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Source: *The Modern Law Review*, JULY 2011, Vol. 74, No. 4 (JULY 2011), pp. 532-554

Published by: Wiley on behalf of the Modern Law Review

Stable URL: https://www.jstor.org/stable/20869092

The Death of Socio-Economic Rights

Paul O'Connell*

Over the last decade, apex courts in Canada, India, and South Africa – which have traditionally been viewed as socio-economic rights friendly – have issued judgments fundamentally at variance with the meaningful protection of socio-economic rights. This jurisprudential turn can be understood as part of a *de facto* harmonisation of constitutional rights protection in the era of neo-liberal globalisation. These national courts, although dealing with idiosyncratic domestic constitutional systems, have nonetheless begun to articulate analogous conceptions of fundamental rights which are atomistic, 'market friendly' and, more broadly, congruent with the narrow neo-liberal conception of rights, and consequently antithetical to the protection of socio-economic rights. This view of rights is becoming, well established as the hegemonic view and the pre-eminence of this view, taken with the entrenchment of neo-liberal policy prescriptions – and tacit judicial approval of such policies – signals the end, in substantive terms, for the prospect of meaningful protection of socio-economic rights.

The debate about whether or not socio-economic rights should be constitutionally entrenched – and judicially enforceable – has led to much ink being spilt over the last thirty years or more.[1] For some this debate has now, for the most part, been resolved; and the broad consensus view has emerged that socio-economic rights are 'real rights' and should be justiciable in the same way as civil and political rights are.[2] To an extent this view is buttressed by developments at the interna-

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1 For illustrative examples of the different perspectives in this debate see: F. Michelman, 'Welfare Rights in a Constitutional Democracy' (1979) *Washington University Law Quarterly* 659; A. C. Pereira-Menaut, 'Against Positive Rights' (1988) 22 *Valparaiso University Law Review* 359; H. Schwartz, 'Do Economic and Social Rights Belong in a Constitution?' (1995) 10 *American University Journal of International Law and Policy* 1233; C. Fabre, *Social Rights Under the Constitution* (Oxford: Oxford University Press, 2000); A. Eide, 'Economic, Social and Cultural Rights as Human Rights' in A. Eide, K. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (The Hague: Martinus Nijhoff, 2nd ed, 2001) 9; M. Dennis and D. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 98 *American Journal of International Law* 462; and A. Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1.

2 Such optimism is exemplified by Langford's claim that 'It is arguable that one debate has been resolved, namely whether economic, social and cultural rights can be denied the status of human rights on the basis that they are not judicially enforceable'; M. Langford, 'The Justiciability of Social Rights' in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 3, 4; similarly Henrard has recently argued that 'the recognition of the justiciability of economic, social and cultural rights is growing and becoming stronger by the day': K. Henrard, 'Introduction: The Justiciability of

 (2011) 74(4) MLR 532–554

Published by Blackwell Publishing, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA

tional level, where the recent adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) seems to signal the final coming of age for socio-economic rights.[3] And by the conscious entrenchment of socio-economic rights in certain national constitutions, most notably the South African, as well as a bourgeoning socio-economic rights jurisprudence in a number of jurisdictions, again most notably in South Africa, but also in Latin America.[4]

While, on one level, these developments are to be welcomed, there is nonetheless cause for concern regarding the fate of socio-economic rights. Put simply, there is the very real danger that in the era of neo-liberal globalisation, socio-economic rights, despite progress in their formal recognition and even entrenchment, are being fundamentally undermined and rendered nugatory by a pincer movement involving both the discursive and material negation of the value of such rights.[5] At the discursive level, Katarina Tomaševski wrote a number of years ago that there was a need to defend all socio-economic rights 'against distortions, not only denials and violations'.[6] In the contemporary era such distortions take the form of recasting socio-economic rights into 'market friendly', consumerist norms and, among other things, the reduction of entrenched socio-economic rights to formal, procedural guarantees, rather than substantive material entitlements.[7]

ESC Rights and the Interdependence of All Fundamental Rights' (2009) 2 *Erasmus Law Review* 373, 377. In contrast Barak-Erez and Gross argue that 'despite the renewed consensus regarding the interdependence of rights, the debates over the similarities and differences between the two sets of rights, and the frequent relegation of social rights to second-class status, persist': D. Barak-Erez and A. Gross, 'Introduction: Do We Need Social Rights' in D. Barak-Erez and A. Gross (eds), *Exploring Social Rights* (Oxford: Hart Publishing, 2007) 1, 6.

3 For discussion of the Optional Protocol see: C. Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8 *Human Rights Law Review* 617; L. Chenwi, 'Towards the Adoption of the International Complaints Mechanism for Enforcing Socio-Economic Rights Under the ICESCR' (2008) 9(2) *ESR Review* 20; and J. Kratochvil, 'Realizing a Promise: A Case for Ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights' (2009) 16(3) *Human Rights Brief* 30.

4 For a good introduction to the South African jurisprudence see: S. Liebenberg, 'South Africa: Adjudicating Social Rights Under a Transformative Constitution' in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 75. And in relation to some of the developments in Latin American see: M. Sepulveda, 'Colombia: The Constitutional Court's Role in Addressing Social Justice' in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 144; and F. Piovesan, 'Brazil: Impact and Challenges of Social Rights in the Courts' in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 182.

5 M. Pieterse, 'Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa' (2003) 14 *Stellenbosch Law Review* 3 argues that '[neo-liberalism] threatens to weaken socio-economic rights both on [a] discursive and structural level. Discursively it delegitimises social rights ... [and the] concrete elements and structural implications of economic globalisation and neo-liberal reform programmes further complicate the realisation of social rights'.

6 K. Tomaševski, 'Unasked Questions about Economic, Social and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998–2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson' (2005) 27 *Human Rights Quarterly* 709, 710.

7 For a discussion of this phenomenon of 'proceduralisation' in the South African context, see: D. Brand, 'The Proceduralisation of South African Socioeconomic Rights Jurisprudence, or

With respect to the material subversion of socio-economic rights, the era of neo-liberal globalisation – with its emphasis on commodification, commercialisation and privatisation – fundamentally undermines the enjoyment of basic socio-economic rights for millions of people around the world.[8] While both of these phenomena are intimately related, this article focuses on the first, and seeks to show that in the era of neo-liberal globalisation apex courts in a number of jurisdictions have engaged in a *de facto* harmonisation of domestic constitutional law with the effect of entrenching the principles of neo-liberalism,[9] and have thereby fundamentally undermined socio-economic rights. We begin by setting the broad, global context, and then move on to a number of case studies that support the general thesis, before drawing some general conclusions.

NEO-LIBERAL GLOBALISATION AND SOCIO-ECONOMIC RIGHTS

A simple point, which has arguably taken on more urgency in the contemporary era, is well made by William Twining, who recently wrote that 'in order to understand law in the world today it is more than ever important to penetrate beneath the surface of official legal doctrine to reach the realities of all forms of law as social practices'.[10] Following on from this Twining notes that thinking about law has several important functions, 'and probably [the] most important ... is the critical function, that is digging out, exposing to view, and evaluating important presuppositions and assumptions underlying legal discourse generally and particular phases of it'.[11] In the contemporary era the context in which such analysis takes place is that of a globalised, interconnected and interdependent world. The defining characteristic of the contemporary era of globalisation is well articulated by Greg Albo, Sam Gindin and Leo Panitch, who write that

> Since at least the election of Ronald Reagan in 1980, the U.S. and other states have embraced an ideology of scaling back the role of government in economic life and letting the invisible hand of the unfettered market work its magic. Rhetoric notwithstanding, this has not meant a withdrawal of the state from regulating economic activity nor from an active role in managing class relations. Instead, it has signalled the institutionalization of public policies and state regulation directed at increasing the power of the dominant capitalist firms in industry as well as financial markets and an enhanced role for markets in determining income distribution

"What are Socioeconomic Rights For?"' in H. Botha, A. J. Van Der Walt and J. C. Van Der Walt (eds), *Rights and Democracy in a Transformative Constitution* (Stellenbosch: Sun Press, 2003) 33.

8 On this see P. O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) HRLR 483; and L. Bernier, 'International Socio-Economic Human Rights: The Key to Global Health Improvement?' (2010) 14 *International Journal of Human Rights* 246.

