

The Responsive Court:

Social Rights, Democracy and Transformation

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Summary

This thesis asks an old question in a contemporary context. Is the adjudication of social rights legitimate and effective, and under what conditions? Delegating final authority over questions of rights to courts generates normative legitimacy concerns and a realist critique that it will be ineffective in practically securing these rights.

The thesis proceeds by arguing for a ‘responsive’ model of social rights adjudication, legally positivist but receptive to the contextualised claims of both victims and lawmakers. The model is scrutinised by examining four sites of debate: the jurisprudential legitimacy of social rights, the democratic legitimacy of judicial review, the fairness of judicial outcomes and the impact of litigation on social transformation.

The analysis and method is situated within legal and political philosophy but draws deeply on human rights jurisprudence and political science. A separate chapter addresses the applicability of the model at the supranational level.

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1. Introduction

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1. The Puzzle

This thesis asks an old question in a contemporary context. Is the adjudication of social rights¹ legitimate and effective, and under what conditions? In other words, is it justifiable and useful to hand interpretive and enforcement powers over these rights to domestic courts or international human rights treaty bodies? Such a delegation of authority commonly raises a series of immediate legitimacy challenges. Are social rights truly human rights? Are they capable of judicial application? Is adjudication consistent with democracy if laws can be struck down or fiscal and policy priorities shifted? Even if these doubts can be assuaged, another body of concern surfaces: is it effective? Are courts likely to provide robust protection of these rights if the judiciary is inherently conservative or elitist? Will judgments be properly implemented given their precarious powers of enforcement? Does a turn to the courts distract attention from the more urgent task of socio-political transformation?

It might be thought that some of these concerns are of growing irrelevance. Over the last three decades, social rights jurisprudence has mushroomed and powers of judicial review have been steadily extended through constitutionalisation or the domestic incorporation of treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).² As Table 1 indicates, at least one social right is justiciable in 107 of 156 sampled countries (69%) while all social rights are justiciable in sixty countries (38%). While legal recognition is only one driver of the jurisprudence,³ global estimates of the total number of social rights judgments are in the order of hundreds of thousands.⁴ Case law has emerged on diverse dimensions of social rights, from negative and positive obligations through to the duties of private actors in private law. This trend

¹ By this group of rights, I principally mean a core group such as social security, health, environmental health, food, water, housing, education, family protection. Labour and work rights and cultural rights can also fall under this heading. This is despite the slightly peculiar international legal terminology that label labour rights as them economic rights. As shall be discussed in the following two chapters, the concern is not with the particular linguistic or legal expression of social rights, but rather with the interests which are expressed within the paradigm of rights.

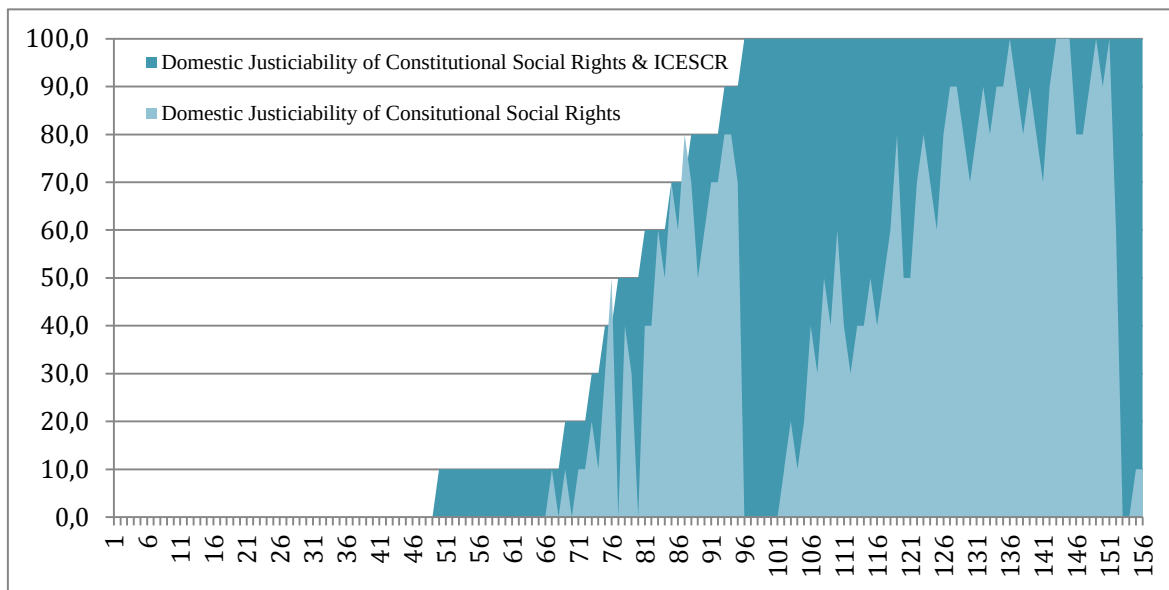
² See Langford (2008c), Coomans (2006), Gargarella, Domingo, and Roux (2006).

³ Other factors include the civil society support structure, the design and culture of adjudicatory institutions and the level of 'political failure': see Epp (1998), Epp (2009), Gauri and Brinks (2008), Langford (2009), and Wilson (2009).

⁴ See discussion in Chapter 4.

is consistent with human rights adjudication generally, leading one critic to despair that “at the very time that the theoretical basis for judicial review is coming under serious and sustained challenge, there has been a huge expansion in the introduction and use of judicial review around the world”.⁵

Table 1. Degree of Justiciability of Social Rights in 156 Constitutions



Source: Computed from TIESR Data Set.⁶

Several sceptics have been won over by the quality of the emerging social rights jurisprudence.⁷ One notable shift was Cass Sunstein: in 1993, he argued that social rights were “absurd” and “unenforceable by courts”.⁸ After the *Grootboom* decision in South Africa, he changed tack and contended that the Constitutional Court’s respect towards “democratic prerogatives and limited nature of public resources” together with a “deliberative attention to those whose minimal needs are not being met” was a

⁵ Hutchinson (2008), p. 64. On expansion of human rights jurisprudence generally, see Jayawickrama (2002).

⁶ Accessed at www.tiesr.org. The social rights measured are employment rights (fair wage, trade union rights, leave, healthy work environment, social security) and general social rights (non-employment social security, children’s social rights, health, land, housing, food and water, development, healthy environment). For a fuller analysis of regional, legal tradition and other patterns of justiciability in this dataset, see Jung and Rosevear (2012).

⁷ See Sunstein (2004). One leading critic of judicial review Jeremy Waldron (2009) has offered some kind words for the reasonableness test for social rights used by the South African Constitutional Court.

⁸ Sunstein (1993), p. 37.

