-economic conditions. To use the wording of the International Labour Organisation Constitution "conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled". Or, as Constitutional Court of South Africa expressed in its *Grootboom* judgment[24] concerning adequate housing: "The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions." Although this is one of the major arguments in support of the argument why justiciability of socio-economic rights is important, it is much more often used against it.

Socio-economic conditions are not easily changed, and if the realisation of economic, social and cultural rights depends of them, they obviously cannot be fully respected so long as the conditions themselves are not upgraded to a satisfactory level. But this is only part of the truth. Socio-economic individual rights and conditions are mutually related, and as much as socio-economic development can influence a breakthrough in respecting individual rights, enjoyment of individual rights can contribute to socio-economic development. But from this correlation derives a further characteristic of individual socio-economic rights, namely that they cannot

24 *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC)

be achieved immediately. The programmatic nature of these rights, it is argued, is a crucial barrier to their justiciability. As progressive achievement of the full realisation of individual socio-economic rights is highly dependent on government policies and socio-economic programs, it is often argued that it is not for the court to decide whether these policies are sufficiently good or not. Ultimately, voters will decide on that in future elections. The court has neither the power nor the expertise to decide on these questions, it is pointed out in numerous studies. If the courts were to be given this influence, it would represent a breach of the separation of powers principle, and make the courts not only interpreters of law, but their makers too.

What is often neglected is that it is legal obligation of the state to adopt such policies and measures as will lead to the progressive realisation of these rights, or as it is stated in the Article 2 of the ICESCR:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The Committee itself made a clear interpretation of this article and explained the meaning and nature of obligation to achieve progressively the full realization of the rights recognized in the Covenant in its General Comment no. 3:[25]

> … the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content… (T) he phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard 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.

It is clear that if there is no possibility for review of national policies imposed in order to fulfil international obligations (and in recent times even constitutional

25 UN Doc. E/1991/23

obligations of the great number of states recognizing socio-economic rights as a constitutional category), unjust or unreasonable policies could not be challenged, not even in elections, if they affect only minority groups excluded from social life.

An extraordinary example of what had been stated above can be found in the recent practice of the Constitutional Court of South Africa. First, the constitution makers recognised the importance of the inclusion of socio-economic rights in the post-apartheid constitution. The Constitutional Court explained this notion by stating that "the realization of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."[26] In the *Soobramoney* case,[27] it was recognized that there are great disparities in wealth in South African society and the importance of socio-economic rights in such a society was confirmed, although the court did not find a breach of the right to adequate health services in this particular case:

> Millions 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 and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[28]

The importance of social and historical context in interpretation of human rights guarantees has been constantly reaffirmed as to that they have to be understood "against … legacy of deep social inequality."[29]

In identifying the place of judicial review of socio-economic policies, the South African Constitutional Court came up with a remarkable model for evaluating reasonableness of government's measures in order to establish whether they are compatible with South Africa's constitutional and international obligations. The "reasonableness test" has been explained by the Constitutional Court on numerous occasions:[30]

> … A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public

26 *Government of the Republic of South Africa v Grootboom*, *supra* note 24, para. 23.
27 *Soobramoney v Minister of Health, Kwa Zulu-Natal*, 1997 (12) BCLR 1696 (CC)
28 Ibid, para. 8
29 *Government of the Republic of South Africa v Grootboom*, *supra* note 24, para. 25
30 Beside *Grootboom* and *Soobramoney* see also *Minister of Health v. TAC*, CCT 8/02.

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.

The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

Thus, as Sandra Liebenberg summarized it, the policies and measures will pass the reasonableness test if they are: (1) comprehensive, coherent and coordinated; (2) balanced and flexible, with provisions of short, medium and long-term needs; (3) reasonably conceived and implemented; (4) transparent and in constant made known effectively to the public; (5) provide relatively short-term relief to those who are in desperate situations.[31]

In addition, it seems that there is one more important element of the reasonableness test: measures have to be planned with regard to social and historical context of South African society.

Can this model be implemented on international level? It is fifteen years now since the Committee on Economic, Social and Cultural Rights started to discuss the preparation of an optional protocol to the International Covenant on Economic, Social and Cultural Rights and more than ten years since Philip Alston, the then Chairman of the Committee, submitted the first draft of the Protocol. Until now, the protocol has not been adopted. What course could the Committee take in reviewing the petitions of groups and individuals?

The Committee has already developed in its practice of reviewing state reports the concept of "minimum core of rights". In essence, the minimum core concept represents a qualitative evaluation of a particular socio-economic right, and explains

31 S. Liebenberg, *Enforcing Positive Socio-Economic Rights Claims: The South African Model of "Reasonableness Review*, paper presented at COHRE "Litigating Socio-Economic Rights", Workshop, December 2003.

what are the elements which constitute its raison d'être.[32]

> …(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. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.[33]

While this concept is adequate for reviewing reports where general conditions are presented, it is quite inadequate for consideration of individual petitions. The second option is a "minimum threshold approach" which practically quantifies "minimum core content".[34] While this approach is much more satisfactory for reviewing individual complaints concerning the practice of a particular state, it does not leave enough space for the Committee to examine the policy led by the state in question and whether it is compatible with the obligations expressed in Article 2 of the Covenant. Although this could be achieved through consistent case-law, it seems that the South African "invention" gives more efficient results when applied to change policies which could lead to social disturbances and consequent violent conflicts. However, it should be noted that while national courts do have insight into the situation on the ground and to some extent legitimacy to intervene against government errors, the same cannot be said of the international monitoring bodies. It remains to see what direction will be taken by the Committee when (or if) the Protocol comes into force.[35]

