

Socio-Economic Rights *Between Essentialism and Egalitarianism*

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11.1 INTRODUCTION

Socio-economic rights are often considered the hard case for moral theories of human rights. Dragging down the ambition of rising above contemporary social structures and competing conceptions of justice, it is feared that socio-economic rights compromise the universalist human rights project. In Cranston's (1983, p. 12) early swingeing critique, such rights take human rights out of the "realm of the morally compelling into the twilight world of utopian aspirations." However, in the recent renaissance of the philosophy of human rights, socio-economic rights have found a secure place. Within the realm of moral theory, ideas of freedom, dignity, agency, need, and justice among others have been offered as justifications.

However, crafting theories of human rights through a purely moral perspective is problematic. Not only is it epistemologically questionable, it risks intellectual myopia by neglecting the insights of practice. I argue that practice- and institutional-oriented theories of rights provide a deeper insight into the values that should drive human rights thinking. This eclectic "political" approach shares some affinities with Nickel and Beitz's appropriation of the international human rights regime. However, their shallow treatment of legal sources, occlusion of domestic institutions, and cursory treatment of ideas of fairness returns them to essentialist-like theorizing on socio-economic rights questions. Instead, I shall argue that these diverse political approaches reveal better a graduated moral concern with equality.

Finally, some scholars in both the moral and political traditions have reiterated conceptual objections to social rights. These complaints typically

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include the positive orientation of social rights and issues of indeterminacy, resource constraints, and justiciability. Yet, as shall be argued, both moral and political approaches to human rights demonstrate that these concerns must be significantly nuanced and, in some cases, rejected.

The chapter proceeds as follows. Section 2 considers a range of moral theories and their implications for socio-economic rights. Section 3 analyses the implications of a political approach to socio-economic rights, both as an alternative framework for rights and a reflective mirror for moral theories. Section 4 analyses and re-evaluates the standard array of conceptual objections to socio-economic rights.

11.2 MORAL THEORIES

Moral approaches to human rights are typically grounded in the exogenous and distinctive dimensions of personhood. Endogenous social relations and socio-political context are sidelined in the “search for moral standards of political organization and behavior that is independent of the contemporary society” (Heard 1997, p. 77). In such essentialist theorizing, the natural rights thinking of John Locke has cast a long shadow (Simmons 2001, p. 185); and the most vocal critics of socio-economic rights tend to be immersed in the Lockean tradition. So I begin my treatment of moral theories there, with a review of Locke. This will be followed by competing approaches that share a similar grounding (in the idea of liberty) or different grounding (such as justice, need, agency, and dignity).

11.2.1 *Locke’s Shadow*

According to Locke (1823), rights are those primary goods which can be justified in a state of nature. The goods of particular interest to Locke is a state of “perfect freedom” or “liberty,” such that individuals can “order their actions, and dispose of their possessions and persons as they think fit,” free from the “will of any other man” (Treatise II, chapter II, para. 4). However, the justifications rest on a number of assumptions. A crucial one is that the state of nature begins with “perfect equality.” According to Locke, “all the power and jurisdiction is reciprocal, no one having more than another,” which is evident because everyone is “born to all the same advantages of Nature” (para. 7). Combining this structural condition with the pursuit of freedom, together with notions of desert, Locke arrives at a reciprocal duty of noninterference for a limited set of rights: “no one ought to harm another in his life, health, liberty or possessions.”

Notably, Locke was not concerned directly with the question of socio-economic rights. However, his reification and essentialization of liberty is invoked in many attacks on the idea of these rights. Kelley (1998, p. 16), for example, draws on the Lockean era as a prelude to his assault:

[T]he individualism of the Enlightenment went deeper. It was not merely the idea that government is the servant of the people, an agent for meeting the needs of individuals. It was also the idea that the individual's primary need is liberty: the freedom to act without interference, to be secure against assault on his person or property, to think and speak his mind freely, to keep the fruits of his labour.

Likewise, Cranston (1983, p. 12) in his Lockean critique of the Universal Declaration of Human Rights argues that only a limited number of civil and political rights are "sacred", and that the absence of socio-economic rights represents no "grave affront to justice." The libertarianism of Nozick (1974, p. 29) leads in a similar direction, with a rejection of positive obligations even though some space is reserved for a limited "freedom from hunger and starvation." Such a freedom from hunger is connected with the right to life which is unlikely to violate the side constraints of feasibility and non-conflict with other rights, especially justly acquired property.¹

On their own terms, there are two problems with these Lockean perspectives. First, it is questionable whether life, liberty, and property exhaust the domain of desired primary goods. It is often forgotten that Locke himself frequently mentioned "health" before liberty and possessions. Locke also endorsed protection from extreme want: "so charity gives every man a title to so much out of another's plenty, as will keep him from extreme want, where he has no means to subsist otherwise."² This right is not derived or grounded in the right to life (compare with Nozick). Instead, Locke appears to base or shape this right (or, technically, obligation) in freedom itself, due to the concern that the wealthy man forces the poorer "to become his vassal."³

Second, the assumption of perfect equality is difficult to sustain outside the heuristic of the state of nature. Resources are not unlimited and there will be conflicts over ownership.⁴ Moreover, unequal access to technology, knowledge, and capital and the birth lottery of origin, fortune, and talent will ensure that the distribution of wealth and property is not commensurate with effort. These features provide an advantage to some individuals in the resolution of

¹ See discussion in Vizard (2006, pp. 31–6). ² Locke (1823, p. Part I, para. 42). ³ Ibid.

⁴ Ibid. He assumes that, "No man's labour could subdue or appropriate all, nor could his enjoyment consume more than a small part." Land and other resources are presumed bountiful.

social conflicts, including over property rights and the distribution of the fruits of labor. To take just the first point, Locke's examples are riddled with a linear understanding of economic productivity. This is clear in the oft-quoted example of the right to the fruits of labor from picking an apple. This conception of labor ignores the reality of capital and technology, which exponentializes the relationship between effort and result, but is not equally distributed. Putting aside the Ricardian or Marxian theory of value, it is difficult to see how Locke could justify differential access to capital and technology as consistent with his starting assumptions. Ubiquitous inequalities destabilize the presumption of equality of power. Indeed, if Locke's assumptions in the state of nature are to hold, one might need a rather maximalist, radical, or even Marxist version of social rights with which to begin.

It is a rejection of these two dimensions of the Lockean account that arguably unite the wealth of alternative and contemporary essentialist theories. First, and *intrinsically*, the deduction of rights is informed by a broader or different psychological conception of human desire and need. The moral idea of human rights has thus evolved from the very thin conception of the eighteenth century. When the phrase human rights formally entered the lexicon, it was used primarily as an expression of outrage of acts against individuals who shared, with the outraged, their bare and basic humanity (Hunt 2007, p. 22). Since then, the concept has thickened considerably, partly because our conception of the human self has expanded. Thus, as shall be elaborated below, some scholars reconstruct the idea of freedom, while others dethrone the concept and privilege instead justice, need, dignity, or agency.⁵ Second, and *instrumentally*, the presumption of prior structural equality between individuals is less present in newer theories of rights. The consequence is that these theories accept that realization of liberty rights may be conditional on the prior or contemporaneous realization of socio-economic rights.

11.2.2 Capabilities and Freedom

The idea that socio-economic rights are intrinsic and instrumental to freedom can be found in the works of a number of scholars (Hirschmann 2017; Sunstein

⁵ For reasons of space, I will ignore consequentialist and utilitarian theories of rights. Sen (1982) notes that any theory of rights will be incomplete without them since our sense of fairness and justice is usually informed by such considerations. For an approach that first builds up prudential and utilitarian arguments and then covers the gaps with non-consequentialist arguments, see Nickel (2007, pp. 54–61). Note also that some dimensions of social rights might also not be fully reducible to an individual interest or requirement of autonomy (Jones 2008, section 4, p. 9). However, these dimensions can be still be classified as rights according to Raz (1986, p. 208).

2004). The most celebrated example is Sen's capability theory. In a somewhat republican fashion, the idea of interference is expanded or transformed by a focus on the "process of choice": freedom is not exercised if a forced choice would have been made in the absence of coercion (Sen 2009, p. 228). Liberty and freedom are also substantively defined as the "opportunity to pursue our objectives," representing a set of capabilities rather than circumscribed sphere of autonomy.

In defining these capabilities, Sen stresses the distinction between the means (which might include primary goods and rights) and the end, individual freedom. Thus, in the case of health care, the aim is not the achievement of health outcomes but rather health opportunities: "a guarantee of basic healthcare is primarily concerned with giving people the capability to enhance their state of health" (Sen 2009, p. 238). He also emphasizes, due to individual and societal variations, that the availability of goods may poorly align with individual capability. A person with a high income but a serious illness or disability cannot be viewed as advantaged merely on the grounds of income. This concern with both freedom and interpersonal variation, as well as the virtues of public reason and debate, led Sen to resist attempts to define capabilities in any detailed fashion.⁶

Sen does, however, affirm that some capabilities can be affirmed as human rights, which he defines as primarily "ethical affirmations" of what is important. Again, he declines from clearly identifying or delineating the subject – in this case, human rights. In a deliberative register, he argues that the process of declaring rights in constitutions, legislation, treaties, etc. should be one of public scrutiny of all arguments (Ibid., pp. 358, 60–1). His simple requirement is that a right would have to draw on a freedom that "meets the threshold condition of having sufficient social importance" noting generally that the "demands of justice have to give priority to the removal of manifest justice" (Ibid, pp. 367, 259). He notes in particular that the idea of social rights meshes well with "an understanding the importance of advancing human capabilities" (Ibid, p. 381) and Sen has written at length elsewhere on rights to work and food.

