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**Social Rights and Welfare Reform  
in Times of Economic Crisis**

**REPORT BY**

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## Social Rights and Welfare Reform in Times of Economic Crisis

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### Introduction – Welfare Reform in Comparative Analysis

All comparative legal work comes with a health warning, but nowhere more so than welfare reform does that warning deserve more prominence. As the great comparative welfare state scholar Gøsta Esping-Anderson has shown quite clearly, a welfare state consists of much more than public spending.<sup>1</sup> There is public and private spending on welfare; different degrees of public ownership; different roles for collective bargaining; different endowments in natural resources. And all this is grafted onto different historical configurations, including race relations – a question the Americas know so much about. Welfare reform – our subject - typically implicates public spending addressing over half a national budget, land reform, health and pharmaceutical regulation, pensions and retirement, natural resources management, health and safety oversight, international trade policy, investment management, labour market regulation – oh, and did I mention taxation levels? This says nothing, one might add, about how to avoid inflation and ensure economic growth. In an interconnected global economy, generous spending on health and social security benefits can be destroyed in a couple of years by high inflation. We know for example that President Alan Garcia's well intentioned actions to rescue Peru in the mid 1980s from brutal economic policies in the country's debt crisis had the effect of creating hyperinflation – in real terms public spending actually plummeted under President Garcia, and paradoxically, it actually rose under Alberto Fujimori's brutal and authoritarian programme of neoliberal austerity. How so? Economic growth and macroeconomic stability, it turns out.<sup>2</sup> One needs to be no fan of Fujimori, authoritarianism, or foreign odious debt to see that the experience suggests the matter is complex.

The starting point of much comparative social policy work is that all of these different factors are interrelated. Your position on one question – such as labour market regulation – will determine the right approach to another question – such as whether social security should be thick or thin, how much public, how much private, how much investment, how much taxation. The American legal theorist and lawyer, Lon Fuller, adapted an idea to describe such issues – the concept of polycentricity.<sup>3</sup> A problem is polycentric when the correct resolution of it depends on the resolution of a large number of other interrelated problems or issues. Such issues are related in a network of cause and effect relationships – when you change your position on one issue, it is like pulling the strand of a spider's web – you redistribute tensions elsewhere in the network of relationships. So setting a minimum wage affects prices, production costs, trade, taxation and so on. Having strong social security system may reduce the need for a minimum wage – England only just got one, and Germany still doesn't have one. In these webs of relationships, the bigger the issue – the closer it is to the centre of the network of relationships – the more interconnected it is with the other issues. The wage of banana pickers in coastal Ecuador is nowhere near as monumental an issue as is whether to repudiate Ecuador's admittedly unjust sovereign debt load. Now, Lon Fuller said that the adjudicative process was not well adapted to

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<sup>1</sup> G. Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990).

<sup>2</sup> S. Haggard and R. R. Kaufman, *Development, Democracy and Welfare States: Latin America, East Asia, and Eastern Europe* (Princeton University Press, 2008) ch.7 and esp Appendix A6.7.

<sup>3</sup> L.L. Fuller, 'Forms and Limits of Adjudication' (1978-1979) 92 Harvard L. Rev. 353.

resolving these problems. They require bargaining, compromise, experimentation, flexibility, and constant adjustment as between a multitude of affected parties. Legislatures and large bureaucracies can offer that. Adjudication, by contrast, proceeds with the input of a relatively narrow range of actors – the parties to the litigation – and yes, of course public interest interventions can help, but only so much. Fuller’s basic insight is correct. When you adjudicate heavily polycentric issues it creates intended consequences. But the view that judges should not adjudicate *any* polycentric issue is clearly false. I have elaborated this argument with examples at depth in my book and in an article.<sup>4</sup> The conclusion is that polycentricity, or complexity, is relevant. And since *welfare reform* implicates everything, it is the very core of the web of social relationships itself. That implies as a very starting point a modest conception of the role of judges, *often even if the other branches are not doing their job properly*.

