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UDK: 342.4
342.56

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Originalni naučni rad

IS REDUCING POVERTY A TASK OF CONSTITUTIONAL COURTS?¹

There are wide-ranging discussions about the meaning and causes of poverty as well as about strategies to reduce it. Who should and who can make real difference? Is the best hope of those living on less than \$1.25 a day - the global international initiatives such as the UN Millennium Development Goals, donor states, the religious charity organizations, the extremely well-off like George Soros or the rich celebrities like Angelina Jolie? In this article, I argue that constitutional courts can represent another front to address constructively the needs of the poor through judicial enforcement of social and economic rights. These rights, also called welfare rights, are regaining currency because they underline the perspectives of the needy rather than genuine intentions of the donors or fashionable trends. Although the constitutional courts cannot direct redistribution of global wealth, they may however provide a meaningful social change by digging the poor out of poverty with a help of rights talk necessary for their inclusion into societies. If we recall here how the courts included African Americans in the American society, we may find this strategy to be more attractive than it looks at first sight.

Key words: *poverty, social and economic rights, constitution, constitutional courts.*

¹ This paper was presented at the international conference on Universal Application of the Universal Declaration of Human Rights: Towards Poverty Eradication, New York, Institute for International Education & Helsinki Espana, November 24-25, 2009.

As we celebrate the 60th Anniversary of the Universal Declaration of Human Rights, the world faces an economic crisis reminiscent of the Great Depression from the 1930s. Some call the current crisis “the end of the end of history”, alluding to the end of the free market which should have led us to an end of history.²

Even yet in 2006, Milton Friedman, a Nobel Prize Laureate in Economics, argued that the road to success for underdeveloped countries were freer markets and globalization. Capitalism, he believed, gained access to the whole planet, bringing prosperity to the poor and progress towards democracy and rule of law.³ However, today, only three years later, it looks like that another ideology, through which the states developed in modern times, capitalism, in its latest form of neoliberalism, is falling apart, just as it had happened with communism, which collapsed exactly 20 years earlier. In any case, what we are witnessing now is that the notion of an End of History has been fatally undermined by the current financial crash.

The byproducts of the first economic crises in the 21st century are unemployment, loss of housing, loss of or cuts in spending for healthcare, social security benefits and education, as well as “crisis taxation”. The current financial meltdown will not only bring more poverty to the world but will also affect funds available for the global strategies to reduce poverty.

Under such circumstances, the issues that matter are who can make a real difference and how to achieve it. Who should take care about the needy? State, international governmental and non-governmental bodies, private national or transnational corporations, a church, NGOs, private donors or celebrities? Although some poor people have certainly benefited from some of them, I do not think that international initiatives

2 In 1992, Fukuyama argued that liberal democracy and free market capitalism, being the most satisfying and efficient form of government and method for organizing the economy, represent the final stage of human government. See Francis Fukuyama, *The End of History and the Last Man*, (New York: Free Press, 1992). For a recent critique, see e.g. IUC Global Legal Standards Research Group (2009), *IUC Independent Policy Report: At the End of the End of History - Global Legal Standards: Part of the Solution or Part of the Problem?*, available at: <http://www.bepress.com/gj/vol9/iss3/art1/> (last visited on August 13, 2009).

3 See the interview with Milton Friedman, *Free Markets and the End of History*, made in spring 2006, available at http://www.digitalnpq.org/archive/2006_winter/friedman.html (last visited on August 13, 2009).

and donor states, along with Bono and Vlade Divac can bring a significant change. Poverty is not only a matter of morality or utility, but primarily it is the issue of justice.⁴

In this article, I favor a human rights approach because it underlines the perspectives of the needy, who are positioned as active “rights-bearers” rather than passive “unfortunates” representing a distinct class inevitably built into the basic structure of our societies. Within the human rights strategy aimed at reducing poverty, social and economic rights are regaining currency because they speak about economic security, they are usually claimed by the needy and because they are fundamentally affected by the globalization and free markets ideology. On this occasion, I will revisit the issue of judicial enforcement, typically used for delegitimization of welfare rights. My aim is to shed light on the role of constitutional courts and to explore whether judicial enforcement of social and economic rights can bring a meaningful social change and make a real difference in reducing poverty.

I will start my discussion by sketching the rhetoric of poverty and by pointing at some stats and facts.

Poverty Stats and Facts

The poor as a distinct class, is inevitably built into society due to different political, historical, social, cultural and other reasons. “Poor people differ from us: most of them are morally weak and undeserving. In any event, we are helpless to solve the complex and daunting problem of poverty. This is the rhetoric of poverty”.⁵

Now, consider the way in which global wealth is currently distributed. The richest 2% of adults in the world own more than half of global household wealth, the richest 1% of adults alone owned 40% of global assets in the year 2000, and the richest 10% of adults accounted for 85% of the world total. In contrast, the bottom half of the world adult

4 Poverty as a matter of injustice was discussed by eighteenth-century philosophers Thomas Paine and Jean-Jacques Rousseau. The idea that the poor have rights amounting to the “means of existence”, appears in the French Declaration of the Rights of Man and the Citizens and in the French Constitution of 1791.

5 Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, (1991) 79 Georgetown Law Journal 1499.

population owned barely 1% of global wealth.⁶

There is more to add to this gloomy picture. New poverty estimates released in August 2008 show that about 1.4 billion people in the developing world (one in four) were living on less than \$1.25 a day in 2005.⁷ Almost half the world — over three billion people — live on less than \$2.50 a day. At least 80% of humanity lives on less than \$10 a day. The poorest 40% of the world's population account for 5% of global income. The richest 20% account for three-quarters of world income.⁸

If one approaches poverty from a capabilities perspective⁹, such as literacy or access to healthcare, clean drinking water and electricity, then the picture is the following: nearly a billion people entered the 21st century unable to read a book or sign their names. An estimated 40 million people are living with HIV/AIDS, with 3 million deaths in 2004. Every year there are 350–500 million cases of malaria, with 1 million fatalities: Africa accounts for 90 percent of malarial deaths and African children account for over 80 percent of malaria victims worldwide. Some 1.1 billion people in developing countries have inadequate access to water, and 2.6 billion lack basic sanitation. In sub-Saharan Africa, over 80 percent of the population depends on traditional biomass for cooking, as do over half of the populations of India and China.¹⁰

Since poverty is a region-specific matter, it can also be conceptualized as relative deprivation: for example, a two-parent American household with two children living on less than \$19,806 per year, which is the official poverty line in the US in 2007.¹¹ Unlike in the developing world, most of them, however, have access to clean drinking water and electricity.

6 Press Release, *Pioneering Study Shows Richest Two Percent Own Half World Wealth*, December 5, 2006, available at http://www.eubankers.net/backend/ffiles/2006-12-6-World_Wealth_Report.pdf (last visited on August 13, 2009).

