Husnain Nasim

Economic Austerity, Human Rights and Judicial Deference: A Case for a More Rigorous Judicial Role

Article (Published version) (Refereed)

Original citation:
Nasim, H (2016) *Economic Austerity, Human Rights and Judicial Deference: A Case for a More Rigorous Judicial Role*, LSE Law Review, Vol 1, pp 32-55. ISSN ISSN 2516-4058
DOI: http://dx.doi.org/10.21953/lse.yw1ct0habxkq

Economic Austerity, Human Rights and Judicial Deference: A Case for a More Rigorous Judicial Role

Husnain Nasim*

INTRODUCTION

Economic austerity measures have had a huge impact on the provision of welfare for the most vulnerable members of society. Given the cuts to welfare benefits, vital services and increasing threats to livelihoods, there is a growing body of precedents that challenges the status quo. However, most of these cases have been met by total judicial reticence. The central reason for this relates to the constitutional division of labour, which is often underpinned by deference-based arguments that point to the institutional differences between the courts and elected branches of government. Understanding the role these factors play in the courts' reasoning, especially in terms of how they affect the outcome in cases will be critically examined in Section I. In Section II, I will address whether there is a good case for greater judicial engagement in the adjudication and enforcement of social rights under the current integrated approach, by which courts read socio-economic interests into civil and political rights. By answering in the affirmative, I will argue that deference-based arguments as well as the oversimplified dichotomy between civil/political vis-à-vis social rights is unsustainable. I will argue that there is a good case for judicial engagement in the adjudication of social rights. As such, I opt for a more limited claim, namely, that an incremental activist approach which centers around the importance of dialogue may work. Lastly, I examine the unique constitutional structure of the UK, particularly sections 3 and 4 of the Human Rights Act 1998, and the way in which dialogue fostered between the judicial and legislative branches may open room for a more engaging approach to social rights adjudication.

* BA (Cantab), LLM (LSE). I would like to acknowledge the efforts of my supervisor, Professor Conor Gearty, in guiding me through this project and my parents, Zarina and Nasim, for their unconditional love and support.

I. AUSTERITY IN BRITAIN: EFFECTS AND THE JUDICIAL APPROACH

Social Rights Under Threat

The onset of the 2007 to 2008 global financial and economic crises had a major impact on the enjoyment of social rights in the United Kingdom. The focus in this Section is to analyse the damage that has been done by responses to the crises, with a critical emphasis on austerity measures that involve the reduction of public expenditure on vital services, cash benefits or benefits-in-kind (e.g. school facilities, local library funding, and care homes). We will also look at the role human rights law has played in what has been called 'judicial protection for the worst of the attacks on the poor made by the Coalition government'.[1]

First, what is meant when we talk about "social rights"? For the purposes of this essay, reference to social rights includes rights to housing, health, education, and social security, that is, the key human rights and social minimum needed for subsistence or well-being, social participation as well as the proper exercise of autonomy. The arrival of the welfare state after WWII gave rise to the recognition of state responsibility for securing our social rights. At the same time, the growth of the welfare state and the range of benefits that it offers have often attracted criticism, including claims that people are "sponging off" the government and abusing the system. Whilst there is a general consensus on the need to cut down on abuse of the welfare system, sweeping generalisations have the tendency to underplay the difficult and often desperate circumstances of benefit recipients, often some of the most vulnerable members of society (e.g. abused women, the disabled, children and the elderly). Beyond the rhetoric, a more microscopic look at the predicament of welfare recipients reveals the vital role welfare plays in ensuring the survival of livelihoods, integrating citizens into society and respecting their dignity.

According to a briefing by the Centre for Welfare Reform, people living in poverty, one in five of the population, will bear 39% of all cuts, including cuts to benefits and funding to local government which includes social care and

[1] C Gearty, 'Human Rights in a Neo-liberal World' (The Stephen Livingstone Tenth Anniversary Lecture, Queen's University Belfast, 27 November 2014).

community services.[2] Vulnerable groups like the disabled, who make up one in thirteen of the population will bear 20% of the burden, making them nine times more likely than the average person to have been affected.[3] According to Oxfam, the UK's five richest families have amassed a total wealth of £28.2 billion, more wealth than the whole bottom 20 per cent (12.6 million) of the population.[4] According to a report by the Institute for Social and Economic Research, the past coalition's policies on welfare and taxation exacerbated the wealth divide.[5] It is no wonder that Policy Exchange has found that over a million households cannot afford to heat their homes sufficiently despite having a household member in work.[6] The growing pattern of inequality and concentration of wealth in the hands of the few is also demonstrated by the Centre for Economic and Business Research, which found that in excess of half of Britain's wealth is controlled by the richest 10 per cent and that the poorest 20 per cent will have to spend £1,910 more than they earn whilst the wealthiest richest 20 per cent of the population will on average put £18,780 into their savings.[7] What is particularly worrying is the disproportionate impact and burden this will have on already vulnerable groups. It is thus unsurprising to see greater willingness to challenge government measures in the courts. But on what basis have these challenges emerged and how have the courts reacted?