9 Pieterse argues that under the weight of neo-liberal globalisation 'domestic judicial interpretation of civil liberties is beginning to show a distinct transnational character', see n 5 above 3. The argument here is that we can now discern a similar, and regressive, transnational jurisprudence on socio-economic rights.

10 W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009) 7.

11 *ibid* 9.

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> and public priorities. This political project has become associated in all parts of the world with the term neoliberalism.[12]

The contemporary era of globalisation, then, has not simply involved the compression of time and space associated with globalisation in popular journalistic accounts,[13] but has been fundamentally defined by the political project of neo-liberal entrenchment.[14]

Neo-liberalism, at least at a rhetorical level, posits a binary opposition between public power, the State, and private power embodied in 'the market' – the former is oppressive, inefficient and should be restrained and limited at all costs, the latter is the fount of individual freedom and wealth maximisation and should be expanded into as many spheres of individual and collective life as possible.[15] But the 'small state' rhetoric, is just that, because

> Neoliberalism is not . . . about the extent of deregulation as opposed to regulation, or holding on tenaciously to this or that public policy component. Neoliberalism should be understood as a particular form of class rule and state power that intensifies competitive imperatives for both firms and workers, increases dependence on the market in daily life and reinforces the dominant hierarchies of the world market, with the U.S. at its apex.[16]

This re-orientation of the state to serve class interests has led, in particular, to an emphasis on privatisation, deregulation and, crucially, commodification as 'the new coins of the neo-liberal realm'.[17] Arguably the key in this trilogy, which in many ways subsumes the others, is the drive towards commodification, by which is meant 'the transformation of all social relations to economic relations, subsumed by the logic of the market and reduced to the crude calculus of profit'.[18] This push towards commodification, with its concomitant privileging of the market, is routinely presented as being in the interests of both individual freedom (choice) and efficiency.[19] In truth, the ultimate rationale behind the commodification push

12 G. Albo, S. Gindin and L. Panitch, *In and Out of Crisis: The Global Financial Meltdown and Left Alternatives* (Oakland, CA: PM Press, 2010) 27.

13 See T. Friedman, *The World is Flat: The Globalized World in the Twenty-First Century* (London: Penguin Books, 2006).

14 See P. O'Connell, 'Brave New World?: Human Rights in the Era of Globalisation' in M. Baderin and M. Ssenyonjo (eds), *International Human Rights Law: Six Decades After the UDHR and Beyond* (Hampshire: Ashgate, 2010) 195, 198–207.

15 For general discussion see: D. Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005); R. Plant, *The Neo-liberal State* (Oxford: Oxford University Press, 2010); and A. Aman, 'Law, Markets and Democracy: A Role for Law in the Neo-Liberal State' (2006/2007) 51 *New York Law School Law Review* 801.

16 n 12 above 28; and Harvey, n 15 above 16–19.

17 Aman, n 15 above 808.

18 D. McDonald and G. Ruiters, 'Introduction: From Public to Private (to Public Again?)' in D. McDonald and G. Ruiters (eds), *The Age of Commodity: Water Privatization in Southern Africa* (London: Earthscan, 2005) 1, 3.

19 As Harvey observes, neo-liberalism 'holds that the social good will be maximized by maximizing the reach and frequency of market transactions, and it seeks to bring all human action into the domain of the market' see n 15 above 3. See also L. Philipps, 'Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization' (2000) 63 *Law and Contemporary Problems* 111, 115.

is to open up new areas for profitable capital accumulation by transnational economic elites.[20]

Neo-liberal globalisation thus serves the concrete material interests of a transnational economic elite,[21] and with the disembeding of capital from domestic markets and societies this elite has, in a very real sense, a shared class interest in the global imposition of neo-liberal reforms and the internalisation of neo-liberal rationality.[22] It should be stressed here that highlighting the fact that wealthy individuals and classes – as well as their institutional manifestations in corporations, business federations, think-thanks, informal gatherings and governments – have shared interests with similarly situated individuals around the world, and that these groups have, due to their wealth and connections, a disproportionate influence on policy formulation at the domestic and transnational levels, is not to imply some form of conspiracy. Rather, it is simply highlighting the basic sociological fact that members of the same class quite often have shared interests, and work together to advance those interests, and in the contemporary era these shared interests have been advanced through the embedding of neo-liberalism as a hegemonic ideology.[23]

Neo-liberalism, of necessity, carries with it very definite understandings of which rights merit respect in a market utopia, and they are, fundamentally, negative rights.[24] As Craig Scott and Patrick Macklem argue, the neo-liberal – or what they call 'the conservative' – vision of the proper content of a bill of rights

> . . . would view the inclusion of social rights as antithetical to the purpose of constitutional guarantees. Social rights generate positive obligations on the state to ameliorate certain social and economic conditions in society, whereas a conservative vision of social justice entails a constitutional imagination that views such state

20 Harvey, n 15 above 160–161.

21 On the concept of transnational capitalist class, see: W. K. Carroll and C. Carson, 'The Network of Corporations and Elite Policy Groups: A Structure for Transnational Capitalist Class Relations' (2003) 3 *Global Networks* 29; T. Fougner, 'Corporate Power in World Politics: The Case of the World Economic Forum' (2008) 2 *Journal of International Trade and Diplomacy* 97; and W. K. Carroll, 'Transnationalists and National Networkers in the Global Corporate Elite' (2009) 9 *Global Networks* 289.

22 Jeff Faux argues that as 'globalization integrates investors, managers, and professionals across borders, it merges their class interests across the same borders' creating a 'global governing class' which includes, of course, the main owners of capital around the world and 'bureaucrats, journalists, academics, lawyers, and consultants' drawn from the elites of the various countries; J. Faux, *The Global Class War* (Hoboken, NJ: Wiley, 2006) 157–163.

23 See W. Larner, 'Neo-liberalism: Policy, Ideology, Governmentality' (2000) 63 *Studies in Political Economy* 5; J. Read, 'A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity' (2009) 6 *Foucault Studies* 25; and D. Miller, 'How Neoliberalism Got Where It Is: Elite Planning, Corporate Lobbying and the Release of the Free Market' in K. Birch and V. Mykhnenko (eds), *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (London: Zed Books, 2010) 23.

24 See Harvey, n 15 above 96–112; D. Ivison, 'Pluralism and the Hobbesian Logic of Negative Constitutionalism' (1999) 47 *Political Studies* 83; J. Harris, 'Rights and Resources – Libertarians and the Right to Life' (2002) 15 *Ratio Juris* 109; and G. Pincione, 'The Constitution of Nondomination' (2011) 28 *Social Philosophy and Policy* 261.

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> intervention in market ordering as illegitimate. Constitutional rights ought to guard against, not compel, such state intervention.[25]

Scott and Macklem also note that a sharp dichotomy between positive and negative rights is central to neo-liberal opposition to socio-economic rights, as they put it

> Positive rights are typically imagined as requiring state intervention to correct for inequalities of wealth caused by market freedom, whereas negative rights are imagined as checking the growth of bureaucratic and governmental intervention into cherished areas of individual freedom. Proponents of limited government thus view positive rights as antithetical to a free and democratic society and argue that it is illegitimate for a constitution to attempt to secure their realization.[26]

The neo-liberal worldview is, thus, antagonistic to the recognition and protection of socio-economic rights at a foundational level.[27] The constitution should confine itself to providing strong protections for private property and some civil liberties. Other than that the State should refrain as much as possible from interfering in any way with the actions of the atomistic, utility maximising individual.[28]

At the behest of transnational capital, the neo-liberal conception of society and of rights is reflected in the international trading regime.[29] As David Schneiderman puts it, in the era of neo-liberal globalisation there is a conscious effort to 'fashion a global tapestry of economic policy, property rights, and constitutionalism that institutionalizes the political project called neo-liberalism'.[30] This project is effected through instruments such as the General Agreement on Tariffs and Trade (GATT), the North American Free Trade Agreement (NAFTA), and countless Bilateral Investment Treaties (BITs), and institutions such as the International Monetary Fund (IMF), World Bank and World Trade Organisation (WTO) which all seek to 'lock-in' the economic logic of neo-liberalism and the interests of global economic elites. Interestingly, for present purposes, Schneiderman also notes that

25 C. Scott and P. Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1, 26.

26 *ibid*, 45–46.