7 Available at <http://www.globalpolicy.org/component/content/article/209/43478.html>, (last visited on August 13, 2009).

8 Available at <http://www.globalissues.org/article/26/poverty-facts-and-stats> (last visited on August 13, 2009).

9 Amartya Sen approaches the issue of poverty from capability perspective. See more in Amartya Sen, *Inequality Reexamined*, (Oxford: Oxford University Press, 1992).

10 Available at <http://www.globalissues.org/article/26/poverty-facts-and-stats> (last visited on August 13, 2009).

11 See in Barbara Stark, *Theories Of Poverty/The Poverty Of Theory*, (2009) Brigham Young University Law Review 381, 386.

During the current crisis, the gap between the rich and poor has become greater than ever. For example, in the United States, while people were losing their jobs and houses due to mismanagement of financial institutions, the collapse of real estate market and stacks of consumer debts, Wall Street distributed \$ 18 billion in bonuses in 2008. This equals around half million jobs.¹²

The economic crisis in Serbia has been going for a very long time due to violent conflicts in the Balkans and the mismanagement of economy in transition. Earlier this year the society was rather shocked by an extreme argument made for fair pay for work. The workers in one of the country's poorest region, Novi Pazar, were protesting over unpaid wages, dating from 1993. To dramatize their plight, one of them chopped off one of his fingers and ate it.¹³ Approximately at the same time, the Serbian National Bank Governor challenged before the Constitutional Court the government's measures aimed at cutting civil servants' salaries due to the economic crisis, because he was not prepared to work for less than his salary of 4,390 EUR.¹⁴ In comparative perspectives, this amount does not appear to be high, but in national perspective, with the average salary of approximately 300 EUR and with 30.000 workers currently in strikes mostly due to unpaid wages, such an announcement has provoked many negative reactions.

Currently, poverty reduction is the overarching goal of many global and national initiatives. The literature on this topic is large and growing. Yet the role of constitutional courts in reducing poverty goes largely unrecognized in practice because the enforcement of social and economic rights pose a significant conceptual challenge for the theory of human rights in general. Before I examine how successful the role of constitutional courts in reducing poverty can be, I will first say something about conflicting views on social and economic rights.

12 Tibor Varady, *After Communism Failed, Did Capitalism Succeed in Eliminating the Owners?* Unpublished. With a permission of the author.

13 The factory once employed some 4,000 workers. Today, only a hundred remain in the facilities. The strikers staged a 19-day hunger strike. This extreme move, qualified as a move of a desperate man, had an impact: the company did not go bankrupt, the workers have been compensated for unpaid social security benefits and they are to get (hopefully) all unpaid wages, as well.

14 Under the new measures, where maximum pay packets are limited to six times the average national salary, this comes down to approximately 1,900 EUR.

What Do We Talk About When We Talk About Social and Economic Rights?

It is a commonplace that social and economic rights are controversial. The controversy most often relates to the character and force of such rights and the problem of (un)enforceability.

The first line of controversy generates from the nature of the claims and interests at stake. What exactly do we mean by the access to fundamental existential needs like food, water, health and shelter? Or, when we talk about free education, unemployment benefits, pensions for the retired and the handicapped, child, maternity or family support, free or subsidized housing? Are we referring to the benefits and services provided by the government to the needy? Or, we speak about entitlements provided through social security scheme based on the principle of solidarity? Alternatively, these issues amount to human rights claims stated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

Next, the confusion about validity of rights claim is also attributable to the fact that some social rights are freedoms rather than rights, while some better fit in the category of civil and political rights than in the category of social rights. For example, the parent's right to choose the kind of education that shall be given to their children is a freedom rather than a social right. Many constitutional lawyers in the United States and Germany believe that the right to education is a political rather than a social right. The fact that Article 2 of Protocol 1 to the European Convention on Human Rights, which is generally seen to cover only civil and political rights, guarantees to everyone the right to education, further underscores their point. In addition, when speaking about social and economic rights many refer to welfare rights, which may imply all social services and monetary support provided by the government to the needy or just the fundamental preconditions of existence, like right to food, health, and shelter. Economic rights may regard entrepreneurial liberty or special guarantees regarding labor.

The "weaknesses" of social and economic rights are sometimes emphasized in comparison with civil liberties and political rights. Thus it is claimed that for an entitlement to be a human right, it must satisfy a number of conditions: it must be fundamental and universal; in principle,

it must be defensible in justiciable form; it should be clear who has a duty to uphold or implement the right; and the responsible agency should possess the capacity to fulfill its obligation.¹⁵ It is often argued that unlike civil and political rights, social and economic rights have failed in every respect.¹⁶ For example, the universality of welfare rights is disputed because some of them expressly refer to special status (employees) or because conditional upon the states' recourses.¹⁷

Another difference, which is badly framed, suggests that social and economic rights, being positive rights, are costly since they require from the state positive action to promote them, while civil and political rights, as negative rights (requesting from the state only non-interference) do not cost money. However, as Holmes and Sunstein rightly pointed out, all rights are positive and the protection of every right costs.¹⁸

When one looks more closely at the debate on whether social and economic rights are human rights at all, one may notice that the arguments against the human rights approach are usually rooted in morality or they are of social or political nature. For example, it is claimed that social and economic rights are in essence undemocratic and that they create culture of dependency from the state which diminishes individual initiative. On the other hand traditional civil and political rights are exercised

15 David Beetham, *What Future for Economic and Social Rights?* (1995) 43 Political Studies 41.

16 András Sajó, *Limiting Government*, (Budapest: CEU Press, 1999) 264-271.

17 Ibid.

18 For a discussion about the merits of such a debate see Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, (NY, London: W.W.Norton & Company, 2000) 35-48. It might well be that this dichotomy between civil and political rights on one hand, and social and economic rights on the other, lies in their different history. Civil liberties originally developed from claims against the government. The right, or privileges of the nobility, preceded corresponding duties of the state not to limit arbitrarily personal liberty or to set up the jury system. In contrast, social and economic rights originated from the duties of the government. Their roots are in the mutual obligations of all members of society in medieval Europe. Because of these obligations, society was expected to take care of the needy. With time, such duties were transformed into corresponding rights. There is a discussion whether the first person to define social rights as rights was a German legal philosopher Rudolf von Ihering in the 1860s or William Blackstone more than a century earlier. See Wiktor Osiatynski, *Introduction*, in *Re-thinking Socio-Economic Rights in an Insecure World*, ed. Nsongurua Udombana and Violeta Beširević, (Budapest: CEU Center for Human Rights, 2006) 14.