[2] M O'Hara, 'Tory austerity will eat up the welfare state' *Guardian* (13 April 2015) <http://www.theguardian.com/commentisfree/2015/apr/13/tory-austerity-welfare-state-conservative> accessed 5 March 2016.
[3] ibid.
[4] L Elliott, 'Britain's five richest families worth more than poorest 20 per cent' *Guardian* (17 March 2014) <http://www.theguardian.com/business/2014/mar/17/oxfam-report-scale-britain-growing-financial-inequality> accessed 5 March 2016.
[5] P De Agostini, J Hills and H Sutherland, 'Were we really all in it together? The distributional effects of the UK Coalition government's tax-benefit policy changes' (2014) Social Policy in a Cold Climate Working Paper 10 <http://www.trustforlondon.org.uk/wp-content/uploads/2014/12/Where-we-really-all-in-it-together.pdf> accessed 5 March 2016.
[6] R Howard, 'Warmer Homes, Improving fuel poverty and energy effiency policy in the UK' (Policy Exchange 2015) <http://www.policyexchange.org.uk/publications/category/item/warmer-homes-improving-fuel-poverty-and-energy-efficiency-policy-in-the-uk> accessed 5 March 2016.
[7] H Meyer, 'UK's richest can save £18,680 a year as poorest 40% spend more than they earn' *Guardian* (29 May 2014) <http://www.the guardian.com/uk-news/2014/may/29/richest-uk-save-poorest-spend-crisis-post-office-data> accessed 5 March 2016.

Judicial Engagement but in Extremis

Despite the courts' unwillingness to read or expand rights to welfare benefits under the Human Rights Act 1998, which incorproates into domestic law the rights and freedoms guaranteed under the European Convention of Human Rights (ECHR), there is some evidence of the courts using the traditional list of civil and political rights to protect some of the most vulnerable members of society. In what has been come to be described as the 'integrated approach,'[8] courts have been willing to read social interests and rights into the civil and political rights listed in the ECHR. Although mention of social rights is not explicitly found in many of the judgments, it is fair to state that the courts are using the current regime to protect what are known as vital social rights to social security and an adequate standard of living. This is important because there is no such wholesale recognition of social rights within the common law or ECHR.

In the case of *Limbuela*,[9] all three asylum claimants were barred from receiving state support by operation of s 55(1) of the Nationality, Immigration and Asulym Act 2002.The court acknowledged that the question of whether and if so in what circumstances, welfare support in the form of food, housing and other basic necessities should be given at the expense of the state to asylum seekers is an intensely political question. Nevertheless, the court found that while it is not the function of Article 3 to prescribe a minimum standard of social support, the refusal of state support combined with the denial of the right to work amounted to 'treatment'. [10] Interestingly, this decision was handed down at a time when the then Labour government claimed to be in the grip of an asylum crisis; a classic polycentric situation which could easily have been used as a deference according factor. What is also revealing, is the approach of the courts, especially in opting for practical guidance rather than a precise criterion in defining the Article 3 threshold. Lord Bingham, whilst adhering to this approach, nevertheless commented on when the threshold to trigger Article 3 may be crossed: 'if a late applicant with no means and no alternative support, is, by the deliberate action of the state, denied shelter, food, or the most basic necessities of life.'[11] The interesting question which follows is whether this

[8] C Gearty and V Mantouvalou, *Debating Social Rights* (Hart Publishing 2011) 114-115.
[9] *R(Adam, Limbuela and Tesema) v Secretary of State for the Home Department* [2005] UKHL 66.
[10] ibid para 13 per Lord Hope.
[11] ibid para 7 per Lord Bingham.

approach could be used as a launch pad to expand Article 3 claims to other scenarios, including, for example, to other vulnerable members of society, and how far courts would be willing to stretch the notion of the "most basic necessities of life". On the face of it, it would seem his Lordship was specifically referring to asylum seekers and those left destitute as a result of the regime implemented and action taken by the state. There seems to be little wiggle room for what has come to be known as rights inflation, and given the absolute nature of Article 3 which disqualifies any proportionality balancing, there may be a defensible case against using this right as a basis to prescribe a minimum standard of social support. Lastly, this case can be characterised as what may be called an *in extremis* anomaly, an example of life threatening and serious circumstances triggering a strong judicial response. Indeed, when we discuss cases involving facts less extreme than those in *Limbuela*, we find that the courts opt for a more deferential approach.

Notwithstanding this, there is further evidence that demonstrates the courts' willingness to engage in meticulous analysis of government social policy. In the joined cases of *Burnip*, *Trengove & Gorry*[12] the Court of Appeal ruled that the housing benefit rules were discriminatory against disabled people and in breach of Article 14 of the ECHR read with Article 1 Protocol 1. The key problem here were the effects of a greater shortfall between the amount of housing benefit received and the actual amount of rent the local authority had to pay each week than for an equivalent non-disabled person under the Housing Benefit Regulations (2006). Henderson J, in determining whether the breach was justified, found that the Secretary of State for Work and Pensions had not established an objective and reasonable justification for the discriminatory effect of the housing benefit criteria. In particular, despite the wide margin of appreciation accorded to the State in ECHR law in relation to measures concerning economic and social policy, he was[13] able to distinguish this case from *AM(Somalia)*[14] in which the Court of Appeal held that discrimination was justified, on the grounds that *Burnip*'s case did not relate to immigration, that the exception from the standard housing benefit criteria was sought only for a specific category of claimaints (unlike all disabled people in *AM(Somalia)*) with severe disabilities and that Parliament had already seen fit to amend the housing

[12] *Burnip v Birmingham City Council & Anor* [2012] EWCA Civ 629.
[13] ibid para 64 per Henderson J.
[14] *AM(Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634.

regulations. Here we see a range of factors, peculiar to this case, which led to a favourable result for the claimaint. The discriminatory effect of the regulations on those who had severe disabilities, a limited category of claimants, a discrete group, as well the fact that this issue only arose because the claimaints were housed in the private rental sector, clearly shows that the unique circumstances warranted a more critical approach. What the courts would have decided if one of the three distinguishing features were absent in Gorry's case cannot be predicted definitively, but again this case shows the degree of difference and uniqueness required to diminish the grip of the margin of appreciation accorded in social policy areas.

