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Human rights transformed: Positive duties and positive rights

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In the post world war landscape of the UK, positive duties to provide welfare to individuals have been firmly situated within the politics of the Welfare State. Conspicuously absent in this arena has been the discourse of human rights. Indeed, when the decision to enact a justiciable bill of rights was finally taken, it was the European Convention on Human Rights (ECHR), with its overriding emphasis on civil and political rights, which was incorporated. This reflects a well-established view that civil and political rights are duties of restraint, preventing the State from interfering with individual freedom rather than casting positive duties on the State to act. As such, they are thought to be more appropriate for judicial resolution than positive duties. Protection by the State against want or need are assigned to the realm of policy, and socio-economic rights to the realms of aspiration.

However, the attempt to draw a rigid distinction between negative and positive obligations has come under increasing strain in the developing human rights case-law, and with it the demarcation between civil and political rights on the one hand and socio-economic rights on the other. Nowhere is this tension more evident than in the recent string of cases brought by destitute asylum seekers whose right to basic social support had been withdrawn because they had not applied for asylum at the port of entry. Their claim was based on one of the most fundamental of human rights: the right not to be subjected to inhuman or degrading treatment or punishment under Article 3 of the ECHR. In *Limbuela*, the House of Lords unanimously held that in order to avoid a breach of Article 3, the Secretary of State was obliged to provide support. Treatment which denies the most basic needs of any human being, to a seriously detriment extent, was held to be clearly inhuman and degrading¹. Equally importantly, the failure to make provision amounted to ‘treatment’ because it was the legal structure itself which rendered the individuals destitute, by prohibiting them

¹ *R v Secretary of State for the Home Department ex p Limbuela* [2005] UKHL 66 (HL) at [7]

from obtaining paid work while simultaneously withdrawing the social support which would otherwise be available to destitute asylum seekers.

The recognition of positive duties and of the role of human rights within the welfare field coincides with a fundamental reshaping of the understanding of responsibility and its relationship to rights within the Welfare State itself. The State's responsibility is no longer conceived of solely in terms of a unidirectional provider of a package of benefits, but instead in terms of facilitation or empowerment of individuals.

Correspondingly, the rights bearer is characterised as an active agent instead of a passive recipient. Nor does responsibility flow only between the State and the individual. Also brought into focus is the role of community, within which the responsibilities of individuals to each other are valued together with the individual's self interest.

The aim of this article is to analyse the interaction between positive obligations within the human rights jurisdiction and political responsibility within the Welfare State.

Part I examines positive duties in the human rights arena. Part II considers their counterparts within the policy arena, tracking the influence of political theories such as liberalism, social democracy, communitarianism and civic republicanism. Part III then turns to justiciability, and examines the effect of relocating traditionally political duties into the field of human rights.

Part I Rights and Duties: Transcending the boundaries

The distinction between negative and positive duties mirrors the traditional division between civil and political rights, which restrain the State from intruding; and socio-economic rights, which elicit protection by the State against want or need. These in turn reflect two distinct views of liberty: liberty as freedom from State interference; and liberty as freedom from want and fear². Yet it long been recognised that the two sorts of freedom are inextricably intertwined. As President Roosevelt put it in 1941:

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‘True individual freedom cannot exist without economic security and independence.’³ The inter-relationship works in both directions: civil and political rights are equally crucial for the achievement of true freedom from want and fear. Thus, as Sen demonstrates, countries with accountable leadership do not suffer famines because leaders know that if they are to remain in power, they must take action to protect the population. Moreover, he argues, ‘political rights, including freedom of expression and discussion, are not only pivotal in inducing political responses to economic needs, they are also central to the conceptualisation of economic needs themselves.’⁴

With the recognition of the unity of civil rights with socio-economic rights comes the acknowledgement that all rights, regardless of their nature, can give rise to positive as well as negative obligations on the State. Even a quintessential civil right such as the right to a fair trial requires the State to provide an adequate court system. It is therefore more helpful to focus on the nature of the obligation generated by different rights than on an attempt to categorise the rights themselves. As recent analysis has shown, both civil rights and socio-economic rights give rise to a cluster of obligations:⁵ the primary duty whereby the State should not interfere with individual activity; the secondary duty whereby the State should protect individuals against other individuals; and the tertiary duty to facilitate or provide for individuals. Known as the duties to respect, protect and fulfil, these duties are now expressly enshrined in the new South African Constitution, and the International Covenant of Economic, Social and Cultural Rights (ICESCR).