autonomously by hardy and self-sufficient individuals.¹⁹

Although I do not contest that socio-economic rights are far more context-dependent than the traditional civil and political rights, I believe that they are human rights because, as it is rightly claimed, they are indispensable for the dignity of a person.²⁰ Civil and political rights alone do not ensure the development of the personality of the individual nor can enable people to remain free.²¹ Moreover, social rights are not about well being and prosperity or about material or economic equality. All rights and freedoms protect the security of a person, which is about freedom from want and from fear. Security is not only aimed at protecting individuals (as well as groups) from private and public violence and interference, but also from violent fluctuations in the market, as well as from poverty, illness or the caprices of family upbringing.²² Accordingly, social and economic rights are about protecting socio-economic security. Therefore, at least what a society should do is to establish a minimum on the level of basic socio-economic security. As Fabre suggests, ‘the government must take all steps to ensure that it satisfies social rights to minimum income, housing education and healthcare, as far as it can, within the constraints of resources reasonably available to pursue them’.²³

In addition, the view about equal importance of civil and political rights on one hand, and social and economic (as well cultural) rights on the other hand, is deeply epitomized in the philosophy of many international documents, the most important being the Universal Declaration of Human Rights, the Declaration of the Vienna World Conference on Human Rights of 1993 and the UN Millennium Declaration.²⁴

19 Holmes & Sunstein, *supra* note 17, 35-48.

20 For more see Cecile Fabre, *Social Rights under the Constitution: Government and the Decent Life*, (Oxford: Clarendon Press, 2000).

21 Some may notice that there are societies indifferent to individual freedom.

22 For more on the relation between welfare and security see e.g. Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, (Chicago and London: The University of Chicago Press, 1995) 243-247.

23 Cecile Fabre, *Constitutionalising Social Rights*, (1998) 6 *Journal of Political Philosophy* 263, 283.

24 “We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development. We resolve therefore: To respect fully and uphold the Universal Declaration of Human Rights. To strive for the full protection and promotion in all our countries of civil, political, economic, social and cultural rights for all...”. The UN Millennium Declaration, GA Res. 55/2, Sept. 8, 2000, par. 24 -25.

Conflicting Views on Constitutional Protection and Enforceability

While the line between classic civil rights and social and economic rights has proved to be hard to maintain in terms of their importance for security of a person, a debate about an appropriate approach to the issues of the protection and enforcement of social and economic rights has yet to receive conclusive answers. The separate adoption of the International Covenant on Economic, Social and Cultural Rights was not a result of any internal logic of the specified rights; it happened because there was no agreement to enforce these rights in the same way as civil and political rights were enforced. On the other hand, the issue of protection cannot be reduced only to international fora since it offers limited protection: international rights of such sort are primarily designed to guide governments to implement rights in legislation and then to protect them through domestic policies of the states.²⁵ Therefore, what is needed is the action of the government.

To clarify: there is no dispute over the issue of whether the benefits and services should be provided to the needy. As it was established long time ago - all, except the most devout free market economists, have accepted the notion of some social responsibility in the sense of incurring non-compensable costs for socially desirable but not legally mandated action.²⁶ Hence, a subject of the dispute is the role of government in regulating market forces as well as a legal method of regulation.²⁷

25 This may change for better once an individual communications procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights becomes operational.

26 Lord Wedderburn, *Common Law, Labor Law, Global Law*, in *Social and Labor Rights in a Global Context: International and Global Perspectives*, Bob Hepple (ed.) (Cambridge: Cambridge University Press, 2002) 52.

27 The efforts to secure social and economic rights on the EU level, well illustrate this point. Thus, for a long time it was not possible to have a European charter of rights due to differences in opinion among the Member States, mainly on the definition of the social and economic rights that were most relevant to the activities of the Community and now the Union. Social and economic concerns had also largely contributed to the fact that the idea of the Constitution for Europe, failed. In a poll by the French *Le Monde* of 2005, 46% of those voting 'no' said fear of unemployment was the most important concern with the EU Constitution. The drafters' endeavor to base Europe on the free market and at the same time to make it a socially conscious Union raised different reactions. They range from the assertion that the Constitution for Europe would enshrine more neo-liberal measures and make any policy that tried to regulate

For many years, welfare rights debates have been revolving around whether social and economic rights deserve a constitutional protection or they qualify only for a lower level of protection.²⁸ An issue is important since welfare rights are to be reconciled with the limits on any government on one hand, and the needs of public policy choices that include redistribution of resources through taxation and political decisions about public spending on the other hand.

Against Constitutional Protection

For the time being, the US Supreme Court and many American constitutional lawyers remain almost unique in the opinion that welfare rights cannot and should not belong to a constitution.²⁹ It is a general view that remedy for failures and weaknesses in the delivery of welfare service are not to be found in the Constitution but through ordinary politics – that is, statutory legislation. The reasons for such standing are different. The US Supreme Court ruled that the State should not be compelled to interfere with the private sphere because nothing in the Constitution speaks about a guarantee of minimum levels of safety and security.³⁰ Many authors believe that the constitution should not specify everything to which a decent society commits itself - otherwise it would become a mere piece of paper.³¹ In addition, it seems that enforcement procedure market forces illegal, to the concerns that it would create new socio-economic rights detrimental to free market economy. For more, see Violeta Beširević, *Socio-Economic Rights in the Constitution for Europe: Between Symbolism and Legal Realism*, in *Rethinking Socio-Economic Rights in an Insecure World*, N. Udombana & V. Beširević (eds.), *supra* note 17, 37-48.

28 To recall, constitutional rights provide protection from all kinds of abuses by the state, they are defined by the framers and cannot be limited by legislators. Statutory rights are much weaker: they grant protection against the executive power but are subordinated to political process. Statutory rights are also implemented by courts but legislators can take them away or redefine them or limit them.

29 It has not always been the case. The welfare rights movement was born in the US during the New Deal and then reborn within the Due Process Revolution (1960s and 1970s). President Roosevelt was a well-known advocate of the “freedom from want” and positive rights for which he considered equally important for security as civil and political rights. Everything changed with President Nixon’s four appointees in the Supreme Court, which then took negative approach to constitutional welfare claims preserving such position up today.

30 See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

31 Here the reference to the former communist constitutions is often made since they

will no longer stay exclusively in the public sphere since the emerging trend in the US is alternative dispute resolution, through mediation and arbitration, particularly in the sphere of health and employment disputes. However, I hasten here to say that it would be wrong to conclude that the US is not a welfare state – its commitment to the most vulnerable citizens is expressed in statutory legislation, for which Marry Ann Glendon claims that it is of constitutional-like in character.³² Moreover, a number of the American state constitutions contain welfare commitments frequently interpreted by the state courts.³³

Very close to the US position is the position of the Canadian courts. Despite the fact that the Canadian Charter of Rights and Freedoms does not recognize any social and economic rights (except for the minority language educational rights) the Canadian courts have been frequently asked to rule on anti-poverty claims based on Article 7 (life, liberty and security of person) and 15 (equality) of the Charter.³⁴ The courts have approached this issue rather consciously and upheld anti-poverty claims only in few cases.³⁵ In the majority of cases, the courts have invoked competence concerns to reject assertions about welfare entitlements, usually finding that a particular social welfare policy is unjusticiable, because judges generally lack competences to review governmental welfare obligations or they lack legitimacy.³⁶

did not have any enforcement mechanism and remained without meaning in the real world.