Despite the optimism these cases have given to proponents arguing for pure application of the proportionality test (devoid of deferential sub-tests), and at a time where the effects of austerity and welfare reforms are coming to hit the most vulnerable in society hardest, hope for the development of social and economic protections under the current civil/political list of rights has been met by what has been called 'judicial protection for the worst of the then Coalition's attacks on the poor.'[15] Courts have relied on the classic constitutional division of labour-type arguments: essentially, that such matters are beyond what the judiciary considers as its role in the broader constitutional landscape. The reasons offered include the perceived superior comparative democratic legitimacy of the elected branches, their expertise in matters concerning social and economic policy, relative institutional competence as well as the polycentric concerns these cases bring, all of which seem to be deeply embedded and hardwired into the courts' psyche and approach, and all recurring reasons and drivers of judicial reasoning evident in these cases. This deep conservatism and unwillingness to countenance the possibility of expanding the scope of the current rights is disappointing. In order to refute the current approach we need to understand what role these factors play in the courts' reasoning and how this affects the outcome of cases.

The Current Deferential Judicial Approach

At the outset, it is important to clarify the nature of the relationship between the doctrine of proportionality and deference. According to Kavanagh,[16] deference

[15] Gearty (n 1) 8.
[16] A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 237.

refers to the intensity with which the questions that form part of the proportionality enquiry are applied. Deference plays a crucial role in determining whether laws or executive decisions satisfy the doctrine of proportionality, as it sets the intrusiveness of review the court will undertake in determining the competing values. Thus, if more deference is applied to a case, then the courts will be less required in terms of strength of argument and supportive evidence to decide that a measure is disproportionate. What is in question is the rigour with which the test is applied.

In *R(JS) v Secretary of State for Work and Pensions*,[17] although the court found that the benefit cap policy was discriminatory and had a disproportionate impact on women contrary to Article 14 of the ECHR taken in conjunction with Article 8 or Article 1 Protocol 1, it held that the Benefit Cap (Housing Benefit) Regulations 2012, made according to s96 of the Welfare Reform Act 2012, was not manifestly without reasonable foundation. The key here is the tone and approach used by the court. Elias LJ stated that the 'the division of resources of the state and more particularly the question to what extent state funds should be made available to those in need for one reason or another is par excellence a political question'.[18] Reminding the court of the need to 'tread with extreme caution' given that Parliament had considered many of the claims identified by the claimaints and had 'chosen not to make the exceptions they seek,' Elias LJ also referred to the fact that in many cases the resultant hardships were alleviated by the discretionary housing payments (DHPs)—a factor which carried great weight in the proportionality exercise.[19] Despite admitting that the cap was too parsimonious, he ended his consideration of the justification question by pointing towards this 'ultimately being a policy isssue.'[20] Evidence of a clearly less rigorous proportionality test in operation is evident here, owing primarily to the perceived superior expertise, democratic legitimacy as well as assumed superior competence of the elected branches to deal with such issues, not to mention the concern about the polycentric nature of resource allocation decisions. But is there more consistent use of this type of reasoning?

The case of *R(MA) v Secretary of State for Work and Pensions*[21] concerns the removal of the spare room subsidy, also known as the "bedroom tax", where

[17] [2013] EWHC 3350 (QB).
[18] ibid para 85.
[19] ibid para 87.
[20] ibid para 95.
[21] [2013] EWHC 2213 (QB).

housing benefit for tenants in the social rented sector will be reduced where there are one or more spare rooms. The claim related to the Housing Benefit (Amendment) Regulations 2012, which the claimaints argued unlawfully discriminated, under Article 14 read with Article 1 of the First Protocol of the ECHR, against disabled tenants, as they failed to make adequate provision for their needs. Despite the finding of discrimination, the crucial issue turned on the test used to determine whether it was justified. Laws LJ, in applying the "manifestly without reasonable foundation" test, found that the measure was justified given that the policy has been properly considered through the application of the public sector equality duty and the absence of a precise class of persons (those who need extra bedroom space by reason of disability) who could be identified in practical and objective terms and sufficiently differentiated from other groups equally in need of extra space[22] —all powerful factors that weighed heavily at the justification stage.[23] He also alluded to the provision for extra funding through the discretionary housing payment in relation to the difficulties disabled persons might face despite not being defined as a class and found that this could not be said to be a 'disproportionate approach to the difficulties which those persons faced'.[24] Unsurprisingly, when this case proceeded to the Court of Appeal,[25] it was held that the measures were justified. What is key to note is the reference to the Regulations as forming part of what was a 'high policy decision', including reducing the budget deficit and welfare reform designed to control the cost of the social security budget.[26] Dyson LJ also laid down the high threshold which must be met to find that a measure is unjustfiable because it does not have an 'objective or reasonable justification,' on the basis that pointing out 'some flaws' in the scheme or 'to conclude that the justification is not particularly convincing', would not suffice, as, for him, the stringent nature of the test requires that there be a 'serious flaw' in the scheme which produces an unreasonable discriminatory effect.[27] Finally, he also referred to the need for the court to be 'cautious' about finding unlawful discrimination of a statutory instrument which had been passed by affirmative resolution of both houses of Parliament and also placed weight on the fact that

[22] ibid para 60.
[23] ibid para 88.
[24] ibid para 88.
[25] *R(MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13.
[26] ibid para 54 per Dyson LJ.
[27] ibid para 80.

some of the 'principal complaints' made by the claimaints were raised and discussed during debates and rejected.[28] But in summing up his overall conclusion of the justification issue, Dyson LJ confirms my suspicion that what is really happening is a form of backpedaling towards a Wednesbury standard of review. The approach, laid out in *Stec v United Kingdom*,[29] is that the court in matters concerning social or economic policy will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'.[30] Despite arguing that the Stec test is not identical to the irrationality standard, he stated that when considering the arguments posited by the Secretary of State, 'his reasons are far from irrational.'[31] This leads to a major concern about the nature of the Stec test, does it mirror the highly deferential standard found in Wednesbury unreasonableness? If so, are deference-based factors and concerns about the possible knock-on effects (financially or politically) when ruling on the unlawfulness of a policy the conceptual justifications of this highly deferential test? The answer, as evidenced above, must surely be a resounding yes.