In *Limbuela*, the House of Lords recognised that it was unhelpful to attempt to analyse obligations arising under Article 3 as negative or positive. ‘Time and again these are shown to be false dichotomies’ Lord Brown declared. Instead, the real issue is whether the State is ‘properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim.’⁶ Although the State has not inflicted violence or

³ 11th Annual Message to Congress (11 January 1944) in J Israel (ed), *The State of the Union Messages of the Presidents* (Chelsea House Publishers, New York 1966) vol 3, 2881, cited in H Steiner and P Alston, *International Human Rights in Context* (2nd edn, Oxford: OUP, 2000) 243.

⁴ Amartya Sen, ‘Freedom and Needs’, *The New Republic*, 10 and 17 January 1994, 31, 32, cited in Steiner and Alston (n **Error! Bookmark not defined.** above) 269.

⁵ H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton: Princeton University Press, 1996).

⁶ *Limbuela* [92] and see Lord Hope at [53]

punishment, it can still be regarded as responsible when the statutory regime it has established leaves individuals in a position of inevitable destitution. Here the State must be regarded as responsible for the destitution of late asylum seekers because it was the statutory regime which removed any source of social support while prohibiting them from supporting themselves through paid work.

Given that there is little which is not regulated by the law in a complex modern State, this is a far-reaching recognition of the breadth of State responsibility. Baroness Hale in *Limbuela* notes that it is no longer possible to expect individuals with no means of support to 'live off the land'. But, apart from a State of Nature without property rules, even living off the land would require a legal regime which gives some exemption from the normal rules of trespass and theft. It is the legal regime which creates property rights and protects them from theft and invasion. Bentham famously declared: 'Property is entirely the creature of law... It is from the law alone that I can enclose a field and give myself to its cultivation... Before the law, there was no property; take away the laws, all property ceases.'⁷

In this sense, then, the legal regime is inevitably responsible for destitution. As Sunstein puts it, if homeless people lack a place to live, it is because the rules of property are invoked and enforced. Similarly, there is no law against eating in the abstract; it is the law which forbids a hungry person to eat any of the food which exists in the community.⁸ Sen puts it even more strongly. People are hungry if they lack entitlements that enable them to eat: thus: 'the law stands between food availability and food entitlement. Starvation deaths can reflect legality with a vengeance'⁹. It is thus impossible to imagine a scenario in which individuals who through no fault of their own find themselves destitute within an advanced welfare state without this being due in some way to the legal regime.

Of course, if the individual is somehow responsible for his or her destitution, this picture might change. It is this which explains *O'Rourke*¹⁰, where the ECHR held

⁷ J Bentham *Principles of the Civil Code* (Simkin, Marshall 1898) 1:307 – 8 CHECK

⁸ CR Sunstein *The Second Bill of Rights* (Basic Books New York 2004) pp23-24

⁹ A Sen *Poverty and Famines* (OUP Oxford 1981) pp.165 - 166

¹⁰ *O'Rourke v United Kingdom* (Application No 39022/97) (unreported) 26 June 2001

inadmissible a complaint of breach of Article 3 by an applicant who was forced to sleep rough after eviction from local authority accommodation. The court regarded as highly relevant that the applicant was unwilling to accept offers of accommodation, so that he was largely responsible for the deterioration in his health following his eviction.

