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Introduction: aims and methods

I Introduction

What is more important, having the ability to preach politics on Hyde Park Corner, or ensuring that we have a fighting chance to live past heart disease or breast cancer? In any just society we should not have to choose between them, and thankfully in most rich ones we don't. But in the Western political tradition we have tended to speak about the former issue in terms of fundamental human rights, and the latter as a matter of policy. There is something ironic in this approach, particularly when many think rights are normatively superior to policy and preferences. A generation ago, many writers were preoccupied with justifying the claim that social rights are human rights. In international law and philosophy, that debate is now largely over: few now deny that it is obvious that our right to live past cancer is as essential to our and our family's basic dignity as is a right so few of us actually choose to exercise. This book is for those who accept that social rights are human rights, or ought to be given comparable political priority, and want to know chiefly about another, more focused institutional question. That question is whether abstract social rights to housing, education, health care, and social security should be put into constitutions and judges should be given broad powers to interpret and enforce them – including by striking down legislation.

This book offers an extended argument about why doing that would be one good way among others to protect our social rights. It will shortly be seen that one cannot answer the question of *whether* to constitutionalise social rights, without saying a lot about *how* judges will enforce them. No theory can answer every question about *how* in advance. Yet a good one should say enough that, if faithfully observed by judges, it would allow us to say with some confidence that judges would avoid the key pitfalls and deliver the core benefits. At the same time, any theory of judging must be one we can reasonably expect judges to adopt. It must fit with the institutional and political constraints under which they operate, and it ought

ideally to connect with the jurisprudential traditions instinct in their craft. It should not be too exotic, in other words.

The main prescription for courts in this book is hardly exotic at all: if given powers to adjudicate abstract constitutional social rights, judges should act incrementally, taking small steps to expand the coverage of existing rules and principles in a controlled fashion, learning from past experiences, and waiting for feedback on new developments. The thorny problems for the thesis in this book are why incrementalism is not too much or too little, and when it is that a judge will need considerably more than the techniques of incrementalism to wade through the thicket of difficulties presented in a typical hard case about social rights.

II Why does it matter?

It would be naïve to think that adopting a bill of constitutional social rights would ensure their protection. A surprisingly large number of countries have adopted bills of social rights without any great reduction in inequality.[1] And all countries that provide the best current legislative protection of social rights did so without constitutional bills of social rights, and a few of them, including Britain, Sweden, the Netherlands, and France, did so in legal environments that were distinctly hostile to judicial review of any legislation. I show in Chapter 2 that the legislative and executive branches play the key role in protecting social rights, and adjudication of the non-constitutional variety already plays a substantial supporting role.

But the question of whether and how to constitutionalise social rights is nonetheless crucially important because rights-discourse is a key element in our contemporary political rhetoric, and in my view either *including* or *excluding* social rights claims from our ontology of constitutional rights has both expressive and concrete impact. Moreover, as I show in Part I of this book, constitutional adjudication offers some important instrumental benefits for protecting our rights and interests. And perhaps most importantly, many countries have already gone down the road towards constitutional social rights, and so some careful guidance at a general level is desirable.

[1] D. S. Law and M. Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 101.

This last reason deserves some elaboration. Whether to constitutionalise social rights is a pressing issue in the United Kingdom, for one.[2] The European Union also has given formal recognition to social rights in its Charter of Fundamental Rights.[3] Indeed, the worldwide constitutional profusion of social rights is as remarkable as it is unknown. Of the constitutions of the countries of the world, as of 2006, 82 per cent include rights to work and to public education at state expense, 78 per cent include physical needs rights, 72 per cent the right to unionise and organise, and well over half include children's rights and a smattering of other worker's rights.[4] Some deep thinking about both whether to constitutionalise enforceable social rights, and how to interpret them, is quite obviously needed.