This leads us to *R(SG) v Secretary of State for Work and Pensions*,[32] previously known as *R(JS)* in the High Court and Court of Appeal. This case concerns a challenge to the benefit cap in relation to the amount of welfare benefits that could be claimed in non-working households, on the basis that it breached Article 14 of the ECHR by unjustifiably discriminating between male and female. In dismissing the appeal, the majority held that the legitimate aims of securing the economic well-being of the country, incentivising work and imposing a reasonable limit on the total amount that a household could receive in benefits were sufficiently important in justifying the benefit cap and were not manifestly without reasonable foundation. For our purposes, it is important to highlight the factors which determined the intensity of review performed by Lord Reed. He stated, that despite the Human Rights Act adjusting the respective constitutional roles of the courts, executive and legislature, it 'does not eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their accountability and their legitimacy'.[33]

[28] ibid para 81.
[29] (2006) 43 EHRR 1017.
[30] ibid para 16.
[31] ibid para 82.
[32] [2015] UKSC 16.
[33] ibid para 92.

Moreover, Lord Reed added that certain matters are by their nature 'more suitable for determination by Government or Parliament than by the courts,' and that courts take this into account when detemining the compatibility of Convention rights with executive action or legislation, by giving 'weight to the determination of those matters by the primary decision make'.[34] Since the issues of proportionality and justifiability concerned social and economic policy that had 'major implications for public expenditure,'[35] which are 'pre-eminently the function of democratic institutions,' the courts, he said, would 'give due weight to the considered assessment made by those institutions'.[36]

What is evident is that the courts, in cases concerning state benefits and allocation of resources, apply a less rigorous and highly deferential approach in determining whether a breach of a right is justifiable. Although it could be argued that the word "manifestly" in the Stec test might appear to indicate a more rigorous standard than the traditional Wednesbury analysis, it could at the very least be argued that the Stec test looks to be as deferential as Wednesbury. This issue leads us to the core of this paper. Are the courts justified in lowering the intensity of review, and is deference-based reasoning justified? Is there a case for more rigorous scrutiny of government measures by simply applying the proportionality test without lowering the intensity of review or incorporating deferential sub-tests?

II. JUDICIAL ENGAGEMENT OR RETICENCE?

In this Section I will argue that there is a good case for greater judicial engagement in the adjudication of social rights under the integrated approach. Although I do point to the need to apply the proportionality test devoid of highly deferential sub-tests, my aim is not so much to demonstrate how this may be done; or to endorse the use of either the current civil and political rights apparatus to include vital social rights (evident in the case law above) or to altogether derive new social rights such as the right to social security or an adequate standard of living, but to clear the way by addressing a logically prior question relating to whether the courts should engage in more rigorous adjudication of social rights. Unsurprisingly, some of the key arguments made

[34] ibid.
[35] ibid para 93.
[36] ibid.

against justiciability overlap and intersect with arguments that often feature in reasons for according deference to the elected branches. As such, I question the assumptions on which deference-based arguments are based and deconstruct the oversimplified dichotomy between civil/political and social rights. I end by pointing to the lessons we can draw from *R(SG) v SSWP*.[37]

The Justiciability Debate

One of the key concerns about the justiciability of social rights relates to the conceptual differences and nature of civil and political rights when compared to social rights. Claims often point to the i) negative/positive nature of civil/political and social rights in terms of the duties and obligations they place on states,[38] ii) the idea that, as rights to resources, social rights may not be achievable and practicable when resources are in short supply, especially following a devastating financial crisis, whereas it is assumed that civil and political rights are always achieveable, and iii) that the obligations imposed by social rights are imperfect and vague, in contrast to more precise civil and political rights.[39]

So is there anything going for these types of arguments? On closer scrutiny we find that these claims are highly questionable. For instance, claim i) which seeks to distinguish the nature of civil and political from social rights based on the type of obligations they impose is based on a misconception and over-simplified demarcation between the two. According to Liebenberg, all human rights require a combination of negative and positive conduct from states and require deiffering amounts of resources.[40] For example, an individual's political right to vote[41] cannot be guaranteed without the state providing the organisation and infrastructure necessary so that elections can be held at certain intervals. Moreover, it is not necessarily the case that social rights impose solely positive

[37] *R(SG)* (n 32).
[38] A Nolan, B Porter and M Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' [2007] NYU Centre for Human Rights and Global Justice Working Paper Series No.15 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434944> accessed 5 March 2016.
[39] O O'Neill, 'The Dark Side of Human Rights' (2005) 81(2) International Affairs 427.
[40] S Liebenberg, 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 SAJHR 359, 362.
[41] ibid 368.

obligations, for instance, where an individual enjoys a social right to health or housing, the state could be prohibited from acting in a way which would violate that right by withdrawing the finances needed to maintain health centres or where restrictive zoning would force shelters provided for the homeless out of an area.[42] In fact, the distinction does not stand. Yet, it may still be argued that social rights demand a greater share of resource allocation and thus impose more duties on the state in comparison to civil and political rights. This may be true, but it is key to remember that the difference distinguishes the two in terms of degree more than in kind.[43]

With regard to claim ii) it is simply wrong to assert that civil and political rights are always realisable because they are costless, whereas social rights are heavily resource dependent, and thus cannot be satisfied in absence of sufficient resources. As has been argued, whether or not a right is costless depends on the obligation in question, as opposed to the classification of the right imposing that obligation as civil/political or social in nature. Indeed, we need only compare the great expenditure, in terms of the training, salaries and administration costs required to ensure that institutions can at least claim to have the competency and capacity to deliver a fair trial,[44] to the fact that positive obligations with respect to social rights may, in the long-term, save the state expenditure or cost nothing at all. Take, for example, investment in education and removing barriers to equality of opportunity or life chances, both of which may reduce state budgets needed for social security or unemployment. As such, the net gain may outweigh the short-term cost. Lastly, it is also key to remember that the misconceived notion of civil and political rights, as not requiring extensive expenditure, is due to the social fact that many of the social systems required to guarantee such rights have been in existence for a long time. The misconception merely reflects the bias domestically and internationally towards civil and political rights, which are seen as less controversial and assumed to have no serious effects on the distribution of resources—a claim which is simply not true.