“powerful rejoinder to those who have contended that socio-economic rights do not belong in a constitution”.⁹

But different critiques linger, erupt or evolve in the literature. Dissensus may be less ubiquitous but normative and empirical disagreement persists.¹⁰ Queries continued to be raised about the institutional competence of adjudicators on social rights while judicial review generally faces charges of being undemocratic and ineffective, such that existing inequalities and power relations are even worsened by the practice.¹¹

These doubts are not confined to the world of academia. As is clear, many countries are yet to make social rights justiciable while the majority are considering whether to ratify new international and regional complaint procedures covering social rights.¹² In the ensuing debates over whether to entrench these rights in a justiciable form, there are clear political or policy questions. Such debates can be ultimately resolved only in normative terms.¹³

Normativity also reverberates in the courts themselves. Some national courts have balked at the idea of applying constitutional social rights. Heavily influenced by some strands of classical legal and political theory, they evince a strong reluctance to enforce these rights, even when faced with a clear constitutional mandate to so.¹⁴ A few courts and bodies might be accused of the opposite: over-enthusiasm and stretching the

⁹ Sunstein (2004), p. 1.

¹⁰ See, e.g., Hirschl (2004), Waldron (2006), Pieterse (2007), Hutchinson (2008), Petter (2007), Østerud and Selle (2006), Backer (2009), Ferraz (2011), Bellamy (2008).

¹¹ For example, the Optional Protocols to the International Covenant on Economic, Social and Cultural Rights, Conventions on the Rights of Persons with Disabilities, and the Convention on the Elimination of All Forms of Discrimination Against Women and the Third Protocol to the Convention on the Rights of the Child.

¹² Some states may ratify a human rights treaty or incorporate constitutional rights with no intention at the time of fulfilling the rights or judicial orders for their enforcement. In other words, they are the “false positives” in Simmons (2009). Normative considerations for these states are likely to be overshadowed by strategic calculations.

¹³ See discussion of Ireland and Hungary in Nolan (2008) and Langford (2008a). Michelmann (2004) predicts such effects and controversies.

boundaries of the legal text.¹⁵ This suggests that normative frames (and possibly preferences) of adjudicators play a role.¹⁶

The argument to be made in this thesis is that the different objections can be dealt with via a model of responsive social rights adjudication. In its essence, positivist-oriented adjudicators possess powers of strong review over social rights but are doctrinally and remedially receptive to the contextualised claims of both victims and lawmakers. It will be argued that the model is normatively coherent and defensible as well as empirically feasible and sustainable in at least mature and transitional democracies that possess a sufficient level of the rule of law.

The remainder of this Introduction sets out the framework for the thesis. Section 2 charts the leading critiques of social rights adjudication and Section 3 examines some alternative responses: minimalism, maximalism, and responsiveness, arguing that the latter provides the best fit.¹⁷ Section 4 sets out the methodological architecture of the thesis, in particular the conditioned case, the testing of the model against different objections, and the use of a multi-disciplinary methodology.

2. Leading Critical Perspectives

As Table 1 indicates, the key critiques of social rights adjudication can be boiled down into three broad clusters: jurisprudential, democratic and realist.¹⁸ Obviously there are differences, nuances, emphases, motivations, epistemologies and contrary views within each cluster and school of thought. But the labels provide a handy abridged tool in which to locate the key objections.

¹⁵ See Section 4.2 of Chapter 4 for a discussion.

¹⁶ The degree to which subjective preferences of judiciary determine decisions is hotly debated. It obviously plays a role although it may not be *ordinarily* decisive. See overview of literature in Grendstad, Shaffer, and Waltenburg (2011).

¹⁷ Note that this is different in key respects from the dialogical model often presented in the literature.

¹⁸ The major absence here is the communitarian critique of rights and adjudication. Social rights may provide a lightning rod for critique as they strengthen the economic and social autonomy of individuals, and extending such rights to women, gays, ethnic minorities and migrants has been controversial in many societies. At the same time, there is a communitarian dimension to social rights since they often require a collective response, create new communal bonds or protect existing ones. In any case, the communitarian challenge is less relevant here since it is principally focused on rights rather than the institutions that enforce them.

Table 1. An Overview of Critiques of Human Rights Adjudication

	Motivation	Constitutional/ Int'l Rights	Judicial Review	Rights/Review valid under certain conditions
Jurisprudential				
Classical Liberalism, Libertarianism	Protect civil and/or economic liberties	Yes, but not social rights	Yes, but not social rights	Yes, always but not for social rights
Constitutional Liberalism	Only negative rights can be legalised	Yes, all rights possible	Yes, but not social rights	Yes, always but not for social right
Legal Orthodoxy	Institutional modesty	All possible	Yes, but not social rights	Largely yes, but not for social rights
Democratic				
Utilitarianism	Maximise general utility of society	No	No	No, generally
Procedural Liberalism	Commitment to neutrality and public reason	Possible	No	Possibly
Republicanism	Freedom from domination and active citizenship	Possible	Some Sceptical	Possibly
Realist				
Political Realism	Political behaviour determined by material and power relations	Sceptical	Sceptical	Unlikely
Legal Realism (including Critical Legal Studies)	Legal interpretation principally shaped by subjectivity/power	Sceptical	Sceptical	Possibly yes
Radical/Progressive	Emancipation of individuals and collectives from	Sceptical	Sceptical	No

2.1 Jurisprudential Legitimacy

Turning to the first, social rights adjudication has been attacked for its presumption that positive social rights are worthy and capable of judicial protection. In its hardest form, a classical liberalism or contemporary libertarianism, social rights are excluded from the domain of human or natural rights. The primary function of the state is guarantee certain freedoms not create the apparatus of a social welfare state. In this Lockean tradition, Maurice Cranston puts the objection this way:

A human right, by definition, is something that no one, anywhere, may be deprived of without a grave affront to justice. There are certain actions that are never permissible, certain freedoms that should never be invaded, certain things that are sacred.... Thus, the effect of a universal declaration that is overloaded with affirmations of economic and social rights is to push the political and civil rights out of the realm of the morally compelling into the twilight world of utopian aspirations.¹⁹

A more instrumental approach might be termed constitutional liberalism. The role of judicial review is to protect basic civil liberties and create the preconditions for democracy. Social questions may be important but they should be left to democratic institutions to resolve. Legal orthodoxy leads to a similar result. It places, however, emphasis on the legal and technical challenges of courts in trying to adjudge the performance of positive obligations. The issue is not so much the right as the doctrinal complexity: “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.”²⁰

2.2 Democratic Legitimacy

A common thread in critiques against human rights, and especially social rights, adjudication is the lack of democratic legitimacy. The motivations for such perspectives differ significantly. Utilitarians, such as Jeremy Bentham, represent the high-water mark in the critique of both rights and adjudication.²¹ In this view, the justification for any coercive act must stem from its ability to maximise the greatest utility of society not necessarily the protection of supposed fundamental interests of individuals. According to Bentham, rights (natural at that time) were not only “nonsense on stilts” - because of their aspirational rather than real nature – they also formed the wrong basis for imposing laws and policies.²² Bentham also emphasised the role of democratically

¹⁹ Cranston (1983), p. 12.