III Arguments against constitutional social rights

For a long time the debate about social rights focused on whether they 'are' justiciable. Justiciability refers, roughly, to whether an issue is amenable to judicial review.[5] I once asked a constitutional law professor whether he thought social rights were justiciable, and his answer was 'they are if the constitution says they are'. That is certainly one way to answer the question. In South Africa there is no denying that social rights are justiciable, because the only reasonable reading of the constitution is that it says they are.[6] However, there are two ways of answering the justiciability question, because, as Geoffrey Marshall pointed out, the term has two senses: a fact-stating sense (i.e. that something is in fact an issue that courts *will*

[2] See Ministry of Justice, Rights and Responsibilities: Developing Our Constitutional Framework, Cm 7577 (2009), Chapter 3 (see pp. 57–58); see also Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', (Twenty-First Report of Session 2003–2004), 10 October 2004; Joint Committee on Human Rights, 'A Bill of Rights for the UK?' (Twenty-Ninth Report of Session 2007–2008), 10 August 2008. For a stronger endorsement after nearly a decade of extensive consultations, see Northern Ireland Human Rights Commission, 'A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland', 10 December 2008, Chapter 3 (advising the Secretary of State for Northern Ireland to adopt a bill of rights that includes justiciable rights to education, health care and social services), available at www.nihrc.org/.

[3] European Union, Charter of Fundamental Rights Parts III, IV, V, 7 December 2000, OJ [2007] C303/1.

[4] Law and Versteeg, 'Global Constitutionalism', 138 (Table 2).

[5] See Chapter 5, section II.C for a discussion of the concept.

[6] *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).

adjudicate) and a normative sense (i.e. that it is something they *ought to* adjudicate (or have no good reason not to) in view of their *institutional capacity and legitimacy*).[7] I was asking the professor about the normative sense, and his answer addressed the fact-stating sense. It is easy to trade on this ambiguity, and both critics and advocates do trade on it by appealing to either sense of the term to prove their point. The pressing issue in dispute here, of course, is whether we ought or ought not to empower courts to adjudicate constitutional social rights disputes. Once focused on this issue, one meets with a variety of arguments, some bad, some good, but none conclusive.

A The bad arguments

I will start with the weaker ones first. They are as follows:

- *Social rights are not human rights*: International law has said they are for about sixty years, and even political philosophy has recently awoken from its dogmatic slumber on that issue.[8]
- *Courts cannot and will not adjudicate policy questions*: Every first-year law student knows that judges can and do base their decisions at times on policy considerations, and Ronald Dworkin's increasingly refined attempts to deny this is one of the bigger dead ends in modern jurisprudence.[9]
- *Courts cannot adjudicate positive rights*: The embarrassing fact for this argument is that they do.[10]
- *It would violate the separation of powers*: This argument is usually circular or question-begging: its advocates merely define the separation of powers in a way that excludes social rights adjudication. If a better argument lurks in the detail, it cashes out into one of the good arguments against social rights reviewed below.

[7] G. Marshall, 'Justiciability', in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961). See Chapter 4 of this book for a discussion.

[8] See Chapter 2.

[9] See Chapter 5, section II.B.

[10] A. R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004); T. Harvey and J. Kenner, *Economic and Social Rights in the EU Charter of Fundamental Rights* (Oxford: Hart Publishing, 2003). See also: *Vriend* v. *Alberta* [1998] 1 SCR 493 (SCC); *R* v. *Secretary of State for the Home Department, ex parte Limbuela* [2005] UKHL 66 [920] (Lord Brown: '[I]t seems to me generally unhelpful to attempt to analyse obligations … as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies.')

- *Social rights are too vague*: If that were the real reason not to entrench social rights, then we might need to do away with a few other legal concepts, such as reasonableness, fairness, unfair dismissal, much of regulation, most of criminal law, and all other bills of rights and much of the constitutional division of powers in federal systems.[11] And progressives beware – it is precisely this type of argument that libertarians use to oppose government regulation of the economy.[12]
- *Social rights conflict with each other*: This looks superficially true – my right to health reaches for the same resources as does your right to social security. But there are conflicts between many other rights that we accept in due course: life vs. liberty and the freedom from torture in terrorism cases; privacy vs. freedom of the press; property vs. taxation; free expression vs. the right to vote, or equality, or security of the person. Private law rights are often balanced against one another, and efficiency and justice joust for supremacy in the arena of administrative law.

People are reluctant to abandon these arguments even when they cannot explain away the counter-examples. Why so?