27 See, for example, R. Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974) 238; and M. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 2003) 100. As Pieterse argues 'It is . . . clear that the idea of constitutionally entrenched social rights goes contrary to several tenets of neo-liberalism' see n 5 above 14.

28 See Harvey, n 15 above 176. As Philipps puts it the 'ideal citizen of neoliberal discourse is responsible to secure his or her own welfare through market activity, family resources, and, if necessary, charity, resorting to government assistance only in the most desperate circumstances. Public services once associated with universal social rights are increasingly restricted, means-tested, and made more closely conditional upon efforts to engage in paid labour. The egalitarian vision of social citizenship, still incompletely realized, is being displaced by a norm of market citizenship in which inequalities are attributed to individual merit or failures, and social rights are displaced by economic rights to private property and free markets', see n 19 above 115–116.

29 See P. G. Cerny, 'Embedding Neoliberalism: The Evolution of a Hegemonic Paradigm' (2008) 2 *Journal of International Trade and Diplomacy* 1.

30 See D. Schneiderman, *Constitutionalizing Economic Globalization* (Cambridge: Cambridge University Press, 2007) 2.

the 'rules and values of [this] regime are also being internalized and made material within national constitutional regimes. This is being accommodated through constitutional reform *and, oftentimes, judicial interpretation*'.[31]

While, of course, the process of neo-liberal globalisation is a complex, dialectical one involving flow and counter-flow from the domestic to the transnational and back again,[32] the focus of this article is on the fact that in furthering the neo-liberal agenda national courts are expected to 'harmonize' domestic constitutional provisions with the imperatives of neo-liberal principles 'to the extent that it does not violate the literal text of the constitution'.[33] We therefore see in the era of neo-liberal globalisation 'a degree of transnational harmonisation' in the way in which courts in different jurisdictions address similar constitutional issues.[34] As we will see below, this process is particularly marked when it comes to judicial interpretations of socio-economic rights.

This convergence, or synthesising, of approaches to issues of constitutional rights, and for present purposes of socio-economic rights, is facilitated by the phenomenon of 'judicial globalization' or 'transjudicial communication'.[35] Terms which denote the friendships and networks established by judges at international colloquia, and the increasing occurrence of transnational judicial conversations on constitutional and human rights.[36] There are, at least, four objective reasons for this increasing dialogue in the contemporary era of globalisation: (i) the same or similar issues face courts in different jurisdictions; (ii) the international nature of human rights issues and the many genealogical links between national, regional and international human rights documents; (iii) advances in technology which make it easier to access comparative material; and (iv) increased personal contact among judges.[37]

But, crucially, such dialogue and harmonisation is also driven by what Anne-Marie Slaughter refers to as 'a common substantive mission' on behalf of the courts.[38] Slaughter notes that 'the creation or generation of a legal community through transjudicial communication could itself help define and strengthen common political and economic values in the states concerned'.[39] As a result, increasing 'cross-fertilization of ideas and precedents among constitutional judges

31 *ibid* 3 [emphasis added].
32 See for example the way in which socio-economic rights, first articulated at the level of international human rights law, and then domesticated in various constitutions now, through the OP-ICESCR, has embraced the language of reasonableness review which emerged in the South Africa constitutional context.
33 n 30 above 147.
34 J. E. Khushal Merkens, 'Neither Parochial Nor Cosmopolitan: Appraising the Migration of Constitutional Ideas' (2008) 71 MLR 303, 307; and see Pieterse, n 5 above.
35 See A. M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 101.
36 See C. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 199.
37 See D. Dyzenhaus M. Hunt and M. Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 23–24; and D. Law, 'Globalization and the Future of Constitutional Rights' (2008) 102 *Northwestern University Law Review* 1277, 1280.
38 n 35 above 102.
39 *ibid* 133–134.

around the world is gradually giving rise to a visible international consensus on various issues'.[40] Perhaps the best-known, and broadly positive, example in the contemporary era is the emergence of proportionality review as a veritable constitutional Esperanto for evaluating State measures which impinge on constitutional rights.[41]

What we are witnessing, in effect, is the migration of a shared substantive vision, manifested in constitutional interpretation in differing ways.[42] As Choudhry notes, the migration of such ideas is 'often covert and illicit',[43] so in this sense what we are talking about here does not necessarily denote a conscious and explicit effort on behalf of courts to harmonise their domestic constitutional praxis with respect to socio-economic rights, but rather a tacit and intuitive move in this direction. The form taken by judicial interpretations of fundamental rights which privileges the neo-liberal project is, generally, twofold. On the one hand courts, in so far as possible, interpret constitutional rights as liberty interests, and portray the relevant constitution as a charter of negative liberties guaranteeing, at best, procedural protection of socio-economic rights.

Where, however, there is some textual commitment to socio-economic rights – or, alternatively, some prior judicial practice of protecting socio-economic rights – and socio-economic rights claims are asserted against the pursuit of neo-liberal policies by the government, the courts embrace a deferential standard of review which, in essence, amounts to tacit approval of the impugned policies.[44] That domestic superior courts should privilege the interests of their own ruling class should not surprise us at all,[45] what is interesting about the current experi-

40 A. M. Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191, 202. The contours of this consensus, insofar as socio-economic rights are concerned, are sketched by Hirschl, who argues that: 'All of the fundamentals of neo-liberal social and economic thinking (such as individualism, deregulation, commodification of public services, and reduced social spending) owe their origins to the same concepts of antistatism, social atomism, and strict protection of the private sphere that are currently enjoying dominance in the discourse of rights . . . national high courts in the world of this new constitutionalism are inclined to support claims for procedural justice and less state interference with the private sphere and are generally hostile toward claims for positive entitlements, substantive equality, state regulation, and workers rights'; R. Hirschl, *Towards Juristocracy* (Cambridge, MA: Harvard University Press, 2004) 147–148.

41 On the diffusion of proportionality, and the role which individual jurists played in promoting it, see A. Stone Sweet and J. Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72.

42 On the notion of migration of constitutional ideas see: S. Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 1.

43 *ibid* 21.

44 In this sense Frank Michelman, writing in the US context, argued that a formalistic adherence to certain constitutional principles in the face of substantially changed material circumstances could be read as concealing an ideological predisposition in favour of the impugned policy; F. Michelman, 'W(h)ither the Constitution' (2000) 21 *Cardozo Law Review* 1063, 1082–1083. We could, with some confidence, extend Michelman's general observation to courts around the world. The basic idea being that, when it suits them, the courts can, and do, use rigid adherence to formalistic notions of deference to conceal their own ideological and policy preferences, which almost invariably coincide with those of the domestic and global economic elites.

45 As Harvey notes 'Class bias in decision-making within the judiciary is, in any case, pervasive if not assured', n 15 above 78; see also D. Kennedy, *A Critique of Adjudication (fin de siécle)* (Cambridge MA: Harvard University Press, 1997) 14.

ence is that apex courts in diverse constitutional settings are converging towards a shared approach, in substance at least, to socio-economic rights which has the net effect of locking in and advancing the interests of transnational economic elites.[46]

IRELAND AS ARCHETYPE

At a foundational level the negative, market friendly conception of rights and constitutionalism, which has become hegemonic in the contemporary era, finds its origins in US constitutionalism.[47] However, in terms of the thesis advanced here, the Irish experience provides an archetypal example of a constitutional order in which the courts, so as to advance and entrench the global neo-liberal project, have obviated the potential of socio-economic rights. Therefore it is with the Irish experience that we begin. The Irish Constitution, as enacted, was by no means a revolutionary or transformative document; in fact in many ways it was markedly conservative. However, for reasons not unrelated to the Irish experience under British rule, the Constitution did contain a catalogue of fundamental rights, and explicitly empowered the courts to enforce these rights.[48]

For the most part the rights protected by the Constitution fall into the category of civil and political rights, with the main socio-economic right guaranteed under the Constitution – the right to primary education – reflecting an historical compromise between the Church and State, rather than any substantive commitment to socio-economic rights and the interests associated with them.[49] In the absence of more generous provision for socio-economic rights a number of avenues have been explored to expand the protection of socio-economic rights under the Constitution; either through reliance on the doctrine of unenumerated personal rights,[50] through an expansive reading of the Directive Principles of Social Policy (DPSP),[51] through the general guarantee of equality under the

46 Where Slaughter sees, at worst, a benign exchange between courts, and at best a progressive sharing of views and harmonisation, she fails to acknowledge that this process is not neutral, but serves specific class interests, namely those of the transnational economic and ruling elite. As Faux notes, in the current era of globalisation 'the vacuum created by the absence of global government is being filled by transnational bureaucratic networks' who seek to give effect to the principles that advance the interests of global elites, and chief among them are judicial networks, see n 22 above 169–170.