Limbuella represents a crucial development in the developing momentum towards recognition of positive responsibilities. It takes forward the gathering pace of recognition by the ECtHR, which has held that the Convention, despite its avowed limitation to civil and political rights, gives rise to positive duties. Unlike *Limbuella*, however, these duties manifest as the secondary duty, to protect individuals against other individuals, rather than the tertiary duty to provide. Thus the right to freedom of assembly in Article 11 ECHR includes, not just the obligation to refrain from banning marches, but also the obligation to protect participants from disruption by a violent counter - demonstration.¹¹ Similarly, the right to life in Article 2 does more than restrain the State from taking life. It also imposes an express obligation on the State to put in place effective criminal law provisions to deter the commission of offences against the person.¹² It can even include a positive obligation on the authorities to take measures to protect an individual whose life is at risk from the criminal acts of another.¹³ Article 3 itself has been interpreted to give rise to positive duties to protect. Thus the State must take action to ensure that individuals are not subjected to degrading treatment inflicted by other individuals¹⁴ such as corporal punishment¹⁵ or child abuse by parents or other adults¹⁶. Even where suffering is due to illness, the State comes under a duty if its actions exacerbate the suffering, through detention or expulsion or other measures for which the State can be held responsible¹⁷.

However, the Strasbourg Court has been far more reticent in cases concerning the duty to make positive provision. In *Chapman v UK*¹⁸ the Court stated: ‘It is important

¹¹ *Plattform ‘Ärzte für das Leben’ v Austria* Series A No 139 (1988) 13 EHRR 204 at [32].

¹² *Osman v UK* Application 23452/94 (1998) 29 EHRR 245 at [116].

¹³ *ibid.*

¹⁴ *Pretty v United Kingdom* 35 EHRR 1 [50]

¹⁵ *A v. United Kingdom* (1998) 27 E.H.R.R. 611 (European Court of Human Rights)

¹⁶ *Z v. United Kingdom* 34 E.H.R.R. 3 (ECHR)

¹⁷ *Bensaid v. United Kingdom*: (2001) 33 E.H.R.R. 10 (European Court of Human Rights); cf *Pretty supra.*

¹⁸ Application 27238/95 (2001) 33 EHRR 18.

to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the contracting states many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.’¹⁹ As will be discussed below, it is only through the equality provision that the positive duty to provide has been manifested.

Other jurisdictions have similarly grappled with the distinction between positive duties to provide and negative duties of restraint. Some constitutions deal with this expressly. One model, found in the Irish and Indian constitutions, is to use ‘directive principles’. This model provides that positive duties in the social policy field are constitutionally required of the State, but that they are not judicially enforceable. This contrasts with justiciable civil and political rights. Thus the Indian Constitution states that ‘it shall be the duty of the State to apply these principles in making laws;’²⁰ but that the principles ‘shall not be enforced by any court’. The Irish duty is somewhat more dilute: the directive principles of social policy are ‘intended for the general guidance’ of the legislature²¹. But the judicial exclusion is more strongly worded: the principles ‘shall not be cognisable by any Court under any of the provisions of this Constitution’. This approach has become particularly relevant for domestic law because of its inclusion in the EU Charter of Fundamental Rights. While the structure of the Charter reflects the unity of civil and political with socio-economic rights, a late amendment distinguished between judicially enforceable rights, and principles to be implemented by legislative and executive acts. Principles ‘shall be judicially cognisable only in the interpretation of such acts and in ruling on their legality.’²²

¹⁹ *ibid* at [99].

²⁰ Indian Constitution (adopted 26 January 1950), Article 37

²¹ Bunreacht Na hÉireann, Article 45

²² EU Charter of Fundamental Rights, Article 52(5). See further MP Maduro 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' in T Hervey and J Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart Oxford 2003); S Fredman "Transformation or dilution: Fundamental Rights in the EU social space" [2006] *European Law Journal* forthcoming

An alternative model sees socio-economic rights as justiciable, but moulds the positive duty to reflect the difficulty of providing resources in immediate fulfilment. Thus, under the International Covenant for Economic, Social and Cultural Rights (ICESCR) each State Party undertakes ‘to take steps to the maximum of its available resources, with a view to achieving progressively the full realisation’ of the rights in the Covenant.²³ This has been adapted by the South African Constitution, which makes socio-economic rights justiciable, while expressly providing that the duty on the State is to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of each of the rights.