Some scholars have gone further and attempted to draw out the consequences of the capabilities approach for socio-economic rights. Vizard (2006, p. 141) has sought to demonstrate in a comprehensive fashion that much of the international legal recognition of social rights can be anchored in capability theory. In her analysis, treaties and jurisprudence "support the idea of a capability to achieve a standard of living adequate for survival and development – including adequate nutrition, safe water and sanitation, shelter and

⁶ Others such as Nussbaum (2000) have set out a list: Bodily Health, Bodily Integrity, Senses, Imagination and Thought, Emotions, Practical Reason, Affiliation, Other Species, and Play.

housing, access to basic health and social services, and education – as a basic human right” (Ibid., p. 141).

Notably, in Sen’s model, there is no central concern for interpersonal disparities in the distributions of capabilities. It is focused on individual’s opportunities and was developed as a response to Rawls’s idea of primary goods. However, Sen (2009, p. 296) does acknowledge that a broader “theory of justice” has to be “alive to both the fairness of the processes involved [in generating and distributing capabilities] and to the equity and efficiency of the substantive opportunities that people can enjoy.” Although he cautions against unifocal distributive approaches that ignore variations in capabilities between individuals.

11.2.3 Basic Justice

A common alternative framework to freedom is justice. While Sen uses principles of justice as a sorting mechanism for human rights and equality, others view justice as the principal yardstick for conceptualizing human rights. Most philosophers present justice as a moral given or Kantian imperative. Empirical work in social psychology and economics suggests that justice may also be an individual preference, although unevenly distributed among individuals (Knoke 1988; Pinker 2015, p. 73). In any event, all attempts at foregrounding justice are based on some interpersonal notion of fairness.

A prominent example of wedding ideas of *universal justice* to human rights is that of Pogge. He argues that “an internationally acceptable core criterion of basic justice” would be “physical integrity, subsistence supplies (of food and drink, clothing, shelter, and basic health care), freedom of movement and action, as well as basic education, and economic participation” (Pogge 2008, pp. 54, 55). While these basic goods should be recognized as human rights according to Pogge there are “limits,” because “what human beings truly need is secure access to a minimally adequate share of all these goods” (Ibid, p. 55).

As to duties, Pogge’s institutional cosmopolitanism is dismissive of maximalist approaches that would “require efforts to fulfil everyone’s human rights anywhere on earth” (Ibid.). Rather, the theory embraces the libertarian use of negative obligations as the basis for articulating obligations. Yet, moving beyond Lockean theory, the scope of impermissible “interferences” is broadened. Deliberate and intentional acts of interference include participation by individuals in domestic and global social structures which have foreseeable and significant impacts on the rights of others. This structural move overcomes, in essence, Locke’s presumption of perfect starting equality. It acknowledges differences in interpersonal power relations, which may affect an individual’s starting point.

However, the overall result is arguably more limited than Sen's model. Sen is focused on the individual in context and agnostic about the relevant duty bearer (something to be determined through deliberation). Instead, Pogge's neo-Lockean framing of obligations partly limits the scope of obligations, certainly extra-territorially and possibly domestically. It excludes responsibility for poverty's many exogenous causal factors (e.g. geography) and is based on a highly attenuated idea of our interaction with the "global basic structure" that can be difficult to operationalize.

11.2.4 *Basic Needs*

Socio-economic rights are often articulated as needs, both in the vernacular and in philosophy. Pogge's approach only draws on the idea of needs (and freedom) in carving out the contours of basic justice. Yet, Heard (1997, p. 117) notes that the idea of needs represents a more powerful universal basis for human rights than freedom, as the latter might "pertain to a particular – liberal – conception of society." In the account by O'Manique (1990), need is the lodestar. If X is necessary for survival, it is a right. He argues that doubling down on what is inherent, even biologically inherent, helps remove the ambiguity over what constitutes a human right.

On first glance, a needs-based approach would imply some form of minimalism, similar to Pogge's account. But this is not necessarily the case – privileging survival can paradoxically imply strong maximalism. A good example is the right to health. Expensive medicines or health care systems may be necessary to keep people alive. It is in these very cases that ideas of (individual) need and (interpersonal) justice come into direct conflict. Thus, it is not surprising that courts around the world have diverged on this question when interpreting the right to health – revealing different preferences over need and justice (see discussion of cases in Yamin and Gloppen (2011); Langford (2014); and Jeff A. King (2012)).

Moreover, the idea of need can be especially elastic. Whereas the "belief that survival is good is virtually universal" (O'Manique 1990) it is not always immediately apparent what this entails: For instance, O'Manique develops his theory far beyond the notion of survival and in the direction of "the full development of human potential", a move not dissimilar to the idea of a "life project" developed by the Inter-American Court of Human Rights.⁷ Thus, a concern with survival of a human being implies support for their development in life. O'Manique takes the idea even further than the court.

⁷ On the Inter-American Court's conception, see Melish (2008).

The range of elements to be included is: “the need for association with other human beings, for self-expression, for some control over one’s destiny, and even the need for love and for beauty – can be observed and even empirically confirmed within the social sciences and psychology” (Ibid., p. 481). While the empiricism of this perspective is to be applauded, O’Manique seems to stretch the idea of survival-based human rights to the point of snapping. As no need appears too small or great to be classified as a human right, one risks missing the point of the moral exercise (articulating a non-negotiable set of moral standards). Moreover, if some degree of determinacy is required for the identification of duties and duty bearers (see Section 4), then some needs would be excluded from a standard rights theory.

In light of these substantive and conceptual limits, a needs-based approach would point generally in the direction of a minimum or adequate threshold for social rights.

11.2.5 Agency

Griffin’s agency-based account provides another alternative. It is particularly interesting because he draws together different ideas into a single and relatively coherent and somewhat historicized theory. In a partly “political” manner, he begins by drilling down on the notion of human rights that emerged at the end of the Enlightenment, which he argues had undergone little transformation since then: the “idea is still that of a right we have simply in virtue of being human” (Griffin 2008: 13). He then moves deeper into the Enlightenment discourse, as well as everyday reasoning about human rights, to try to uncover what are the criteria for invoking this right. He argues that the red thread is the protection of “our human standing . . . our personhood,” which we value “often more highly than even our happiness” (Ibid., pp. 33, 32). Griffin translates this idea of personhood as agency, or more precisely, *normative agency*: the ability to deliberate, assess, choose, act. His most incisive example concerns torture. He argues that the primary aim of torture is not to cause pain but rather undermine “someone’s will, getting them to do what they do not want to do” (Ibid., p. 52).

Independently of Sen and Nussbaun, Griffin enlists the idea of capability, as well as purposiveness, to fill out his notion of agency. In order that agency is meaningful, a person must be “capable” of choosing a path through life without control or domination by others (*autonomy*), with real choices (meaning a *minimum provision* of information, education, and resources), and be free to pursue what is worthwhile (*liberty*). But unlike Sen, he retreats partially to the condition that rights must exist in “states of nature.” Human rights must

be relevant in a “traditional medieval hamlet” (p. 49). However, Griffin takes a much more generous approach to the agency of residents in such a hamlet: such individuals would want sufficient autonomy, liberty, and minimum provision over authoritarian rule and hunger.

While acknowledging that social rights are “controversial,” Griffin largely embraces them: they meet his agency and practicability requirements. As to agency, they are “empirical” necessities for autonomy and freedom – and thus of a second-order value – but are “logically” necessary since they are intrinsic to agency itself, the exercising of it (Ibid., pp. 180–1). Yet, in his discussion of international law, Griffin grapples with the thickness of certain legalized human rights standards. He remains skeptical to maximalist demands, for example the right to the highest attainable standard of health in international law (Ibid., p. 208).

11.2.6 Human Dignity

A final and increasingly popular approach is to ground rights in human *dignity*. In Nickel’s (2007) pluralistic articulation of four key principles of human rights, which include basic social rights, he notes that human dignity is the only notion that could fully and uniquely support them all.⁸ Human dignity emerged separately from the idea of human rights but since the end of the Second World War the two “have increasingly become fused” (Donnelly 2009). It is cited at the beginning of virtually every major human rights instrument.

The connection between dignity and social rights is not difficult to make. The lack of social rights, or the manner in which they are realized, may engender feelings of powerlessness, humiliation, domination, and debasement, which damage self-worth. This experience of indignity may be internally generated (the mere denial) or it may be relational (denial before others or the comparison with others). These two dimensions makes it an attractive theory since it opens for both a universalist and situated conception of social rights. It recognizes a “distinct personal identity, reflecting individual autonomy and responsibility” but also “embraces a recognition that the individual self is a part of larger collectivities” (Schachter 1983, p. 851).

Clearly, a denial of a minimum level of social rights, including access to decent work, would be inconsistent with the notion of human dignity: “Few will dispute

⁸ They are the secure claim to have a life, the secure claim to lead one’s life, the secure claim against severely cruel and degrading treatment, and the secure claim against severely unfair treatment. He “reject[s] the view of many that human dignity is found exclusively in human agency or autonomy” (Nickel 2007, p. 66).

that a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers a profound affront to his sense of dignity and intrinsic worth” (Ibid, p. 851). Likewise, the means by which social rights are realized must not be characterized by domination or debasement.