32 Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, (New York: The Free Press, 1991) 96 -97.

33 For an extensive discussion see e.g. Elisabeth Pascal, *Welfare Rights in State Constitutions*, (2008) 39 Rutgers Law Journal 863; Jonathan Feldman, *Separation Of Powers And Judicial Review Of Positive Rights Claims: The Role Of State Courts In An Era Of Positive Government*, (1993) 24 Rutgers Law Journal 1057;

34 For more see David Wiseman, *Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument*, (2006) 51 McGill Law Journal, 503.

35 See e.g. *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, (1999) 3 S.C.R. 46, 1999 CarswellNB 306, 1999 CarswellNB 305 (S.C.C.). The Court held that Section 7 mandates the State to provide legal aid to parents of young children who are involved in custody proceedings. In *Eldridge v. British Columbia (Attorney General)*, (1997) 3 S.C.R. 624, 1997 CarswellBC 1940, 1997 CarswellBC 1939 (S.C.C.) the Court ruled that a hospital's refusal to provide language interpretation services to deaf patients was an unreasonable violation of Section 15 of the Charter.

36 Wiseman, *supra* note 33.

Britain's position is similar not only because of its specific constitutional arrangement and the fact that the country is subjected to unwritten rather than to written constitution. The welfare cases testify that court decisions are explicable on traditional administrative law grounds, and do not support the argument for providing constitutional, as opposed to statutory protection of welfare rights.³⁷ In addition, the enforcement procedure appears to be "privatized" as to include an emerging shift to arbitration, as it is the case in the sphere of employment, similar to certain extent to the trend now emerging in the US.

Now, two typical reasons to oppose any idea of judicial interference with welfare policy are legitimacy considerations and competency concerns.

One way of calling into a question judicial adjudication of social and economic rights is to appeal to legitimacy concerns and assert that interventions by the court in the name of the reduction of poverty should be seen more as a seizure of power rather than a legitimate exercise of judicial review. Such a strong assertion follows from the very nature of welfare rights as well as from division of powers among different branches of the government.

The first line of the legitimacy argument is built on the contested nature of social and economic rights. The real problem in adjudicating these rights is the conceptual tension between rights on one hand, and resource constraints on the other. Recall here that because they need to be implemented through expensive welfare programs and because they put an extensive pressure on the state budget – the welfare rights are not seen as legitimate but rather as "political" rights. Many believe that most of the welfare rights are programmatic rights requiring only governmental measures designed to promote them. Some argue that they are rather arguments about the character of a particular political community.³⁸ In any case, perceived as political rights, programmatic measures or state objectives, they inevitably fall exclusively in the realm of political arena and cannot be subject of judicial review since traditional legal remedies are either inappropriate or impracticable to do such a job. Therefore, questions about the level and types of the aid to the needy are best to

37 For more see Ivan Hare, *Social Rights as Fundamental Human Rights*, in Hepple (ed.), *supra* note 25, at 170.

38 See in Goodwin Liu, *Rethinking Constitutional Welfare Rights*, (2008) 61 Stanford Law Review 203, 245.

be left to the political process since only the elected governments can legitimately decide how to allocate public funds.

The second line of the legitimacy argument appeals to accountability: courts being the theoretically least accountable branch of government should restrain from attempting to undertake such governance intervention. When questions on recourse allocations are at stake, legislators might be better suited to providing answers because they enjoy the express mandate of the taxpayers.

Another argument against judicial intervention in welfare policy relates to competency concerns. It is often claimed that judges cannot correctly assess the normative and empirical questions that arise in welfare cases and do not have competence to weigh interests of vulnerable groups. Consideration of competences are also manifested in concern that judges have a limited capacity to evaluate the balance that the governmental decisionmakers made between the potential fiscal impact of anti-poverty claims and competing claims to fiscal resources.

In sum, there is a doctrinal view that issues of poverty and distributive justice should be resolved through legislative policy making rather than constitutional adjudications.

An Account of Constitutional Protection

On the other hand, a considerable number of the modern constitutions include the constitutional welfare provisions albeit in different ways and forms. The constitutions of many European countries have included the idea of “social” by referring to the security and well-being of the individual in terms of the social state or various socio-economic rights. For instance, the constitutions of Spain and Portugal expressly recognize some welfare rights as well as the constitutions of new democracies emerged in East, Central Europe and the Balkans. The Italian Constitution specifies some employment related rights. The German Basic Law has a provision which defines Germany as a “social state”. Next, all African national constitutions include either generous provisions on social and economic rights or “directive principles of state policy” with the same rhetoric as that of social and economic rights. “Directive principles of state policy” are also embodied in the Indian constitution. Finally, welfare rights have been the indispensable characteristic of the Latin American national constitutions as well.

In a number of countries, whose constitutions indirectly or expressly provide for social and economic vision of security, the constitutional courts were frequently asked to interpret the meaning and the scope of such vision. Thus, the principle of “social state” provided in the German Basic Law, in combination with the reference to human dignity and the right to freely develop one’s personality, has been interpreted in a way that favored welfare benefits to the needy. The French Constitutional Council has used the Preamble of the 1946 French Constitution, which is part of the current French constitution, to legitimize constitutional nature of certain social rights, including the right to health and adequate housing. Despite their unjusticiable nature, the Irish courts have used the Directive Principles of Social Policy, embodied in the Irish Constitution, to create enforceable welfare rights. The Indian courts use the constitutional principles of “directive policy” together with constitutionally guaranteed right to life to mandate welfare legislation in India.

Particularly active in enforcing welfare policy have been the courts in India, South Africa, Latin America and the courts in the European post-communist countries. However, the strategy they have employed in adjudicating social and economic claims and a level of their readiness to represent a meaningful voice of the poor, differs considerably. Some constitutional courts have attempted to develop a more economically relevant concept of security by expressing readiness actively to intervene in the sphere traditionally reserved for legislators. Others were completely deferential to the will of the legislature confirming indirectly the arguments that constitutional welfare provisions were meaningless and could represent no more than empty promises in the face of great expectations. I will now more closely look at some of the rulings concerning fundamental preconditions of existence and social security services necessary for minimum standard of living.