Challenging Inequality and Discrimination

As stated above, inequality can be an important component in the outbreak of conflicts, and its eradication may be regarded as one of the crucial tasks in the campaign against war. Fortunately, both international and national laws are much more consistent in this field than in the case of socio-economic rights. In addition, the non-discrimination principle has shown itself to be a very powerful tool in efforts

32 See K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights – Theoretical and Procedural Aspects* (Hart, Antwerpen, Groningen, Oxford: Intersentia, 1999) at 130 - 141

33 General Comment no. 3, *supra* note 25, para. 10.

34 Arambulo, *supra* note 32, at 141.

35 It should be noted that at least one more option exists. The proportionality test used by the European monitoring body of the European Social Charter (which already recognizes international justiciability of socio-economic rights, although only for groups), could be useful, especially with regard to the restrictions of certain rights.

to adjudicate certain socio-economic rights, even in those states where this set of rights is largely disregarded.[36]

Although the Committee on Economic, Social and Cultural Rights stated that the rights enlisted in the Covenant are primarily of a progressive nature, it emphasized that certain rights, first and foremost the principle of non-discrimination, are "of immediate effect".[37]

There are numerous examples where socio-economic rights have been successfully contested through the principle of non-discrimination before international bodies for the protection of human rights. A very important decision is that of the UN Human Rights Committee made in the case *Zvaan - de Vries v. Netherlands*,[38] which had significant impact on the implementation of Article 26 of the International Covenant on Civil and Political Rights[39] and reaffirmed notion of indivisibility and interdependence of all the rights from the International Bill of Human Rights:

> The State party contends that there is considerable overlapping of the provisions of Article 26 with the provisions of Article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments… as in the present case, the International Covenant on Economic, Social and Cultural Rights… The Committee observes in this connection that the provisions of Article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of Article 26 of the International Covenant on Civil and Political Rights.
>
> The Committee has also examined the contention of the State party that Article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under Article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance)…
>
> The Committee begins by noting that Article 26 does not merely duplicate the guarantees already provided for in Article 2. It derives from the principle

36 One of the famous cases in U.S. legal history is *Tayyari v. New Mexico State University*, 495 F. Supp. 1365 (D.N.M. 1980) 51n. The case was about discrimination on the grounds of nationality in the field of higher education. The court found that state universities do not have the right to restrict the access to education to individuals on grounds of their nationality (it is interesting to note that Tayyari was an Iranian national, and the case occurred while the hostage crisis was still in progress).

37 General Comment no. 3, supra note 25, para. 1.

38 Selected Decisions of the Human Rights Committee under the Optional Protocol vol.2. Seventeenth to Thirty-second Sessions (October 1982 - April 1988), U.N Doc. CCPR/C/OP/2 (1990).

39 See for instance *Ato del Avellanal v. Peru,* Communication No. 202/1986 and *Gueye et al v. France*, Communication No. 196/1985

of equal protection of the law without discrimination, as contained in Article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

Although Article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with Article 26 of the Covenant.

In the European system of human rights protection, up until recently there was no such broad provision on prohibition of discrimination as contained in Article 26 of the ICCPR.[40] Nevertheless, the prohibition of discrimination contained in Article 14 of the European Convention has been used with success several times in respect to socio-economic rights. This was possible because of the broad interpretation of certain rights guaranteed within the Convention. The European Court held, for example, that although the Convention does not protect as such the right to have access to a particular profession,[41] a far-reaching ban on taking up private-sector employment does affect "private life" as prescribed by the Article 8 of the Convention.[42] The court further held that this kind of prohibition of employment on the grounds of political engagement constitutes a violation of the prohibition of discrimination in conjunction with the right to private life. The court has also very broadly interpreted the right to the protection of property. For example, in *Gaygusuz v. Austria*[43] it held that the right to a retirement pension does fall within the scope

40 Protocol 12 on general prohibition of discrimination came into force on 1. April 2005.

41 See *mutatis mutandis Vogt v. Germany, App. no.* 17851/91.

42 *Sidabras and Džiautas v. Lithuania*, (app. no. 55480/00 i 59339/00). The applicants were Lithuanian citizens who had been KGB employees during the SSSR sovereignty over Baltic states. Lithuanian Lustration Act provided that for a period of ten years from the date of entry into force of this law "former employees of the SSC may not work as public officials or civil servants in government, local or defence authorities, the State Security department, the police, the prosecution, courts or diplomatic service, customs, State supervisory bodies and other authorities monitoring public institutions, as lawyers or notaries, as employees of banks and other credit institutions, on strategic economic projects, in security companies (structures), in other companies (structures) providing detective services, in communications systems, or in the educational system as teachers, educators or heads of institutions[;] nor may they perform a job requiring the carrying of a weapon" (Art. 2 of the Lithuanian Lustration Act).

43 *Gaygusuz v. Austria (*app. no. 17371/90). The applicant was a Turkish national who resided and worked in Austria for a long time. Due to a professional illness, he was receiving an advance on his retirement pension, but it seized after some 8 months. When he applied to the authorities for an advance on his pension in the form of emergency assistance he was rejected on the grounds that he had no Austrian nationality.

of Article 1, Protocol 1 of the Convention, and that a restriction of this right on the ground of nationality does constitute a breach of the prohibition of discrimination in conjunction with right to protection of property. In addition, it should be noted that the Court has become very open when consulting case law of other international monitoring bodies, especially when they are from the European system of human rights (for example the Committee for Prevention of Torture and the European Committee on Social Rights). It is yet to be seen how the Court will implement the provisions of Protocol 12 on the general prohibition of discrimination, but there is no reason to believe that it will not perform in a similar way as did the UN Human Rights Committee in implementing Article 26 of the ICCPR.