In my book, *Judging Social Rights*, I argue that judges in countries having background political conditions like those in Europe ought to give weight to four important principles of judicial restraint – democratic legitimacy, polycentricity, administrative expertise and administrative and legislative flexibility. These factors commend a default approach of judicial incrementalism. In this sophisticated forum of jurists, I will take it as clear that these four principles, these grounds for judicial restraint before complex issues of resource allocation, are reasonably clear. And what is also clear is the limitations of each of these reasons for judicial restraint: minorities need protection in democracies; expertise is often a lie and organization disorganized or doing someone else’s bidding; and administrative *inflexibility* is often the problem that takes litigants to court. *Claro que si*. Let’s move on then.

### **The Difference between Emergencies and Crises**

Lawyers often associate national emergencies with war and terrorism. But in fact the concept of a national *economic* emergency has been used extremely often in the 20<sup>th</sup> Century, by both left-wing governments and right-wing liberal democratic as well as authoritarian governments to justify limiting social provision.<sup>5</sup> Franklin Delano Roosevelt launched the New Deal in America under what he claimed were emergency powers at a time of national economic emergency. He used the language of war to describe his mission against want (later described as ‘Freedom from Want’ in his famous Four Freedoms speech), and many believed his actions in expanding the reach of federal jurisdiction in the United States were genuinely unconstitutional. Similarly, the labor government of post-WWII Norway used emergency ‘state of exception’ powers in the 1950s to pass ‘enabling acts’ to create one of the best welfare states in the world.<sup>6</sup> The Weimar Republic in Germany, also, used Art. 38 of the Weimar Constitution to suspend the constitution to deal with economic problems.<sup>7</sup> That didn’t end well. Authoritarian governments also used this power. In the early days of the 20<sup>th</sup> century, emergency powers were often used in the United States and Great Britain to break strike actions by organized labour.<sup>8</sup> Peru’s Alberto Fujimori also used emergency powers to have Congress delegate broad discretionary authority to him in the early 1990s, and later, after his *autogolpe*, he suspended the constitution and dismissed Congress altogether on precisely the same pretext.<sup>9</sup> These are just some of *many* other

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<sup>4</sup> *Judging Social Rights* (Cambridge University Press, 2012) ch.4; J. King, ‘The Pervasiveness of Polycentricity’ [2008] PL 101.

<sup>5</sup> W. Scheuermann, ‘The Economic State of Emergency’ (2000) 21 *Cardozo L.R.* 1869 (a superb historical and theoretical overview).

<sup>6</sup> Scheuermann, above.

<sup>7</sup> *Ibid.* at 1.

<sup>8</sup> Scheuermann, above at 1868-69; C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press, 1948). (This volume is available for free online).

<sup>9</sup> Haggard & Kaufman, above, ch.7.

examples. The political scientist William Scheuermann declared that there were ‘innumerable’ such declarations of economic emergency between the two world wars alone.<sup>10</sup>

Since we are jurists, I want to concentrate on the *legal* nature of the issue – what do judges do about social rights when the government announces a national economic emergency? How should they respond to such a declaration? This is important because the rhetoric of ‘national emergency’ is often used to suspend the constitution, and thus to justify setting aside civil and political as well as economic and social rights. But the rhetoric of ‘emergency’ can be misleading: there is a difference between a national emergency and economic crisis. The concept of a national emergency has been well-studied, particularly in the post-9/11 world of robust action state against terrorism.<sup>11</sup> A legal state of emergency normally has the following features: it is an extremely urgent situation – there is a need for rapid, decisive response that may preclude consultation and legislative debate; the threat is typically *existential* or comparable thereto – article 15 ECHR defines ‘emergencies’ for those events which ‘threaten the life of the nation,’ though there are clearly other situations such as a natural disaster or serious or widespread breakdown in public order;<sup>12</sup> the executive or legislature proclaims the existence of the emergency, and the legal consequences that follow; it suspends the operation of ordinary law, including potentially the constitution; it is of a temporary or limited nature, and premised on a return the status quo as soon as possible.<sup>13</sup> A hallmark of this exercise of power, as the legal theorist David Dyzenhaus puts it, is that the government ‘claims the authority to operate outside the law.’<sup>14</sup>

Now, some fiscal crises may have all these features, but most do not. In particular, the recent round of fiscal crises in Europe have not had this character. In the fundamental crises faced by Greece, Italy, Spain, Portugal and Ireland, the government used the language of ‘crisis’, and ‘emergency’ and even ‘national emergency,’ but in each case it did not suspend the operation of ordinary constitutional law nor exclude the legislature from the design of remedies and

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<sup>10</sup> Scheuermann, above at 1867.