Yet, it must be asked whether dignity can ground a broader and more equity-oriented conception? Liebenberg (2005, p. 1) claims that “Human dignity as a relational concept requires society to respect the equal worth of the poor by marshalling its resources to redress the conditions that perpetuate their marginalisation.” However, it is unlikely that human dignity might operate fully in this way: it seems most powerful as a principle that addresses self-worth rather than equal worth. Alone, and with the adjective “human,” it will tend toward a minimalist and truncated view of rights⁹, particularly if the emphasis is on humiliation rather than equal status, freedom rather than material outcomes.¹⁰ Schachter’s observed these dilemmas in 1983. He noted that “relations of dominance and subordination” and “great discrepancies in wealth and power” would be “antithetical to the basic ideal” of human dignity, but pointed out that “such egalitarian objectives cannot be realized without excessive curtailment of individual liberty and the use of coercion.” He concluded that the “far-reaching implications” of human dignity have “not yet been given substantial specific content,” a comment that might remain pertinent.

11.2.7 *Reflections on Essentialist Theories*

Post-Lockean essentialist theories of human rights tend to be remarkably similar on the question of social rights. By enlarging or displacing the freedom as the guiding norm and/or removing the assumption of structural equality, the deduction of socio-economic rights proceeds in a reasonable and convincing fashion. However, this approach only advances a constrained set of social rights – envisaging a bare minimum of social rights or a higher non-comparative threshold such as adequacy. More maximalist and equity-conscious approaches tend to stretch the conceptual apparatus and it is rare to find the word “fair” among the verbiage.¹¹

⁹ Indeed, Liebenberg buttresses her account with Nussbaum’s freedom and capability theory.

¹⁰ For instance, in articulating the idea of a right to sanitation, a UN Special Rapporteur tends to reserve the dignity argument for particular aspects of the denial: “being forced to defecate in public is an affront to human dignity,” UN Press Release, 18 November 2008.

¹¹ A partial exception is Nickel’s (2007, p. 65) synthetic theory, which postulates as one of four secure claims: a guarantee against “severely unfair treatment.” However, the one example given concerns fair trial rather than interpersonal fairness.

Which of the alternative versions – freedom, justice, need, agency, dignity – is the most convincing is not my concern here. I am not seeking in this chapter to articulate a distinct moral theory of social rights.¹² The prime aim is to demonstrate that social rights can be justified within diverse and prevailing theories of rights. Indeed, it is doubtful whether the strategy of the “hedgehog,” the pursuit of a “single, central” idea (Berlin 1993, p. 3) is particularly advisable in justifying or delineating rights. A pluralistic approach is usually necessary since solitary grounds will often look “thin and vulnerable” in the “limelight” (Nickel 2007). Notably, the approaches described above borrow and steal from each other in order to delimit or expand the sphere of human rights. Sen’s freedom-based theories use justice as a criterion for determining human rights, while the agency- and justice-based theories employ freedom and need for the same purpose. In that sense we may have moved no further than the committee of philosophers assembled by UNECSO during the drafting of the Universal Declaration of Human Rights. They were able famously to reach consensus, but on the condition that members refrained from articulating their reasons.

11.3 POLITICAL THEORIES

Moral approaches provide clear deductive templates for rights theorizing but their epistemological and ontological foundations are doubtful. As to epistemology, why should a particular scholar (Locke, Pogge, Griffin) or a particular historical period in one part of the world (the Enlightenment in Europe) determine how we justify and delimit human rights? As Nickel (2007, p. 9) argues, the Universal Declaration, which contains socio-economic rights, has been “amazingly successful in establishing a fixed worldwide meaning for the idea of human rights.” Buchanan (2010, p. 683) questions the validity of the “one-way” reconstruction of international human rights standards by moral theory scholars. A moral logic can simply assume that if there are elements of law that cannot be supported by one’s theory of human rights, it is the law “that must change.”

As to ontology, it is not clear why moral theorizing has confined itself to analyzing the rights of individuals without any significant reference to their social relations. No one is an island. The situatedness of human existence

¹² An example of such approach is Bilchitz (2007). In seeking to justify judicial review of the minimum essential level of social rights, he draws on Gewirth (1978) and purpose-based values, developing a theory that mixes contractarian and agreement-based arguments. But the risk is that the resulting theory of judicial review is contingent on the particular theory of human rights.

and legalization/institutionalization of rights means that it may be legitimate to take into account the nature of politics in which individuals live in considering the nature of their human rights. It is not immediately clear that socio-economic rights cannot be reduced to bare and mere non-comparative thresholds. As Dworkin (1977, p. 367) noted long ago, a social right can be conceived as a threshold minimum, a relative equality claim, or even strict egalitarianism: it might mean a claim to “not less welfare than some specified fraction of the welfare of the best-off person (or group); or possibly, to exactly as much welfare as any other person (or group) has.” Many of these claims are relative and have been institutionalized. A question arises as to whether they provide an alternative theory of social rights or a correction to moral theories.

This section therefore proceeds by looking at two different but complementary political approaches: *international practice* and *domestic institutionalization*.

11.3.1 International Practice

International practice provides both a “departure point” and a “deliberative forum” for developing theories of human rights. As outsiders, philosophers tend to take the former approach while lawyers, as “insiders,” tend to prefer the latter.

Beginning with practice as a *departure point*, the philosopher Beitz (2009) draws on the post-1945 international human rights regime and the discourse of the global community.¹³ He defends his choice *empirically* by pointing to the startling omnipresence of global human rights practice and *instrumentally* as its “norms seek to protect important human rights interests against threats of state-sponsored neglect or oppression which we know from historical experience are real and can be devastating when realised” (Ibid., p. 11). Within it, Beitz discerns a “practice” through which its members “recognise the practice’s norms as reason-giving and use them in deliberating and arguing about how to act” (Ibid., p. 8). However, he identifies some pertinent criteria within this tradition which he elevates to a normative level. Human rights are “requirements whose object is to protect *urgent* individual interests against certain predictable dangers . . . under typical circumstances of life in a *modern world* order composed of states” to which “political institutions” must respond (Ibid., p. 109).

¹³ Beitz is also discussed by Corrigan, Hessler, Müller, and especially Karlsson Schaffer in this volume.

This account is largely based on the notion of human personhood but the criteria of urgency and modernity clearly reflect a constructivist perspective. This constructivism allows him to relax the strict requirements of universal essentials and the assumption of a static human nature. For Beitz, “an urgent interest is not necessarily an interest possessed by everyone” (*Ibid.*, p. 110). It is sufficient if the interest is significant enough to be recognized across “a wide range of possible lives” and, absent protections for the right, institutions will act in ways that “endanger this interest” (*Ibid.*, p. 111). Human rights are not for the medieval hamlet but for the modern world.

Beitz endorses the idea of social rights, labeling them “anti-poverty rights.”¹⁴ With this descriptor, it is not surprising that he finds that the primary duty is to secure a certain “threshold” of well-being (*Ibid.*, p. 161). He adopts the standard of “adequacy” from Article 25 in the Universal Declaration of Human Rights, noting that such a threshold is a “noncomparative standard of wellbeing” as it does not “import equality as a value,” unlike rights to equal treatment of the law, voting, and access to public position (*Ibid.*, p. 162). However, Beitz’s threshold is not one of pure minimalism or survival. Moreover, he notes that it does not exclude a domestic conception of distributive justice in which inequalities should be narrowed.

On extraterritorial obligations, Beitz asserts that international law resolves some of the puzzles over the relevant duty bearers, particularly through Article 2(1) of the ICESCR and Article 25 of the Universal Declaration on Human Rights. He concludes that there is a negative and facilitative “duty to cooperate internationally to remove obstacles or disincentives for local governments” (*Ibid.*, p. 162). He is more cautious, however, on the idea of a duty to “contribute a system of international transfers,” envisioning instead a conditional, contextual and consequentialist obligation (*Ibid.*).

Beitz’s account suggests that the international human rights regime should be constrained to a single underlying logic. But it not clear why space is not allowed for other deliberative processes, which might produce expressions of human rights which are less coherent and grounded more firmly in historicized experiences of injustice and degradation or political aspirations for a better world.¹⁵ This raises a new challenge: if we relax predetermined substantive demands for any putative human right can we still emerge with a coherent theory? Risks abound in the jungle of international relations. Some scholars warn that we should be particularly skeptical about the quality of diplomatic endeavors (see, e.g., Griffin (2008); Nickel (2007); Cranston

¹⁴ He largely ignores labor rights.

¹⁵ See the chapter by Karlsson Schaffer in this book for a similar critique.

(1973)). However, the widespread involvement of different states, regions, and non-state actors does provide a particular form of both competence and legitimacy (see, e.g., Glendon (2001)).

Such recognition of pluralism points to more procedural or *deliberative* approaches that take the processes behind international practice more seriously. An example of this is Alston's claim that the General Assembly is the preferred deliberative body for articulating what counts as a human right (and often its general scope). The argument is partly legal but also practical. Alston (1984) eviscerates philosophers for failing to resolve ambiguity in philosophical reasoning over rights. In discussing the adoption of the Universal Declaration, he notes that, "For the first time in history, at the international level, a final arbiter had emerged in an area where conflicting ideologies, cultures and interests had previously made the prospect of general agreement seem far beyond reach and even utopian" (p. 608). However, he argues that some basic process criteria must be met for the purposes of quality control: preparation of a background study, a multi-stakeholder consultation process, and involvement of other relevant UN organs in a phased deliberative process. Alston also suggests that there must be some sort of experimentation at the national level before rights are ready to mature at the international level.