What about the final claim? Liebenberg has pointed out that the reason why 'the content of many social and economic rights is less well-defined than

[42] ibid.
[43] P Alston and G Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Hum Rts Q 156, 183-184.
[44] European Convention of Human Rights, Article 6.

civil and political rights is more a reflection of their exlcusion from processes of adjudication than of their inherent nature'.[45] Indeed, it is a known fact that social rights have been historically excluded from the process of judicial adjudication in the United Kingdom, so that their meaning has not concretised over time. Moreover, it could also be argued that the open and vague nature of key civil and political rights, such as the right to life, liberty or private life, are equally as vague as their social counterparts, and have also been construed broadly to apply to a broad range of circumstances. On the other hand, some social rights such as the right to an adequate standard of living can be calculated with precision, based on, for instance, what is agreed to be a living wage or the cost of living in a particular geographical region or area. As such, these arbitrary and untrue distinctions between the two type of rights do not logically stand.

Legitimacy, Expertise, Institutional Concerns and Polycentricity

This leads us to some of the central arguments which underpin the case law addressed in Section I. The key arguments relate to the perceived comparative advantages the courts believe that the elected bodies have over them, and especially in relation to the resolution of issues concerning social rights and governmental social/economic policy. By first understanding the claims and then deconstructing and challenging the assumptions on which they are based, I hope to expose the fallacies that drive judicial reticence when confronted with social rights claims under the integrated approach.

According to Kavanagh,[46] courts always owe a duty of minimal deference to parliamentary and executive decision-making. Minimal deference, she argues, is the minimal presumptive weight in favour of the legislative or executive decision. That is, the decisions made by Parliament or the executive be treated with respect in the sense that they should be taken as a bona fide attempt to solve whatever social problem they set out to tackle. On the other hand, substantial deference, which has to be earned by the elected branches is only warranted when the courts perceive themselves to suffer from institutional

[45] (n 40) 370.
[46] A Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press 2008).

shortcomings.[47] For instance, in the realm of national security, it is often argued that due to the fact that certain information is kept secret by the executive, with the result that the court does not have access to all information on which a primary decision is based, the court will be inclined to pay more deference. Given the gap in information, it will be unsure about the effects of its decision on public safety. Similarly, in the realm of social and economic policy it could be argued that given the implications of a social policy decision, which forms part of a larger goal of securing macro-economic stability, the risky nature of granting an individual or a particular group of individuals (due to the individualised nature of court hearings) protection at the expense of others, as well as deep ideological disagreement amongst political parties over how to restructure the welfare system, courts are right to judge themselves to be ill-suited and institutionally inferior when it comes to dealing with these hotly contested policy areas.

As such, one of the main grounds for deferring relates to the argument from institutional competence. The argument here is that when a case deals with an issue that would require widespread or radical reform of various interlinked areas of the law, judges will sometimes pay substantial deference to the superior law-making competence of Parliament. The assumption is that Parliament is best equipped to deal with such issues. Similarly, proponents of deference may argue, given the polycentric[48] nature of an issue, especially welfare policy and benefits, which often interlock with decisions relating to budgetary allocations that form part of a larger unified policy to incentivise work and shift the burden of welfare into society, that courts may be justified in placing great weight on the executive's judgment. It is also alleged that that the adversarial nature of judicial proceedings makes the courts ill-suited to make polycentric decisions. The example often cited is the *Bellinger* case,[49] in which the House of Lords decided against interpreting the Matrimonial Causes Act (1973) compatibly with the European Convention as this raised issues 'whose solutions calls for extensive inquiry and the widest public consultation and discussion'.[50] For the court, it was Parliament which had the law-making ability to deal with the varied

[47] A Brady, *Proportionality and Deference under the Human Rights Act* (Cambridge University Press 2012) 25.
[48] L Fuller, 'The Forms and Limits of Adjudication' [1978] 92(2) HLR 353, 395.
[49] *Bellinger v Bellinger* [2003] 2 AC 467.
[50] ibid Lord Nicholls para 37.

subject-matter and only Parliament could comprehensively deal with this area of law.

A second similar ground relates to the courts' disparity in expertise, qualification and experience, when it comes to matters relating to public policy.[51] The argument is aimed at capturing the difference between the task of the courts and the elected branches – that courts are experts in matters of law, whereas the latter are experts in policy formulation and implementation. Given the different functions of the two institutions, it is argued that the courts ought to remain within their remit and show deference in cases involving contentious policy questions.

The third and final ground relates to the perceived superior democratic legitimacy of Parliament and the executive in comparison to the courts.[52] The claim is that as laws are passed by a democratically representative and elected Parliament, courts should pay deference to the view of Parliament as to what is in the interest of the public. One objection that is also made in relation to the legitimacy of adjudication concerning social rights is the counter-majoritarian nature of such adjudication.[53] The claim is that administration of the public purse or formulation of social policy should only be carried out by the legitimately elected representatives of the people.