Thus, although not yet fully justiciable at the international level, social injustice, especially when it is based on inequality and discrimination, can already be protected before international bodies, at least to some extent. It is up to the practitioners to explore the limits of these possibilities, and consequently, to contribute to the establishment of universal peace.

International Cooperation as a Tool of Prevention

International aid still plays an extremely important role where the eradication of poverty and attainment of stability is concerned. In the fifty years history of intensive international aid, remarkable results have been achieved. For example, real per capita GNP tripled for all developing countries between 1960 and 1989.[44] Significant progress has been made, especially in the countries of East Asia.[45]

However, international aid is constantly decreasing. Donor countries today give half as much, as a proportion of their income, as they did in the 1960s. In 1960–65, rich countries spent on average 0.48 % of their combined national incomes on aid. By 1980–85 they were spending just 0.34 %. By 2003, the average had dropped as low as 0.24 %.[46] This is due to several factors. Without entering into discussion on military expenditures of most developed countries and their involvement in several very expensive and highly controversial military campaigns, or the adequacy of aid directed at the structural adjustments and programs for economical stability promoted by the World Bank and International Monetary Fund, one of the major barriers will be examined here.

44 P. Hoy, *Players and Issues in International Aid* (West Hartford: Kumarian Press, 1998) at 136.

45 It is important to mention that development of Taiwan or South Korea is not only due to the international aid, but also due to a good economic policy of these countries in using of the aid which had been given to them.

46 A. Fraser, B. Emmett, *Paying the Price – Why Rich Countries Must Invest Now in a War on Poverty* (Oxford: Oxfam International, 2005) at 33.

Authoritarian governments are one of the consequences of poverty. It is not extraordinary then that in many developing countries such governments exist. After the end of the Cold War, the political affiliations of the governments were put aside (in terms of their loyalty to the East or the West), and their economic achievements have been scrutinized in order to evaluate the outcomes and outputs of given aid. To be sure, non-democratic leaders and highly corrupt governments are a significant factor in persuading donor states to withhold their donations.[47] If that were not the case, it could be stated that donations given do not provide sustainable results, and thus represent only short-term relief. In addition, under these circumstances, such countries could be even more destabilized and become the threat to peace.

Nevertheless, this should not be an excuse for withholding aid from those who are in need. There are numerous ways to pass over governments, and still make significant changes in the society. For example, while the Serbian government was under strict international sanctions during the presidency of Milošević, international aid in the last years of dictatorship was directed toward oppositional democratic parties and municipalities which were under democratic control for non-violent campaigns against the authoritarian government, which eventually led to the fall of the regime and the establishment of democracy in Serbia. Since then, massive reforms of the economic and political system supported with significant international aid and direct foreign investment have taken place.

Although international aid plays a significant role in developing countries (some of which are completely dependent on it), it occupies only the second place in their foreign income; the first place is taken by earnings from export, mainly of natural resources, to the international open market. Because of the nature of the goods they are exporting, their share ratio in global trade was around 31% (shared between around 150 countries or 75%) in 2004, but this was primarily due to the higher oil prices.[48]

Interdependence in international trade is crucial for maintaining peace. The stronger the connections are, the higher is the interest to preserve peace and harmony. This was recognized by the European countries when they established what is now known as the European Union, but it was also acknowledged by the founders of some modern states when deciding to create federations of such divergent entities as those now present in Switzerland or the United States. Socio-economic interests can build strong and just unions; they can even build nations.

Is the building of a global nation the only way to achieve the ultimate state of peace? Many would react by rephrasing Lenin's remark that this would only rep-

47 Only 5 countries are fulfilling their obligation to provide 0,7 of their national income to achieve Millennium Development Goals. Ibid. at 34.

48 The World Trade Organization, Press Release, 14 April 2005.

resent "joint exploitation of the world by internationally united finance capital,"[49] - "ultra-imperialism". Others will simply state that it is a long process which will eventually be crowned with the victory of the supporters of globalization. There is no definite answer to this question. However, certain points can be raised. There is no reason to believe that the creation of some kind of a global state would lead to the ultimate cessation of conflicts. Internal conflicts are raging throughout the world. A monopoly of force, although powerful, is not sufficient to prevent such conflicts. Furthermore, if disparities among the developed and underdeveloped regions of the world continue to grow, as it is the case now, the establishment of a global state would only change the name of the international wars into the "provincial wars" or maybe even "separatist wars".

This does not mean that globalisation should be immediately banished as a bad idea, but it should be dealt with step by step. Inequality among the citizens within the same state has to be reduced, poverty eradicated, disparity among nations reduced, fair trade conditions on the open global market have to be created and upheld, all nations have to be subject to the rule of law and human rights have to be regarded as truly indivisible and interdependent, and much stronger mechanisms for prevention of international conflicts have to be established. Although it is uncertain whether the achievement of these goals will lead to the conclusion of the globalisation process, it is highly probable that it will have a significant (if not decisive) influence on the eradication of violent conflicts on a large scale.

49 V. I. Lenin, *Imperialism – the Highest Stage of Capitalism*, (New York: International Publishers, 1939) at 94.

Part Four

SOCIO-ECONOMIC RIGHTS AND MARGINALIZED GROUPS

ROMA RIGHTS, RACIAL DISCRIMINATION AND ESC RIGHTS

Claude Cahn

Roma constitute Europe's most excluded and marginalized ethnic group. Significant segments of the Romani community live mired in poverty or extreme poverty. Substandard living conditions lead to exposure to a range of contagious diseases. Adequate health care and schooling are frequently unavailable, and where these are available, they are frequently racially segregated. In addition, Roma have in recent years frequently endured physical attacks as racism has once again become acceptable in European societies, and as movements with explicitly racist agenda have grown, often with "Gypsies" as a named target group.