B The good arguments

A better set of arguments against constitutional social rights adjudication raises four sets of concerns that are foreshadowed somewhat imperfectly above, but which can be restated more crisply:

- *Democratic legitimacy*: Resource allocation by definition implicates the interests of nearly everyone, because we nearly all pay in and take out of the public system. There could be hardly a better scenario in which the voice of each should count equally, or as close to equally as practically possible, where we can bargain and compromise, and no better institution for that than a representative legislature. The ordinary case against judicial review is thus amplified here.
- *Polycentricity*: Some issues require the comprehension of a vast number of interconnected variables in order for one to understand the likely consequences of any change of policy. Consider whether a country

[11] See Chapter 4, section II.C. See also C. Gearty and V. Mantouvalou, *Debating Social Rights* (Oxford: Hart Publishing, 2011), pp. 113–14.

[12] F. A. Hayek, *The Constitution of Liberty* (London: Routledge, 1960); J. O. Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] *British Tax Review* 332 (addressing the argument from vagueness).

should seek a foreign loan in order to cope with a financial crisis. The question is linked to a judgment about how international markets will react, the political acceptability of any repayment conditions, long-term macroeconomic stability, and all of this must be balanced against similar calculations in respect of alternative policy options. Further, all such factors change over time. This is a polycentric problem because the soundness of some proposals is dependent on the comparative merits of others, the complete comprehension of which is extremely difficult and which involves considerable guesswork. Resource allocation at the nationwide level is a polycentric activity par excellence.

- *Expertise*: Polycentric decision-making often requires expertise. However some questions are not polycentric in a strict sense but primarily require the application of expert judgment. Determining whether a drug is safe, a building structurally sound, whether a certain test is appropriate for measuring a disability, or whether some proposed procedural right will cause unsustainable problems in a modern bureaucracy are matters on which expertise must be brought to bear. Courts not only often lack that kind of expertise, but are invited to strike down expert judgments on the basis of their intuitions. Expertise, in fact, was a key rationale for limiting earlier judicial intrusions into the welfare state that most now see as having obstructed the recognition of social rights.
- *Flexibility*: On some issues the government might be shown to be essentially fumbling in the dark, and there might be no good reason to think that a judge or claimant's view on the issue is in any way inferior to the government's. But there may *still*, though, be reasons to let the executive or legislature take ownership of the issue if the possibility of changing positions in response to unforeseen information or developments is crucial. It is hard to say that there exists a fundamental right to kidney dialysis in January, but not in December, because the price spiked in June.
- *Alternatives*: No doubt there is a need for justice in the welfare state. But why look to courts first? We have over half a century of administrative justice studies and many of them have been concerned (in the common law world) with reasons why we should consider institutions that improve upon the shortcomings of courts. This led to the creation of many of those institutions.

These are strong arguments against social rights adjudication because they all contain a significant core of truth. In fact, my exploration of them in Chapter 3 and Part II of the book will show that they are critically important in public law. However, Part II also shows that these

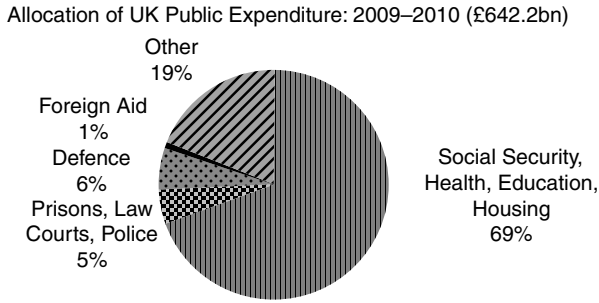

Figure 1
Source: HM Treasury, *Public Expenditure Statistical Analyses 2011* Cm 8104 (2011), p. 69 (Table 5.2).[13]

arguments cannot justify any sweeping conclusion that social rights are non-justiciable. Such an argument would reduce to absurdity, because it would require us, if consistent, to abandon so much else in our legal system. Our public and private law systems are rife with cases that are polycentric, involve expert judgment, impose inflexibility, or raise an issue about democratic legitimacy in some way or another (especially modern bills of rights). These systems have adapted to take these issues into account, without excluding adjudication altogether. So if these good arguments against social rights do not rule out those cases, why should they rule out social rights?