In the case of social rights, almost all contenders would meet this moderate demand: i.e. endorsement by the General Assembly in the wake of a deliberated process. A significant number of social rights were included in the Universal Declaration and expanded slightly in subsequent treaties which were adopted by the General Assembly, in particular ICESCR, CRC, and CRPD. The only real controversy has been the recognition of the right to water after the Committee on Economic, Social and Cultural Rights implied it from Article 11 of the ICESCR in 2002 (Tully 2005). The right had been recognized many times by states in various international conferences and declarations but without a formal process in the General Assembly (Langford 2006). This was rectified in 2010 when both the General Assembly and the Human Rights Council recognized water (along with sanitation) as a right, which was preceded by a number of background studies.¹⁶

Moreover, long-standing international human rights treaties containing social rights have been ratified by almost all states.¹⁷ Although the United States has not ratified any of these key treaties, there is an argument that social

¹⁶ UN General Assembly, *The human right to water and sanitation* (Sixty-fourth session, 2010) U.N. Doc A/64/L.63/Rev.1, para. 1; UN Human Rights Council, *Human rights and access to safe drinking water and sanitation* (Fifteenth session, 2010) U.N. Doc. A/HRC/15/L.14.

¹⁷ 83 to 99 percent of states have ratified long-standing treaties containing social rights. As at February 13, 2013, the figures are, respectively, 160 state parties for the ICESCR, 193 for the

rights have secured some place in international customary law (see overview of alternative arguments in Langford, Coomans, and Isa (2013)). These legal developments have been strengthened by growing and considerable institutional equality. UN Special Rapporteurs have been appointed for many ESC rights while the human rights treaty body committees have issued interpretations which outline elements of socio-economic rights and subsequent duties, which have met with little direct resistance from states. A individual complaint mechanism was also created for the ICESCR in 2008, mirroring the long-standing mechanism for the ICCPR. However, in terms of “institutionalization” in the form of adjudicative mechanisms, there is obviously a degree of variance between states in terms of constitutionalization and ratification of the new international complaints mechanism for socio-economic rights, while policies and culture diverge further. But this raises the question as to whether institutionalization or legalization should represent strict deliberative criteria for human rights in the first place: one of the purposes of human rights standard setting is to catalyze legislative, institutional, and social change.

Nonetheless, the legalization of a number of these socio-economic rights has attracted criticism from philosophers, even those that adopt a political approach. Some articulations of socio-economic rights seem too expansive. Either the issue is not of sufficient importance or the level of realization is pitched at too high a level, and certainly above adequacy. In the case of the Universal Declaration, derision is commonly directed at the right to “periodic holidays with pay” as part of the “right to rest and leisure” in Article 24 (see, e.g., Cranston (1983, p. 13); Buchanan (2010)). In the case of the ICESCR, the concern is substance. Article 12 contains the “enjoyment of the *highest attainable* standard of physical and mental health,” and Article 11 adds the right to “*continuous improvement* of living conditions” to the right to an adequate standard of living.¹⁸ In addition, some of the labor and health rights in the European Social Charter standards have been described by Nickel (2007, p. 139) (often placed in the political camp) as simply goals or potential means:

CRC, 187 for CEDAW, and 175 for ICERD. The denominator is 195 states, which is a common figure for the number of states in the world and all 195 states have ratified at least one human rights treaty. Even the recent CRPD has been ratified by 65 percent of states: 127 parties (as at February 13, 2013).

¹⁸ It has also been questioned whether a right to higher education in Article 13 and a state duty to make it progressively free is sufficiently important. However, the right in Article 13 is restricted to equal access: “Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.” Only primary and secondary education are envisaged as being made available to everyone.

The European Social Charter includes human rights to vocational guidance, annual holidays with pay, and “protection of health” that aspires to “remove as far as possible the causes of ill-health . . . these standards go far beyond the conditions of a minimally good life.

The tendency among philosophers (moral and political) is thus to “trim” these more expansive aspects.

What should be the proper response to these critiques? Even if we accept a “deliberative forum” approach that is heavily weighted toward process, it might be reasonable to expect a minimum degree of coherence in any legal instrument or sufficient modesty in a document titled “human rights.” There are four ways forward. The first is to treat these seemingly obese rights or their phraseology as an embarrassing mistake, a relic from an age of excessive social democratic optimism, and quietly sweep the untidiness under the carpet and ignore it. The CESCR almost goes down this road in relation to the right to the continuous improvement of living conditions. In its various general comments concerning housing, food, and water in Article 11, it mentions this phrase only once, in General Comment 4. However, feigning ignorance seems much too like adjudicative abdication, a purely political approach to legal text. The next three alternatives seem more fruitful.

A second approach is purposive interpretation, which resembles the trimming strategy of philosophers. The text is read in light of the objectives of the treaty, an acceptable method of interpretation in international law. Social rights would be read consistently with the modest objectives that generally underlie human rights and are routinely placed in preambular paragraphs. The CESCR makes this move in the case of health: it begins General Comment 14 by explicitly subjecting the right to the standard of dignity in its opening sentence.¹⁹ It expresses reticence about the more expensive elements of tertiary health care²⁰ and focuses the interpretive comment on medicines deemed “essential” by the WHO; basic, universally needed health care (e.g. maternal health care); and the relatively affordable and basic underlying determinants of health such as water, sanitation, and food. This move brings the right to health into line with the CESCR’s general jurisprudence, and its dominant concern: ensuring excluded groups reach a feasible threshold level of the rights as soon as possible.

¹⁹ “Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.” *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) (CESCR).

²⁰ *Ibid.*

A third approach is to respect legally the inclusion of these maximalist elements but acknowledge that they do not reflect *human* rights. In the case of the European Social Charter, this is relatively simple. It is not clear from the text of the treaty that it is purporting to articulate human rights, at least in a traditional sense. The social rights are nowhere described as human rights, and it is only in the preamble to the 1996 Revised European Social Charter that one could possibly make such a link.²¹ In the case of the ICESCR, such a sleight of hand is not possible. The idea of human rights is ubiquitous in the text. Nonetheless, one could accept that some of the expansive dimensions of the treaty provisions are citizens' rights and legally apply them as such. There is no problem in articulating citizens' rights in an international treaty if the primary obligations are between a state and their citizens and residents.

A fourth approach seeks to identify the purposes behind the *wording*. Like the third, it takes the text seriously but seeks to reason more deeply about its rationale. Buchanan (2010: 683–4) makes precisely the same point about human rights treaties. He notices that egalitarianism is a constant feature across all rights.²² They are ascribed to “all persons,” demand “robust equality before the law,” “encompass social and economic rights that can reduce material inequalities and indirectly constrain political inequalities,” guarantee the right of citizens “to participate in their own government,” and “contain rights against all forms of discrimination.” And, unlike Beitz he specifically notes that even the word “adequate” opens up for a “social comparative” understanding of social rights.

Now, the most ridiculed socio-economic right cannot be saved on this basis: periodic holidays with pay. It is not the idea of rest or periodic leave that is the problem. It is that the right is inordinately precise and specific: there are multiple ways to achieve the inherent objective of ensuring a right to adequate standard of living during any reasonable period of rest leave. Equally, the right lacks universal application: it is largely irrelevant to non-wage livelihoods (Cranston 1983, p. 13). Rights such as vocational guidance suffer the same sort of problem.

However, result-oriented rights may survive. If we ask why we should be concerned with the continuous improvement of living conditions or the highest attainable standard of health, the simple answer might be disparities

²¹ It states in part that, “Recalling that the Ministerial Conference on Human Rights held in Rome on 5 November 1990 stressed the need, on the one hand, to preserve the indivisible nature of all human rights, be they civil, political, economic, social, or cultural and, on the other hand, to give the European Social Charter fresh impetus.”

²² Karlsson Schaffer also makes this point in his chapter in this volume.

or substantive equality of opportunity. The problem with non-comparative thresholds is that they say nothing about a society characterized by extreme inequality. The drafters of these conventions might have been reasonably and legitimately concerned about this. There seems no inherent reason why a global text cannot say anything about who shares in social, economic, and medicinal progress, whether such a text is based on human rights grounds (dignity but also equality) or citizens' rights concerns (such as equal status or luck egalitarianism). Even a more modest equality of opportunity can be undermined in these situations, for example through intergenerational transfers between advantaged families.

In hindsight, it is notable that the first mention of equity by the CESCR comes in the two sentences that precede its only mention of the right to continuous improvement of living conditions: "States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others."²³ While the citation could be read as equating "unfavourable conditions" with "inadequate conditions," the sentence evinces a clear concern about disparities in their own right.

This pattern emerges again when the Committee comes to interpret the right to health. Equity is mentioned five times. It is partly a negative equity: the costs of accessing health care should not be disproportionately borne by the poor.²⁴ It is also a positive equity: ensuring that the disadvantaged attain a fair share of health care and services. Thus, the highest attainable standard is not understood as requiring the devotion of all a society's resources to healthcare and longevity but is understood as requiring greater equitable realization. Given the amount of resources available for health, the state should strive for similar health outcomes for all, narrowing health inequalities.

This discussion of alternative approaches to these more expansive provisions of the ICESCR is somewhat provisional. The principal point is to affirm that international practice-based approaches which produce more maximalist outcomes can be understood within a human rights framework.²⁵ We now turn to a different type of political approach.

²³ *General Comment 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991) (CESCR).

²⁴ *General Comment 14, The right to the highest attainable standard of health* para. 12(b)).