47 n 30 above 223.

48 As former Chief Justice O'Dálaigh put it: 'If our Constitution ... adopted the theory of the tripartite separation of the powers of government with express limitations on the powers alike of the Legislature and Executive over the citizen, the reason is not unconnected with our previous experience under an alien government where parliament was omnipotent and in whose executive lay wide reserves of prerogative power'; *Melling* v *Ó Mathghamhna* [1962] IR 1, 39.

49 See G. Quinn, 'Rethinking the Nature of Social, Economic and Cultural Rights in the Irish Legal Order' in C. Costello (ed), *Fundamental Social Rights: Current European Legal Protection & the Challenge of the EU Charter of Fundamental Rights* (Dublin: Irish Centre for European Law, 2001) 35, 49.

50 For discussion see: A. Nolan, 'Ireland: The Separation of Powers Doctrine vs. Socio-Economic Rights?' in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 295.

51 See G. Carey, 'The Constitutional Dilemma of Article 45: An Avenue for Welfare and Social Rights?' (1995) 5 *Irish Student Law Review* 78.

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Constitution,[52] or by way of amendment.[53] All of these avenues have, to date, proved unsuccessful.

Nonetheless, the guarantee of free primary education in Article 42 of the Constitution, alongside the implied right of 'at risk' children to be placed in the care of the State in extreme circumstances,[54] generated a substantial body of case law, particularly in the mid to late-1990s.[55] In response to which the Irish Supreme Court, in 2001, delivered two of the most significant recent judgments in Irish constitutional jurisprudence: *Sinnott* v *Minister for Education* (*Sinnott*) and *TD* v *Minister for Education* (*TD*). The cases dealt, respectively, with the State's obligation to provide education for severely disabled people,[56] and the State's obligation to provide for the needs of at risk children, whose parents, for one reason or another, had failed to do so.[57] More broadly, however, these two cases were fundamentally about the extent to which the courts would enforce rights against the elected branches of government, where such enforcement imposed a positive obligation on the state to provide certain services. The two cases were, ultimately, about whether or not the Irish courts would protect socio-economic rights, and if so, in what way. In over-turning the respective High Court orders in both cases, the Irish Supreme Court sent out a clear message: the Irish Constitution was a charter of negative liberties, and socio-economic rights, although laudable aspirations, were not a matter for the courts, but, rather, should be left to the elected branches of government.[58]

In both of the cases the respective High Court judges had issued somewhat novel mandatory orders, directing the State to expend resources for specific purposes within a set timeframe. The overarching narrative, then, of the Supreme Court judgments in over-turning these judgments was that the orders in question fundamentally undermined the constitutionally mandated separation of powers.[59] However, while this was the stated reason for the majority judgments it was not, of course, the full picture. Two key points are worth noting: (i) the conception of the separation of powers approved by the majority in the two cases was extremely rigid and formalistic and is not necessarily consonant with the design of the Irish Constitution, or one of the important philosophical

52 See R. O'Connell, 'From Equality Before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution' in O. Doyle and E. Carolan (eds), *The Irish Constitution: Governance and Values* (Dublin, Thomson Round Hall, 2008) 327.

53 See the Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationary Office, 1996) 235–236.

54 See Articles 42.1 and 42.5 of the Constitution and *FN* v *Minister for Education* [1995] 1 IR 409.

55 For an overview of these cases see: G. Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Dublin: Institute of Public Administration, 2002) 177–215.

56 *Sinnott* v *Minister for Education* [2001] 2 IR 241.

57 *TD* v *Minister for Education* [2001] 4 IR 545.

58 See G. Hogan and G. Whyte, *Kelly's The Irish Constitution* (Dublin: Lexis-Nexis, 4th ed, 2003) 104 who note that the Irish judiciary have come to view the separation of powers through the 'prism of liberal democracy' and that 'Within this philosophical tradition, rights are viewed essentially as negative immunities, protecting personal autonomy from an encroaching State, rather than as positive guarantees designed to facilitate the participation of every citizen in society. Operating within this paradigm, Irish judges have shown considerable reluctance to extend constitutional protection to positive socio-economic rights, arguing that this is essentially a matter for the other organs of State'.

59 See, for example, n 56 above 707–710 and n 57 above 358 per Hardiman J.

influences on the Constitution (Christian democracy);[60] and (ii) a number of judges in the majority expressed their clear opposition to socio-economic rights, or positive rights, in any shape or form,[61] thus re-casting the Constitution (arguably against the explicit text),[62] as essentially a charter of negative liberties and thus displaying a normative preference for the limited constitutionalism of neo-liberalism.

It should also be borne in mind that these decisions were delivered at a time at which one of the parties in government in Ireland was the only 'openly neo-liberal party' in the state,[63] which was successfully spearheading a program of privatisation and other neo-liberal reforms. And in many respects, particularly given the political affiliation of the lead judge in the majority in both cases, the judgments could be seen to have captured the *zeitgeist* of Ireland's elite, which obviously resonated with that of the global elite. In light of the judgments in *Sinnott* and *TD* there appears to be little likelihood of socio-economic rights being further recognised and enforced at a constitutional level in Ireland in the foreseeable future.[64] It may well be, as Tim Murphy argued some years before the *Sinnott* and *TD* judgments, that this was always likely to be the case given the nature of the Constitution and of Irish politics. As he puts it

> The essential reason, why [socio-economic] rights are not afforded constitutional protection in Ireland is because the state and its institutions (including the judiciary and virtually all of the political parties) are committed to a form of liberal-capitalist economic system which tacitly incorporates [inequality and poverty] ... Any movement to a situation where substantive economic rights were recognised and protected would have at least the *potential* to undermine, ideologically and perhaps practically as well, that mode of production.[65]

But the fact remains that there was scope, both textual and normative, to develop greater protection for socio-economic rights in Ireland, should the will exist. The fact that the courts have eschewed this approach sets out the Irish experience – of the Supreme Court opting for a formalistic and rigid conception of the separation of powers so as to entrench a neo-liberal vision of the Constitution – as an archetypal example of practices we see adopted across a range of jurisdictions in the contemporary era.

60 See G. Whyte, 'The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman' (2006) 28 *Dublin University Law Journal* 1; Cf A. Hardiman, 'The Role of the Supreme Court in Our Democracy' in F. Mulholland (ed), *Political Choice and Democratic Freedom in Ireland* (Donegal, 2004) 32.

61 See, for example, n 56 above 316–317 per Murphy J.

62 See O. Doyle, *Constitutional Law: Text, Cases and Materials* (Dublin: Clarus Press, 2008) 375.

63 See E. Hazelkorn and H. Paterson, 'The New Politics of the Irish Republic' (1994) 207 *New Left Review* 49, 58.

64 Indeed the subsequent change in the composition of the government has not resulted in any discernible shift in the viewpoint of the Supreme Court, see: *Magee* v *Farrell* [2009] IESC 60 in which the Supreme Court definitively rejected the notion that the Constitution guaranteed the right to civil legal aid for indigent litigants, but confirmed the 'common sense' position that where individual liberty is at stake, the Constitution did confer a right to criminal legal aid.

65 T. Murphy, 'Economic Inequality and the Constitution' in T. Murphy and M. Twomey (eds), *Ireland's Evolving Constitution, 1937-1997: Collected Essays* (Oxford: Hart Publishing, 1998) 163, 179.