²⁰ S. Rubin, *Economic and Social Rights and the New International Economic Order*, Address Before the American Society of International Law, cited in Schwarz (1995), p. 1233.

²¹ Although, other utilitarians such as Mill were strong defenders of certain rights.

²² Bentham (1833) p. 501.

elected parliaments and their use of reason in developing legislation. Giving power to the judiciary outside the enforcement of legislation (whether to decide on natural rights or develop the common law etc) only compounded the problem. He excoriated his contemporary Justice Mansfield for developing the English common law in defiance of “popular assemblies” and squandering legal certainty since “amendment from the judgment seat is confusion”.²³ This utilitarian resistance to rights continues its influence today within economics and policy-making.²⁴

A second stand of democratic majoritarianism comes from liberalism. It is a procedural variant that is less concerned with than the substantive protection of civil or economic liberties and more with the foundational challenge of pluralism. As Kymlicka puts it:

A liberal state does not seek to resolve these conflicts [over values] but rather provide a ‘neutral framework’ in which citizens can pursue their diverse conceptions of the good life. Liberalism on this view is the only humane response to the inevitable pluralism and diversity of modern societies.²⁵

According to Lamore, a neutral framework requires rational dialogue and equal respect.²⁶ The former constrains the process of argument to neutrally agreed-upon principles and the latter ensures political processes and legal coercion are justifiable to all persons. With these principles, some liberal contend that judicial review (and even constitutional recognition of rights) cannot be justified: it satisfies neither the commitment to rational dialogue or equal respect within a society characterised by pluralism and reasonable disagreement. Elected parliaments are instead better placed to fulfil these requirements. As Jeremy Waldron argues, judicial review:

[D]oes not, as is often claimed, provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights; on the contrary, it distracts them with side-issues about precedent, texts, and interpretation. And it is politically illegitimate, so far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it

²³ Bentham (1928).

²⁴ Gauri (2005), pp. 78-81, Darrow (2003).

²⁵ Kymlicka (1995), p. 483.

²⁶ Lamore (1990).

disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.²⁷

A third source of scepticism is located in civic republicanism. It places heavy emphasis on democratic representativity but its vision of democracy is less formalistic and is more concerned with preventing domination rather than ensuring a neutral playing field.²⁸ One feature of this line of thought is the emphasis on the virtues of ‘active citizenship’: it seeks the flourishing of civil society through individual or organised engagement in political life and direct forms of participation through referenda and other models.²⁹

Judicial review of human rights has been attacked on republican grounds. Bellamy aligns it with what he calls the “pre-democratic form of the constitution”,³⁰ predicated on promoting political stability. A ‘mixed constitution’ with multiple veto points “assumed the division of society into different classes with distinct interests: namely, the people, the aristocracy and the monarchy” with the aim being “to achieve a balance between these three groups”.³¹ In the case of the US Constitution, the Framers were anxious to institutionalise checks against what they saw as the irrational passions of collective and majoritarian assemblies, a concern that was particularly motivated by the perceived need to protect individual property rights. Bellamy notes, as others have done, that the Framers “continued to fear that the propertyless had distinct interests from the rest of the population and in a democracy might use their electoral muscle to redistribute resources from the rich to the poor”.³²

2.3 Realism and Effectiveness

Realist critiques are less concerned with the idea of human rights adjudication and instead its *empirical* manifestation, whether in outcomes, processes or collective action

²⁷ Waldron (2006), p. 1353.

²⁸ There is considerable debate over whether republicanism is an alternative to or a variant of liberalism, due to its emphasis on the substantive dimensions of freedom, an issue that will be taken up later in the book. On the debate, see generally Rogers (2008), Thomas (1997) and Pettit (1997).

²⁹ Skinner (1984), Pettit (1997).

³⁰ Bellamy (2008), p. 14.

³¹ Ibid.

³² Ibid. See also Gargarella (2006).

frames. While the critiques vary, they all place emphasis on real, or more precisely, observable phenomenon. In this view, adjudication and its effects are mere “epiphenomena or surface manifestations of deeper forces operating in society” and social change only occurs when “the balance of these deeper forces shifts”.³³

Political realism doubts the ability of legal institutions to external influence political and economic behaviour. In its descriptive guise, political life is driven by the material and social interests of individuals and groups and outcomes are determined by prevailing power relations.³⁴ The relative powerlessness of courts consequently engenders scepticism to their capacity to effect change. An archetypal example is the work of Rosenberg on the impact of the US Supreme Court:

[A] danger of litigation as a strategy for significant social reform is that symbolic victories may be mistaken for substantive ones, covering a reality that is distasteful. Rather than working to change that reality, reformers relying on a litigation strategy for reform may be misled (or content?) to celebrate the illusion of change.³⁵

For instance, he postulates that a leading civil rights judgment from the US Supreme Court, *Brown v. Board of Education*, was not responsible for progress on school desegregation. Rather it was “growing civil rights pressure from the 1930s, economic changes, the Cold War, population shifts, electoral concerns, the increase in mass communication” that prompted racial desegregation.³⁶ The Court simply “reflected that pressure; it did not create it”.³⁷

A second strand is legal realism which focuses on the internal dynamics of courts. It is sceptical as to the ability of courts to *reason* objectively and independently about text. One of its progenitors, Justice Oliver Wendell Holmes, was wary of a judge “heading into vague words like 'liberty', and reading into law his private convictions or the

³³ Young (2001)

³⁴ Wohlforth (2008). This is to be distinguished from straightforward normative realism which says that power relations *should* be the basis for determining social outcomes. Although, separating the two in practice, like in any school of thought, is tremendously difficult.

³⁵ Rosenberg (2008), p. 428.

³⁶ Rosenberg (1991), p. 169.

³⁷ Ibid.

prejudices of his class”.³⁸ This early legal realism evolved further with the post-structuralist-influenced critical legal studies. In the resolution of doctrinal gaps and conflicts, the textual ambiguity of law, courts will find that their professional methods clash with their subjective preferences. Kennedy argues that, “The rule choices that emerge from [this] interaction should be understood neither as simply the implications of [legal] authority nor as the implications of the ideological projects, but as a compromise”.³⁹ If the judiciary is dominated by a conservative or liberal ideology, expectations of rights-enhancing jurisprudence should be modest. Other critical legal scholars go further though to claim that all interpretation is subjective and driven by power relations. Koskenniemi claims that “Outside the relationship between the argument and the context” there is no “‘external method’, no ‘theory’ that could have proven the correctness of one’s reasoning”.⁴⁰

A third body of critique is concerned directly with the political orientation of judicial institutions. It has its origins in Marxist and radical theory but also political and legal realism. The underlying presumption is that the judiciary is simply an extension of the ruling political and economic elite; and jurisprudence will follow suit. As Hirschl puts it, “constitutionalization of rights and the establishment of judicial review” is “driven in many cases by attempts to maintain the social and political status quo and to block attempts to seriously challenge it through democratic politics”.⁴¹ He describe the process of elitist interdependence and rights as follows:

[J]udicial empowerment through constitutionalization is more often than not the result of a strategic tripartite pact between hegemonic, yet increasingly threatened, political elites seeking to insulate their policy preferences from the vicissitudes of democratic politics; economic elites who share a commitment to free markets and a concomitant antipathy to government; and supreme courts seeking to enhance their symbolic power and institutional position.⁴²

³⁸ Biddle (1960), p. 10.