<sup>11</sup> O. Gross, ‘Chaos and Rules: Should Responses to Violence Crises Always Be Constitutional?’ (2003) 112 Yale Law Journal 1011; B. Ackerman, *Before the Next Attack: Preserving Civil Liberties in a Time of Terrorism* (Yale University Press, 2006); D. Dyzenhaus, *The Constitution of Law: Legality in a time of Emergency* (CUP, 2006).

<sup>12</sup> See also Constitution of Portugal, 19(2) – a ‘state of siege’ may only be declared in cases of actual or imminent aggression by foreign forces, a serious threat to or disturbances of constitutional democratic order, or public disaster. See also art.48 of the Constitution of Greece, which applies only to situations of war, general mobilization due to external dangers or immediate threats to national security, or armed insurrection or overthrow of the democracy. Both constitutions also limit the range of rights which can be suspended. In practice, governments sometimes invoke emergencies such as terrorism to deal with situations that clearly do not threaten either a breakdown in social order or a national emergency. See *A & Others v Secretary of State for the Home Department* [2004] UKHL 56 (UK House of Lords). The majority of the Law Lords accepted the Secretary of State’s assessment of the existence of a national emergency but Lord Hoffmann famously rejected this argument in his brief concurring speech.

<sup>13</sup> There is some discussion in the terrorism context about whether an ‘emergency’ is in fact temporary or meant to be more permanent. See Gross, ‘Chaos and Rules’, above, at 1069-1096. In my view, once an emergency is sufficiently normalized there will be either a legal or extra-legal revolution in the legal order such that the old order disappears and a new one replaces it. In this sense, the emergency ceases to ‘suspend’ the old order and it rather replaces it. At any rate, Gross also distinguishes ‘economic emergencies’ and considers that his analysis does not extend to them since the urgency of response time is of a different order. See Gross, ‘Chaos and Rules’, above at 1025-1026.

<sup>14</sup> D. Dyzenhaus, ‘States of Emergencies’ in Goodin, Pettit and Pogge (eds) *A Companion to Contemporary Political Philosophy* (Blackwell, 2012) at 804.

responses.<sup>15</sup> These cases set an important precedent by showing that in a well-functioning democracy, even in cases of fiscal crises we do not suspend the ordinary process of law.

A fiscal crisis is a situation of urgency but it not the same as a national emergency. It is much less often an existential threat. The time-sensitivity is not as acute. There is a greater role for both legislative participation and broader consultation. And as other scholars have also noted,<sup>16</sup> a crisis is usually an event that betokens a change that is not only temporary, but which is often *permanent*. Hence a different approach is needed. At the same time, a great fiscal crisis is manifestly *not* business as usual. It is a crisis – it is serious, widespread, and requires an abnormal and sometimes urgent response.

So, how ought judges recognize a fiscal crisis or financial emergency? One thing is clear. Judges have almost always declined to quash executive or legislative determinations about *whether such a crisis exists*, and there are many cases in which they do recognize and give weight to its existence.<sup>17</sup> I think the thrust of the several cases before Greek, Italian, Spanish and Portuguese constitutional courts, as well as the Canadian Supreme Court, is that it is appropriate for a judge to recognize the existence of a fiscal crisis and *to give it weight* in the balancing exercise so common in rights adjudication. I think this is the correct approach. The expression ‘desperate times call for desperate measures’ is a cliché because it has a good deal of truth to it. But this is manifestly not a license to set the right aside. Any measures must respect rights and the constitution. Fiscal crises, the impact of one person’s social rights on another person’s social rights, represent the outer ambit of rights claims when social rights appear in conflict, rather than a suspension of social rights altogether.

### **What approach to social rights protection?**

We now know that due to the proliferation of constitutional social rights, judges must give answer to the questions submitted. Ignoring the constitution is not an option, and neither is it desirable. So what approach should they take? I want to suggest there are three key strategies judges *could* follow in giving protection to social right in times of financial crisis and law reform. Ultimately, I only recommend one of them as a default position for adjudicating social rights in times of economic crisis.