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CANADA: A *CHARTER* OF LUXURIES

Next we look at the Canadian experience. Canada's transition from a system of parliamentary supremacy, to a constitutional order in which the courts are empowered to curtail the exercise of governmental power through the enforcement of an entrenched Bill of Rights, was one of the first in a modern era that has seen the gradual abandonment of 'pure' parliamentary sovereignty and the concomitant ascent of judicial power.[66] Although primarily concerned with the protection of civil and political rights, the *Canadian Charter of Rights and Freedoms* (the *Charter*),[67] contains two potentially promising routes for providing protection for socio-economic rights: the guarantee of equality in section 15 and the rights to life and security of the person contained in section 7.[68] For equality and social justice campaigners, the adoption of section 15 of the *Charter* carried with it the promise of substantive equality, and of rights guarantees reaching beyond formal commitments and addressing the material circumstances of people's lives.[69] In two judgments in the mid-1990s the Canadian Supreme Court appeared to vindicate this faith, by holding, in essence, that section 15 entrenched a uniquely Canadian notion of substantive equality,[70] which could in certain circumstances impose positive obligations on the State.[71] In light of these judgments it seemed inevitable, for some, that the recognition of positive obligations flowing from section 15 would lead, logically, to the recognition of substantive socio-economic rights. As Gwen Brodsky and Shelagh Day put it '[once] we recognize the extent to which it has already been accepted that positive government obligations flow from *Charter* rights, the resistance to such obligations in the economic sphere should abate'.[72]

66 For general discussions of this phenomenon see: Hirschl, n 40 above; and J. Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 *Law and Contemporary Problems* 41.

67 For a general introduction to developments in Canadian constitutional law leading up to the adoption of the *Charter* see P. J. Monahan, *Constitutional Law* (Toronto: Irwin Law Inc, 3rd ed, 2006) 4–10 and P. Hogg, 'Canada's New Charter of Rights' (1984) 32 *American Journal of Comparative Law* 283; on the *Charter*, generally, see: R. Sharpe and K. Roach, *The Charter of Rights and Freedoms* (Toronto: Irwin Law Inc, 3rd ed, 2005).

68 See M. Jackman, 'From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through *Charter of Rights* Review' (1999) 14 *Journal of Law and Social Policy* 69, 79 and D. Wiseman, 'Methods of Protection of Social and Economic Rights in Canada' in F. Coomans (ed), *Justiciability of Economic and Social Rights* (Antwerp: Intersentia, 2006) 173, 186 who argues that 'Lacking any express mention, protection of labour, housing, health and social assistance rights relies entirely upon judicial interpretation of the Charter's guarantees of freedom of association . . . the right to life, liberty and security of the person . . . and the right to equality . . . The phrases used in these sections are sufficiently open-textured that there is at least the potential that they can be interpreted as protecting social and economic rights'.

69 See B. Porter, 'Expectations of Equality' (2006) 33 *Supreme Court Law Review* 23, 29.

70 G. Brodsky, 'Constitutional Equality Rights in Canada' (2001) *Acta Juridica* 241, 241.

71 See *Eldridge* v *British Columbia* [1997] 3 SCR 624 and *Vriend* v *Alberta* [1998] 1 SCR 493. For discussion of the two see: B. Porter, 'Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*' (1998) 9(3) *Constitutional Forum* 71.

72 G. Brodsky and S. Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 *Canadian Journal of Women and the Law* 185, 208. There were others, however, who sounded a more cautious note, see: M. Young, 'Change at the Margins: *Eldridge v British Columbia (A. G.)* and *Vriend v Alberta*' (1998) 10 *Canadian Journal of Women and the Law* 244.

However, such optimism (or confidence) proved to be unfounded. In the subsequent case of *Auton* v *British Columbia* (*Auton*), in which parents of children with autism sought to require the State, under section 15, to provide their children with a specific form of treatment, the Supreme Court – under the leadership of Chief Justice McLachlin – held that section 15 was in fact only implicated where the State had acted in a discriminatory manner.[73] Section 15 would not be implicated if the State failed to act completely, that is to say if, as in the instant case, the State did not positively provide a specific service, the court would not impose a positive obligation under section 15. Commenting on *Auton*, Porter notes that in the decision 'we see worrying signs that the McLachlin Court may in fact wish to increase the divide between expectations and the Court's approach by closing the door on a positive rights approach to section 15 that was quite explicitly left open in *Eldridge* and *Vriend*'.[74] Porter further criticises the Court for reverting to 'the kind of non-discrimination analysis that had been rejected during the drafting of section 15',[75] and argues that the decision 'represents an unprecedented betrayal of the expectations of equality seekers that the right to equality ought to mean something to those who have unique and significant needs'.[76] Without necessarily adopting the language of betrayal, it can be said that the Court in *Auton* drew a line in the sand, and fundamentally limited the potential of section 15 to provide protection for socio-economic rights which it had been hoped it would, it also served to reinforce the view of the *Charter* as a fundamentally negative instrument.[77]

Even more significantly in the Canadian experience, is the decision of the Supreme Court in the *Chaoulli* case.[78] In a number of earlier cases the Supreme Court had left open the possibility that section 7 could be interpreted as providing for the protection of certain positive rights,[79] however in the *Gosselin* case the Court appeared to pour cold water on this prospect, preferring to frame section 7 as, for the most part, a negative guarantee of individual autonomy.[80] In *Chaoulli*, however, the Court took the idea of individual autonomy and inviolability to a real, and controversial,[81] extreme in holding that a provincial ban on insurance to provide private health care was in breach of rights protected in the provincial human rights

73 *Auton (Guardian* ad litem *of)* v *British Columbia (Attorney General)* [2004] 3 SCR 657.
74 n 69 above 38.
75 *ibid* 39.
76 *ibid* 40.
77 Some Canadian commentators had consistently argued that the *Charter* was never likely to extend protection beyond core negative freedoms into the realm of material deprivation and inequality, see: J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).
78 *Chaoulli* v *Quebec (Attorney General)* [2005] 1 SCR 791 (*Chaoulli*).
79 See *Singh* v *Minister of Employment and Immigration* [1985] 1 SCR 177, [46–47], *Slaight Communications Inc* v *Davidson* [1989] 1 SCR 1038, 1056-1057 and *Irwin Toy Ltd* v *Quebec* [1989] 1 SCR 927, 1003–1004.
80 *Gosselin* v *Quebec (Attorney General)* [2002] 4 SCR 429 (*Gosselin*) at [81] per McLachlin CJ; the judgment is discussed in D. Matas, '*Gosselin v Quebec (Attorney General)*: Is Starvation Illegal? The Enforceability of the Right to an Adequate Standard of Living' (2003) 4 *Melbourne Journal of International Law* 217; and G. Brodsky, '*Gosselin v Quebec (Attorney General)*: Autonomy With a Vengeance' (2003) *Canadian Journal of Women and the Law* 194.
81 As King puts it *Chaoulli* 'may well be the most controversial case yet decided under the *Charter*'; J. King, 'Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision' (2006) 69 MLR 631, 620.

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charter and, for three members of the majority, the federal *Charter*. The fundamental rationale for the majority was that delays in the single-tier, public health system could potentially place individuals health and life at risk, and therefore not allowing those individuals who could, through their purchasing power, exit the public system and pay for private health care constituted an impermissible interference with the right to personal inviolability and security of the person under section 1 of the *Quebec Charter*. Arguably of more significance, three of the judges in the majority, led by McLachlin CJ, held that while the *Charter* did not confer a freestanding, positive right to health care, the prohibition on private health care, in the context of significant delays in the public system, did constitute an unjustifiable interference with the life and security of the person guaranteed by section 7.[82]

The decision of the majority in *Chaoulli* provoked uproar, and many critics of the decision argue that it represents a clear expression of judicial privileging of the ideology neo-liberalism, which some would argue was latent in the *Charter* from the outset.[83] In Bruce Porter's memorable phrase, the Court had, in effect, recognised a right to health, but only for those who could afford it.[84] The Canadian experience, thus, provides another example of a constitutional order in which the apex Court has opted for an interpretive approach which limits the transformative and re-distributive potential of socio-economic rights claims, but which also shamelessly asserts, in the strongest terms, a consumer right to exit the public health care system and shop around.

SOCIO-ECONOMIC RIGHTS IN INDIA: SWINGS AND ROUNDABOUTS

The Indian Constitution, in large part because of the influence of Jawaharlal Nehru, was intended to be a transformative document, and was infused with a commitment to three over-arching themes: 'protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; *and fostering a social revolution to better the lot of the mass of Indians*'.[85] It was, however, intended that in terms of socio-economic transformation the elected representatives of the people would take the lead, thus the Indian Constitution contains mainly guarantees of civil and political rights, augemnted by Directive Principles of State Policy (DPSP) intended for the guidance of the elected branches of government. Notwithstanding this, the Indian courts, and the Supreme Court

82 *Chaoulli*, n 78 above at [104], [107–108] and [124] per McLachlin CJ.