³⁹ Kennedy (1997), p. 19.

⁴⁰ Koskenniemi (1999), p. 356. The extent to which judges actually influenced by subjective preferences is debated but some political science studies do indicate that preferences can play a key role. See, e.g., Grendstad (2010).

⁴¹ Hirschl (2004), p. _.

⁴² Ibid., pp. 213-4. See also D’Souza D’souza (2008).

Courts simply help enlarge the “private or economic” sphere but do not prompt any “redistribution of resources or opportunities”.⁴³

One of the major theme flowing through realist critiques, and particularly radical ones, is that they foster a delusional and disempowering belief in the power of rights and judiciaries. The possibilities of emancipation, political imagination, bottom-up politics and eventually social justice and transformation are lost in the illusion of rights. Neocosmos (2009: 276) states that:

Citizenship, from an emancipatory perspective, is not about subjects bearing rights conferred by the state, as in human rights discourse, but rather about people who think becoming agents through engagement as militants/activists and not politicians.

As we shall see, there is a wide division of opinion within these different realist traditions as to whether rights and courts should be dismissed out of hand or remoulded in a progressive manner.⁴⁴ The presumptions of judicial elitism largely emerged from analyses of some judicial responses to civil and property rights and some critics have expressed guarded hope that constitutional inclusion of social rights could partly restrain and redirect judicial preferences.⁴⁵ Other are less optimistic. They expect courts will find different ways to evade enforcing social rights in a meaningful ways: social rights will be applied symbolically, restrictively or just ignored.⁴⁶

3. Models of Social Rights Adjudication

The diversity of critiques is rather overwhelming and it is tempting to focus on just one of them. But this approach will be resisted. All these intrinsic and instrumental positions have gained a degree of credibility and influence and are increasingly raised in tandem. The values and concerns behind them are also worthy of consideration, in particular the importance of individual autonomy and coherent legal interpretation (jurisprudential legitimacy), equal voice and decision-making (democratic legitimacy) and fostering fair

⁴³ Hirschl (2004), p. 218.

⁴⁴ As to the latter, see Unger (1998), Klare (1998).

⁴⁵ Klare (1998).

⁴⁶ David Kennedy (2001), Pieterse (2007).

legal outcomes and social transformation for all individuals and groups (legal and socio-political effectiveness). Thus, any response should be relatively well equipped to meet any of them.⁴⁷

Before proceeding, it should be noted that the concept of *legitimacy* is primarily used in a normative manner: “To say that an institution is legitimate in the normative sense is to assert that it has the right to rule” through “promulgating rules and attempting to secure compliance”.⁴⁸ The benchmark should be distinguished from legal legitimacy: i.e., that an institution *has acted* within its legally defined constraints.⁴⁹ Nonetheless, legal positivism will feature prominently in the analysis since it will be set as a basic requirement for adjudication.⁵⁰ A normative approach is likewise to be delineated from sociological legitimacy: whether individuals, the ‘governed’, accept that an institution has, or maintains, the power to rule over them.⁵¹ But, as we shall see, empirical perspectives generated by political science and sociology of law can help sharpen ‘general’ and normative theory.⁵² Finally, *effectiveness* could be bundled under the general concept of normative legitimacy. Legitimacy can be determined by an institution’s capacity to provide substantive outcomes:⁵³ “justice considerations seem

⁴⁷ Moreover, in considering the normative legitimacy of governance rather than governing institutions, attention has to be given to ideational legitimacy (i.e., the status and content of social rights) as well as institutional principles of legitimacy (i.e. adjudicatory powers). Meyer and Sanklecha (2009) distinguish between ‘institutional’ and ‘non-institutional’, determining what the “social ideal consists of” in addition to how “institutions ought to be designed” (Ibid. p. 21.). A neat ideational-institutional distinction fits very well discussions of the legitimacy of governing institutions, such as parliaments, executives and intergovernmental organisations. It is strained, however, in the case of governance institutions, such as courts. With governing institutions, one can debate to what extent they should be bound by either procedural or substantive rules. Thus, in considering the legitimacy of a government, a national central bank, an international trade organisation or a world parliament, one might argue that certain internal voting procedures or the protection of the human rights are necessary components of institutional design for ensuring legitimacy. In the case of the governance institutions, they have by nature restricted law- or policy-making powers. In order to have a focused discussion, the substantive rules need to be more clearly discussed or specified in advance.

⁴⁸ Buchanan and Keohane (2008), pp. 25. For difference perspectives on dividing up normative legitimacy, see Føllesdal (2006); Bodansky (1999); Ulfstein (2008).

⁴⁹ The jurist Abi-Saab (2008) makes this distinction clear in his defence of legal legitimacy: “I would discard from the discourse of legitimacy any attempt to use it as a means to dodge or get around the law; as a *passé-droit*, a licence trumping legality or a “justification” of its violation.” (p. 116).

⁵⁰ For instance, in many works on normative legitimacy of institutions, there is often assumption that will be a minimum level of legal compliance.

⁵¹ Weber (1964), p. 382

⁵² Habermas (1979), p. 205.

⁵³ See, e.g., Føllesdal (2006) and his categorisation of different arguments on the legitimacy of the European Union.

relevant to legitimacy no matter what conception of legitimacy one works with”.⁵⁴ However, it is useful to keep the two concepts separate for the sake of analytical clarity. Many discussions on effectiveness do not take a point of departure in legitimacy; and establishing legitimacy arguably “does not require perfect or full justice”.⁵⁵ The pointed question is whether an institution is suited to achieving a particular end.⁵⁶

So with our criteria in mind – jurisprudential legitimacy, democratic legitimacy and legal and socio-political effectiveness – three alternative models are interrogated:

3.1 Minimalist

A tempting means of meeting jurisprudential and democratic legitimacy critiques is to advocate a minimalist model of social rights adjudication. The minimalism imagined here can be manifested in different ways; which may or may not be cumulative. It may support a restricted catalogue of social rights, covering only the right to education and subsistence. It might be integrated and only permit social rights protections to evolve through a partly expansive interpretation of civil and political rights: to include non-discrimination in the social sector or minimum social entitlements.⁵⁷ It might even grant full social rights for very disadvantaged individuals. For instance, the European Court of Human Rights has stated that persons with severe illness or disability may be able to assert an immediate positive right to housing by virtue of their civil right to privacy.⁵⁸

Minimalism may be expressed through the intensity of review. Full legal recognition of social rights is acceptable but the judiciary is required to exercise considerable deference in interpretation. Only in extreme cases of irrational or unconscionable laws or policies, should an adjudicator intervene. A deferential or cautious posture could be equally manifest in the remedial and enforcement phase. A violation of rights may be

⁵⁴ Meyer and Sanklecha (2009), p. _.