C The best argument – the risky enterprise

A more refined argument would say, roughly, that even if courts can adjudicate some problematic cases that put a strain on the concerns mentioned in the previous section, it may be that a bill of social rights will present a lot more of them. We can present this type of objection a bit more graphically. It is a common riposte to arguments against social rights to say that courts enforce positive obligations in respect of prisons, courts and the like. Figure 1 allows us to compare the amount of the UK budget spent in 2009–2010 on areas that traditionally concern civil liberties such as law, prisons, policing (including immigration), with that spent on the areas directly implicating social rights (with a few other familiar items thrown in

[13] The sums are rounded, and housing includes some funding for community development and research and development.

for comparison). One can see that the stakes are not quite the same.[14] The aggregate number of problematic cases could be much higher, this argument goes, and thus the costs associated with all those good but rebuttable arguments against social rights would be much greater with than without constitutional social rights. Taking a few cases here and there, and showing how judges can work through them, will not convince this critic. Even less so when one takes a highly theoretical argument and applies it after the fact to a decided case, in the style of some theorists, rather than by showing how that argument can function predictably in the hands of real judges who disagree with each other and are impatient about theory. The point is, for these critics, that the whole enterprise is too risky.

IV The case for incrementalism in a nutshell

This book seeks to give a convincing answer to all of these daunting arguments. I show first, that the four considerations set out above are best accounted for in adjudication by being restated as principles of judicial restraint. When properly understood, they function as principles to which judges can give weight when they decide cases. Part II expounds these principles, showing where the limitations of each argument lies, and why these arguments all tend to converge on one general theme, which is caution rather than abdication.

But the prescriptions aim to be more specific than suggesting mere caution. In each case, the format of the chapter is quite similar. I explain why the concern or objection addressed is insightful and important, but that it cannot be deployed (consistently) as a strong argument against justiciable social rights. In the chapter on democratic legitimacy (Chapter 6), I argue that courts can respect the idea of treating people as equals but compensate for democratic problems with the finality of legislation by addressing two key problems, namely, the absence of legislative focus on some rights issues and the failure to protect adequately those groups that are particularly vulnerable to majoritarian bias or neglect. With polycentricity (Chapter 7), I show why the argument is good but that there are a range of attenuating factors – such as the existence of a strong judicial mandate, the degree of polycentricity, role of interventions and so on – that

[14] Of course civil and political rights implicate more than prisons, policing and the like, but then social rights implicate other areas of the budget that I have also excluded from the tally above, such as possibly transport (£23 billion), debt servicing (£31 billion), and waste management (£7 billion).

moderate the weight that a court should attach to the polycentric character of a given legal issue. On the question of expertise (Chapter 8), I show that although the historical relationship between administrative expertise and the welfare state suggests that the idea must be given great weight, both that history and current practice point to something more nuanced than a closed door. There are trade-offs between expertise and accountability, just as there are different types of expertise calling for restraint in different ways. And then there is the problem of failures of expertise – situations where the state is inconsistent, has failed to focus on the issue, or is patently defying a substantial uniformity of expert opinion on the matter. The need for flexibility (Chapter 9), too, is acute, but courts can help to strengthen this role both by breaking up bureaucratic or political inertia, and by adopting specific techniques of adjudication that respect the need for flexibility in the welfare state. What emerges over the course of each chapter is a restatement of the argument under consideration as a principle of restraint, one that can assist the task of interpretation, and keep it within safer bounds.

These four principles of restraint are helpful when adjudicating a case that raises a particular issue in acute form (such as expertise, social science evidence, or legitimacy) but I am not suggesting that a judge sets out all four as tests and works through them mechanically in each case. Such rigour could not even be expected of the Germans.[15] It would also be unnecessary, because the four principles collectively recommend that judges take a default position of judicial incrementalism. Incrementalism is a useful heuristic, or rule of thumb, for what the principles of restraint ordinarily recommend. Incremental steps are those that require only a relatively small departure from the status quo, or which, when addressing significant macro-level policy, allow for substantial administrative or legislative flexibility by way of response. The common law has expanded incrementally over time and it typically involves expanding the coverage of a rule or principle, introducing an exception, or overruling a case after a history of problems leads to a strong case for change. The case for this approach, in a nutshell, is that judges can adjudicate social rights disputes if the range of considerations, affected parties and judicial control more generally, are ordinarily limited to a relatively localised set of issues, or, if addressing more macro-level issues, only impose finality upon the resolution of the issue to a limited degree.