83 See A. Petter, 'Wealthcare: The Politics of the *Charter* Revisited' in C. Flood, K. Roach and L. Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 116; A. Hutchinson, 'Condition Critical: The Constitution and Health Care' in C. Flood, K. Roach and L. Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 101; and B. Porter, 'A Right to Health Care in Canada: Only if You Can Pay for It' (2005) 6(4) ESR *Review* 8, 11, who criticises an 'increasingly neo-liberal Supreme Court'.

84 See Porter, n 83 above.

85 G. Austin, *Working a Democratic Constitution: The Indian Experience* (New Delhi: Oxford University Press, 1999) 6 [emphasis added]; these various commitments encompass what Austin refers to as the 'seamless web' of Indian constitutionalism.

in particular, embarked in the mid-1970s on a 'series of unprecedented and electrifying initiatives',[86] which cumulatively have come to be known as the court's Public Interest Litigation (PIL) jurisdiction. From the earliest PIL cases the judges of the Supreme Court emphasised that the purpose of this new initiative was to strenghten the protection of the socio-economic rights of India's poor and excluded.[87] Following on from this the Supreme Court, in the heyday of PIL, embraced an expansive understanding of the content of the right to life under Article 21 of the Constitution, so as to encompass rights to 'the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms'.[88]

The Supreme Court subsequently reaffirmed the existence and importance of the rights to health, shelter and education in various cases.[89] Particularly significant, for present purposes, was the litigation in which the Court recognised a right to free primary education, and the way in which the Supreme Court's judgments in this respect led to a constitutional amendment to explicitly entrench the right to education in the Constitution.[90] Of particular note in these judgments was the observance of a number of the judges that because of its nature as a fundamental right, education could not be considered as a commodity. For example in the *Mohini Jain* case Kuldip Singh J held that for-profit educational institutions were 'contrary to the constitutional scheme and ... wholly abhorrent to the Indian culture and heritage', he further held that 'education in India has never been a commodity for sale'.[91] Similarly in *Unni Krishnan* Jeevan Reddy J held that '[trade] or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country'.[92] The Supreme Court thus took a strong stand against the idea of education, and one would think by extension any other basic service implicated by socio-economic rights, as a commodity – in effect the Court posited a binary opposition between socio-economic entitlements as fundamental rights and as consumer products, and placed the Indian Constitution firmly on the side of the former.

Around the same time, in a case which concerned an individual who had fallen from a train in Calcutta and suffered extensive head injuries, but had been refused

86 M. Galanter and J. Krishnan, '"Bread for the Poor": Access to Justice and the Rights of the Needy in India' (2004) 55 *Hastings Law Journal* 789, 795.

87 As Bhagwati J observed in *S.P. Gupta* v *Union of India* (1981) Supp SCC 83, 'it is necessary to democratise judicial remedies, remove technical barriers against easy accessibility to justice and promote public interest litigation so that the large masses of people belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socioeconomic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes'.

88 See *Francis Coralie Mullin* v *The Administrator, Union Territory of Delhi* [1981] INSC 12 (13 January 1981).

89 For general discussions of India's socio-economic rights jurisprudence see: S. Muralidhar, 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 102.

90 See *Miss Mohini Jain* v *State of Karnataka* [1992] INSC 184 (30 July 1992) and *Unni Krishnan* v *State of Andhra Pradesh* [1993] INSC 60 (4 February 1993).

91 *ibid.*

92 *ibid.*

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access to several public medical facilities on the basis that they were either ill-equipped to treat his condition or did not have free beds, the Court held that

> The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligation undertaken by the Government in a welfare state. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in [a] violation of his right to life guaranteed under Article 21.[93]

The Court therefore read timely access to emergency medical treatment as a minimum core of the right to health derived from Article 21 of the Constitution. As well as awarding the applicant damages, the Court also issued a declaration requiring the State to implement a comprehensive plan to improve availability of and access to emergency medical treatment.

Ironically, it was at the very moment that the Supreme Court was making these strong, pro-socio-economic rights pronouncements that the Indian State began to embrace the logic of neo-liberalism.[94] Since then, the attitude of the Supreme Court has, in large part,[95] shifted into alignment with the narrow neo-liberal view of constitutional rights. As Prashant Bhushan puts it the trend of Supreme Court judgments in recent years suggests that the Court's

> . . . liberal and expansive pronouncements on socio-economic rights under Article 21 have not been matched by a determination to implement those rights. Since the liberalization of the Indian economy, even the court's rhetoric on socio-economic rights [has] been weakening. Very often the court has itself ordered the violation of those rights, and in the process [violated] the principles of natural justice.[96]

Bhushan further notes that in the neo-liberal era the shift in the focus and tenor of the Supreme Court's jurisprudence 'seriously calls into question the commitment of the Indian courts to the rights of the poor and the constitutional imperative of

93 *Paschim Banga Khet Mazdoor Samity* v *State of West Bengal* [1996] INSC 659 (6 May 1996).

94 As Sadgopal observes 'The doors of the Indian economy were formally opened to the neo-liberal agenda with the government's declaration of new economic policy in 1991'; A. Sadgopal, 'Education Policy & RTE Bill: A Historical Betrayal' (2009) 8(3&4) *Combat Law* 14, 18.

95 Although the court's judgments have been somewhat inconsistent, there is a general trend away from the transformative vision which imbued PIL at its inception, on this see: S. Shankar and P. B. Mehta, 'Courts and Socioeconomic Rights in India' in V. Gauri and D. Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) 146.

96 P. Bhushan, 'Misplaced Priorities and Class Bias in the Judiciary' (2009) 44(14) *Economic & Political Weekly* 32, 37.

creating an egalitarian socialist republic'.[97] He concludes that there 'can be little doubt that the Indian courts have failed to protect the socio-economic rights of the common people of India' and that this abdication is a direct result of the realigned class interests of the Indian judiciary in the era of neo-liberal globalisation.[98]

The stark assessment presented by Bhushan is borne out by a number of recent Supreme Court judgments that have seriously undermined the primary achievements of the 'PIL revolution'. For example, in the case of *T.M.A. Pai Foundation* v *State of Karnataka*,[99] the Supreme Court essentially handed *carte blanche* to for-profit education providers. The case concerned a challenge to the quota system established in the wake of *Unni Krishnan*, whereby 50 per cent of the places in third level institutions were reserved for members of scheduled castes and other disadvantaged groups, and such students fees were subsidised by significantly higher fees being charged to the other students. The Court held that the right to establish and operate educational institutions was inherent in Articles 19(1)(g) and 26 of the Constitution, and such privately established institutions, if they eschewed State funding, should be entitled to near untrammelled freedom in determining the admissions policy of their institution, including the fees to be charged.

This decision seems to completely contradict the sentiment in the Court's earlier education cases, and led S. P. Sathe to obeserve that 'the philosophy underlying the *Pai Foundation* decision that one who can afford alone would have the access to education is quite opposed to the philosophy of the Constitution of India and opposed to the settled law of the Supreme Court of India'.[100] Similarly, the Supreme Court decisions in both the *Narmada Valley* and *Tehri Valley* cases,[101] in which the Court completely disregarded the right to shelter of tens of thousands of people in deference to neo-liberal 'development' programs, show how in the contemporary era 'the Court's activism increasingly manifests several biases – in favour of the state and development, in favour of the rich against workers, in favour of the urban middle-class against rural farmers, and in favour of a globalitarian class and against the distributive ethos of the Indian Constitution'.[102]

97 *ibid.*

98 *ibid*; see also: G. Singh, 'Judiciary Jettisons Working Class' (2008) 7(6) *Combat Law* 24, 33 who argues that the 'judiciary has abandoned the working class. Globalisation has caused a sea change in the thinking of judges'.

99 [2002] INSC 455 (31 October 2002); followed and further reiterated in the subsequent decision of *P.A. Inamdar* v *State of Maharashtra* [2005] INSC 413 (12 August 2005).