Anti-Poverty Claims before the Constitutional Courts: Some Comparisons

Adjudicating social and economic rights sometimes requires very difficult choices to be made. The South African Constitutional Court was faced with such a choice when asked to decide on who would get

recourses – the terminally ill or the patients who did not suffer from fatal illness. The case concerned the hospital's denial of dialyses treatment to the terminally ill patient for the benefit of saving limited recourses for the preventing health care and treatment of patients who were not terminally ill.³⁹ The Court took deferential approach and upheld the hospital decision emphasizing that it was a job of the medical practitioners to make choices in the presence of limited recourses even if it meant that a life of an individual had to be sacrificed in the interest of the general welfare. Therefore, no violation of the right to have access to health care was found.⁴⁰

Yet, when less tragic but still pressing health care issues were at stake, such as the treatment of HIV/AIDS patients, this Court was more ready to direct the policymakers in realization of the right to have access to health care. It declared unconstitutional the government's refusal to provide Nevirapine drug to HIV positive pregnant women at all state clinics and hospitals, albeit the government's justification that such policy was necessary because of the concerns about the safety, potential side effects and efficiency of the drug.⁴¹ The Court declared the government's program unreasonable because it could have been provided without budgetary costs and ordered the government to provide the drug immediately to all state hospital and clinics and ensure the programs of testing and counseling in such medical facilities.

In the same area of social concern, the courts in Latin America, in particular in Argentina, Venezuela, Columbia, Bolivia, Brazil and Costa Rica, have all ordered the government to provide AIDS drugs to the patients who need it or to entire population.⁴²

On the other hand, the pressing issue regarding the right to have access to health care in transitional countries turned to be availability

39 *Soobramoney v Minister of Health, Kwazulu-Natal*, 1998 (1) SA 765 (CC) (S. Afr.).

40 It is important to know that the right to access to health care is subject to qualification that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights. See Article 27 of the South African Constitution.

41 *Minister of Health & Others v Treatment Action Campaign & Others*, 2002 (5) SA 721 (CC) (S. Afr.).

42 See in Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, (2009), 8 Washington University Global Studies Law Review 1, 62-63.

of free of charge medical services. The constitutional courts that ruled on the constitutionality of the measures on mandatory payments for medical services (usually specified in rather small amounts) were all completely deferential to the measures of the legislators. For example, the Hungarian Constitutional Court has stressed that it does not follow from the Constitution that particular health care services should be free of charge, adding that the political branches enjoyed broad discretion as far as the systemic arrangements of the welfare sector were concerned.⁴³ The Bulgarian Constitutional Court on the same issue argued that the required payments were reasonably low, and therefore did not deprive citizens from accessible healthcare. "Accessible" was interpreted to mean "open to all under fair conditions and equal opportunities": the arrangement, the judges claimed, was in accordance with the principles of equality and solidarity, because the payments were equal for all insurance-paying persons, and did not reflect their health condition.⁴⁴ The Serbian Constitutional Court ruled on the same issue in a quite similar manner. It reduced its inquiry to the issue of the legislator's competence to lay down the procedure and conditions for realization of the right to health care and then, mostly on the grounds of legitimacy and equality considerations, upheld the provisions of the Health Insurance Act that introduced the payments for medical services.⁴⁵

The Hungarian Constitutional Court has gone a step further in explaining the meaning of the constitutional health care protection. The Court ruled that the right to the highest possible physical and mental health, guaranteed by the Constitution, is not an individual right, but expresses the duty of the state to establish, within available resources, such an economic and legal environment as guarantees a healthy life.⁴⁶

43 For a discussion, see e.g. Renata Uitz, *Grand Promises in the Face of High Expectations: Welfare Rights in Hungarian Constitutional Jurisprudence*, in N. Udombana & V. Beširević (eds.) *supra* note 17, 49-79.

44 See Daniel Smilov, *Social and Economic Rights in the Jurisprudence of the Bulgarian Constitutional Court*, in N. Udombana & V. Beširević (eds.) *supra* note 17, 92-94.

45 See Decision IU- 424/2005 (published in *Official Gazette of RS*, 106/2006).

46 Article 70 D of the Hungarian Constitution reads: 1) Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health. (2) The Republic of Hungary shall implement this right through institutions of labor safety and health care, through the organization of medical care and the opportunities for regular physical activity, as well as through the protection of the urban and natural environment. Text in English is available at: <http://www.servat>.

In particular, the state is obliged to establish health care institutions and organize medical services. In one of the subsequent cases, the Constitutional Court said that a violation of the right to health might only be ascertained in extreme situations, such as if the government were not to establish any health care service in a particular region.⁴⁷

Unlike the Hungarian Constitutional Court, which has interpreted the constitutional welfare provisions in the language of state obligations rather than in terms of individual rights, the Indian courts, since the early 1980s, have adjudicated social and economic concerns by creative interpretation of fundamental rights, read in conjunction with expressly unenforceable constitutional directive principles. Thus, the Supreme Court of India has interpreted the right to life, guaranteed under Article 21 of the Indian Constitution, to encompass a variety of social and economic rights, including the rights to health, shelter, fresh air and water, education, food and clothing, land for tribal populations and protection from environmental degradation.⁴⁸ Many of its decisions imply that a fundamental right to life has a value only when it implies the minimum standard of living needed to live and develop as a human being. Particularly illustrative is the Supreme Court's decision regarding the right to adequate housing. In 1985, when the Court for the first time ruled that the right shelter was an aspect of the right to life, it did not however consider that this implied any positive action from the state apart from establishing a fair and just procedure for a deprivation of such right. However, in its landmark *Ahmedabad* decision of 1996, the Supreme Court of India ruled that the right to shelter, when seen as essential requisite to the right to life is a fundamental right. Accordingly, the state's obligation to secure the right to shelter within the limits of its economic budgeting has derived from the judicial construction which combined the fundamental rights doctrine and the constitutional provisions on Directive Principles.⁴⁹ Specifically, in *Ahmedabad*, which

unibe.ch/icl/hu00000_.html For the Court's explanation, see e.g. Uitz, *supra* note 42, 67-68., quoting decision 56/1995 (IX. 15.) AB decision. ABH 1995. 260, 269. Affirmed in 54/1996 (XI. 30.)

47 Ibid. Quoting decision 54/1996 (XI. 30.).

48 Note that the way in which the Indian Supreme Court have interpreted the right to life differs from classic understanding of welfare jurisprudence by many, including the relevant bodies of the UN (for example, its ruling concerning the enforcement of traffic regulations). For more see Robinson, *supra* note 41.