⁵⁵ Buchanen (2004), p. 432.

⁵⁶ See for example Gauri (2011) *ibid*.

⁵⁷ Føllesdal (2009b).

⁵⁸ *Marzari v. Italy*, (1999) 28 EHRR CD 175 (European Court of Human Rights), stating “although Article 8 does not guarantee the right to have one’s housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a refusal on the private life of the individual” (p. 8).

judicially established but only a weak remedy is issued: e.g., a declaration or recommendation.

Even a philosopher oriented towards socially just outcomes, such as John Rawls, only conceives of constitutionalising a social minimum.⁵⁹ He argues that limiting judicial protections to “negative rights” and a social minimum is justified since negative rights are existentially more “important” and “politically acceptable”.⁶⁰ In a legal modus, he continues by saying that it is “far easier to tell” whether these liberties are being realised and social rights requires the establishment of a “complex institutional apparatus” for the implementation of any judicial order.⁶¹

These minimalist conceptions ensure that a court sets very basic minimum standards or only gently intrudes upon the powers of the legislative sphere. However, an overly minimalist model struggles to meet the effectiveness criteria.⁶² Under certain conditions, a minimalist model may be effective enough: e.g., a deferential court in a strong and consistent social welfare state. But as a general model, this is less likely to be sufficient. Stronger forms of protection of social rights may be necessary to help advance the progressive and equitable realisation of social rights beyond subsistence towards a more adequate level.⁶³ Stronger forms of protection may be necessary for ensuring rights are effectively protected but also to improve democratic representativity and participation of excluded groups.⁶⁴

Moreover, an asymmetry of rights protections (with strongly protected liberty rights) can justify retrogressive actions against socio-economic rights or neglect and inaction. Such outcomes are most associated with strong protections of economic liberties and is classically exemplified by the *Lochner*-era of judicial review in which the US Supreme Court. As Bellamy notes, judicial review

⁵⁹ Rawls (1971), §38.

⁶⁰ Rawls (1993), p. 230.

⁶¹ Ibid.

⁶² The argument is expanded on in Chapter 2 and throughout the book.

⁶³ This argument will be fleshed out in Chapter 3 and see Fabre (2000), pp. 84-6, for a detailed response.

⁶⁴ See argument in Chapter 4.

[E]nabled the state and federal courts to strike down some 150 pieces of labour legislation between 1885 and 1935 of an analogous kind to those passed by Western democracies free from such constraints over roughly the same period. Change only came when chronic economic depression and war allowed a hugely popular president with a large legislative majority to overcome judicial and other barriers to social reform.⁶⁵

These asymmetrical effects are not exceptional. The pattern is discernible at times in other jurisdictions and the European Court of Justice has re-stoked such controversies in its recent decisions on the right to strike.⁶⁶

Conflicts between social rights and non-economic ‘liberties’ can also arise. For instance, in the Canadian *Chaoulli* case, the majority of the Supreme Court held that a provincial ban on private health insurance violated *rights to life and security of the person*⁶⁷ and invalidated bans on tobacco advertising on the grounds of *freedom of expression*.⁶⁸ King has argued that if the right to health had been included in the Canadian Charter, then the Court could have accepted the Government’s argument that the ban on health insurance was necessary.⁶⁹ Likewise, courts in other countries have upheld tobacco bans on the grounds of health rights.⁷⁰

3.2 Maximalist

Conversely, I reject a *maximalist* model of judicial review. Such a phenomenon is more feared or dreamed of than realised, although some courts have displayed tendencies in this direction. The maximalist model envisages a court that is particularly active in defining the scope of human rights, including social rights, is prone to issuing detailed remedies and becomes deeply involved in the enforcement phase.⁷¹ In essence, it views

⁶⁵ Ibid.

⁶⁶ *Case C-341/05 Laval v Svenska Byggnadsarbetareförbundet*, Judgement 18 December 2007 (European Court of Justice), *Case C-438/05 International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* Judgement 11 December 2007 (European Court of Justice). See discussion in Davies (2008).

⁶⁷ *Chaoulli v. Quebec (Attorney General)* [2005] 1 SCR 791. (Supreme Court of Canada)

⁶⁸ *RJR-Macdonald Inc. v. Canada*, [1994] 1 SCR 311 (Supreme Court of Canada). Note that case was overturned thirteen years later: *Canada (Attorney-General) v. MacDonald Corp.*, [2007] C.C.J. No. 30 (Supreme Court of Canada).

⁶⁹ King (2006).

⁷⁰ See discussion in Langford (2008b).

⁷¹ For example, see the assumptions behind remedial relief in OSJI (2010), Mbazira (2008).

the judiciary as the primary enforcer of rights or at least a pre-eminent actor along with the legislature. Consequently, adjudicators must be visible and present in as many aspects of rights protection as possible.

This model is problematic. Courts may enjoy jurisprudential or democratic legitimacy but it is unlikely that this extends to all cases and issues. Moreover, a court of philosopher kings may not be more effective. Sensitivity to legitimacy concerns, public deliberation and a catalytic prodding of responsible actors could achieve greater impact in practice.⁷² A maximalist model also risks imposing technical or misguided understandings of socio-economic rights that reduce the space for transformational social progress or feasible and efficient social policy.⁷³

3.3. Responsive

The preferred alternative is what I call a *responsive* model: a court that is responsive to legal text in the spirit of positivism but is receptive to the democratic and material context when exercising its discretion and designing remedial orders. It contends that careful institutional design and a reflexive judicial posture is equally consistent with a mission of rights protection (effectiveness) and sensitivity to epistemic and representative competence (legitimacy). A legal case may warrant a minimalist response, a maximalist response or no response at all. Sometimes, legitimacy and effectiveness criterion may push in the same direction (in terms of system design, jurisprudence or remedies) but in other jurisdictions or cases, there may be more tension, requiring choices to be made.

Nine key features of the model are set out in in Figure 2 below and shall be elaborated upon in the following Chapter with examples. As can be seen, the institutional features are expressed in a rather maximalist form. In order to permit a full range of judicial responses, the design of the adjudicatory institutions must be strong enough, with some modifications and exceptions. This may raise the danger of maximalism or excessive

⁷² See argument in Chapter 6 as well as Rodríguez-Garavito (2011). On the general deliberative contribution of courts, see Kumm (2007) and Gargarella (2011).