Beginning in the 1990s, advocates began challenging the practices to which Roma are habitually subjected, including by pressing for expanded legal norms banning racial discrimination, as well as by using these once they had been secured. As a result, the recent period has been characterized by a steady trickle of positive rulings by domestic and international tribunals in cases involving racially motivated treatment of Roma. Some of these have significantly reshaped domestic and international jurisprudence in matters related to the extreme harm of racial discrimination.

These positive developments re-ignite fundamental questions as to the relationship between the ban on discrimination – including the extreme harm of racial discrimination – on the one hand, and the establishment and advancement of economic and social rights on the other. This paper aims to explore briefly this dilemma and to sketch the current state of affairs, with the aim of pointing advocates toward possible future action.

The Justiciability of Roma Rights

A string of recent decisions brought by international tribunals in Roma rights cases involve matters first brought in the mid-1990s, which are now reaching a final decision. These include decisions in matters such as *Nachova and Others v. Bulgaria*,

in which military police shot and killed two unarmed Romani men in circumstances giving rise to concerns that the killings were infected with racial animus. In a July 2005 ruling, the Grand Chamber of the European Court of Human Rights partially upheld an earlier decision at first instance that the killings and subsequent failure to investigate the matter implicated Article 14 – the European Convention ban on discrimination. Although the decision is the fourth in which the European Court has found Bulgaria in violation of the Convention in matters related to the abuse of Roma by police, it is the Court's first ever finding of an Article 14 violation in a racial discrimination case.

Similarly, in *Hajrizi Dzemajl et al. v. the Federal Republic of Yugoslavia*, the UN Committee Against Torture (CAT) found Montenegro in violation of the Torture Convention. The case involves the failure of the Montenegrin government to remedy harms arising from the destruction by pogrom of a Romani settlement in 1995 in the town of Podgorica. Following the UN CAT ruling, the government of Montenegro awarded seventy-four victims a total of 985,000 Euro damages.

It will be seen that these cases, and other, similar ones brought to domestic and then international tribunals, involve pogroms against Romani communities or other forms of very extreme violence against Roma. Reasons why such cases have reached international tribunals are numerous, but two in particular are worth noting. First, the circumstances of these cases were so extreme that they evidently required just settlement, and since the governments concerned had failed to provide this, international tribunals were willing to weigh in to correct matters. A second noteworthy issue involves the nature of international justice: it is at present particularly suited to address matters involving violence and other extremes of human interaction. It is not (yet) as adept at confronting matters less picturesque than pogroms and killings by law enforcement officials, despite the fact that such less graphic harms may have an equally pernicious impact on the lives of the marginalized poor.

In keeping with the spirit of narrowing the concerns of international justice to the most constricted possible range, in ruling on these cases, there has been a determined effort to exclude economic and social concerns from the matters at stake, as well as to keep considerations such as the influence of racial discrimination to a bare minimum. Thus, for example, in the European Court of Human Rights Grand Chamber ruling in *Nachova*, the Court describes an approach whereunder states may only have particular obligations to examine racial discrimination matters if a person dies in the custody of the state, or in similarly extreme circumstances:

> The Grand Chamber reiterates that in certain circumstances, where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of death of a person within their control in custody, the burden

of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of, in particular, the causes of the detained person's death (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). The Grand Chamber cannot exclude the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis.[1]

In so ruling, the Grand Chamber recapitulated the approach of the European Court's first instance ruling, which seemed to suggest even more that states may only have particular obligations related to racial discrimination when someone dies violently at the hands of a representative of that state:

157. That obligation must be discharged without discrimination, as required by Article 14 of the Convention. The Court reiterates that where there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Compliance with the State's positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin (see *Menson and Others v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V).

158. The Court considers that when investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV). In order to maintain public confidence in their law enforcement machinery, contracting States must ensure that in the

1 *Nachova and Others v. Bulgaria*, ECHR Grand Chamber Judgment of 6 July 2005, para. 157.

investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing.

159. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute (see, *mutatis mutandis*, *Shanaghan v. the United Kingdom,* no. 37715/97, § 90, ECHR 2001-III, setting out the same standard with regard to the general obligation to investigate). The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.[2]

Left begging are what criteria are required of a state with respect to investigating, for example, an employment discrimination case, despite the fact that discrimination in the field of employment might be a type of harm with much farther-reaching implications for long-term exclusion of certain categories of person. It is hard to see how the resulting codification of an approach whereunder an international tribunal affirms that racial discrimination matters are only particularly compelling in circumstances in which someone dies violently would be anything other than a significant degradation of the system of international human rights justice. On the contrary, it would seem to reaffirm the most problematic elements of international justice: until the European Court of Human Rights first instance ruling in *Nachova and Others v. Bulgaria* in February 2004, the Court had never once managed to find a violation of Article 14 in a racial discrimination case.

The effort to limit racial discrimination matters and to exclude social and economic matters from international human rights justice notwithstanding, these issues cannot be excluded from international justice, and so persistently invade rulings by tribunals which seem determined to keep them out or which are by mandate designed to exclude them. Thus, for example, among primary compelling details heard by the UN Committee Against Torture in *Hajrizi Dzemajl et al. v. the Federal Republic of Yugoslavia* noted above was the fact that as a result of being hounded from the town, all of the Romani men in the settlement had failed to come to work, and had then been dismissed from their place of employment – a local factory – and in the eight years following the pogrom had not been provided with due remedy, despite civil complaints for unfair dismissal. Thus, although the UN CAT has no mandate in matters related to employment, the ludicrous circumstances of the dis-

2 *Nachova and Others v. Bulgaria*, ECHR, Judgment of 26 February, 2004.

missals of the Romani men concerned from their place of employment, as well as the failure to provide justice in these cases, weighed significantly in the finding of degrading treatment related to the pogrom.