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<sup>15</sup> See the excellent collection of essays in C. Kilpatrick and B. de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges* (EUI Institute Working Paper, 2014) (available at <http://cadmus.eui.eu/handle/1814/31247>). One exception may be Spain, which adopted a ‘Royal Decree Law’ ‘which is adopted by government in exceptional circumstances and emergency’, however this law is concerned with giving the executive sweeping powers rather than suspending ordinary law or the constitution: see M. Gonzalez Pascual, ‘Welfare Rights and the Euro Crisis – The Spanish Case’ in Kilpatrick and de Witte, above.

<sup>16</sup> J. Rubenstein, ‘Distribution and Emergencies’ (2007) 15 *Journal of Political Philosophy* 296.

<sup>17</sup> *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 [64] (Binnie J, for the Supreme Court of Canada): ‘It is true, as the Court recently affirmed in *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, that “[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the Charter” (para. 109 (emphasis added)). The spring of 1991 was not a “normal” time in the finances of the provincial government. At some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a Charter right, subject, of course, to the measures being proportional both to the fiscal crisis and to their impact on the affected Charter interests. In this case, the fiscal crisis was severe and the cost of putting into effect pay equity according to the original timetable was a large expenditure (\$24 million) relative even to the size of the fiscal crisis.’ See the essays in Kilpatrick and De Witte (eds), above, for several other examples.

### 1. Strong rights review: Resources and the Minimum Core

One approach is to declare resources to be irrelevant. It is common in the realm of civil liberties for judges to say that the failure to protect a right cannot be justified by lack of resources. This has approach has been taken in some of the earlier jurisprudence in Brazil on the right to health, and if I'm not mistaken also in Colombia. A critique of these approaches is well-documented in the work of Octavio Ferraz, and Virgilio Afonso da Silva in Brazil,<sup>18</sup> and in Latin America more broadly in the book *Litigating Health Rights*.<sup>19</sup> At its peak, there were around 40,000 right to health cases in Brazil a year and the evidence shows *conclusively* that most of it was taken in the richer Brazilian states, that the claimants came from the richer neighbourhoods in these states, they overwhelmingly had referrals from private doctors rather than coming from the public system, and the claims were for drugs that were experimental and expensive and so out of all proportion to the cost of primary care services for the poor, which were desperately needed and presumably marginalised. Similar evidence is available in the experience with health *Tutelas* in Colombia, though my understanding is that both Colombia and Brazil have taken some action to help correct these problems. The more general problem here is that resources almost always do matter. If judges ignore them, they only ignore the impact of their decision on the rationing of resources in the system as a whole. Doing so produces two key problems. The first is unintended consequences. We just don't know what will happen or how to study it. Bureaucracies have often developed sophisticated ways of making rationing decisions, fair and transparent procedures, and they are tied to a political process that can provide more resources when they are needed or demanded. On the whole, these systems are better than adjudication. The second problem is access to justice. Once it becomes clear that the court will disregard scarcity, then lawyers engage in a race to the courthouse and those with the resources to get there come out on top. That means that those with the sharpest elbows get to the front of the queue.

It is relevant to address the minimum core content doctrine found in the jurisprudence of the UN Committee on Economic, Social and Cultural Rights and in the constitutional jurisprudence of certain countries.<sup>20</sup> The UN Committee's doctrine is in fact rather equivocal about whether a minimum core of subsistence rights is what one is entitled to. In the initial formulation, a failure to provide the minimum core triggers a more potent justificatory burden for the state.<sup>21</sup> But other courts have been truer to the basic idea – the doctrine of '*Existenzminimum*' in German constitutional jurisprudence is recognized, and the idea of a minimum core is recognized in Germany, Italy and Portugal among potentially other states. It is said that the state must ensure a minimum core existential existence of each person. In practice, the courts, including in Germany, tend to pay some judicial deference to legislative and executive attempts to define

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<sup>18</sup> O. L. M. Ferraz, 'The right to health in the courts of Brazil: worsening health inequities?' (2009) 11 *Health and Human Rights: An International Journal* 33; O. Mæstad, L. Rakner and O.L.M. Ferraz, 'Assessing the Impact of Health Rights Litigation: A Comparative Study of Argentina, Colombia, Costa Rica, India and South Africa', in A. Yamin and S. Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press, 2011); V. Afonso da Silva and F. Vargas Terrazas, 'Claiming the Right to Health in Brazilian Courts: The exclusion of the Already Excluded?' (2011) 36 *Law & Social Inquiry* 825.