⁷³ Horowitz (1977).

unpredictability. But it will be argued that maximalist outcomes are unlikely to dominate and that a number of doctrinal features ensure a threshold of legal certainty. The proposed model is not one of leaving adjudicators with complete discretion over the deployment of their powers: system design, the nature of social rights obligations and the normal constraints on adjudication provide some security. As Farber and Sherry comment, “Judging is an act of tightly controlled creativity.”⁷⁴ At the same time, maximalism may be justified - when the neglect of social rights obligations endures over a long period - and uncertainty is not always a liability. A model of responsive judicial accountability mimics the unpredictability created by periodic elections for political representatives. In the view of Habib, *substantive* uncertainty is necessary for ensuing that “political elites are not able to unilaterally implement their agendas” and forces them to become “responsive” to the interests of other stakeholders.⁷⁵

Figure 2. Features of a Responsive Model

Institutional	Substantive	Procedural
Constitutional expression of social rights	Responsive to legitimacy conditions	Equally accessible to all
Strong judicial review (relatively durable orders)	Protective or transformative outcomes	Process is open and transparent
Positivist legal method	Careful adjudication of conflict of rights	Responsive remedial framework

It is also important to point out the difference between the model and reality. The hypothesis is that this model of adjudication is likely to be more legitimate and effective under varying conditions than alternative models or no model at all. But it does not mean that it will always be feasible or that any court is currently representative of all features in all cases. For example, this responsive model holds that courts should be procedurally equal and accessible for all. In other words, access to justice should not be

⁷⁴ Farber and Sherry (2002), p. 14.

⁷⁵ Habib (2013), p. 119.

primarily premised on being a member of one group: procedures should be open enough to permit claims from a diversity of individuals and communities. In practice, this feature may be highly contingent. Only some jurisdictions may meet this test: e.g., the direct and open access model of some South Asian and Latin American courts or countries with legal aid systems for non-criminal cases. Thus, for the model to be operative, particular contextual conditions or reforms may be critical.

The model should also be distinguished from some related conceptions of courts and law. Quite a few authors have promoted and revealed in practice a ‘dialogical model’ of adjudication for human rights, and particularly for social rights.⁷⁶ The responsive model has strong dialogical tendencies but it is not defined by it: harder forms of adjudication are sometimes required for effectiveness. The model shares more affinity with Young’s ‘catalytic model’. She shows how some courts have moved from deferentialism through to conversational, experimentalist, managerial and peremptory review in order to catalyse changes in the performance of legislatures, executives and private actors.⁷⁷ Michelmann paints a similar picture of adjudication, but not in the field of social rights adjudication, in his portrait of Justice Brennan, the “responsive judge”.⁷⁸ However, the responsive model differs in a number of respects from these inductive approaches. It seeks to specify key institutional features behind review, introduce more rigorous and post-judgment effectiveness criteria, and provide a more normative framework for the purposes of evaluating adjudicatory performance.

A final similarity can be found in Selznick’s idea of ‘responsive’ law, which he contrasts with repressive law and autonomous law, the latter referring to the uniform and neutral application of rules.⁷⁹ Law should be a “facilitator of response to social needs and aspirations”, particularly the most disadvantaged.⁸⁰ In some respects a model of social rights adjudication is an application of this idea of law but the relationship is more complicated. Part of the idea of a responsive court is to leverage the autonomous and

⁷⁶ See, e.g., Roach (2008), Scott and Macklem (1992).

⁷⁷ Young (2011).

⁷⁸ Michelmann (1999).

⁷⁹ Nonet and Selznick (1978).

⁸⁰ Ibid. p. 14.

neutral qualities of law towards responsive ends. Thus, the model presented here possibly includes more autonomous features.

4. Structure of Argument

The attempt to determine whether social rights adjudication is legitimate or effective is not original.⁸¹ But most studies tend to focus on just one of these criteria or aspects of them: this thesis aims to be more comprehensive. In addition, it seeks to push the disciplinary boundaries by drawing on philosophy, jurisprudence and political science; placing normative and empirical arguments side-by-side. It also does not take for granted that judicial review of civil and political rights is legitimate.⁸² Social rights adjudication needs to be understood within a general but reconceived defence of judicial review. Finally, the thesis embraces international review. Although there may be different legitimacy and effectiveness challenges (the displacement of State sovereignty or weaker enforcement mechanisms) it is feasible and worthwhile to include both levels of review in a single work. The debate partly takes the same course regardless of whether the adjudicatory institution is national or supranational.⁸³

4.1 A Conditioned Case and Stylised Model

The ambition of this thesis is to make a positive but conditioned case for social rights adjudication. This is done by first setting up a stylised version of social rights adjudication in *Chapter 2* that will be attacked and defended throughout the remainder of the book. As the aim is to stake a claim for a model that will function under varying conditions, the number of assumptions will be minimised: the only scope condition is a minimum threshold of rule of law within a jurisdiction. Instead more attention will be

⁸¹ See for example, Michelmann (2004), Hershkoff (2008), Bilchitz (2007), Young (2011), Fabre (2000), Gauri and Brinks (2008), Yamin and Gloppen (2011) and more sceptical references at footnote 10.

⁸² E.g., Vierdag (1978). However, there is some convergence in the literature and public debate. For example, opposition by some commentators and government lawyers to the ratification by Norway of the Optional Protocol to ICESCR has taken the form of adding the 'budgetary consequences' of social rights to more general scepticism over judicial review of civil and political rights.

⁸³ There are some seeming exceptions to this, such as the United States and China (which are generally sceptical to all international review) and Norway (which has argued that it is not opposed to social rights adjudication at home, only abroad). However, a deeper look at the of the latter reveals conflation of many arguments and rather a strong scepticism by central government lawyers to any form of judicial review.

given to describing the institutional, substantive and procedural features of the proposed model together with their internal coherency and empirical feasibility.

The model covers courts or other bodies entrusted with adjudicatory powers. The noun ‘adjudication’ is formally chosen over ‘judicial review’ for two reasons. First, the issues at play extend beyond the mere capacity of courts to review (i.e. interpret) legislation and executive acts and omissions: the post-judgment phase is equally important. Second, the concern is not only with institutions with strong or coercive remedial powers, but also with international quasi-judicial bodies whose procedures mimic many features of a standard judiciary – e.g., the authority to receive or instigate cases, the authority to interpret legally enshrined rights, determine whether there has been a violation and provide or recommend some form of remedy. It might be questioned whether these ‘softer’ forms of adjudication are of real interest: their powers raise fewer democratic legitimacy concerns and instead could be questioned as to their effectiveness. Moreover, the enforceability of a right or rule is sometimes viewed as determinant of whether it constitutes ‘law’.⁸⁴ However, the inclusion of quasi-judicial procedures is analytically useful since the debates on the legitimacy or effectiveness are not always graduated according to the remedial strength of a procedure.⁸⁵

The upside of developing a conditioned and stylised model is to concentrate the debate. As is evident in some of the literature on the judicial review of human rights, there are clear risks in meandering through arguments for and against *without* an articulated model in mind. It is often not clear at times if protagonists are talking to or past each other.⁸⁶ Moreover, attempting to foreground a model of adjudication can provide a metric or evaluative theory for assessing jurisprudence and institutional design. Since social rights jurisprudence is becoming a daily reality in many jurisdictions, we arguably need some form of applied theory to appraise particular cases and broader trends. As Amartya Sen puts it, “the identification of a transcendental alternative does not offer a solution to the problem of comparisons between any two non-transcendental alternatives.... What is needed instead is an agreement, based on public reasoning, on

⁸⁴ See further discussion in Chapter 3.