No recent decisions better exemplify the phenomenon in which social and economic rights issues haunt the margins of civil and political rights decisions, acting as repressed agents forcing forward positive decisions, than the two recent excellent decisions in the matter of *Moldovan and Others v. Romania*, the official name of the case generally referred to as "*Hadareni*". Hadareni is a village on the road between the towns of Cluj and Tirgu Mures, in the Transylvania region of Romania. There, on September 20, 1993, following the stabbing of a non-Romani man by local Roma, villagers killed three Romani men and then set upon the Romani settlement itself, burning fourteen houses to the ground. The event was one of a series of major anti-Romani mob violence incidents which took place in Romania in the period 1990-1993, in which locals killed Roma, burnt their settlements to the ground, and expelled them from localities. Following the near-complete failure of justice in the case before local courts, in January 2001, the case was brought to the European Court of Human Rights.

In a first ruling on the merits of the case, issued on July 5, 2005, the Court confirmed a friendly settlement between the Romanian government and eighteen victims, in which a total of 262,000 euros would be paid in damages. Amounts awarded range between 11,000 and 28,000 euros per individual or couple. The July 5 decision also commits the Romanian government to a range of measures aimed at ameliorating the situation of the Roma locally, as well as dampening the continuing high degrees of anti-Romani hatred in the area. In an unusual move, the decision of July 5 includes a detailed recital of the case. The Court evidently decided that the facts of the case should be part of the public record.

The Court issued decision on the merits of the case on July 12, 2005, delivering judgment on matters concerning seven applicants who refused friendly settlement with the government. In the ruling, the Court found violations of Article 3 (prohibition of inhuman or degrading treatment), Article 6(1) (right to a fair hearing) on account of the length of the proceedings, Article 8 (right to respect for private and family life), and Article 14 (prohibition of discrimination) taken in conjunction with Articles 6(1) and 8. In a very rare move, the Court held that the discrimination in the proceedings of the case had been so intense that it amounted to degrading treatment as banned under Article 3. Damages totaling 238,000 euros were awarded to the victims, including one award of 95,000 euros to one of the victims, a very high award by European Court standards.

There are many striking features of the two *Hadareni* decisions, and it is not the purpose of this article to examine them in detail. One aspect of the decisions

is, however, relevant for the purposes of this article: for formal reasons, the Court could not hear complaints relating to the pogrom itself because the episode had taken place before Romania entered the Council of Europe, and therefore before it was bound by the European Convention on Human Rights, the law the European Court is charged with enforcing. Nevertheless, in a landmark admissibility ruling in June 2003, the Court agreed to hear the case, on the basis of the fact that a vacuum of justice in the case, and the continuing degrading conditions in which the victims lived once Romania was bound by the Convention might constitute continuing violations of the Convention.

Thus, one of two sluice gates through which the Court approached ruling on the matter of the pogrom was in fact the living conditions of the persons concerned following the episode. Indeed, the reasoning in relation to these aspects of the ruling is among the most detailed parts of the Court's ruling on the merits of the case. After deliberating on matters such as "three houses have not to date been rebuilt and, as can be seen from the photographs submitted by the applicants, the houses rebuilt by the authorities are uninhabitable, with large gaps between the windows and the walls and incomplete roofs; […]", the Court held:

> 108. In the Court's view, the above elements taken together disclose a general attitude of the authorities – prosecutors, criminal and civil courts, Government and local authorities – which perpetuated the applicants' feelings of insecurity after June 1994 and constituted in itself a hindrance of the applicants' rights to respect for their private and family life and their homes (see, *mutatis mutandis*, *Akdivar v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1215, § 88).
>
> 109. The Court concludes that the above hindrance and the repeated failure of the authorities to put a stop to breaches of the applicants' rights, amount to a serious violation of Article 8 of the Convention of a continuing nature.
>
> 110. It furthermore considers that the applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.[3]

After further recital of facts, the Court proceeded to find a violation of Article 3 of the Convention for reasons including racial discrimination, thus ruling that

3 *Moldovan and Others v. Romania*, [No. 2] ECHR, Judgment of 12 July, 2005.

Romania had breached the ban on cruel and degrading treatment.

The foregoing however begs the question of how these facts might differ from those of persons compelled to live in extremely substandard conditions, but who had not previously been subjected to community violence (or at least not in the very immediate past), and why exactly the State's obligations toward such persons might be different from its obligations toward persons subjected to pogrom. How would the feelings of "humiliation and debasement" differ in the two cases? Having proceeded to develop an approach whereby the Court recognizes that "severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities," might give rise to "considerable mental suffering", it is very unclear why a person would additionally have to demonstrate that she had been subjected to community violence in order to secure some sort of remedy from the condition by the State.

These subversive elements of the Court's jurisprudence remain, however, at present, just that: subversive elements. Economic and social matters tend to weigh in as supporting material, but the focus of the Court and similar international tribunals are civil and political matters: death, torture, exclusion from political and justice processes. Thus, the European Court's most significant ruling on environmental harms to date - *Oneryildiz v. Turkey* - makes very important law surrounding issues related to the treatment of slum dwellers and a state's obligations toward them. The Court heard a range of evidence in the case in question indicating that local officials were aware of environmental threats posed to slum dwellers by a local dump, and not only failed to take steps to remove the dangers, but actually facilitated the continued presence of the slum dwellers on the site, including by providing rudimentary services and taxing the dwellings. However, the Court's ruling in the matter came only after thirty-nine persons died as a result of the explosion of the facility.