<sup>19</sup> Yamin and Gloppen (eds), *ibid.*

<sup>20</sup> See General Comment No.3, and the latter comments, No.12, 13, 14. I analyse some of these in *Judging Social Rights*, chs. 4 and 9, and together with Malcolm Langford in our essay on the ICESCR in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press, 2009). See also K. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113; D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio Economic Rights* (Oxford University Press, 2007).

<sup>21</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 3.

what the *Existenzminimum* is. In the most famous case on this question, the Hartz IV case<sup>22</sup> of the *Bundesverfassungsgericht* (Constitutional Court of Germany), the Court held that the government had the duty to calculate the thresholds, but also that it had not calculated them correctly because its methodology was flawed and unrelated to need. In their case on the asylum seekers,<sup>23</sup> it found that excluding this group from receipt of benefits was unconstitutional. So the doctrine tends to focus on the exclusion of particular groups and the light touch review of government determination of thresholds, rather than on the courts determining themselves the thresholds for the appropriate levels should be.<sup>24</sup> I am by no means saying that there is no role for a minimum core or *Existenzminimum* doctrine in constitutional social rights adjudication - but I am saying it must be formulated with care and that those countries who have deployed the idea have done so within welfare regimes in which a basic universal welfare payment of comparatively generous proportions is a more or less fixed part of the political landscape.

## 2. Structural Reform Injunctions

A structural injunction, roughly speaking, is one in which a judge issues an order to a defendant institution to undertake comprehensive structural reforms. The judge retains supervisory jurisdiction, requiring the defendant to report back to the court on success in satisfying judicially imposed benchmarks and timelines. The judge typically orders the appointment of an official (normally, a “special master”) who has technical proficiency in the area at issue.<sup>25</sup> The role of the master is to help devise and later supervise implementation of the decree, and to report to the court. They often supervise negotiations between claimants and defendants, steering them to an agreed remedial plan that the judge subsequently turns into a binding public law obligation by means of a “consent decree”, the violation of which will constitute contempt of court. Many such decrees remain in effect for several years, in some cases decades, and they are supplemented from time to time by court orders that may be aimed at aspects of administration or the legislature itself. The cases are episodic, better described as “litigations” rather than court cases. Foreign courts other than those of India have largely been quite cautious about using these remedies; they are miles away from anything remotely as interventionist as the practice in America.<sup>26</sup> While structural injunctions grew out of the institutional reform litigation following *Brown v Board of Education*, they have been used subsequently in hundreds (or more) cases, many concerned with education, disability, and mental health.

Structural reform injunctions are not a panacea for dealing with the institutional competence of courts in constitutional social rights adjudication, least of all with the macro process of welfare reform. First, the experience in America and India has been decidedly mixed. There is no clear record of empirical success, and it represents a serious departure from the ordinary conception of the separation of powers.<sup>27</sup> Second, these remedies were born out of a political situation in

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<sup>22</sup> See below for citation.

<sup>23</sup> BVerfG, 1 BvL 10/10, 18.7.2012, Absatz-Nr. (1 - 220).

<sup>24</sup> The practice is somewhat varied on this point and there may be exceptions. I believe this statement represents the general trend at this point in time.

<sup>25</sup> See D. L. Horowitz, ‘Decreeing Organizational Change: Judicial Supervision of Public Institutions’ (1983) 32 Duke L.J. 1265, 1272-1276, 1297-1302.

<sup>26</sup> See Judging Social Rights, 271-275 for a comparative overview.