[15] But see R. Alexy, *A Theory of Constitutional Rights*, trans. J. Rivers (Oxford University Press, 2002), pp. 120–38 (making Hohfeld's scheme of rights and duties *more* complex).

When focused in this way, the universe of relevant considerations for the judge is radically reduced. That makes the legal issue less polycentric, any deficit in expertise less of a concern, and it preserves flexibility to adjust to unforeseen circumstances or work around judicial holdings that were based on findings or assumptions that are no longer tenable. I commend a set of techniques – the techniques of incrementalism – that will at once both be familiar to judges and connected both to the idea of incrementalism and the principles of restraint set out in Part II of the book.

If we thus reconsider the good arguments against social rights, we can see that the principles of restraint explain why those arguments can be given weight in day-to-day adjudication, and the idea of judicial incrementalism gives a straightforward answer to the risky enterprise argument against social rights.

V Background political conditions – when the argument applies

Adjudication is an institutional mechanism to help attain certain goals, and in the case addressed by this book, the implementation of social rights. I explain how this works in Chapter 2, but it should be apparent immediately that the success of constitutional adjudication is not something determined in the abstract. The attractiveness of *constitutional* social rights depends on the political conditions prevailing in the country where the case is advanced.

One way to present the case for social rights is to limit it to one jurisdiction. Another, which may be more enlightening in comparative perspective, is to identify a set of salient political conditions that are present in a particular community to which the argument is directed. I take this second approach, and the paradigm community is the United Kingdom, because of its historical centrality to the legal culture throughout the Commonwealth, similarity to other European countries, and the richness of its public law scholarship.

A The background political conditions

In my view, the salient background political conditions that apply in the United Kingdom and some other Commonwealth countries are the following:

1. Courts operate on a model of common law (or institutionally similar civil law adjudication) that is not likely to change radically, and they

are unlikely to adopt the public law litigation paradigm sometimes used in the United States and India, nor a strong role for investigative judges.
2. There are reasonably independent courts that are not party political, even though the political preferences of judges may and likely will influence their judgments.
3. The legislature is elected by universal franchise, it shows a basic commitment to rights, it can pass and amend legislation competently, and committees play an important accountability function in legislative decision-making.
4. There are substantial non-judicial or specialised adjudicative accountability mechanisms for welfare rights grievances (e.g. tribunals, ombudsmen, alternative dispute resolution, complaint panels).
5. There is a good-faith political commitment to protecting social rights, manifested by a reasonably good welfare state (or in less wealthy countries, the foundations of a welfare state).
6. Disproportionate political and economic power is held by wealthy groups, whether by inherited privilege or otherwise. They own most of the major enterprises in the economy.
7. There is a reasonably independent, professional, well-functioning, mostly non-corrupt civil service and other executive agency staff.
8. The system of government respects the principle of inter-institutional collaboration. That means that there is a general rebuttable presumption that the various branches of government carry out their responsibilities in good faith, and seek to work harmoniously and respectfully with one another. Courts, respecting this idea, give weight and show deference to the good faith decisions of other institutions, and those institutions in return absorb and work in good faith with the decisions of the courts.[16]

These are not 'ideal conditions' as some might at first believe. They are broadly meant to be descriptive of the social and political conditions presently obtaining in the United Kingdom. I also believe they presently exist

[16] This condition is particularly important to the theory set out in this book. See Chapter 2, section IV; Chapter 3, section II; Chapter 4, section III.B; esp., Chapter 5, section III.B; Chapter 9, section III.A.3; Chapter 10, section III.A.7. This is not the principle of institutional settlement from the legal process school of jurisprudence. That doctrine suggests that one institution ought to accept with finality the findings of another. The vision here is of collaboration and combines the ideas of one body giving weight and deference to the views of another, but also of oversight and the power to challenge, set aside, and revisit the findings of other institutions within an overall framework of comity and collaboration.

in Canada, Australia, New Zealand, and possibly South Africa, as well as much of Continental Europe (apart from condition one). I do not, however, believe these conditions prevail in the United States, because conditions two, five, and arguably three and eight, and possibly even seven (due to the political appointment and change of bureau chiefs) do not apply in any reliable sense.[17] It is common also to hear lawyers from India question whether conditions three and five apply there. As for Latin America and Africa, the situations are too complex and varied to comment.