Unconvincing Arguments and Lessons from *R(SG) v SSWP*

First I will address the argument from institutional competence and the contention that the courts are incapable of dealing with polycentric tasks. It may very well be true that a polycentric situation will have complex knock-on effects beyond those conceivable in a case, but as has been pointed out, this issue is not unique to claims involving social rights claims. As Nolan argues, civil and political rights claims made by one group of people or an individual may equally impact on the rights of others.[54] Such claims also have budgetary consequences and may also have unforeseeable policy and administrative implications. For instance, a ruling on the state of prisons with regard to Article 3 of the ECHR may have massive implications for state funding of prisons, to ensure that

[51] Brady (n 47).
[52] ibid.
[53] J King, *Judging Social Rights* (Cambridge University Press 2012) 12.
[54] Brady (n 47).18.

prisoners are not treated in an inhuman and degrading way. Yet, it could be argued that the impact in terms of degree is much higher in cases concerning welfare policy as welfare constitutes a high percentage of total budgetary spending. However, this does not itself demonstrate why adjudicating on a social right would necessarily have complex effects beyond those present in a case when compared to a ruling on the state of prisons potentially held to violate prisoners' Article 3 rights. This leads to the heart of the claim – there is no room for judicial reticence or deference in determining whether or not rights have been breached. In particular, I point to the joined cases in *Burnip*,[55] where one of the claimaint Gorry's disabled children was disadvantaged by the application of neutral criteria. What this case shows is that it is wrong to presume that the legislature is always more competent in dealing with polycentric cases. In fact, it has been pointed out that lack of overall accountability and transparency in the budget setting process, failure to consider rival evidence and a trend in responding to the most powerful lobby groups may prove to be obstacles to effective accountability of government.[56] The judicial branch, it could be argued, given its competence in matters of principle, fairness, equality and critical examination of the details of a case may be ideally suited in considering the rights of those minorities who may not be at the forefront of the minds of those in the political process. This argument is supported by the fact that many civil societies, non-governmental organisations and charities are intervening and being asked to submit evidence on the effects and possible alternatives available in certain social policy areas. As such, the judical process may provide another layer of accountability by bringing to the forefront the negative impact of policies that turn a blind eye to key issues and are nevertheless knowingly pursued by government, and shed light on other more equitable and proportionate responses that were not considered by the government.

But what about the perceived lack of expertise? It is key to remember that what I am advocating is a more engaging approach for courts deciding on whether a right has been breached in accordance with the law, not to design policies or allocate funding for a budget. In fact, I want to dispel the notion of comparative inferior expertise in matters concerning policy. It seems as if the bar has been set unrealistically high. It is true that judges are not politicians, but

[55] *Burnip* (n 12).
[56] Brady (n 47).

that does not mean they are not competent enough to at least critically examine whether a policy is justifiable and whether it meets the aims it claims to achieve. Indeed, judges spend years working their way up to the higher courts and often develop expertise and skills to understand, analyse and criticise policies. Given the level of competence already present in the adjudicative system, it makes sense, as Foley argues, that the perceived institutional differences be eliminated if not reduced.[57] Foley contends that it would be better if the courts were provided with the requisite information, which is already the case in most cases, and that courts hear evidence from expert witnesses and their views on whether governmental measures are necessary to achieve their desired objectives, again something which is already part of the judicial procedure.[58] So we see that courts are not necessarily handicapped and have the foundational skills to deal with these types of issues.

We now come to the legitimacy argument. Is the argument watertight? For two reasons it is not. Feldman argues against relying on the democratic acccountability of politicians for two reasons.[59] Firstly, he argues that democratic considerations are not the sole basis for legitimate policy-based decision-making, as in his perspective the legitimacy of the courts derives from the obligation to justify decisions publicly, by means of rational arguments.[60] Reasons are to be formulated by reference to objective standards, with authority derived from a source other than the opinions of an individual judge and the independence of the judiciary from the political arms of government, guaranteeing an unbiased assessment of the legality of the acts and decisions of the executive. He views judicial independence from the political arm as a positive feature and believes that the legitimacy of the courts is a way of challenging the common conception of the executive as the bearer of greater legitimacy. Indeed, this places the judiciary in a better position to adjudicate fully on the proportionality test as it has to base its decisions on legal norms, whereas the government only justifies itself so far as it is required to do so by Parliament. As such, these unique characteristics of the courts, which go to the heart of the rule of law, form a forceful basis for the legitimacy of judicial decision-making.

[57] B Foley, *Deference and the Presumption of Constitutionality* (Institute of Public Administration, Dublin 2008) p210-255.
[58] ibid 271-8.
[59] D Feldman, 'Human Rights, Terrorism and Risk: the Roles of Politicians and Judges' [2006] PL 364.
[60] ibid 375.

Therefore, the assessment of the executive cannot be final, as the rule of law demands that the courts remain the ultimate decision-makers on matters of law.

Another line of argument draws on Dworkin's idea that the decision of the majority is only legitimate if it is a majority in a community of equals.[61] He distinguishes between statistical and communal democracy, and argues that communal democracy is key in all charters of rights. For Dworkin, a democratic decision is legitimate if people have expressed their will from a position of political equality, which is inconceivable without a basic minimum level of subsistence and material position for all. For instance, can it really be claimed that citizens, such as lone mothers or the severely disabled, who are shackled by concerns about homelessness or fuel poverty due to the disproportionate impact of welfare cuts, are able be to meaningfully and optimally participate in the democratic process if they are primarily concerned about putting food on the table or meeting rent payments? In this way, in order to ensure that there is equality in society, especially when the government errs, it is the duty of the courts to ensure that social rights adjudication is not beyond their constitutional responsibility. Without these considerations ingrained in the court's psyche, we cannot truly claim to be a democracy.