The Ban on Discrimination

The tendency of international human rights justice to concentrate on civil and political rights issues has been at least in part behind moves to bring social and economic issues into international justice through a focus on discrimination matters. Discrimination is banned under both Covenants. Famously, in the cases *Broeks v. the Netherlands*[4] and *Zwaan de Vries v. the Netherlands*[5], both cases relating to dis-

4 *Broeks v. the Netherlands*, Communication No. 172/1984, Views adopted on 9 April 1987.
5 *Zwaan de Vries v. the Netherlands*, Communication No. 182/1984, Views adopted on 9 April 1987.

crimination in connection with the right to draw social security benefits, the UN Human Rights Committee ruled that the Article 26 ban on discrimination of the International Covenant on Civil and Political Rights (ICCPR) covered issues outside the rights contained in ICCPR and therefore constituted a freestanding right for the purposes of the ICCPR. Even persons and entities opposed to the idea that social and economic rights exist as fundamental rights on the same footing as civil and political rights have been willing to recognise – and indeed have encouraged the idea – that economic and social exclusion matters be addressed within the framework of a ban on discrimination. Thus a degree of consensus has emerged on the ban on discrimination, which has not yet been secured on the existence – let alone the justiciability – of social and economic rights.

In recent years, in particular in response to the very disturbing return of visceral and explicit racism to the European public space, European authorities have responded by considerably elaborating the ban on racial discrimination law in Europe, both in the framework of European Union law and therefore in the Member States of the European Union,[6] as well as in the Council of Europe system.[7] This article is not the place to discuss the scope and nature of the very rich and manifold concepts at issue in the ban on discrimination. A brief overview suggests that at minimum a number of matters are implicated in the ban on discrimination for the purposes of the legal systems of Europe, as well as under the international law systems binding European states. These include but are not necessarily limited to bans on:

- Direct discrimination, or treating similarly situated persons differently in similar situations, for arbitrary reasons including race, ethnicity, nationality, gender, political conviction, sexual orientation, social status, birth or other reasons;
- Following the European Court of Human Rights ruling in *Thlimmenos v. Greece*, "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."[8]
- Indirect discrimination, meaning where persons are placed at a particular disad-

6 The most significant development under EU law in this area to date has been the adoption in 2000 of Directive 43/2000 "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin", generally referred to as the "Race Directive".

7 Significant developments, in addition to jurisprudence discussed above, include the adoption in 2000 of Protocol 12 to the European Convention on Human Rights, creating a ban on any rights secured by law under the European Convention; the adoption of the Framework Convention on the Protection of National Minorities, including 3 separate provisions banning discrimination; and the adoption of a Revised European Social Charter, including for the first time a ban on discrimination in the Charter's substantive provisions.

8 *Thlimmenos v. Greece*, *(Application No. 34369/97),* ECHR Judgment of 6 April 2000.

vantage as a result of an apparently neutral rule, criterion or practice, provided there is no objective justification for the disadvantage;
- Failure to progressively realize the rights included in the International Covenant on Economic, Social and Cultural Rights, for reasons of any of the criteria set out under Article 2(2) of the Covenant;
- "Harassment", meaning "unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment";
- An instruction to discriminate against persons on grounds of racial or ethnic origin;
- Any adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Even though these are still early days, the implications for Roma of these expanded norms have already been significant. For example, in the period since December 2003, when Bulgaria adopted its first comprehensive anti-discrimination law as a result of the requirements of the EU Race Directive, Bulgarian courts have on at least eight occasions ordered compensatory damages for Romani victims of racial discrimination, in cases including bans on services in shops and restaurants, discriminatory refusals to hire, and the arbitrary refusal of equal treatment in the provision of state-provided electricity services.

At international level, quasi-judicial bodies have been persuaded that Roma suffer systematic discrimination. For example, in December 2004, the European Committee of Social Rights, ruling in the matter of *European Roma Rights Center v. Greece*, held that Greece had violated Article 16 of the European Social Charter in three different aspects by systematically denying Roma the right to adequate housing, due to:
- The insufficient number of dwellings of an acceptable quality to meet the needs of settled Roma;
- The insufficient number of stopping places for Roma who choose to follow an itinerant lifestyle or who are forced to do so;
- The systemic eviction of Roma from sites or dwellings unlawfully occupied by them.[9]

Similar complaints are currently pending before the Committee against Italy and Bulgaria. However, because of the nature of the European Social Charter mechanism, no compensation flows directly to victims of such practices.

9 *European Roma Rights Center v. Greece*, Collective Complaint No. 15/2003, European Committee of Social Rights, Decision on the Merits, 8 December 2004.

Implications for the Development of ESC Rights

The above mentioned developments in anti-discrimination law are to be welcomed without qualification; for the first time, Romani and other victims of the severe harms of discrimination have access to justice, and perpetrators of injustice are being punished. In many cases, these perpetrators were acting out practices so casually and habitually indulged in that it is only now, for the first time, that discriminators are becoming aware of the harms they have undertaken. Governments are now acutely aware that they must undertake and implement policies to improve the situation of Roma and roll back the effects of widespread if not systematic discrimination, or risk being held accountable by intergovernmental bodies, or by international or domestic tribunals. These facts notwithstanding, it is unclear whether, in the absence of further measures, they significantly advance economic and social rights. Indeed, it is unclear whether or not these advances in the scope, depth and range of the ban on discrimination may not have paradoxically come at the price of an erosion of social and economic rights, or at least masked some ongoing erosions.

This dilemma is perhaps best illustrated with respect to the current state of affairs in the field of housing in Hungary. Hungary is a party to the International Covenant on Economic, Social and Cultural Rights, and therefore in principle the country is bound by the Article 11 guarantee of a right to adequate housing. However, the Hungarian Constitution does not establish a right to adequate housing and, to date, all efforts to establish a right to adequate housing under domestic law have failed. Moreover, Hungary has to date avoided joining the Revised European Social Charter, which provides explicitly for a right to housing under the Council of Europe system, in addition to providing a collective complaint mechanism for petition where such rights have been violated.