Notably, it is not necessary that a country be particularly wealthy for these conditions to apply. However, conditions two through five and especially seven have proved harder to stabilise in less wealthy states.

B When the conditions do not apply

Although the prescriptions in this book are aimed centrally at states manifesting the background political conditions set out above, that fact does not mean that they are irrelevant to other states. The principles and theme of incrementalism may or may not apply. It may be the case, as with the United States, that several of the background political conditions do not apply. In that case, I would think that the suggestions do not apply in two different senses. On the one hand, the theory in this book would not support introducing constitutional social rights of the sort I discuss, at least not without further discussion of the peculiarities of local institutions. Something more or less might be needed. On the other hand, it might not be appropriate for the courts to adopt a default position of judicial incrementalism. It is no surprise, for instance, that there is quite radical structural reform litigation for social rights litigation at the state level in America and India, when due note is taken of the clarity of the constitutional provisions and the radical underfunding or other problems encountered in some of those cases.[18] It may, on the contrary, simply be that because of the way adjudication functions, it would be too risky to introduce such rights. Having said this, it remains the case that in most countries courts will face substantial epistemic limitations that make incrementalism an attractive strategy for decision-making. Even if the non-judicial institutions are 'not working' and the case for democratic

[17] Despite this, I address a range of American law and legal theory throughout this book. The experience there teaches important lessons, and the scholarship is too brilliant to ignore.

[18] See Chapter 9, section III.A.3; Chapter 10, section IV.B.

restraint is weak, those epistemic limitations and the potential for the negative consequences detailed in Part II of this book remain. As noted in Chapter 3, the experience in Latin America thus far would appear to confirm that.

A more interesting question is what ought to occur when such conditions ordinarily apply, but do not apply in respect of a particular issue. It may be that on a particular social issue there is a breakdown in the presumption of inter-institutional collaboration, for example a patent legislative failure, a breakdown in agency government, or an ethnic or cultural division that prevents some institution from carrying out its task. That was the case, for example, with race relations in post-Second World War America, and with Aids denialism in the South African government at the end of the twentieth century. Or judges may divide along party, regional, or ethnic lines. If the conditions fail to apply, there may well be a case for departing from the core suggestions set out in this book. In some cases it may counsel a more active judicial role. I argue in Chapter 9 that where inter-institutional collaboration breaks down, there can be a case for more intrusive remedies. In other cases, perhaps where judges are likely to disagree ideologically, it may counsel a more restrictive role. Any determination in this regard is wholly contextual and little more in the abstract can usefully be said on the matter.

VI Conclusion

This book ranges over legal and political theory, legal doctrine and judicial decisions, and social science and in particular socio-legal studies. This is not out of any methodological ambition. It is rather that the case for constitutional social rights is a complex one. It depends in part on normative political arguments about which institutions of the state should have interpretive authority over defining our human rights. It also requires information about how judicial and other institutions will respond to the demands of constitutional social rights adjudication, and about whether they can and will conform to the expectations of the theory put forward. That information is frequently doctrinal, empirical, and predictive all at once. It requires looking at comparative law, socio-legal studies, and organisation theory. And since some involve a level of speculation about the nature of judicial decision-making, legal theory will also bear on how these questions are answered.

Notwithstanding the wide-ranging nature of the material examined, it all drives clearly towards two key arguments. The first is that there is

a good case that constitutionalising social rights in countries having the background political conditions set out in this chapter will be a worthwhile and important endeavour. The second is that the ideal role for courts, and the one that makes the case for social rights succeed, is structured by four key principles of judicial restraint whose chief theme is judicial incrementalism. Notwithstanding the accent on incrementalism, it is hoped that, by the end of the book, the reader can see that it is in fact an ambitious strategy for providing greater justice in the welfare state.