²⁵ Equity is also embedded in the article on gender equality (Article 3, ICESCR) and the equitable access to higher education (Article 13, ICESCR).

11.3.2 *Domestic Institutionalism*

It is notable that leading moral theorists privilege not only the political thought of the seventeenth and eighteenth centuries but the emergent and rather libertarian laws and institutions of the time (the English Bill of Rights, American Bill of Rights, the ascendant English parliament and US Supreme Court). However, some theories of rights begin with the nineteenth and twentieth centuries. T. H. Marshall's (1964) account of the rise of civil, political, and social rights is probably the most well known.

To be sure Marshall's account can be equally accused of selection bias. It describes a particular process in the West, which has not been *fully* replicated elsewhere. However, the advantage of studying the domestic institutionalization of rights provides an opportunity to understand the deeper ideational processes at work in practice. The other advantage of studying Marshall is ontological – he foregrounds social relations and status, which should give us pause when theorizing about human rights. Although his account is primarily sociological, an account of the historical rise of citizenship and constituent rights, it contains an underlying normative argument (King and Waldron 1988, p. 422), and is often treated as such in political debate (Powell 2002). The fundamental idea is that *full* citizenship is a status and outcome to which members of a political community are entitled, and it is constituted by civil, political, and social rights. In his words, "Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed" (Ibid, p. 92).

Marshall does not spell out in significant detail why status should be privileged as the normative lodestar. He mentions though the indignity of difference: the "stigma" of exclusion, the unfairness of elite "privilege," and the importance of living a civilized existence consistent with the "standards prevailing in the society" (Ibid., p. 72). In doing so, Marshall's sociological perspective is apparent, focusing attention on the importance individuals attach to relative status and not simply material dimensions of income and social goods and services.²⁶ Status is defined as "a position in a social system" which "can be imagined only in terms of relationships," on the basis of objective or subjective criteria (Ibid., p. 203). The *status of citizenship* does not equate with a particular or desired *social status* such as a position on a prestige scale or structured ranking, rather an acceptable equality of status.

²⁶ Many economists now concede that human behavior is just as motivated by social status (Rege 2008).

Marshall's status-based account of rights is buttressed by reference to a number of other intrinsic grounds: civil and political rights are justified by the demands of freedom and liberty and social rights by the need for material dignity – a “civilized life.” He also gestures toward more instrumental reasons for social rights such as the benefits of education and health in developing human capital and thus prosperity. In my view, he could have also added ideas of luck egalitarianism and the legitimization of state coercion, which are both central to Rawls's (1971) citizenship-based theory of justice.

In Marshall's conception of social rights, status is to be reconfigured by legislative and programmatic interventions that seek partial de-commodification: the “economic value of the individual claimant” should not determine their social citizenship.²⁷ Yet, the full implications of equality of status for the substance of social rights remain somewhat disputed (see Powell 2002). While Marshall offers both minimalistic and maximalist perspectives, the account clearly requires moving beyond a mere minimum. Equality of status involves a threshold of adequacy, equality of opportunity, and more equitable outcomes. This is clear in his opening gambit: “I mean the whole range, from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being” (Marshall 1964, p. 72). However, Marshall evinces a particular concern for equity, a reduction in disparities. While this can be progressive over time, greater equalization is to be driven through the creation of “an image of ideal citizenship against which the achievement can be measured” (Ibid., p. 84). As to the eventual end, Marshall does not press for equal outcomes: inequality “should not cut too deep,” and “Equality of status is more important than equality of income” (Ibid., p. 103). The result is that Marshall evinces a strong preference for forms of social provision and regulation that are universal and inclusive rather than targeted and means-tested.

To these demands, Marshall makes two qualifications: he acknowledges the importance of first addressing the basic minimum (the “basement of the social edifice”) and that achievement of full social citizenship need not be immediate (it is dependent on resources) (Ibid., p. 86). As to the minimum, he cautions that most endeavors of this nature are not citizenship-based but rather aimed at making the “class system less vulnerable to attack” (Ibid.). Minimalistic provision should instead be part of a movement toward full social citizenship and social rights as permitted by available resources and as shaped by social context. Today, Marshall would probably also add a third qualification: social

²⁷ On de-commodification, see discussion of Marshall in Esping-Andersen (1990, pp. 21–23).

rights should be shaped by active citizen participation and accommodate difference. The shape of the emerging welfare state in the middle of the twentieth century gives a slight paternalistic ring to Marshall's vision of social citizenship.²⁸

Up to now, the question of *who* is a "citizen" has been bracketed. This has been intentional. The point has been to emphasize that the core of citizenship conceptions of rights are not ethnic, legal, territorial, or national but stem from the social fact of situated selves in political communities. This partly addresses a common critique of citizenship-based approaches for civil, political, or social rights: that they are overly exclusive and thus may be difficult to universalize and treat as human rights.²⁹ Like the inclusion of elements of egalitarianism in international human rights treaties, it suggests that status equality may be a strongly universally felt preference.

However, transposing social citizenship rights to the universal level in full has its problems. While globalization has opened the space for new orderings of status and belonging, few individuals conceive of their social identity and worth in global terms. Most transnational positioning is not done by individuals but by various collective entities – respective comparisons between states, between regions, between corporations, etc.³⁰

A conscious resistance to the export of a domestic-based political theory to the global level comes from Rawls. He notably declined to transpose his relational-based theory of justice to the international plane. Instead, his *Law of Peoples* has a distinctly communitarian flavor with only a weak international duty of assistance. The empirical premise is that poverty is essentially, and almost categorically, "endemic" or endogenous, and therefore the sole responsibility of the state concerned (Rawls 1999, p. 108).

Yet, even these objections are not fully solid. While one must be cautious about externalizing responsibility for poverty at home, and the persistence of poverty in middle-income countries suggests the importance of national political determinants (Sumner 2010), Rawls' categorical premise appears to rest on somewhat tenuous empirical grounds (Pogge 2008). And normatively, it ignores the exigencies of a global birth lottery, which is even more

²⁸ Although the republican Pettit (1997) notes that Marshall's account offers a plausible perspective, as it is firmly rooted in a historical experience of struggle.

²⁹ Crowley (1998) is probably correct to argue that the nation-state is essential to this account: "The conclusion is not that a Marshallian framework cannot be applied in a postnational context, but simply that nothing in Marshall provides any authority for doing so" (p. 175).

³⁰ Navin (2011, p. 403) makes a similar point: "nor is it clear whether such [international] inequalities would undermine the self-respect of those persons and societies that are relatively disadvantaged from an international point of view."

pernicious than a national one. As Milanovic (2009) has found, the global Gini coefficient of inequality of 65–70 is much higher than average national inequality. Thus, simply on the basis of global luck egalitarianism, Caney (2001, p. 114) makes the claim for a global equality of opportunity: “Persons should have the same opportunity to achieve a position, independently of what nation or state or class or religion or ethnic group they belong to” where positions are commensurate across societies. Gore (2013) provides an alternative: the aim is that all individuals should be able to share an adequate standard of living, an idea of global social rights.

Moreover, from the perspective of legitimating coercive power, the world’s most oppressed and poorest individuals possess the least power of exit from their states and are arguably subject to a global basic structure, analogous to a domestic one, that determines their life chances and opportunities. Føllesdal and Beitz argue that this structure would provide justifications for justice principles that go toward some level of global redistribution and global democratic participation. Global institutions – composed of states but also other actors – have a “pervasive” impact on “individual life chances and preference formation” (Føllesdal 2011, p. 53). Various versions of a global difference principle have been proposed that would require international wealth transfers or taxation of international transactions or the application of the least-advantaged principle in decisions by international institutions or states in prioritizing development funding or making decisions about domestic policy (e.g. agriculture) (Navin 2011, p. 402).

The problem though with these arguments is identifying who is to make these transfers and trade-offs and what happens when the domestic and global difference principles conflict: if the least-advantaged in a domestic society have to make the sacrifice for the least-advantaged elsewhere. Here, the challenge of specifying duty bearers for positive obligations truly comes to the fore. The tendency to search for simply an immediately realizable global minimum core should be resisted: imperfect duties may require establishing standards by which more privileged states provide assistance, some of which exist in international law while others are nascent.³¹ The point here, though, is not to resolve the debate. Rather, it is to indicate how a normative conception of citizenship in an actual global context requires one to rethink what might be just or fair.

³¹ See analysis of international law by various authors in Langford, Vandenhole, Scheinin, and Genugten (2013).

11.3.3 *Reflections on Political Theories*

While lacking in full coherence, political approaches to theories of rights are generally more grounded in their epistemology and demonstrate what is feasible as a discourse, law, or institution. Of particular relevance to social rights is that political approaches are less cautious than moral rights about pushing the envelope on questions of scope. There is a tendency to embrace a more robust and egalitarian conception of social rights, domestically and even internationally. Of course, there are limits. The full international practice of social rights is contested by some scholars and states, while Marshall's conception of social welfare rights has not been fully embraced elsewhere with equality of status less prominent in some corporatist and liberal versions of welfare states. Yet, this broader egalitarian dimension of social rights in political approaches suggests that moral approaches should be more reflexive. It suggests, at the least (1) an *adequate* not a *basic* level of socio-economic rights can be justified and (2) *very gross* material inequalities are a human rights concern. In this respect, it is worth observing the emergence of the recent sustainable development goals. Some northern states resisted a target for inequality at the domestic and international law. Yet, in the end, a broad campaign characterized partly by human rights language led to the inclusion of Goal 10 on Inequality (Langford 2016). The first target specifically addresses the reduction of disparities although its ambition is modest (Anderson 2016).