<sup>27</sup> In the US, see R. Sandler and D. Schoenbrod, *Democracy by Decree* (New Haven: Yale University Press, 2003); cf. the critical review by S. Rose-Ackerman, (2003) 118 *Political Science Quarterly* 679–81. See also J. King, ‘Two Ironies about American Exceptionalism over Social Rights’ (2014) \_\_ *Int’l J. of Const’l L.* (forthcoming); For a more upbeat appraisal, see C. F. Sabel and W. H. Simon, ‘Destabilization Rights: How Public Law Litigation Succeeds’ (2004) 117 *Harvard L. Rev.* 1016. In India, see A. Desai and S. Muralidhar,

which the breach of the constitutional standard was patent, and the bureaucracy refused to comply with the court judgment. They arose out of the desegregation litigation in the United States but also dealt with problems in prisons where officials simply refused to comply. There were real and serious rule of law problems in these cases. The clarity of the constitutional breach in most social rights cases is not ordinarily as clear as they have been in the desegregation cases. Such conditions may well arise in some Latin American or other countries. At the same time, the political situation here may lead to a bold step like this being met with a powerful political assault on judicial independence, which could have profoundly negative knock on effects for the rule of law on other key issues. At any rate, the point is that welfare reform is not nearly as clear cut as the patent executive disobedience of a judicial order in the desegregation cases in which these remedies found their origin. I believe there is a role for this remedy – but it is a residual role best reserved for egregious cases.

### 3. Incrementalism – a Focus on the Process of Decision-making

In *Judging Social Rights*, I argue that the best role for courts in adjudicating constitutional social rights is to recognize that in the complex welfare state, it is the primary duty of the legislature and executive to define and create the enabling statutory and administrative framework for securing social rights. The role of the court is to supervise this process, to ensure it works properly, and to push it into motion when it hasn't done so itself.<sup>28</sup> This role for courts can be potent. It shows the appropriate mix of judicial restraint and judicial vigilance. But what sorts of measures fall within such an approach? Let me give a list of approaches or principles that emerge from comparative jurisprudence of various constitutional and supreme courts, and also could be seen in the jurisprudence of the European Committee on Social Rights, specifically addressed to the issue of welfare reform:

- a. *Legislative oversight*: In all the recent structural reforms taken in Europe (Greece, Italy, Spain, Portugal, Ireland) there was active involvement of the legislature in the design of the policies. True, there was a lot of delegation of power to the executive, but the experience collectively shows that it is manageable to involve the legislature in devising responses to acute financial emergencies. The Italian experience in particular, at least in this round, has tended to show a distinct preference for legislative law-making over executive orders or decrees.
- b. *Evidence-based policies*: Often administrative decisions are taken in a very rushed manner, and are based on gut instincts rather than adequate or real evidence. In the Hartz IV decision of the German Constitutional Court,<sup>29</sup> a case concerning the reorganization of the basic welfare benefit for those no longer eligible for unemployment insurance, the court found that there was no real theory determining what a person's basic needs were in the recalculation of the benefits. Someone in government had just made a best guess of what the benefit should be. The Court ordered the government to reassess it. In the South African

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'Public Interest Litigation: Potential and Problems', in B. Kirpal (ed.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, 2000); P. Singh, 'Promises and Perils of Public Interest Litigation in Protecting the Rights of the Poor and the Oppressed' (2005) 27 *Delhi Law Review* 8.

<sup>28</sup> A very important qualification of my argument is that it applies to countries which have similar specified background social conditions to the United Kingdom, including much of northern Europe. While this does not apply as such to Latin America, the principles of restraint identified would often also apply wherever the epistemic constraints of adjudication are a factor in deciding upon the best way to resolve a social problem.

<sup>29</sup> BVerfG, 1 BvL 1/09 (9 February 2010).

Constitutional Court's *Treatment Action Campaign* case,<sup>30</sup> which was a challenge against the government's decisions to restrict the availability of an HIV antiretroviral drug on health grounds, the Court found that the government had ignored its own health agency's determination of the safety of the drug Nevirapene. The Court ordered the restriction removed and that the drug – which was provided cost-free by the company – to be made available.