Thus, judicial protection of social rights remedies some of the deficiencies of our democratic system.[62] It is critical to note here that courts should not rely on deference-based arguments when the effect of a measure or statute is discriminatory and an affront to equality. The very legitimacy of the courts rests on its ability to protect the individual from the majority, who in the name of democracy, claims to be the supreme and final arbiter, but in fact, is manifesting the tyranny of the majority. Given that the courts have this ability to scrutinise, it is disappointing to see that the courts lack the courage to be creative, especially because it exposes the judiciary as putting the concept of majority rule above the value of political equality to the detriment of the court's reputation as protector of this fundamental value. Both overcoming the court's inferiority complex towards the majority, and acknowledging the duty that courts have in protecting equality, will help remove current barriers to judicial engagement in the adjudication of social rights.

In this instance, is there any evidence of the courts' ability to logically tackle cases involving social policy, that would shed doubt on arguments relating

[61] R Dworkin, *A Bill of Rights for Britain* (Chatto and Windus: London, 1990) 35.
[62] Gearty and Mantouvalou (n 8) 123.

to competence, expertise and legitimacy? Firstly, I am wary of arguments that posit broad aims relating to fairness between those inside and outside of work, saving public money and incentivising work and promoting long-term behavioural change, which is what was argued by the government in *R(SG) v SSWP*.[63] The dilemma for the courts is that such arguments may overwhelm or frighten the judiciary when in fact all that is required is rigorous consideration of whether the aims specified by the government are sufficient to justify discriminatory treatment. The aim should be to test the veracity of the government's claims and consider whether the government is trying to use them as a smokescreen to push forward unjustifiable policy aims. For example, although the government in *R(SG)* claimed to be incentivising work and promoting behavioural change, it accepted that this aim 'may be less pertinent for those who are not required to work,' and ultimately fell back on the argument that it sought to make 'fiscal savings and creating a system which is fairer as between those receiving out of work benefits and working households'.[64] What is evident and worrying about this type of fallback argument is that the government was insistent on getting its policy through regardless of the discriminatory effects of the benefit cap policy on lone parents (mostly women who are unable to work given their family size and the age of their children) and young children. Moreover, reliance on the fallback argument of achieving fairness between those receiving out of work benefits and working households could easily have been discarded by the courts, as the government's claim of achieving fairness between two groups improperly fused the involuntary plight of lone parents unable to work (who without benefits would suffer), with those people out of work and receiving benefits who were not restrained by family or other circumstances, and thereby could be expected to work. What this reveals is the government's short-sightedness—it sought to achieve its aims without regard to the damage it was doing to children by depriving them 'access to adequate food, clothing, warmth and housing, the basic necessities of life',[65] circumstances described by Lady Hale as not of their making. Exposing the absurdity of the government's aims, Lady Hale emphatically rejected the 'major aim' of incentivising work and reforming the

[63] *R(SG)* (n 31).
[64] ibid para 207 per Lady Hale.
[65] ibid para 227 per Lady Hale.

benefits culture as having 'little force' in the context of lone parents.[66] This case illustrates that regardless of the polycentric nature of a case, challenging the aims that the government seeks to achieve can be done without engaging in wholesale reform of a policy area. Moreover, this case also demonstrates the freshness which a judicial approach brings, coupled with the strong powers of reasoning and meticulous scrutiny which were undertaken by the two dissenting judges in this case. Lastly, a more activist approach has the benefit of not only legitimising the courts by using rational criteria and reasoning, as identified by Feldman,[67] but also in demonstrating the court's high regard for political equality and commitment to a truly representative democracy, by ensuring that the most vulnerable in society have a basic minimum level of subsistence needed to ensure a community of equals.

III. THE WAY FORWARD: CONSTITUTIONAL HURDLES OR SPRINGBOARDS?

The aim of this paper has been to argue that there is a good case for judicial adjudication of social rights. It should be borne in mind that I am not dealing with the issue of social rights forming part of a constitution, subject to final strong judicial review with the courts striking down and having the final say on the lawfulness of legislation, but with the unique constitutional context provided by the Human Rights Act (1998). As elucidated above, in UK courts and in the European Court of Human Rights, there is a growing trend towards an integrated approach in the interpretation of civil and political rights, in which courts are willing to read social interests and rights into documents that primarily protect entitlements classified as civil and political. Given the promising use of this approach, I have sought to deconstruct and refute the argument that it is constitutionally appropriate for courts of law to adopt tests deeply rooted in a deferential mentality, such as *Stec v UK*.[68] As such, I argue that courts should have the confidence to fully engage with the integrated approach, without feeling that they are exceeding their constitutional parameters. They should apply the proportionality test without heightening parts of the test to a *Wednesbury*-type review, as *Stec* does. This section seeks to further defend this

[66] ibid.
[67] Feldman (n 59).
[68] ibid.

claim by reference to the structure of the Human Rights Act itself. In particular I point to the conducive nature of the Human Rights Act (particularly sections 3 and 4) to this type of adjudication and the scope for dialogue and incrementalism.[69]

The Human Rights Act 1998

My aim here is to point to the features of the Human Rights Act which complement my thesis and provide the ideal context for adjudication of social rights. I argue that since the Act upholds the principle of parliamentary sovereignty and upholds a model of judicial review which has in-built mechanisms for dialogue, sceptics need not be concerned about the effects of judicial adjudication on social interests. Indeed, given that critics may point to the breach of the separation of powers as well as the unknown consequences of how the executive may react to greater judicial adjudication of social rights, I wish to clarify a key point. It must be remembered that I am advocating for a close and meticulous scrutiny of measures or pieces of legislation that are alleged to have breached the basic minimum required to live a dignified life. I am not arguing for the courts to design the budget or demand the executive to implement a particular policy, I simply want them to apply the proportionality test—to decide on questions of law. In this way the government has space to reconsider its policy choices and design them in a rights compatible manner, with ultimate decisions relating to methods and financial planning remaining with the government. So how can the Human Rights Act facilitate relations between the judiciary and executive if the courts decide to engage more actively in social rights adjudication?