49 *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Ors*, (1996) Supp.

was about non-implementation of the legislation concerning accesses to housing, the Court found that the appellant corporation had constitutional duty to enforce the right to residence to the poor in a planned manner by annual budgets.⁵⁰

The Constitutional Court in Columbia, known as a particularly interventionist court in welfare policy area, also uses the fundamental rights doctrine to uphold poverty claims: it has frequently ruled that the state has a duty to remove poverty-base obstacles to the exercise of the constitutionally protected social and economic rights. Thus, the Court took the approach that social or economic rights may be constitutionally enforced whenever the protection is necessary to preserve another fundamental right directly linked to them. For example, the Court has consistently protected the right to health in cases in which the right to health is connected mainly to the right to life or the right to personal integrity. However, the Court has also defined situations in which social or economic rights, directly or through judicial interpretation, were fundamental themselves. Such is the case with children's fundamental social rights, the right to an adequate nutrition, and the right to elementary education.⁵¹

On the other hand, although using the bill of rights approach, the South African Constitutional Court, often seen as an example of a court ready to assess violations of social and economic rights, has provided much narrower interpretation of the meaning and the scope of their protection. For example, the state's obligations regarding the implementation of the right to have access to adequate housing in the South Africa proved to be closely akin to the obligations proclaimed by the Indian Supreme Court, albeit spelled out on less compelling grounds. Like the Indian Constitution, the South African Constitution also guaranties a qualified right to have access to adequate housing.⁵² The

7 S.C.R. 584.

50 For a discussion in a comparative perspective, see e.g. Norman Dorsen et al. *Comparative Constitutionalism*, (Minnesota: West Group, 2003) 1225-1238.

51 For an extensive discussion see Manuel Jos Cepeda-Espinosa, *Judicial Activism in A Violent Context: The Origin, Role, And Impact of the Colombian Constitutional Court*, (2004), 3 Washington University Global Studies Law Review 529.

52 Article 26 of the South African Constitution states that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. No one may be evicted from their home, without an order of court made after considering all the relevant circumstances.

South African Constitutional Court was faced with the issue of forced evictions in the case of *Grootboom*, initiated by 900 plaintiffs, out of whom 510 were children.⁵³ The plaintiffs were living for a long period in informal squatter settlement, then on vacant private land from which they were upon an ejectment order forcibly evicted, and then under temporary structures made from plastic sheets. The Court resolved the issue under “reasonableness” test which aimed to establish whether in a particular case a particular welfare right was violated or not. Although the Constitutional court ruled that the named plaintiff Mrs. Grootboom did not have a right to immediate shelter, it nevertheless declared the State’s housing program unconstitutional because it was unreasonable, since it addressed only the medium and long-term housing needs, while not addressing those whose housing needs were the most urgent. What the Court actually said was that the Constitution did not speak about the right to adequate housing for everybody, but instead required a reasonable priority-setting, with particular attention to the needs of those who are in most desperate situation.⁵⁴

In contrast, the scope of protection against “eviction to the street” is much narrower in Hungary. The Hungarian Constitutional Court argues that the state has a constitutional duty to provide housing to the needy only in emergencies. When asked to respond to the ombudsman’s request for abstract constitutional review, seeking to establish a constitutionally protected right to shelter, the Court specified that the State had to secure the preconditions for human life, which does not amount to the “right to have a place of residence”.⁵⁵ Only in case of such an extreme situation is the State obliged to take care of those who themselves cannot provide for the fundamental preconditions of human life.⁵⁶ The state obligations stem from its duty to protect human life and human dignity and include the provision of a shelter when an emergency directly threatens human life. It is interesting to note that the Court did not ground its decision on the right to social security, for which it previously ruled that it entailed the obligation of the State to secure a minimum livelihood through all of

53 *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC) (S.Afr.).

54 For an extended discussion see Cass Sunstein, *Designing Democracy: What Constitutions Do*, (Oxford, New York: Oxford University Press, 2001) 226-237.

55 Uitz, *supra* note 42, 63-64. Referring to 42/2000 (XI. 8.) AB decision.

56 *Ibid.*

the welfare benefits necessary for the realization of the right to human dignity.⁵⁷

The constitutional courts in the transitional countries have frequently discussed the right to social security with regard to maintaining the level of social services to the traditional losers in transition markets (pensioners, women on maternity leave, the sick, unemployed etc.). The following examples testify that some constitutional courts were ready to spring to their support, while some were not prepared to give them more protection than what was requested by formal equality considerations.

In 1995, the first comprehensive post-communist austerity package was challenged before the Hungarian Constitutional Court. Among other measures, the austerity package entailed layoffs in higher education and the introduction of a monthly tuition fee, requiring contributions to various health care services, restrictions on maternity and child support, limiting sick leave payments of employees, and required higher contributions from employers.⁵⁸ Relying primarily on the requirements of legal certainty, understood as the theoretical foundation for the protection of acquired rights, and to a lesser extent on the right to social security, the Constitutional Court invalidated the provisions of the government's austerity package seeking to revoke welfare benefits. The Court noted that certain social security services (including sick leave and pensions in cases where the contribution to the mandatory, state-operated social security fund was minimal) were to receive property-like protection.⁵⁹ Notwithstanding such a position, when in a more recent case petitioners challenged the alteration of the indexing of old-age pensions to their detriment, the Constitutional Court said that the new and clearly disadvantageous indexing of pensions did not amount to a deprivation of property.⁶⁰

In contrast, when the Serbian Constitutional Court was faced with a request to review the constitutionality of the alteration of the indexing of the pensions to pensioners' detriment, it took quite a different position

57 The legislature has relatively great liberty in implementing such constitutionally mandated state goals and it may define the minimum amounts of certain benefits by reference to the percentage of other types of income (prevailing minimum amount of old age pension, minimum wage etc.). Ibid. 63.

58 Ibid. 59.

59 See in Dorsen et al. *supra* note 49, 1256, 1259.

60 See Uitz, *supra* note 42, 61. Referring to 39/1999 (XII. 21.) AB decision.

from the Hungarian Court. The petitioners based the challenge on the ground of legal certainty and the acquired rights doctrine, but the Court based its decision exclusively on discrimination grounds. It upheld the legislator's right to define the scope, manner and procedure for providing social security services and at the same time ruled that the legislator did not violate the principle of equality because the particular measure did treat equally all persons in same situation.⁶¹

The Bulgarian Constitutional Court reasoned similarly. Under the welfare reform circumstances, the Bulgarian Constitutional Court was asked to rule on the amendment to the law which restricted the size of pensions to no more than three times the (minimum) social pension. The Court upheld the measure stating that although the right to a pension, as a kind of social security measure was covered and protected by the Constitution, the procedure and conditions for its realization were left to the law. The legislators have the jurisdiction to adopt the necessary policies and regulation, in so far as they do not violate other provisions of the basic law. The Court also found that the amendment did not violate the right to equality since it did not discriminate on the basis of "race, nationality, ethnicity, personal and social standing, or wealth".⁶²

Dignity and social-existence minimum were discussed with regard to pension entitlements by some courts in the developing world as well. In sharp contrast to the rulings of the Serbian and Bulgarian constitutional courts stands the approach of the Columbian Court. In 1992, it decided the case where an elderly man required a retirement pension from social security entities.⁶³ On that occasion, the Court asserted the existence of a right to minimum subsistence conditions that derived from the constitutional rights to life, health, work and social security in the framework of a Social State and from the perspective of human dignity. The practical effect of this right is to entitle persons in conditions of absolute poverty to special assistance from public authorities. The Court noted that protection of the right to minimum subsistence conditions should be assessed in accordance with the specificities of each individual case. In this particular case, it argues that the payment of retirement pensions is not, in itself, a fundamental right, but it may be protected when payments are unduly suspended because this keeps the recipient

61 See Decision IU- 22/2006 (published in *Official Gazette of RS*, 106/2006).

62 Smilov, *supra* note 43, 99-100.

63 See in Cepeda-Espinosa, *supra* note 50, 619.

from maintaining a minimum subsistence level of income.⁶⁴

Judicial Discourse: Does It Make A Difference?