- c. *Focus on vulnerable groups*: The democratic legitimacy of the court in times of constitutional review is at its peak when it is seeking to protect the interests of politically marginalized groups.<sup>31</sup> One can both recognise where such attention to vulnerable groups is not given, and where it is given. In Portugal, the measures taken to reduce public sector wages only applied to those in the higher income bracket. Commentators have shown that this attempt to make the better off bear a greater share of the burden was destroyed by the Portuguese Constitutional Court's decision to strike down the tax on them. Those earning less than 600 Euros a month received no cuts.<sup>32</sup> In Canada's welfare reform in the 1990s, though it represented a brutal set of cuts at first, ultimately employed specific concrete and targeted measures aimed at the vulnerable ended up showing that despite considerable reform and savings, the relative poverty did not increase substantially – in marked contrast to the reforms under Reagan and Thatcher under the 1980s.<sup>33</sup>
- d. *Transparent and Consultative process*: In the Irish financial crisis, there was the so-called 'Croke Park Agreement' in which the Irish government consulted and agreed an agreement with public employees to cooperate with widescale reforms of the public sector, but in so doing agreed not to reduce civil servants' pay rates beyond the reductions decided in 2009 – 2010.<sup>34</sup> In Portugal, the scholar Manuel Noriega de Brito shows that civil society groups were allowed to express a view but not engage in a social contract of this sort.<sup>35</sup> In the United Kingdom during World War II, there was a coalition government of all the parties. There was an explicit agreement with the labour unions that they would take no industrial action during the period of the war. In return their wages were legally protected. The Unions wholly supported this outcome and were hostile to the few wildcat strikes that took place.<sup>36</sup>
- e. *Transitional measures*: Courts can insist that there are transitional measures between the old and new policy that give some relief to those who suffer from the policy change, whether because they had legitimate expectations of the old

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<sup>30</sup> Minister of Health and others v. Treatment Action Campaign and Others, 2002 (10) BCLR 1033 (CC).

<sup>31</sup> J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980). See *Judging Social Rights*, ch.6 for a critical analysis and integration of these insights into a theory of adjudication for social rights.

<sup>32</sup> L.M.P. Nogueira de Brito, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis' in Kilpatrick & de Witte (eds).

<sup>33</sup> P. Pierson, 'Coping with Permanent Austerity: Welfare State Restructuring in Affluent Societies' in P. Pierson (ed.) *The New Politics of the Welfare State* (OUP 1999).

<sup>34</sup> See the essay by A. Kerr, 'Social Rights in Crisis in the Eurozone: Work Rights in Ireland' in Kilpatrick & de Witte, above.

<sup>35</sup> Nogueira de Brito, in Kilpatrick & de Witte (eds), above.

<sup>36</sup> Rossiter, *Constitutional Dictatorship*, above.

policy's continuation, or because they are particularly vulnerable to the change. There are many examples in the recent cases highlighting that the programmes had transitional measures. This is especially evident in the Italian and Portuguese decisions.<sup>37</sup>

- f. *Sunset or renewal provisions*: If the rationale for the emergency action is truly time sensitivity, then it is possible and desirable to use 'sunset provisions' which are essentially expiration dates on laws. These are commonly used in emergency legislation, in England especially with anti-terrorism legislation. It is also possible and indeed common to use renewal provisions such that a law's continued operation requires a parliamentary intervention. Bruce Ackermann has argued that in times of true national emergency, it would be plausible to create a procedure known as a 'super-majoritarian escalator' which would require that measures require, over time, an increasingly large proportion of support in the legislative assembly.<sup>38</sup>

One might fairly ask, *is there any substance behind all this process?* Can't the government just jump through the hoops, pretending to care but in reality just ticking the boxes? Well, law also provides a remedy for this type of issue. In fact labour tribunals have long assessed *good faith negotiations* in collective bargaining. They can see when one party's action is mere box ticking, and when there is genuine and meaningful engagement. Now it's true, they will be unlikely to stop a government that is highly aggressive and has half a good argument. But at the same time they can certainly raise the political costs for adverse political action, and ensure that the political decision-making process takes social rights as serious as possible along the way. This is a much more potent judicial control than you might at first think – and it relies on a mode of control that judges happen to be good at.

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<sup>37</sup> Nogueira de Brito, in Kilpatrick & de Witte (eds), above.

<sup>38</sup> Ackermann, *Before the Next Attack*, above.