100 S. P. Sathe, *Judicial Activism in India* (New Delhi: Oxford University Press, 2nd ed, 2002) ivi-ivii; and see A. Kashyap, 'Education for Few' (2005) 4(4) *Combat Law* 15.

101 See *Narmada Bachao Andolan* v *Union of India* [2000] INSC 518 (18 October 2000) and *N.D. Jayal* v *Union of India* (2004) 9 SCC 362.

102 B. Rajagopal, 'Pro-Human Rights But Anti-Poor? A Critical Evaluation of the Indian Supreme Court From a Social Movement Perspective' (2007) 8 *Human Rights Review* 157, 158.

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SOUTH AFRICA: TRANSFORMATION DEFERRED

The new South African Constitution, adopted in 1996, was greeted as 'the most admirable constitution in the history of the world',[103] in large part because it incorporated judicially enforceable socio-economic rights.[104] It was thought that these rights, coupled with the general tenor of the Constitution and the significant role conferred on the courts under it, would help realise a transformative vision for the new, post-apartheid South Africa.[105] Indeed, Marius Pieterse has argued that the inclusion of socio-economic rights in the Constitution – along with various other provisions of the Constitution, including the Preamble – indicated that 'the South African Bill of Rights is . . . strongly focused . . . on social transformation . . . It would seem clear that the Constitution does not only envisage the political transformation of South African society, but also its social and economic transformation'.[106] The Constitutional Court's first judgment under the new Constitution certainly did not set the world alight,[107] and even led some to argue that the decision signalled a 'disturbing possibility for the basis of future decisions about socio-economic rights claims',[108] which might 'foreshadow a downgrading of the status of socio-economic rights'.[109] Though cognisant of such misgivings and concerns about the decision in *Soobramoney*, Craig Scott and Philip Alston argued that this was 'too quick a judgment' and that the appropriate way to understand *Soobramoney* was as the first, tentative steps of the Court into the terrain of socio-economic rights jurisprudence, which should by no means be read as limiting the horizons of future jurisprudence.[110]

As it transpired, the Court's subsequent jurisprudence was more progressive, without necessarily being revolutionary, and reached a high point in the cases of *Minister of Health* v *Treatment Action Campaign* (*TAC*),[111] in which the Court ordered the state to make antiretroviral drugs available to all pregnant women on an equal basis, and *Khosa* v *Minister of Social Development*; [112] in which the Court found a provision of the South African social welfare code which excluded non-South

103 C. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001) 261.

104 For a comprehensive discussion of South Africa's socio-economic rights jurisprudence, see: S. Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Claremont: Juta, 2010).

105 On the idea of transformative constitutionalism, see: K. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; D. Moseneke, 'Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309; and P. Langa, 'The Vision of the Constitution' (2003) 120 *South African Law Journal* 670.

106 n 5 above 9; see also S. Liebenberg, 'Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate' in S. Woolman and M. Bishop (eds), *Constitutional Conversations* (Pretoria: Pretoria University Law Press, 2008) 303, 305.

107 *Soobramoney* v *Minister for Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).

108 D. Moellendorf, 'Reasoning About Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *South African Journal on Human Rights* 327, 327.

109 *ibid* 329.

110 C. Scott and P. Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramooney's* Legacy and *Grootboom's* Promise' (2000) 16 *South African Journal on Human Rights* 206, 241 and 268.

111 2002 (10) BCLR 1075 (CC).

112 2004 (6) BCLR 569 (CC).

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Africans from receiving certain benefits to be unconstitutional. Throughout this period the Court refined and consolidated its now well known 'reasonableness' standard of review, and while this approach – coupled with the Court's unwillingness to engage with the concept of the minumum core content of socio-economic rights – came in for some criticism,[113] it could be said that the Court's jurisprudence was at least making some minimal progress in terms of advancing the interests of the poor and excluded in South Africa.[114] Concurrently with the adoption of the new Constitution, the South African government had also embraced the general policy prescriptions of neo-liberalism,[115] and some commentators had raised concerns that conflicts between the imperatives of neo-liberalism, embodied in the global trading regime, and the ostensible commitment to transformative re-distribution and egalitarianism in the South African Constitution may 'threaten to undermine the South African constitutional project'.[116]

These potential tensions came to the fore in a recent case which problematises the South African governments support for the commodification of water services,[117] and the tensions this created with the guarantee of a right to water in Section 27 of the Constitution.[118] The Constitutional Court judgment in *Mazibuko*,[119] would seem to signal a significant departure in South Africa's socio-economic rights jurisprudence,[120] with the opinion of O'Regan J seeming to both implicitly validate neo-liberal reforms, which are arguably inherently inimical to the protection of socio-economic rights,[121] and to substantially narrow the horizons of the possible in terms of socio-economic rights litigation in South Africa. The applicants in the case sought to challenge the decision of Johannesburg Water

113 See D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007); M. Pieterse, 'Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services' (2006) 22 *South African Journal on Human Rights* 473 and D. Davis, 'Socio-Economic Rights: The Promise and Limitation – The South African Experience' in D. Barak-Erez and A. Gross (eds), *Exploring Social Rights* (Oxford: Hart Publishing, 2007) 193.

114 n 104 above.

115 See P. Bond, *Talk Left, Walk Right: South Africa's Frustrated Global Reforms* (Pretoria: University of KwaZulu-Natal Press, 2nd ed, 2006).

116 n 30 above 18.

117 McDonald and Ruiters note that in the era of neo-liberal globalisation there is a discernible trend in South Africa 'towards increasing privatization and commercialization, particularly in the form of public sector corporatization where publicly owned and operated water systems are managed like private businesses, leading to harsh cost recovery measures such as repossessing houses, water cutoffs, [and] prepaid meters . . . that restrict water supply to the poor', n 18 above 13–14.

118 For a panoptic assessment of the tensions between the pursuit of commodification and privatisation of water services with the guarantee of a right to have access to water in the Constitution, see: S. Flynn and D. M. Chirwa, 'The Constitutional Implications of Commercializing Water in South Africa' in D. McDonald and G. Ruiters (eds), *The Age of Commodity: Water Privatization in Southern Africa* (Earthscan, London 2005) 59.

119 *Mazibuko* v *City of Johannesburg* [2009] ZACC 28 (8 October 2009) (*Mazibuko*).

120 For general discussions of the judgment see: n 104 above 466–480; S. Heleba, 'The Right of Access to Sufficient Water and the Constitutional Court's Judgment in *Mazibuko*' (2009) 10(4) *ESR Review* 12; and P. Danchin, 'A Human Right to Water? The South African Constitutional Court's Decision in the *Mazibuko* Case' 13 January 2010 http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case/ (last visited 4 January 2011).

121 See n 8 above.

Ltd to install pre-paid water meters in the poor township of Phiri. The two main aspects of the applicants challenge was that the installation of the pre-paid water meters was, for a variety of reasons, unlawful and secondly that the company's Free Basic Water Policy – which provided 6 kilolitres of water per month for free to all account holders – was in breach of Section 27 of the Constitution as it provided an insufficient amount of water. The applicants succeeded in both the High Court and the Supreme Court of Appeal (SCA), with the SCA finally holding that the City should provide each individual with 42 litres of water per person, per day.