⁸⁵ This issue is treated in some depth in Chapter 2, Section 2.3.

⁸⁶ On this dimension of the debate, see Tushnet (2010).

rankings of alternatives that can be realized.”⁸⁷ Without over-stating it, in the case of social rights there is rich material for evaluation due to differences in judgments and final outcomes across and within jurisdictions, which are not necessarily reducible to context or some reasonable threshold of pluralism.⁸⁸ When faced with an institutional arrangement, a particular decision or cycle of litigation, a normative theory can help us give clarity to our instinctive reactions.

The downside of proceeding with a ‘universalisable’ model presupposes that one can generalise across jurisdictions: it risks glossing over widely varying circumstances, legal systems, social systems, histories and languages. Even basic concepts are not necessarily communicable across contexts. Skinner reminds that “concepts have a history”⁸⁹ and Koselleck argues that concepts are in flux as words move across space, time and language.⁹⁰ Different manifestations of social rights adjudication may be only explicable in historical terms, a result of path dependencies. For example, the Indian constitution is more restrictive as to the justiciability of social rights than Bangladesh. But the jurisprudence of their respective Supreme Courts has proceeded in the reverse direction. Some would explain this paradox by pointing to the Supreme Court of India’s reaction to its sudden decline of public legitimacy in the 1970s: it acquiesced to an increasingly authoritarian executive and then repositioned itself as a public defender of rights. This explanation is compelling but it is not sufficient. Other courts have developed in a similar trajectory to India’s without the same public legitimacy crisis: Nepal, Pakistan, Colombia, Latvia and Costa Rica. What they share instead with India is extremes of inequality or government intransigence. These commonalities suggest that

⁸⁷ Sen (2009), p. _.

⁸⁸ For example, the doctrines developed on positive obligations by apex courts in Hungary, South Africa, Finland, Ireland and Colombia have taken divergent paths; as has jurisprudence on forced evictions in Venezuela, South Africa, India and Kenya and Canada (Langford, 2008). One can also find a spectrum of strong and weak forms of review across national and international jurisdictions. However, it is dangerous to be too seduced by formal doctrinal differences; For an example of intra-jurisdictional variance, compare in South Africa the modest deference in *Grootboom*, limited deference in TAC and extreme deference in *Mazibuko*. See further Liebenberg (2010) and Tushnet (2008). Adjudicators have also arrived at similar conclusions through use of different legal doctrines. For instance, the German Constitutional Court has adopted the ‘minimum essential level’ doctrine while the South African Court has rejected it, but at times their mode of interrogating policy is not altogether different.

⁸⁹ Skinner (1998), p. 62.

⁹⁰ Koselleck (1989) (1989).

it may be possible to make some general comparisons across countries. Moreover, by taking a wide sample of jurisdictions and localised debates, it is hoped that the books can draw from the similarities across the jurisdictions and the ways in which concepts are *used* rather than talked about (see further section 4.3 below).

4.2 Attacking and Interrogating the Model

This conditioned case for social rights adjudication raises two normative and two empirical challenges. Normatively, is the model *internally coherent* and *defensible* when compared against alternative arguments and schools of thought? Empirically, is the model *feasible* and sufficiently *sustainable* in practice? Do we know whether such systems of adjudication can be fashioned and that adjudicators can and will act in the expected manner?

The mix of normative and empirical approaches is akin to avoiding the choice of ‘impaling oneself’ on the horns of either ideal or non-ideal theory.⁹¹ Whereas ideal theorising permits a more focused debate and non-ideal approaches permits findings of greater relevance, a multi-level approach helps cope with wide variance in conditions in space *and* time. Although demanding, it is particularly important in a field characterised by symbiosis between the two. If some courts (and scholars) consistently reason on the basis of idealised conditions, then it necessary to address this logic, even if the particular jurisdiction is far from ideal. At the same time, idealised theorising has much to learn from ‘real world’ legal and political science. It has been particularly concentrated in Western English-speaking jurisdictions while much of the innovative social rights jurisprudence has occurred in transitional democracies and civil law countries. Moreover, arguments from both sorts of reasoning can enhance each other. For example, if judicial review is legitimate under ideal conditions, the argument for it may apply with greater force in non-ideal conditions.⁹² Conversely, if it is illegitimate in non-ideal conditions, the claim for it under ideal conditions may be more difficult.

⁹¹ Meyer and Sanklecha (2009), p. 24. See also Sen (2009).

⁹² One argument against this, considered in Chapter 6, is that a strong court in non-ideal conditions may crowd out attempts to improve democracy as excessive hope is placed in the institution.

In seeking to address these challenges, the book is structured around four sites of debate that throw the legitimacy and effectiveness criterion into sharp relief. *Chapter 3* begins with the claims that social rights lack *jurisprudential legitimacy*. It first addresses the charge that social rights are not human rights, or at least not fully equivalent to civil or political rights. It examines the alleged valuative, conceptual and epistemic deficiencies of social rights and argues that they can be resolved within any of the leading theories of human rights: essentialist, behavioural, functional, deliberative and political.⁹³ It then moves on to examine whether social rights can be genuinely and sensibly applied in courts, and whether meet the demands of *legal interpretation* (e.g., clarity, coherence and certainty) and *institutional competence* (i.e., possession of necessary information and expertise by adjudicators). The chapter argues that the emerging jurisprudence largely dispels these doubts and adjudicators can overcome concerns over vagueness and positive duties, resource allocation, conflicts of rights and the spectre of dynamic interpretation and unpredictability.

Chapter 4 addresses the *democratic legitimacy* challenge: how can unelected judges purport to strike down legislation approved by a democratically-elected majority or require them to adopt new laws and policies? This chapter begins by asking if there is a democratic problem at all if review powers are the subject of societal precommitment and constitutions and treaties can be altered post-judgment. Despite these democratic features, a democratic deficit remains and needs to be defended. The chapter considers four cumulative arguments: democratic, minimalistic, outcome-based and balanced review. It argues that there is a modest democratic case for adjudication, as it can broaden representation and trigger democratic deliberation, and that the impact of judicial review on democratic principles is often minimal. But the model of responsive adjudication envisions circumstances where democratic legitimacy needs to give way to effectiveness. The chapter argues that a theory of responsive judicial accountability (derived from ideas of trust building, non-domination, complexity and legislative pathology) can overcome any remaining democratic deficit. In addition, any system of

⁹³ This partly draws on but also departs from delineations in Dembour (2010) and Beitz (2009).

judicial review that is restricted to civil and economic liberties would fail the test of democratic legitimacy since it preferences certain voices.