Indeed, since the collapse of Communism, both in fact and in law, Hungarian authorities have significantly eroded rights associated with the right to adequate housing, and policies aimed at securing adequate housing for all. For example, Hungary already has among the lowest public housing stocks in Europe, and as a result of diminishing resources, local authorities have, since the early 1990s, been progressively selling off what public housing stocks do exist, a fact which national lawmakers have done nothing to check. At the same time, Hungarian lawmakers have knocked out previously existing protections against forced evictions: since 2000, the notary – an assistant to the mayor – may order eviction, against which no appeals are suspensive, and action which previously could only be taken by a court. Police must implement notary-ordered evictions within eight days. Although there is a requirement to re-house evicted furniture, there is no requirement to re-house evicted persons.

These developments, combined with rising prices in Hungary, have given rise to new armies of homeless in Hungary. The Hungarian Ministry of Social Affairs estimates a homeless population of approximately 30,000 in the country. Due to pressure on public housing stocks, increasingly bizarre responses to this crisis are reported, such as the adoption in some municipalities of the practice of auctioning off social housing to the highest bidder (!), to name only one example. In early 2005, the Hungarian Constitutional Court declared a number of local practices in this area unconstitutional, and review of all local practices in this area has been ordered, as yet without significant impact.

There are clear indications that the practice of forced eviction and concomitant homelessness are disproportionately falling against Hungary's Romani community. Indeed, it was Hungary's Parliamentary Commissioner on National and Ethnic Minority Rights who recommended a review of local rules on the provision of social housing in the wake of the Constitutional Court rulings, primarily because their impact is disproportionately experienced by Roma. It should be noted that this is by no means unique to Hungary; to a greater of lesser degree, similar dynamics are afoot in the Czech Republic, Slovakia, Bulgaria and Romania. Indeed, in all of these countries, there are concerns that housing is increasingly racially segregated.

Since December 2003, as a result of its European Union obligations, Hungary has had a comprehensive law banning discrimination, including in the area of housing. As such, one can now bring a challenge before a court of law or before Hungary's recently established anti-discrimination authority to an act of discrimination – including racial discrimination -- in the field of housing. Thus, if one is able to demonstrate that a refusal to provide housing, or some other decision in relation to housing, was influenced by arbitrary matters of race, it should be struck down by a court or other authority. This is clearly an advance, particularly for persons excluded from housing for arbitrary reasons such as race. This importantly remedies a massive lacuna in Hungarian law – the failure until recently to provide a useable and effective ban on discrimination, among other things to shelter pariah groups such as Roma. However, it goes nowhere toward resolving major components of the underlying problem, namely the near complete evisceration in recent years of a previously existing housing rights framework.

Conclusion

Important advances in recent years in anti-discrimination law have crucially provided excluded, pariah and marginalized groups with chances for redress when fundamental rights are violated, including fundamental social and economic rights.

However, in the absence of a strengthening of the social and economic rights regime per se, these advances will be only partial, and may additionally have pernicious side effects, such as for example aggravated social tensions and resentment against "Gypsies who receive special treatment". International tribunals are already dragged in the direction of ruling on social and economic rights matters, but at present, due to limited mandates, these matters are often held in the margins of jurisprudence. The absence of a clear and unequivocal justice framework on social and economic rights matters threatens further to distort international justice in the coming years, as tribunals bend and warp their own mandates in order to rule on matters in need of just remedy. At domestic and international level, a clear and established framework for hearing and redressing social and economic rights violations, is the need of the day. Indeed all indications are that in order to ensure effective protection for all persons, including pariah minorities such as Roma, both a strong social and economic rights protection mechanism and a strong anti-discrimination framework are required.

CONTRIBUTORS

Violeta Besirević is Research Coordinator at the Center for Human Rights/ Central European University (CEU), Budapest, Hungary and a Visiting Lecturer at the Union University School of Law, Belgrade, Serbia. She holds an LLM in comparative constitutional law and an SJD from CEU. Her previous posts include Head of the Consular Department and Senior Diplomat at the Embassy of Serbia and Montenegro in Hungary; Senior Legal Officer and Staff Attorney at the Constitutional and Legal Policy Institute, Budapest, and Senior Legal Adviser at the Ministry of Justice of FRY and the former Yugoslavia. She is a Research Associate of the Center for Ethics and Law in Biomedicine/CEU, Budapest and a member of the Serbian Association for International Law. She is co-author of the Council of Europe Report on the *Compatibility of the Yugoslav Law and Practice with the requirements of the European Convention on Human Rights* (2002). Her research work and published papers include topics from human rights law, constitutional law, medical law and international criminal law. Her forthcoming book is *Euthanasia: Legal Principles and Policy Choices* (European Press Academic Publishing, Italy, fall 2006).

Claude Cahn is Programme Director of the European Roma Rights Center, Budapest, Hungary. He holds a Bachelor of Arts degree from Oberlin College in the United States, and has undertaken post-graduate work in Germany and Hungary. He also has a Masters Degree in History. He is editor of the book *Roma Rights: Race, Justice and Strategies for Equality* published by DEA Press, 2002.