I will urge two points here. First, it is hard to establish any significant relationship among the extent of welfare rights in the constitution, the willingness of a constitutional court to apply these rights and the extent of welfare benefits provided by the state. Second, in the absence of a comprehensive welfare state, that renders the enforcement of social and economic rights less necessary, particularly in the developing countries and economically challenged societies, the issue of poverty needs to be addressed through constitutional adjudication.

As to the first point, it seems that there is no correlation between the existence of the constitutionalized welfare policy and the availability of the state's aid to the needy. For example, some European countries like the Netherlands or Sweden are advanced welfare states without specifying social programs in their constitutions. The German example shows that although the Basis Law does not provide any welfare rights, the German Constitutional Court has been extremely active in reviewing the constitutionality of laws affecting economic liberties and the principle of equality as it applies to conditions of employment and the workplace. In addition, given the special protection to family and children in the Basic Law, the Court developed the right to minimum standard of living in cases related childcare maintenance.

Next, despite different constitutional approaches, a comparative study shows that positive rights in Canada, New Zealand, South Africa and Israel, account only for 10-20% of the litigation reaching the constitutional courts of those countries, with a success rate considerably lower than negative rights litigation. Among these countries, South Africa had the highest number of positive rights cases (22%) and the highest success rate (45%).⁶⁵

Finally, in the countries where the need for a meaningful social change is the most apparent, a pro-poor jurisprudence is notably missing. For example, Malawi's Constitution of 1994 is particularly pro-poor oriented with a strong voice on the right to development, education, rights to pursue a livelihood and to fair labor practices. Yet, to the extent that

⁶⁴ Ibid.

⁶⁵ Pascal, *supra* note 32, 888.

litigation involves social rights, it deals with employment and education rights of non-poor litigants, rather than health, housing, shelter or other welfare rights critical to transforming lives of the needy.⁶⁶

However, when assessing the need for constitutional adjudication it is not enough to assess only practical results of such protection (if there are any) but also the goals of the constitutional protection. Rights, including welfare rights, are rules which protect interests. What are the interests of the needy? Redistribution of the wealth. The choice of neo-liberal macro-economic policies has been to prioritize growth rather than redistribution. In such an environment the governments are masters of the budgetary funds. As Pogge correctly observes, they advance their own interests as well as the interests of domestic or foreign corporations.⁶⁷ The poor are marginalized in all sort of possible ways. If we agree that among the poor, the vast majority belong to the undeserving poor, the issue of a just redistribution cannot only been reduced to political accountability. A significant social change is needed.

Now I come to my second point – why do we need to address the issue of poverty through constitutional adjudication.

The critical issue is marginalization. The cultural separation and stigmatization of the poor has been a constant feature of human civilization. The fact that the poor are neither registered as voters nor are organized voters in general, testifies about their political marginalization in modern times. Political parties go very rarely after their votes and when they do, they make broad rhetoric statements rather than reasonable and reachable promises. In the transitional countries, the governments being under the constant pressure from the international financial institutions are ready to sacrifice the needs of the poor for the speculative benefits of even more speculative economic growth.⁶⁸ As for the protection, the needy routinely receive the very least judicial consideration when governmental actions burden them. They lack resources required for effective political mobilization to pursue protection from the political

66 Siri Glopen, *Courts and the Poor in Malawi: Economic Marginalization, Vulnerability and The Law*, (2007) 5 International Journal of Constitutional Law 258, 269.

67 For more see Thomas Pogge, *Recognized and Violated by International Law: The Human Rights of the Global Poor*, (2005) *Leiden Journal of International Law* 18/4, 717-745.

68 For more on the role of constitutional courts in transitional countries see Kim Lane Scheppele, *A Realpolitic Defense of Social Rights*, (2004) 82 *Texas Law Review* 1921, 1924-1927.

branches of government. In short, the desperate are trapped: on one hand, they do not have economic or political influence to convince the governments to end infringements on their social and economic security, while on the other hand, the courts deny adjudicating their claims about infringement of their economic security by the political branches of government.⁶⁹ So, who represents the interests of the needy?

I tend to agree with Michelman who claims that if we accept the moral obligation to provide for citizens' basic needs regardless of how we believe the obligation should be fulfilled, then creating constitutional welfare rights both legitimates the obligation and establishes a right of social citizenship in the polity.⁷⁰

Why do rights matter here? They matter not only because rights speak about the needy, underlying their autonomy and dignity, but also because they are about inclusion. In the process of digging the poor out of poverty, rights can create movements and public support. Recall the impacts of the rights approach in the race reform during the 1950s in the US. Other Americans took for granted rights that were systematically denied to the African Americans. At the end, the rights strategy included the African Americans in the American society.⁷¹

Some may claim that this example does not work in favor of constitutional welfare rights because the problem of the African Americans was a consistent denial of equality, which could be subjected to judicial review, while the problem of the poor was socio-economic security which was the concept incompatible with judicial enforcement.

As Tushnet argues, the enforceability problem should not delegitimize social and economic rights.⁷² Moreover, judicial interpretation of welfare rights entails a similar process as the interpretation of provisions on classical civil rights and liberties. For example, a court is just as able to define an "adequate housing" as it can define "cruel and unusual" punishment. If the latter task does not require a court to "legislate,"

69 Julie A. Nice, *No scrutiny Whatsoever: Deconstitutionalization of Poverty, Law, Dual Rules of Law & Dialogic Default*, (2008) 35 Fordham Urban Law Journal, 629, 631-635.

70 Frank I. Michelman, *The Constitution, Social Rights, And Liberal Political Justification*, (2003) 1 International Journal of Constitutional Law, 13, 14-16.