Chapter 5 addresses the realist critiques that courts fail the test of *legal effectiveness* – the idea of judicial accountability is nice in theory but is far from practice: the distributive legal impact of decisions will favour more advantaged groups over the disadvantaged. The response to this critique requires going beyond illustrations of protective judgments, wherein courts have made well-reasoned decisions or given judgments that favour the disadvantaged or uphold social rights for all. The chapter first sets up benchmarks for determining what counts as legally effective; and emphasises the importance of contextually conducting evaluations in light of the comparative performance of legislatures and executives. It then uses various legal and quantitative methods to investigate the *likelihood* in practice that adjudicators will produce such outcomes and under what conditions.

The effectiveness lens is widened in *Chapter 6* as it looks at the degree of *socio-political impact and transformation* produced through social rights litigation. Courts may lack the powers to properly enforce their decisions or when impact is achieved, it may not be traceable to a court judgment, and their decisions may have negative material and political impacts. While the literature is still emerging on this topic and the methodologies are diverse, it is possible to set out some evidence concerning the degree of material and political impact of social rights litigation in diverse jurisdictions. It argues that under certain conditions, litigation has secured impact and even broader transformation in practice, shifting power relationships and catalysing changes in public perceptions: to use Abel's words, litigation is "politics by other means".⁹⁴

Chapter 7 on *supranational adjudication* takes up some key legitimacy and effectiveness questions at the supranational level. International review raises additional legitimacy and effectiveness problems due to the potential for greater reasonable disagreement over the content of social rights, concerns of displaced sovereignty, the challenges of enforcement and the potential restrictions on procedural rights and

⁹⁴ Abel (1995).

transparency due to geographical and cost concerns. The first section addresses the extent to which supranational review creates additional considerations for legitimacy through an examination of different theories of subsidiarity. The remainder of the chapter examines supranational review of social rights adjudication with a particular focus on the jurisprudence and its effects, particularly four regional bodies which have interpreted different aspects of social rights.

4.3 Method

In trawling through these different sites of debate, the method is not limited to political or legal theory. The research question may be normative but the approach is multi-disciplinary. Theory is used to frame an issue and establish benchmarks but the tools of legal practice and social science are employed to assess the weight of arguments. If it is claimed that courts are better or less equipped to protect minorities, harm or support democracy, creep towards strong or weak review, make poor trade-offs, encourage or discourage public deliberation, are riddled by elitism or emerge as defenders of the poor, it is important to consider the actual evidence. Thus, in working back and forth amongst ‘considered judgments’ towards some sort of ‘reflective equilibrium’, the thesis will draw heavily from a range of disciplines.⁹⁵

Adopting a multi-disciplinary approach contains though the peril of being a ‘jack of all trades and master of none’. It may make it difficult to develop a comprehensive and coherent account within a single discipline. Moreover, whereas most discussions on the topic are formally situated in a single discipline - legal or political theory, legal interpretivism or social science – there is a tendency for cross-fertilisation and interdisciplinarity. The problem is that this can occur without any acknowledgement or clear articulation of method. Thus, this thesis attempts to adopt a more rigorous multi-disciplinary method. It tries to separate out the premises and conditions for introducing different types of argument and evidence.

⁹⁵ Daniels (2003), Føllesdal (2009a).

As to the use of legal doctrine, it is employed in three respects. The first is to highlight the role of legal interpretation, which is often under-emphasised in philosophy and social science. The book will thus test the *feasibility* of certain arguments by recourse to common judicial methods of interpretation. Secondly, legal jurisprudence will be used to *illustrate* how courts have addressed legitimacy and effectiveness concerns in practice. In seeking illustrative examples, there is no strict need to confine oneself to a particular jurisdiction. But in order to ensure some rigour, the thesis will focus largely on jurisdictions which have a relatively settled or mature jurisprudence on social rights - both 'progressive' and 'rejectionist' - and represent different types of legal and economic systems. This way, the illustrations are arguably reflective of a sustainable and replicable legal practice and not isolated or particular events. Indeed, one can't resist the feeling that the general literature on judicial review is almost framed by the US experience⁹⁶ while analysis of social rights tends to be limited to a group of usual suspects such as Germany, South Africa and India. Other states with a relatively mature or interesting jurisprudence in the area which will be analysed, such as Argentina, Brazil, Canada, Colombia, Costa Rica, Finland, Hungary, Ireland, Nepal, Italy, Portugal, Philippines, Bangladesh, Pakistan, Ireland and Hungary and to a lesser extent the Baltic States, Poland, Norway, Kenya and Egypt. Cases from a number of supranational mechanisms will also be considered.⁹⁷ Great care of course needs to be taken in analysing these decisions out of context. But a growing body of secondary literature on these jurisdictions provides a partial marker against which to test the comparative analysis.

The third use of legal doctrine is instances where we need to wish to understand the *likelihood* that certain interpretations or practices will prevail. This requires much more rigorous and aggregate approaches akin to social science or the highest demands of comparative legal method. The thesis tackles this challenge by first building databases that code decisions across fifty or so countries in order to get a sense of trends at an

⁹⁶ Sadurski (2002), *ibid.* comes to a similar conclusion.

⁹⁷ European Court of Human Rights, European Social Rights Committee, Inter-American System for Human Rights, African Commission on Human Rights, UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights.

aggregated level as well as the causes of these patterns. The second is the introduction and analysis of longitudinal studies in different jurisdictions so that interpretive and remedial patterns over time can be seen.

In addition to this social scientific approach to law, this thesis draws heavily on literature and methods from political science and to a lesser extent sociology, economics and anthropology in understanding the role of courts, their behaviour and their impact. The thesis will particularly draw on the rich body of early and current American scholarship on civil rights litigation as well as emerging social and human rights literature from elsewhere. Moreover, it encompasses a range of original qualitative work carried out in South Africa, France, Nepal, Colombia, Kenya and Norway.

4.4 Generalisable Conditions and Roads to Reform

In the final concluding chapter the analysis is drawn back together and concludes that some critiques do need to be taken seriously but that a responsive and conditional model of social rights adjudication can be sustained against objections. It also argues that the debate needs to move on from a recurring swing between optimism and pessimism. Rather, we need a better understanding of the conditions under which adjudication is legitimate and effective and the means by which adjudicatory models can be made more responsive in practice. It thus asks if there are any generalisable conclusions on the feasibility and replicability of the model: political, economic, legal or institutional conditions that make the model more likely to appear more or less likely. And are these conditions common or rare, constant or variable, malleable or resistant to change? The chapter is likely to argue that factors such as the type of legal system, economic wealth or democratic system are less important than assumed. More important is the orientation of the judiciary (whether voluntary or involuntary, e.g., through public pressure and access procedures) and a strong but strategic civil society support structure.

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