11.4 CONCEPTUAL OBJECTIONS³²

Moving beyond the question of the basic contours of social rights, the second major advance on Lockean-style theories is the pushback against traditional conceptual objections. A number of "old hoary chestnuts" are often raised in relation to social rights and four are worth considering: positive rights, indeterminate obligations, excessive costs, and nonjusticiability. Notably, both moral and political approaches have been marshaled to overcome these objections even if some degrees of difference remain between different bundles of rights.

11.4.1 *Positive Rights and Obligations*

The negative/positive distinction represents an enduring scaffold in rights thinking. It has been regularly deployed to challenge social rights. A primary

³² Practical and strategic objections are sometimes raised (Neier 2006, p. 3) but they will not be addressed here. See generally Rubenstein (2004).

complaint is that the open-ended and more opaque nature of positive rights or obligations weakens their normative clarity:

[W]hen one discusses civil and political rights, one is generally talking about *restraints* on governmental action, not *prescriptions* for such action . . . it is easier to tell governments that they shall not throw persons in jail without a fair trial than they shall guarantee even a minimal but sufficient standard of living.³³

However, this position ignores the simple fact that civil and political rights have significant positive components. Realizing the right to personal security, fair trial, property, or political participation requires a host of positive measures that require laws, institutions, action, and resources. Not surprisingly, all international treaties protecting civil and political rights contain positive duties, to “ensure” the rights³⁴ or prevent violations.³⁵ Conversely, it is trite to note that social rights require government restraint: Their realization is dependent on noninterference with access to housing, medical treatment, and schooling. The salience of such restraint varies across different social rights, but it is possible to identify a “negative dimension” in all of them.³⁶

This multifaceted nature of rights has prompted new configurations. A prominent example is the trichotomy of state obligations of respect, protect, and fulfill. Introduced by Asbjørn Eide (1987) and Shue (1980),³⁷ and accepted by some UN human rights treaty bodies, each duty points in a different direction: *respect* aims at circumscribing governmental abuse, *protect* at obliging states to regulate private actors, and *fulfill* at direct measures to ensure realization.³⁸ Alternatively one can, as a number of scholars do, frame the entire catalog of social rights in the negative: “freedom from want,” “freedom from poverty,” “freedom from disease,” etc (see Pogge (2008), Hirschmann (2017), Sunstein (2004), and partly Sen (2009)). Or one can divide social rights along the classical four incidents of rights from Hohfeld (1917): privileges, claims, powers, and immunities (see Langford (2014)).

Moreover, a closer examination of social rights theory and practice reveals that these rights share many other structural features with civil and political

³³ Cited in Schwarz (1995). ³⁴ See, for example, Article 2(1), ICCPR.

³⁵ Articles 2(1), 16, Convention Against Torture.

³⁶ The right to social security is one right in which positive obligations are very prominent: see *General Comment 19, The right to social security (art. 9)*, (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008) (CESCR).

³⁷ For the history of this intellectual development, see Eide (2006).

³⁸ Although it should be noted that the overuse of this typology has prompted similar complaints about the dangers of rigid categorizations (see Langford and King (2008), Koch (2005), Craven (2005, pp. 30–6)).

rights. This includes various procedural elements, such as entitlements to information, consultation, due process, and consent, which might arise in cases of interference. The overlap extends to broader participatory dimensions where individuals, as an intended, actual, or potential beneficiary of a right, are permitted to shape the nature and content of social rights, reflecting a general trend in acknowledging individual agency in rights interpretation and achievement:³⁹ the spaces in which rights are determined must be open, informed, and non-paternalistic (Cornwall 2009, p. vii). As Beetham (1995, p. 49) notes, most people do not wish to be the “passive recipient of paternalist social welfare.”⁴⁰

11.4.2 *Determinacy*

A related critique comes from the assertion that any properly framed right must consist of an entitlement *plus* a duty. In “entitlement plus” theory, “moral or legal norms directing the behavior of the addressees are essential to the existence of moral or legal rights” (Nickel 2007, p. 31). The philosopher Onara O’Neill (2005, pp. 430, 28) distinctively stated that talk of social rights is “null and void” given the opaqueness of the identity of the duty bearer and the content of duties. Contrariwise, it is presumed that civil rights, as negative claims, can be claimed against everyone:

One person’s liberty rights impose on every other human being the obligation to respect them. I am obliged not to murder or steal from other individuals [but] . . . No advocate of welfare rights would say that a poor person has a right to appear at my door and demand food, or a place to sleep.

(Kelley 1998, p. 24)

How to respond? Adherents of the narrower “entitlement” approach to rights question the need for clear delineation of the *who*, *what*, and *when* of duties. A right is “a very strong moral reason why people should have a certain freedom, power, protection, or benefit” even if it does not “specify who bears the burden” (Nickel 2007, pp. 30–1 summarizing McClosky 1976). In this modus, rights function as critical norms. Rights provide a lens through which existing and alternative social arrangements are evaluated, challenged, or defended. Thus, “the statement that someone has a right can be used to

³⁹ See, for example, Article 29, CRPD; Art. 3 Convention on the Rights of the Child; *General Comment 15, Right to water*, Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003) (CESCR).

⁴⁰ See also Madlingozi (2013) and Gaventa (2010).

perform many speech acts besides claiming a right to something” (Nickel 2007, p. 27).

An alternative and complementary response is to acknowledge that not all corresponding duties may be specific and “perfect.” Sen (2004, p. 341) recalls Kant’s notion of imperfect obligations, which are “ethical requirements that stretch beyond the fully delineated duties.” The duty is “to give reasonable consideration to what one can sensibly do for the rights, and the underlying significant and influenceable freedoms, of others” (Ibid., p. 339). This conception of imperfect obligations also permits a more flexible and approach as to *when* a right must be realized, such as the duty of “progressive achievement” commonly found in the legalization of social rights.

Notably, a strict approach to the determinacy of duties would exclude many civil and political rights. The effective realization of these rights often requires positive action, which might be taken by various individuals, actors, and institutions. O’Neill concedes this as much. However, she presses the point about the identification of duty bearers: “we can know who violates a liberty right without any allocation of obligations” (p. 428); and Kelley (1998, p. 27) claims that a “complex set of regulations is required to define the entitlements” for social rights. However, the mere identification of the author of harm does not take us particularly far, neither does it exhaust the set of potential duty bearers nor define the parameters of the duty. A specification of entitlements and exceptions and an institutional apparatus in which they can be exercised is necessary. Indeed, realizing civil rights is not simply about dealing *ex post facto* with nameable violators. The point is to avoid injury to life, liberty, or property; and such prevention requires an apparatus. Implementing some of these rights (e.g. those concerning the criminal justice system) can be equally as complex as ensuring health and social security, and some states require assistance from international actors in their implementation.

Moreover, it is arguable that individuals and private entities can bear social rights obligations. It is curious that many Lockean scholars ignore the specification of such a horizontal duty by Locke for subsistence needs (discussed above). Although the scope of horizontal duties for both civil and social rights must be circumscribed by capacity or influence of individuals and private entities, they are based customarily on some form of interaction: e.g. landlord–tenant, employer–employee, bank–mortgagee, and water utility–customer. Indeed, courts in Germany, South Africa, and Canada have recognized and applied human rights in such horizontal relations.

As to *what* are social rights particularly immune to definition? Unlike civil and political rights, socio-economic rights appear to involve setting a threshold

on a cardinal or continuous scale. For non-comparative measures, we might measure social rights through liters of water, nutritional calories and proteins, quality-adjusted life years for medicines, years of schooling, etc. For comparative measures, we are concerned with the relative shares of these goods or the relation between disadvantaged groups and other groups in the population. The question is where one places the ruler across these scales in order to reflect a qualitative normative standard (see critique by Kelley (1998, p. 27)). Indeed, universal poverty measures are regularly attacked for their decontextualized inappropriateness (too high in some countries, too low in others) and the arbitrariness of measurement method.

Two types of response to this problem exist. The first is to argue that it is possible to determine intertemporal thresholds for social rights with some degree of exactitude (Chapman and Russell 2002). This might be achieved with computational means such as determining the level to meet some standard of functioning or capability (as reflected in many development indicators, e.g. Howard and Bartram (2003)) or the best practices or performance of similarly situated countries (as reflected in the SERF index developed by Fukuda-Parr, Lawson-Remer, and Randolph (2009)). Alternatively, the standards can be determined through a deliberated process. Actors must agree on the relevant standards. Such processes include legislative enactments, multi-stakeholder deliberation, jurisprudential doctrines, or dialogical processes that include elements of each. For instance, the Colombian Constitutional Court has established certain substantive and process-based criteria that a claimant has to meet before they can claim an immediate right to a medicine (Sepúlveda 2008). Any standard is likely to have strengths and weaknesses: for instance, the MDG's and World Bank's (\$1) dollar-a-day measurement of extreme poverty permits easy cross-country comparison but is a poor measure of the actual costs of living (Fischer 2013; Pogge 2010). In countries where the majority have their social rights secured, national poverty lines that use a proportion of the median income as the standard are much more likely to reflect whether a person can afford a basic package of social goods and services.