71 On the same line, see Nice, *supra* note 68, 662.

72 Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, (2004) 82 Texas Law Review 1895, 1895.

neither does the former. Therefore, just as it is appropriate for a court to determine that a legislature has gone too far, it is appropriate for a court to determine that a legislature has not gone far enough.⁷³

A method of interpretation is however a separate issue. The examples used in this paper show that new paradigms of judicial enforcement of economic and social rights have emerged: the application of non-enforceable “directive principles” of state policy; constitutional protection in a bill of rights and protection of socio-economic rights through traditional civil rights guarantees. In addition, the government’s duties to satisfy a minimum agenda of social and economic rights can be subjected under judicial control not only by traditional legal remedies but also by means of an abstract judicial review or group actions.⁷⁴

On the other hand, it is not enough to reduce constitutional protection of social and economic rights only to the issue of formal equality as the Serbian and Bulgarian constitutional courts have done. Although discrimination and deprivation often go together, the two concepts differ in important ways as Harvard professor Michelman suggested long time ago.⁷⁵ In elaborating this view, he drew a distinction between “discrimination”, that is the harm that lies in the stigmatic or dignitary offense caused by governmental classification and “deprivation”, that is the harm that lies in the non-satisfaction of certain needs as and when they occur. Remedy for deprivation, Michelman argues, need not entail or suggest any ‘equalization’ of treatment or circumstances” but adequate provision. Whereas claims of discrimination against the poor tend to draw into question the free-market premises, attacking poverty-related needs as unjust “deprivation” is less radical.⁷⁶ On the minimum welfare view, “a state’s duty to the poor ...is not to avoid unequal treatment at all, but rather to provide assurances against certain hazards associated with impecuniousness which even a society strongly committed to competition and incentives would have to find unjust”.⁷⁷

In addition, judicial enforcement of welfare rights need not necessarily always create a separation of powers issue. To have

73 Feldman, *supra* note 32, 1084-1085.

74 For more see in Fabre, *supra* note 22.

75 Frank I. Michelman, *The Supreme Court, 1968 Term: Foreword: On protecting the poor Through the Fourteenth Amendment*, (1969) 83 Harvard Law Review 7, 10-13.

76 Ibid. 13-11, 27-32.

77 Ibid. 13-16.

constitutional meaning, constitutionalized welfare rights need not imply strong individual remedies. Recall here the approach of the South African Constitutional Court: in the right to adequate housing case, it did not declare that the Constitution guaranteed this right to everybody, nor did it require from the government to allocate budgetary funds in a certain manner; rather it declared that the government's measures regarding realization of the right to shelter were unreasonable and as such unconstitutional. A finding of unconstitutionality merely sets the legislative process in motion by requiring the legislature to devise new measures. Welfare rights serve primarily to demarcate the duties of the state to its citizens. While courts should not set economic priorities - it is a job of legislators, they may establish the parameters within which legislative action must proceed without exceeding their constitutional mandate.

Conclusions

The comments in this paper are made in light of the fact that each day, some 50 000 human beings – mostly children, mostly female and mostly people of color – die from starvation, diarrhea, pneumonia, tuberculosis, malaria, measles, perinatal conditions and other poverty-related cases.⁷⁸ On the other hand, the vast majority of the modern constitutions lay down generous provisions on socio-economic security either in terms of state objectives or programmatic measures or bill of rights. So far, in most cases such provisions have proved to be empty promises. A number of constitutional courts that have engaged in reviewing the government's welfare measures have not been much aggressive in enforcing welfare rights; most of them have routinely reviewed claims regarding socio-economic security and have been mostly deferential to the will of legislators.

While many think that remedies for infringement upon socio-economic security should be fixed in the democratic process, I find that constitutional welfare provisions might be effectively vindicated through constitutional adjudication, as well. Having in mind the conceptual difficulties and in particular the budgetary constraints regarding realization of welfare rights, the tests and methods of adjudications need not be automatically equated with those employed in the interpretation of civil

⁷⁸ Pogge, *supra* note 66.

and political rights, but should be developed in a way which would allow courts to examine, within their constitutional mandate, whether the governments have fulfilled their constitutional duty to meet the socio-economic needs of their citizens. So the appropriate strategy is not to declare social and economic rights unjusticiable but to develop new methods for their adjudication. Some examples offered in this paper have shown that constitutional adjudication is for better rather than for worse of legislative politics when it comes to the interests of the poor. This is especially true when the rights to minimum income, health care, adequate housing and education, which are indispensable for transforming lives of the poor, are at stake. I have also argued that the major test to assess anti-poverty claims should not be reduced to inequality and discrimination but rather to the issue of deprivation, because poverty is predominately the issue of socio-economic security and less of equality.

Will the constitutional courts thus become the legislator of the welfare state? Will they run the government? In my view it is a certain ideology that renders constitutional courts incapable of adjudication anti-poverty claims rather than institutional and competence concerns. Within their constitutional mandate there is enough room for them to become a meaningful voice of the needy. The competence concerns appear to be redundant in the presence of the fact that judges generally lack any pre-bench experience in criminal justice or civil law matters or as a matter of fact in any other area of judicial adjudication.

Finally, it certainly follows that a constitutional court cannot, in the ordinary course of things, direct redistribution of the wealth. Key redistribution of global wealth will not be won in the courts. But what the courts can do is to give meaning to social and economic rights in the context of democracy and free market economy.

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DA LI JE SMANJENJE SIROMAŠTVA ZADATAK USTAVNIH SUDOVA?

Borba protiv siromaštva, razvoj i primena strategija njegovog smanjenja, prioritetni su ciljevi globalnih i regionalnih međunarodnih organizacija kao i njihovih država članica. Pored država i međunarodnih organizacija, danas su prepoznatljivi donatori i ekstremno imućni pojedinci, profesionalni sportisti i šou zvezde. Pitanje je, međutim, ko i čije strategije mogu postati ključ za rešavanje problema siromaštva i doprineti pravednijoj raspodeli dobiti i bogatstva, kako na globalnom tako i na nacionalnom nivou. S jedne strane, nesumnjivo je da su uspešni primeri u borbi protiv siromaštva globalne inicijative, poput Milenijumske deklaracije UN, zemlje donatori, verske humanitarne organizacije, imućni pojedinci, kao što je Džordž Soroš ili holivudske zvezde, kao što je Anđelina Džoli. S druge strane, pitanje je da li njihove aktivnosti više doprinose potrebama ugroženih grupa, na primer onih čiji su prihodi ispod 1.25\$ dnevno, ili, indirektno, više potenciraju plemenite interese donatora. Polazeći od interesa najsiromašnijih, autor u ovom radu ukazuje na potencijalnu ulogu koju u borbi protiv siromaštva mogu imati ustavni sudovi kao mehanizmi sudske zaštite socijalnih i ekonomskih prava. Iako ustavni sudovi ne mogu uticati na raspodelu dobiti na globalnom nivou, oni mogu dovesti do željenih društvenih promena tako što će efikasnijom kontrolom implementacije određenih ljudskih prava i sloboda obezbediti uključanje najsiromašnijih i drugih marginalizovanih grupa u društveni život. Podsećajući na to da su sudovi SAD putem „govora ljudskih prava“ uključili Afro-Amerikance u američko društvo, autor ukazuje da se uloga ustavnih sudova u smanjenju siromaštva, naročito u zemljama u razvoju i tranzicionim društvima, može pokazati značajnijom nego što to na prvi pogled izgleda.

Ključne reči: siromaštvo, socijalna i ekonomska prava, ustav, ustavni sudovi.