In the Constitutional Court O'Regan J, for a unanimous Court, found against the applicants on all grounds. In a particularly formalistic and narrow application of the Court's reasonableness standard of review she held that the 'City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right',[122] and that the installation of pre-paid water metres was not unreasonable. While the Constitutional Court's judgment has been welcomed by sections of the media,[123] and some commentators have found it 'difficult to fault' the Court's analysis,[124] others, such as Pierre de Vos, consider *Mazibuko* to be a 'carefully argued (but ... utterly unconvincing) judgment'.[125] For de Vos the judgment ultimately reflects 'a limited (and quite conservative) understanding of [the courts] role in enforcing social and economic rights and shows an over eagerness on the part of the Court to endorse the essentially "neo-liberalism-with-a-human-face" pay-as-you-go water provision policies of the Municipality. To some extent the judgment represents a retreat for the Court from its hey-day [in cases such as *TAC*]'.[126]

Ultimately, de Vos argues, behind the rhetoric of contextualised reasonableness review and deference to the elected branches, the judgment in *Mazibuko* involves the Court in endorsing 'the neo-liberal paradigm of water provision adopted by the city, a policy which would often deny poor people access to adequate water because they would be unable to pay for the water needed to live'.[127] It may be that the *Mazibuko* judgment, and subsequent judgments such as *Nokotyana*,[128] simply reflects the 'fully fledged embrace of a uniquely South African doctrine of judicial minimalism' by the Constitutional Court, and a general hollowing out of the Bill of Rights.[129] However, the judgment can also be seen as another example, indeed perhaps the most worrying example, of judicial harmonisation of domestic constitutional praxis with respect to socio-economic rights so as to entrench the

122 n 119 above at [85].
123 See E. McKaiser, 'Court Strikes Rights Balance on Water for Poor People' *Business Day Online* 13 October 2009.
124 Heleba, n 120 above, 15.
125 For a cogent critique of the judgment, see P. de Vos, 'Water is Life (But Life is Cheap)' 13 October 2009 http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/(last visited 22 December 2010).
126 *ibid.*
127 *ibid.*
128 *Nokotyana* v *Ekurhuleni Metropolitan Municipality* [2009] ZACC 33 (19 November 2009).
129 S. Woolman, 'The Amazing Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 784.

neo-liberal world view. Or, at the very least, a substantial step in that direction. This development, necessarily, has involved a jettisoning of the transformative vision of the Constitution,[130] and the recasting of the socio-economic rights guarantees as some form of hyper-procedural requirement, rather than a guarantee of substantive material change.[131]

CONCLUSIONS

The argument here, then, is that the above case studies bring home the point that in the context of neo-liberal globalisation domestic courts are unlikely, because of a tacit and implicit acceptance of neo-liberal orthodoxy, to advance the protection of socio-economic rights. It is certainly possible that another narrative, such as fealty to the separation of powers or some notion of deference, could explain the jurisprudential turn in the various countries considered here. But such an explanation is difficult to sustain when, for example, the Canadian Supreme Court's deferent refusal to protect the rights of welfare claimants and disabled children, is contrasted with their all too apparent willingness to intervene in the controversial and sensitive area of health care funding on behalf of private health insurance consumers. Or when the Irish Supreme Court's professed recognition of a bright line insulating decisions on budgetary allocation in the context of deprived and at risk children, is contrasted with their strident defence of the right to property, irrespective of the fact that their judgment could cost the State between €500 million and €1.2 billion.[132] If, then, such alternative explanations do not stand up to scrutiny, then the argument advanced here, it is hoped, goes some way towards providing a coherent explanation of this jurisprudential turn.

Despite outward appearances, this article is not intended to be pessimistic, but simply realistic.[133] And the reality is that despite an explosion in the language of

130 Harvey notes that in the context of global neo-liberal reform 'The South African case is particularly troubling. Emerging in the middle of all of the hopes generated out of the collapse of apartheid and desperate to integrate into the global economy, it was partly persuaded and partly coerced by the IMF and World Bank to embrace the neoliberal line, with the predictable result that economic apartheid now broadly confirms the racial apartheid that preceded it', n 15 above 116.

131 In *Mazibuko*, for example, O'Regan J argues that 'Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights', n 119 above at [59]. This sounds a lot like the general common law entitlements to consultation, procedural due process and legitimate expectations, rather than the transformative entrenchment of socio-economic rights. On this see M. Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29 *Human Rights Quarterly* 796, 811–813 and Brand, n 6 above 36-37; cf. A. Pillay, 'Courts, Variable Standards of Review and Resource Allocation: Developing a Model for the Enforcement of Social and Economic Rights' (2007) 6 *European Human Rights Law Review* 616 who argues that the 'apparent modesty of court demands for transparency and coherence should not disguise the importance of their being able to force government's hand when it comes to designing effective policy'.

132 See *Re Article 26 and the Health (Amendment) (No 2) Bill, 2004* [2005] 1 IR 105; and n 50 above 314

133 Realistic in the sense of looking behind formal rhetoric and ostensible reasoning to locate the concrete material interests served by the jurisprudential developments and trends identified

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socio-economic rights, such rights are being fundamentally undermined through a pincer movement which on the one hand distorts and narrows the meaning of socio-economic rights, stripping them of their egalitarian potential, and on the other by macro-economic policies, including privatisation and commodification of essential services, which fundamentally undermine peoples' ability to enjoy these rights, thereby reducing the promise of socio-economic rights to mere empty rhetoric. This study, then, serves to illustrate the more general point that the seeming bright future for constitutionally protected socio-economic rights, now subordinated to the imperatives of a capitalist world-system, is in doubt.[134] Of course none of this means that courts cannot – consistent with the principles of constitutionalism – play a role in the vindication of socio-economic rights, they can.[135] The foregoing discussion simply serves to illustrate that under the concrete circumstances of neo-liberal globalisation, they are very unlikely to do so.[136]

One clear implication of this, then, is that at least in the short term the prospects for seriously advancing any sort of egalitarian or re-distributive project through, in part, judicial enforcement of socio-economic rights is unlikely to gain much ground.[137] So that at the very moment when the material processes of neo-liberal globalisation are relentlessly undermining the material circumstances of the people of the world, socio-economic rights have been shorn of their egalitarian potential. Such a pessimistic reading, however, misses two key points: (i) any counter-systemic opposition to neo-liberal globalisation will require, in some form or another, a conception of rights;[138] and (ii) the assertion of rights is not

above. On the imperative of cutting to the core in this sense, see: A. Chase, 'A Note on the Aporias of Critical Constitutionalism' (1987) 36 *Buffalo Law Review* 403; and M. Matsuda, 'Are We Dead Yet? The Lies We Tell to Keep Moving Forward Without Feeling' (2008) 40 *Connecticut Law Review* 1035, 1038, who stresses the need and importance for us to step outside of the 'room called "Everything is okay".

134 A. Chase, 'The Rule of Law and the Capitalist State: Bills of Rights in Jeopardy' (1991) 65 *St. John's Law Review* 85, 90; and see n 14 above.

135 For a discussion of the role which domestic courts could, consistent with the separation of powers, play with respect to socio-economic rights, see: P. O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, Oxford 2011) in particular chapter 7.

136 This judicial narrowing of socio-economic rights is a discernible, general trend, but is by no means universal, and there are exceptions. Most notably the experience of the Hungarian Constitutional Court in resisting IMF imposed welfare reforms and the still burgeoning socio-economic rights jurisprudence of a number of South American countries; on the former see: K. L. Scheppele, 'A Realpolitik Defense of Social Rights' (2004) 82 *Texas Law Review* 1921; and on the latter see n 4 above. Also of note are the recent judgments of the German and Latvian Constitutional Courts, rejecting proposed welfare reforms as being contrary to the constitutional guarantee of social rights in their respective constitutions, see: *The Hartz IV Case* Judgment of 9 February 2010 – 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 and *The Latvia Pensions Case*, Judgment of 21 December 2009 – Case No 2009-43-01.

137 Although we should note that in the South African context, the right to housing in s 26 of the Constitution has led to a fundamental redefinition of the right to property, extending significant benefits to poor and marginalised individuals and groups in the context of evictions, repossessions and so on, which is by no means a trivial development, see: n 104 above, in particular chapter 6.

138 See n 15 above 180; indeed Jeff Faux has argued that in response to the deleterious consequences of neo-liberal globalisation, rebalancing the interests of economic elites with those of ordinary people will require, among other things, 'an extension of the rights of citizens to minimum levels

confined to the courthouse. An important point to recall is that constitutions, and constitutional law, despite the rhetoric of being 'above politics' are fundamentally implicated in the political life of a community, and can therefore 'provide a focal point for real conflict about alternative futures'.[139] Therefore, in the struggle for an alternative future to that which is promised by neo-liberalism, counter-hegemonic movements will play a key role,[140] and socio-economic rights, because their meaningful observance is fundamentally incompatible with the neo-liberal worldview,[141] can and should be reclaimed to play an important role in this struggle.

of health, safety and conditions of work, transparency in government, minimum levels of education, food free from contamination, and minimum levels of clean air and water as well as other fundamental environmental conditions' n 22 above 241.

139 n 30 above 180.

140 As Chase argues 'Under the new alignments structuring the capitalist world system . . . it may well be that the crucial confrontation will occur between essentially authoritarian public and private power, on the one hand, and rights-based anti-systemic movements, on the other' n 133 above 117.

141 See n 15 above 182; and n 65 above 179.

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