The second response to the measurement challenge is simply to acknowledge it (often with the warning that a search for exactitude will usually lead to very minimalistic thresholds) (see Porter (2005), Craven (2005), Young (2008)). This move also permits the observation that civil and political rights face similar and perennial challenges. Delineating a clear inner core is difficult for all rights given the gap between potential minimums and maximum articulations, whether for free expression, legal assistance for trials, policing for security, and prison conditions (Nickel 2013, pp. 984, 98). This

raises the question as to what level of preciseness is needed for rights if the challenge has not been fatal for legitimating civil and political rights. Analogous to the earlier discussion of imperfect duties, we might turn to notions of reasonableness and process in the absence of clarity, together with institutionalization of the processes of setting relevant benchmarks.

11.4.3 *Costs and Resources*

Most theories of rights include a criterion of feasibility and a requirement that the costs or, more precisely, consequences of a right not be overly or excessively burdensome. The two concepts are often fused under practicability but they are distinct. In the field of civil rights, it is customary to think of competing public policy goals as a “cost,” which may limit the right. This is why there are very few absolute rights. As the progenitor of “rights as trumps” clarifies:

Rights may be also less than absolute; one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts. We may define the weight of a right, assuming it is not absolute, as its power to withstand such competition. It follows from the definition of a right that it cannot be outweighed by all goals.

Dworkin (1977, p. 92)

Or as he states in the case of socio-economic rights:

The claim that someone has a right to a minimum level of welfare, for example, can easily be understood as the claim that it is wrong for governments to maintain an economic system under which certain individuals or families or groups fall below minimum welfare even if that system produces higher average utility (greater overall collective welfare) than any other system.

(Ibid., p. 367)

In the case of social rights, the discussion often turns to financial costs. This framing of the debate is somewhat misleading. It needs to be immediately pointed out that social rights possess many immediate dimensions that do not require fiscal outlays. The duties to respect and protect social rights and guarantee non-discrimination are largely immediate. The conflict in these cases will often be competing public policy goals such as national security, public order, public health, or other rights. Moreover, it is accepted increasingly that the implementation of civil and political rights takes time and resources, including fiscal investments (Nickel 2008). Indeed, international

development targets were recently set for improving a range of civil and political rights by 2030.⁴¹ As Holmes and Sunstein (2000, p. 29) put it,

Many conservatives cling instinctively to a cost-blind protection of the so-called negative rights of property and contract, because staring hard at costs would shatter the libertarian fiction that individuals who exercise their rights, in the classic or eighteenth-century sense, are just going about their business, immaculately independent of the government and the taxpaying community.

Yet, some social rights will be comparatively costlier in a well-ordered democracy, i.e. a state that does not devote excessive fiscal or other resources to the police, military, or governing elites. Are such high costs fatal for a theory of social rights? In his theory of social rights, Nickel (2007, p. 149) addresses this question of feasibility. He proposes a general test that requires any human right must be feasible in “an ample majority of countries.” He argues that the test is met for a basic package of social rights of some level of adequacy. This is because lower middle-income countries can meet the standard; the minority of poorer countries can be excused on the grounds of inability; and secondary duty bearers such as wealthy countries have a duty to help realize the rights in these countries (*Ibid.*, pp. 140–1, 150).

Today, one could go further than Nickel since the overwhelming majority of the world’s poor, 72 percent according to Sumner (2010), now live in middle-income countries. Further, empirical studies cast serious doubt on the idea that resources represent the most serious constraint in realizing, at least, a minimum level of social rights. The SERF project and my econometric work with Anderson reveals a surprising variance of performance on social rights for countries with a similar economic pie.⁴²

However, is Nickel’s test of an “ample majority” of countries appropriate? The implication is that socio-economic human rights might only have emerged at a specific and recent point in history. Yet, these rights have a long historical pedigree. Griffin (2008, p. 177) notes that,

Contrary to widespread belief, welfare rights are not a twentieth century innovation, but are among the first rights ever to be claimed. When in the twelfth and thirteenth centuries our modern conception of a right first appeared, one of the earliest examples offered was the right of those in dire need to receive aid from those in surplus.

⁴¹ See Goal 16 and 5, Sustainable Development Goals.

⁴² See Fukuda-Parr, Lawson-Remer, and Randolph (2009); Randolph, Fukuda-Parr, and Lawson-Remer (2010 *ibid.*); Randolph and Guyer (2012); Anderson and Langford (2013); and Dugard, Langford, and Anderson (2017).

Moreover, Nickel's test appears contradictory. He allows secondary duty-holders to support realization, which is incongruous with his national starting point.

In my view, the simple qualification of "available resources," found in most philosophical and legal articulations of social rights, is a better response to the challenge (see overview in Langford (2008a)). Feasibility is integrated into the duty rather than being imposed as a condition for the right. Thus, the approach of imperfect duties deals with the demand that resources must be available. If a state can meet a bare threshold, and almost all can, the idea of a right is not threatened. Indeed, the UN CESCR places the burden of proof of states to prove that they cannot meet a minimum essential level.⁴³ And the primary task in such situations is, as Sen (2004, p. 348) notes, "the need to work towards changing the prevailing circumstances to make the unrealized rights realizable, and ultimately, realized."

However, Nickel (2007, p. 151) is right to question the use of "progressive realisation" in social rights *if* it is not done for civil and political rights. He rightly points out that feasibility is a "serious problem" for this latter set of rights. Thus, his proposal for a consistent approach on progressivity is compelling. He notes that the duties of "respect and ensure" would be appropriate for all sets of rights combined with a supplemental exception for resource availability, which is in effect the doctrinal model of the European Committee on Social Rights.⁴⁴

Even if social rights are feasible, are the requisite costs *bearable*? Like any rights, social rights imply the imposition of actual or opportunity costs on other actors or individuals – redistribution in the broad sense of the word. The most classical objections are to arrangements that impose monetary costs. According to Kelley (1998, p. 12), "Enacting entitlements to goods at taxpayer expense has produced exploding costs and a raft of perverse incentives. It is the concept of a right to such goods that gives rise to those and other ill effects." The variability of economic growth and unemployment since the 1970s in high-income countries means that the question is of universal importance.

Such monetary costs commonly involve social transfers (e.g. via social security, public health care, subsidized or free education) or interference with contractual and property arrangements with direct cost implications

⁴³ *General Comment 3, The nature of States parties' obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), para. 10. This test was reaffirmed in *General Comment 19, The right to social security* (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008).

⁴⁴ See *Autism-Europe v. France*, Complaint No. 13/2002, Decision on the Merits (European Committee on Social Rights).

(e.g. minimum wages, quality controls, or housing tenure protections). These actions may raise objections that the interests of individuals are harmed, coerced into sacrificing liberty and property (libertarianism), or their productive contributions or efforts are penalized (the “desert” principle). Alternatively, the purported harm may be collective: general welfare is not promoted as the means to realize social rights retard economic growth and innovation (a utility principle). The costs may also be accepted only on certain conditions: a social welfare model that creates perverse incentives such that individuals take less responsibility for their income, health, and education may be unacceptable.

Social rights may also conflict with non-monetary interests generating other sorts of “costs.” In this case, the complaint is more with the “rights” in social rights. Thus, while social rights may only be accepted to the extent they simply reflect an interest or goal, there exists an objection to their substantive transformation into rights.⁴⁵ A particular concern of some economists is that social rights should not be granted any primary position when trade-offs between different interests are at stake. Following a utilitarian conception, social arrangements should be evaluated as to whether they meet individual preferences rather than predetermined rules and norms. For example, participatory dimensions of social rights may clash with preferences for strongly centralized or technocratic, decision-making on the grounds that the latter is speedy and efficient.

Nonetheless, the headline discussions tend to focus on fiscal costs. If we compare the costs of policing, courts, and defense with overall social spending there is some support for this claim. If we take a country in which social rights are very strongly realized, Sweden devoted in 2006 nearly 30 percent of GDP to social spending (accounting for almost two-thirds of the budget) (Guess and LeLoup 2010, pp. 6–7). The United States used just 15 percent of GDP, which accounted for slightly less than half of fiscal spending.⁴⁶ Yet, even this cost is considered too high by some political parties and commentators (Keeley, 1998, p. 27).

Does realizing social rights require such large fiscal commitments? First, not all social expenditures represent pure fiscal commitments. In the United States and Sweden, the overwhelming majority of social security payments are made within social insurance schemes where individuals receive benefits which are

⁴⁵ On the distinctions between rights and goals, see Nickel (2013), Sen (1982), and Dworkin (1977, pp. 90–4).

⁴⁶ While Mexico used just 5 percent of GDP for social spending (and which accounts for only a quarter of the budget).

strongly correlated to contributions. The amount devoted to social assistance programs is relatively small in comparison. However, it should be noted that social insurance programmes are often part of an egalitarian pact, as the middle classes incur a higher tax burden. Second, the fiscal costs are dependent on policy design: some countries do not regulate the prices of medicines or fail to keep in check the cost of civil servant pension schemes. Third, the marginal utility or benefits of spending on some civil and political rights may be more quickly reached than social rights. It is more difficult to eliminate crime than absolute poverty and illiteracy.

Fourth, and perhaps most importantly, the focus on fiscal costs ignores the principal concern in economics: opportunity costs. Enforcing the negative dimensions of civil and political rights can interfere with economic growth: property rights may halt infrastructure or urban development, while electoral democracy may disincentivize medium-term economic planning. The opportunity costs of the positive dimensions of social rights are well-noted in economics, in particular the crowding out of private savings and access to finance. However, the opportunity costs of not making such fiscal “investments” can be significant, particularly lost human capital or the outbreak of diseases (Bartram 2008, p. 283). For every dollar invested in sanitation the resulting benefits are estimated to be between 9 and 34 dollars (De Albuquerque 2009; UNDP 2007).