Vidan Hadži-Vidanović is researcher at the Belgrade Centre for Human Rights where he conducts research on legal issues. He was one of the drafters of the *Strategy for Legal Reform of the Republic of Serbia* and one of the experts who prepared the *National Strategy of Serbia for the Serbia and Montenegro's Accession to the European Union*. He is co-author of the UNDP Human Development Report on multiculturalism in Serbia and a member of the NGO delegation which presented to the UN Committee on Economic, Social and Cultural Rights the alternative report on the status of economic, social and cultural rights in Serbia and Montenegro. In 2004 the Ministry of Foreign Affairs of Serbia and Montenegro, appointed him as a researcher in the *Genocide* case (*Bosnia & Herzegovina v. Yugoslavia*) currently pending

before the International Court of Justice. He is the author of two books and several articles and reports. He also works as an interpreter.

Wiktor Osiatynski holds degrees in law and sociology from Warsaw University and the Polish Academy of Science. He is a University Professor at CEU as well as a member of the Board of the Open Society Institute and of a number of OSI Sub-Boards, including the Justice Initiative, Human Rights and Governance Grants program and CEE sub-board. Professor Osiatynski has taught at many American and European universities, including Columbia, Stanford, Chicago, Connecticut and Siena. His main field of scholarly interest is comparative constitutional law and human rights. In the 1990s, Osiatynski was an advisor to a number of constitutional drafting committees and co-director of the Center for the Study of Constitutionalism in Eastern Europe at the University of Chicago Law School. He has written 20 books on various subjects, including history of social and political ideas, constitutionalism, addiction, science, and sports.

Daniel Smilov is Programme Director of the Center for Liberal Strategies, Sofia, Bulgaria and a Recurrent Visiting Professor at the Legal Studies Department, Central European University, Budapest. He is a member of the Committee on Party Funding and Corruption of the International Political Science Association (IPSA). Professor Smilov holds a DPhil from the University of Oxford and an SJD in Comparative Constitutional Law from Central European University, Budapest. His scholarships and awards include 2003-2004 Jean Monnet Fellowship; 2001 International Policy Fellowship, Open Society, Budapest; 1997-2000 East European Graduate Scholarship, Jesus College, Oxford; 1996 Soros/Foreign and Commonwealth Office Chevening Scholarship; 1994-1997 Central European University Graduate Scholarship1993-1994; and Sofia University, Political Science Department Stipend for best student. His professional interests relate to comparative constitutional and administrative law, legal theory, party funding and corruption, political parties. He is the author, co-author and editor of several books including *Party Finding and Corruption in Eastern Europe*, (ed.), *From the Ground Up: Assessing the Record of Anticorruption Assistance in Southeast Europe*, (with Martin Tisne) and *Administrative Law in Central and Eastern Europe*, (with Denis J. Galligan).

Anita Soboleva holds a degree in philology from Moscow State University, a law degree from Moscow Law Institute (currently Moscow State Law Academy), LL.M. in comparative constitutional law from the Central European University and Ph.D. in linguistics from Moscow State University. She is a member of the Moscow Oblast Chamber of Trial Lawyers (Bar Association) and of the Scientific and Expert Council of this Chamber. She is also the author of more than 15 publi-

cations in leading legal journals on philosophy of law, legal arguments, legal interpretation, linguistic rights and ethnic discrimination. In 2002 she published a book *Topical Jurisprudence: Arguments and Interpretation in Law* (in Russian). She is also editor-in-chief of several books on discrimination and human rights. Her experience includes litigation in civil and administrative cases, teaching constitutional law and legal reasoning in the Moscow State University (1997), expert work for the Russian Government (1992-1993), and research in the USSR Institute of Strengthening the Legality and Legal Order (1986-1989). She was also Director of the Rule-of-Law Program at the Open Society Institute in Russia from 1997 to 2003. Currently she is Executive and Legal Director of the independent not-for-profit organization "Jurists for the Constitutional Rights and Freedoms" (JURIX) and vice-president of the Russian Association of Law Libraries.

Filip Spagnoli works for the National Bank of Belgium. He holds a Master's degree in Philosophy from the Free University of Brussels as well as PhD in Philosophy from the same university. He is the author of two books -*Homo Democraticus, On the Universal Desirability but the Not So Universal Possibility of Democracy and Human Rights*, and *Democratic Imperialism*, *A Practical Guide*, both published by the Cambridge Scholars Press, London, as well as the author of numerous newspaper articles.

Nsongurua J. Udombana is an Associate Professor and Director of CEU Center for Human Rights, Budapest. Educated at the Universities of Lagos and South Africa, Professor Udombana has previously taught at the University of Lagos and has made presentations at different international fora. A former visiting Research Fellow with the Danish Institute for Human Rights, Professor Udombana writes on international—human rights, humanitarian, criminal, institutional, economic and development—law, with an Africanist outlook. He has published extensively in international legal journals, including the *American Journal of International Law*, *Indian Journal of International Law, The International Lawyer, Human Rights Quarterly,* and publications at Yale, Stanford, Michigan, Texas, Cornell, and Emory.

Renata Uitz is an Associate Professor of comparative constitutional law at Central European University, Budapest, Legal Studies Department. She holds an LLM in comparative constitutional law and an SJD from Central European University. She is a member of the experts' council of the Institute for Law and Public Policy, Moscow. She used to be a correspondent for the East European Constitutional Review (1998-2003) and is currently a correspondent for the International Journal of Constitutional Law (I-Con). She is the author of the book *Constitutions, Courts and History, Historical Narratives in Constitutional Adjudication* (2005), and is co-edi-

tor (with Andras Sajo) of the volume *The Constitution in Private Relations: Expanding Constitutionalism* (2005). In addiiton, she is the author of numerous articles appearing mainly in English, Hungarian and Russian on comparative constitutional adjudication and on fundamental rights issues. Her research interests cover theories and practices of constitutional review and constitutional interpretation, problems of constitutional adjudication and good governance in democratic transition, and the role of courts in constructing the constitutional subject.

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