Firstly, it should be noted that the Human Rights Act preserves parliamentary sovereignty in the sense that through s 3(2)(c) and s 4(6)(a) any declaration of incompatibility does not affect the validity of legislation under scrutiny, it simply places the executive and legislature under immense political pressure to change the legislation. Should the courts be unable to interpret legislation compatibly with convention rights under Section 3 ('s 3'),[70] which is often the case in the face of a blatant breach of rights, the role of Section 4 ('s

[69] King (n 53) 9.
[70] The Human Rights Act 1998.

4')[71] would be key and it is what s 4 promotes and espouses that is of significance to my argument.

Section 4 and Scope for Dialogue

Section 4 allows the elected branches to decide on how to deal with a ruling on the incompatibility of legislation with a Convention[72] right. In this sense, as a ruling does not automatically affect the validity of legislation, polycentric concerns are not as applicable as the elected bodies have the ultimate say on how to proceed with a declaration of incompatibility. However, due to the political pressure the elected branches usually do respond to s 4 declarations, but given the possibility of outcry over greater judicial activism in social rights adjudication, we need to anticipate how the courts could deal with this possibility and how their use of s 4 could facilitate this further. In this regard, I point to the importance of the principle of incrementalism, as described by King, a useful rule of thumb, and 'what the principles of restraint ordinarily recommend.' [73] According to Jowell, incremental steps are those that require only a small departure from the status quo, and for 'substantive administrative or legislative flexibility by way of response'.[74] This is where the courts will need to be careful about how they frame these disputes and the demands they make from the government. In other words, courts must allow for administrative or legislative flexibility by way of response. In this way, the courts can scrutinise legislation for its compatibility with human rights law without having the last word on how resources will be distributed. For Gearty and Mantouvalou this is appropriate due to the fact that judges might not always have the 'overview or systematic knowledge of the budget' in comparison to the executive branch of government.[75] Moreover, this model of judicial review can also lead to a dialogue between the courts and elected branches of government. Note here that I am not arguing that the declaration of incompatibiltiy should be used more often because it facilitates dialogue. Clearly, if the court can legitimately use s 3 to deliver a remedy for a claimant it should, but given current judicial

[71] ibid.
[72] European Convention on Human Rights.
[73] King (n 53) 9.
[74] J Jowell, 'Judicial Deference and Human Rights: a Question of Competence' in P Craig and R Rawlings, (eds) *Law and Administration in Europe: Essays in Honor of Carol Harlow* (Oxford University Press 2003) 67.
[75] Gearty and Mantouvalou (n 8) 142.

reticence and hesitancy to engage in social rights adjudication, s 4 provides a less radical alternative to sceptics when compared to s 3, given that it does not deliver an immediate remedy and gives Parliament space to respond. It could be argued that s 3 might be the better option given that it provides remedial relief to litigants, but whether use of s 3 will be appropriate is a context specific question. The advantage of a s 4 declaration is that it imposes great political pressure to remedy a breach and provides space for the executive to reconsider its approach to policy in making it rights compatible. Kavanagh argues that s 3 is limited by terms of the law, the broader legislative scheme of which the incompatible clause is a part, and past precedent.[76] Indeed, it must be remembered that the court does not have the power to enact another statute whereas Parliament has the ability to legislate at any time. This leads to a major concern relating to both s 3 and s 4—if Parliament is ultimately sovereign and can enact an amendment to undo a s 3 interpretation and choose to ignore a s 4 declaration of incompatibility, thereby showing its unwillingness to reform an area of law despite questions on its lawfulness, can it truly be claimed that Human Rights Act is of a conducive nature?

The answer must still be yes, for the track record of the government responding to s 4 declarations should give us confidence. Indeed, although Kavanagh expresses concerns about the "dialogue metaphor", we see the strength of the s 4 argument by pointing to the power of a court ruling that a legal wrong has been committed—a compelling constitutional factor underpinned by the rule of law, which places Parliament under a strong obligation to change the law in light of the declaration. Another line of argument by Kavanagh posits that s 4 does not really throw the ball back in into Parliament's court. Although this may be true given the past track record, it is key to first understand that respect for the rule of law is a vital part of our claim to democracy, such that there should be respect for rulings relating to the lawfulness of measures or laws, and second, courts are giving Parliament the time and space to reconfigure its policy approach to ensure that it is rights compliant and lawful. This is sensible as a large amount of state money is spent on welfare spending. As such, providing Parliament with the choice of how to muster a suitable rights-compliant legislative solution to a declared breach is a way of respecting the separation of powers whilst at the same time recognising the importance of ensuring that basic minimum needs are not neglected by

[76] Kavanagh (n 16) 277.

Parliament. This is how the dialogue metaphor can be revived to meet the more unique demands of social rights adjudication.

CONCLUSION

This paper has rejected the idea that the courts are not constitutionally suited to adjudicate on social rights under an integrated approach. I have suggested that courts have good reasons to adopt an incrementalist position which emphasises the importance of dialogue. Moreovoer, by overseeing measures and laws that deal with the social minimum required for an adequate standard of living and subsistence, the courts demonstrate their commitment to political equality which is a vital pre-condition for representative democracy. As such, the courts need not adopt heightened tests which are underpinned by a deferential mindset. Rather, courts should decide based purely on the proportionality test. Lastly, the Human Rights Act is conducive to social rights adjudication. It has room for dialogue and gives the government space to reconfigure its policy choices, removing concerns about courts making policy or designing budgets.