The empirical debate over such trade-offs between economic growth and social advancement is voluminous. Evidence suggests that civil rights, democracy, rule of law do not harm, and perhaps even promote, economic growth (McKay and Vizard 2005). Chauffour (2009) argues, however, that once the state expands to more positive welfare rights, economic growth is lower. However, his statistical method presumes that the size of the budget corresponds to social rights and he makes little allowance for variance in policy design. Brady (2005) and Cichon et al. (2004) demonstrated that through good policy design, some countries have incurred high fiscal costs in meeting social rights but not at the expense of economic growth rates, while Randolph and Guyer (2012, pp. 319–21) established that a minority of states have achieved and maintained a *virtuous* cycle of high growth and high social rights realization. These quantitative results confirm the idea that rights and economics can be integrated: the former provides the normative standards and the latter the tools for choice-making and trade-offs within it (Seymour and Pincus 2008).

11.4.4 Legal Implementation and Justiciability

Lastly, theories concerning the form of rights implementation have been used to disqualify social rights. One approach is to stipulate that any right must be

reducible to law: whereby “legal enforcement is central to the existence of rights” (Nickel 2007, p. 32). The idea that rights must be fully expressible in law is somewhat peculiar. It may be possible to argue that the actual enjoyment of those rights in a state may not be limited in fact at a particular point in time, making remedies neither necessary nor sufficient.

Nonetheless, the idea that every right must have a remedy has a powerful pedigree and it is fundamental to many conceptions of accountability – the so-called *raison d’être* of human rights. With this requirement in mind, the last thrust at social rights has been their nonjusticiability. But like the objections before, it has faltered on theoretical and practical grounds.

Justiciability is an “unusually protean” term, manifesting itself in multiple forms (Barton 1983, p. 506). The most precise application is prescriptive. It signifies a threshold or admissibility *doctrine* where courts decline to investigate the merits of a claim despite possessing formal jurisdiction. Such judicial abdication may be for *functional* reasons (an absence of judicially discoverable and manageable standards) or *prudential* (a lack of institutional competence or democratic legitimacy on the part of the judiciary). In countries ranging from Ireland, the Netherlands, and France to Uganda and the Philippines, these functional and prudential reasons separately or together have been sufficient to restrict the justiciable scope of positive obligations (Langford 2014).

However, the conflation of justiciability with inadmissibility is problematic. The prevailing “modern” or “constitutional” approach is suspicious of the formalist tradition that permits declarations of *non liquet*: spaces where no law is declared applicable (Navot 2007; Finn 2002, p. 253). If there are concerns with the suitability of adjudication, this is a matter for judicial self-restraint at the merits phase. As the US Supreme Court stated in 1962, if courts possess jurisdiction over a matter, and an applicant presents a case that is not “absolutely devoid of merit,” they are compelled to conduct a “discriminating inquiry into the precise facts and posture of the particular case” and refrain from seeking to resolve it through “semantic cataloguing.”⁴⁷

This shift away from justiciability doctrines is evident in the debate over social rights. Scheinin (2005, p. 17) was moved to remark that the justiciability critique of social rights resembled a “quiet echo from the past.” The earliest and most systematic deconstruction of the doctrine by a court came in 1978 by the Supreme Court of Washington in the United States, in *Seattle School District No. 1 v. Washington*. Adjudicating one of the early school finance cases based on the right to education, the Court rejected the textual argument

⁴⁷ *Baker v. Carr*, 369 U.S. 186 (1962) (*Supreme Court of the United States*), p. 217.

that the provision was merely “preamble,” vague, or hortatory, as the provision was declarative of a constitutionally imposed *duty* (p. 499). The Court then dismissed the claim that the provision was solely directed to the legislature and created no subjective rights. These institutions could not be the sole “guardian” as not only were a class of persons mentioned specifically (“all children”), but individual interests were affected. And, it dismissed prudential claims concerning the separation of powers. The Court noted that it was “sensitive to the fact that our state government is divided into legislative, executive and judicial branches” but that the “compartments of government are not rigid” (p. 505) – any need for prudence or judicial restraint was a matter to be considered in the determination of the merits. Similar reasoning can be found elsewhere at the national and international level, with the South African court making the point most pithily:

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only . . . the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.⁴⁸

Moving beyond the admissibility stage, have social rights been adjudicated on the merits? The answer is a resounding yes even if the nature and extent of the jurisprudence varies across states. One collection analyzes more than 2000 decisions across 30 different jurisdictions in Europe, Asia, Africa, and the Americas (Langford 2008b). These cases not only deal with obligations to respect, protect, and non-discrimination but also fulfill rights. An example of the latter comes from the Supreme Court of Argentina. In *Campodónico de Beviacqua*, the Supreme Court upheld an order for the continued provision of medication to a child with a disability.⁴⁹ It affirmed that the right to health in the ICESCR, incorporated in the Constitution, imposed on public authorities an “immediate duty” to take “positive actions” to “guarantee” the right. These duties were to be realized to the fullest extent allowed by available resources, but the state must develop a plan of action to reduce infant mortality and assure medical service and medical attention in the event of sickness. In subsequent cases, the Court has gone further by suggesting that statutory interpretation of health legislation must be guided by minimal constitutional

⁴⁸ *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC) (Constitutional Court of South Africa).

⁴⁹ *Campodónico de Beviacqua, Ana Carina v. Ministerio de Salud y Banco de Drogas Neoplásicas*, 24 October 2000 (Supreme Court of Argentina). See generally Courtis (2008, p. 172).

considerations, including the provision of “*full essential* medical services in case of need.”⁵⁰

The most challenging and limited form of litigation is egalitarian claims that challenge disparities. Generally, most litigation requires a comparison of the position of an individual or group with some threshold of accessibility, affordability, or quality. That in itself raises questions of institutional competence and democratic legitimacy of courts. But courts are able to engage in different reflexive processes that push states to review these thresholds. However, addressing disparities outside of a threshold risks plunging a court into fundamentally distributive questions. Nonetheless, a closer examination of the jurisprudence indicates that principles of equity have been judicialized in a number of respects. The first is the defense of legislation that promotes equitable objectives.⁵¹ The second is to apply principles of equity in examining the rights and duties of the specific parties in a case.⁵² Greater protection is given to “weak and defenceless individuals and groups,” while private property rights that affect “community interests or environmental integrity” and municipal obligations to the community are scrutinized more closely (Cepeda-Espinosa 2004, p. 661).⁵³ A third use of equitable principles is to challenge laws or social arrangements in which the most disadvantaged bear the greatest burden. The decision of the New Jersey Supreme Court in *Abbott v. Burke* XXI explicitly recognized that the most disadvantaged schools would bear the burden of retrogressive cuts in school funding.⁵⁴ A final area where equity had been made justiciable is equal opportunity. Some social rights have very strong linkage effects: outcomes for these rights determine whether individuals have an equality of opportunity in accessing other social, civil, and political rights. Rights to health and to primary and secondary education are pertinent in this regard. Thus, it is perhaps not surprising that the greatest adjudicative focus by courts on disparities has emerged in these two areas and particularly in states racked by high levels of inequality.⁵⁵

⁵⁰ Cited in Courtis (2009, p. 390). Emphasis added.

⁵¹ *Public Utilities Case*, C-566 of 1995 (Constitutional Court of Colombia); *City Council of Pretoria v. Walker*; *Marschall v Land Nordrhein-Westfalen*, [1997] ECR I-6363 (European Court of Justice); *Pradhwosh Chhetri and Others*, NKP 2061 No 7, p 901 (Supreme Court of Nepal), Judgement C-371 of 2000 (Constitutional Court of Colombia).

⁵² Cepeda-Espinosa (2004, p. 662).

⁵³ As an example, see *Port Elizabeth Municipality v. Various Occupiers*, 2005 (1) SA 217 (CC) (Constitutional Court of South Africa).

⁵⁴ See also *Disbursement Law Case*, Case No. 2009-43-01 (Constitutional Court of Latvia). Although, see a refusal by a court to do this in *Mazibuko and Others v. City of Johannesburg and Others*, 2010 (4) SA 1 (CC) (Constitutional Court of South Africa). For a critique, see Liebenberg (2010, pp. 472, 76–9).

⁵⁵ See *Robinson v. Cahill*, 62 N.J. 473 (1973) (Supreme Court of New Jersey, United States) and *Medicines Case*, T-760 of 2008 (Constitutional Court of Colombia).

11.5 CONCLUSION

While socio-economic rights may seem like the poor cousin of human rights for moral theorists, this essentialist dogma is no longer sustainable. Socio-economic human rights can be justified across a spectrum of moral theories ranging from freedom and agency to need and justice. Moreover, this chapter has argued purely moral approaches to social rights are limited. They neglect the more grounded origins of social rights practice and the insights it brings to difficult questions in moral theory. Thus, any fully fledged theory of social rights must take into account both domestic and international practice. It provides an insight into challenging questions around the scope of social rights and their egalitarian character.

Moreover, such practice help us to resolve classical conceptual objections concerning social rights – such as concerns with the positive orientation of socio-economic rights and issues of indeterminacy, resource costs, and justiciability. International treaties, court practice, actual budget allocations, and economic analysis of the effects of institutionalizing socio-economic rights suggest that many of the traditional concerns need to be significantly nuanced. Socio-economic rights is a practice which does not generate all or many of the outcomes or dilemmas predicted earlier by theory.

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