What then is the relationship between the duty and the right? Does the individual have an immediate right to claim the benefit? Or is the right merely one to call on the State to demonstrate that a plan is in place to realise the right? The ICESCR committee has responded in two ways. Firstly, although the State need not achieve the full realisation immediately, it does have an immediate duty to construct a programme to realise the duty. Secondly, every State party has a ‘minimum core obligation’ to ensure minimum levels of essential foodstuffs, primary health care, basic shelter and housing, and basic forms of education. State parties ‘must demonstrate that every effort has been made to use all resources at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’²⁴

The South African Constitutional Court, which has been given a frontline role in adjudicating entrenched rights against a background of desperate poverty and inequality, has approached the issue differently. It has rejected not only the notion of minimum core obligations, but also of any interpretation which would ‘give rise to a self-standing and independent positive right’ enforceable irrespective of the express qualifications to the State’s duty²⁵. As Makgoro J put it: ‘Section 27(1) [the right] and section 27(2) [the duty] cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another. Section 27(2) [the duty] exists as an internal limitation on the content of section 27(1) [the right] and the ambit

²³ ICESCR Article 2(1)

²⁴ General Comment No 3

²⁵ *TAC* para. 39.

of the right can therefore not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right.²⁶

The individual's claim is therefore not for an immediate benefit. Instead, the individual acts a trigger for judicial scrutiny, a mechanism of accountability to ensure the State is indeed taking reasonable steps to fulfil its duty. Thus the Court in *Grootboom*²⁷, responding to a claim by squatters in desperate need of housing, held that the government plan must be modified to give priority to the needs of the most desperate, but not that each should immediately be given a house.

But the need to adjudicate on positive duties is not confined to constitutions with express provisions. Other jurisdictions without such express provisions have also had to address the issue. While *Limbuela* unusually saw Article 3 as the basis of the duty to provide for the destitute, the right to life has loomed larger in other jurisdictions. Thus the Canadian case of *Gosselin* concerned section 7 of the Canadian Charter, which states that: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. The claimant argued that by providing her with social security benefits which were so low as to subject her to acute poverty, the State was in breach of its positive duty under section 7. McLachlan CJ for the majority emphasised that section 7 refers to the right not to be deprived of life, liberty and security of the person, which, on the face of it, is a duty of restraint only. She declined to hold that the case in question 'warrant[ed] a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.'²⁸ However, she expressly left open the possibility that section 7 could be interpreted as including positive obligations in other circumstances.

This possibility was examined in detail and upheld by Arbour J's dissent. She stressed that positive rights were not an exception to the usual application of the *Charter*, but an inherent part of its structure.²⁹ Indeed, the *Charter* compelled the State to act positively to ensure the protection of a significant number of rights, including the

²⁶ Khosa para [43] and see *Soobramoney* at para 22; *Grootboom* at para 74; *Treatment Action Campaign* at paras 23 and 39.

²⁷ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) (South African Constitutional Court)

²⁸ *Gosselin* para 83

²⁹ *Gosselin* [350]

protection of the right to vote³⁰. Section 7, in her view, gave rise to two separate rights, the positive right to life and the negative right not to be deprived thereof. This in turn means that the government need not be proved to have caused the problem. Instead, the duty arises when government intervention is needed to secure the effective exercise of a claimant's fundamental rights. This specifies and takes further Lord Brown's formulation in terms of whether the State can be said to be responsible³¹.

Still more adventurous has been the Indian Court, which has interpreted the right to life in section 21 of the Indian constitution as the font of a stream of positive duties, centred on the right to quality of life, and the right to live with human dignity. The right to life entails the right to livelihood, since no-one can live without the means of living³². Similarly, the right to health of a worker is an 'integral facet of meaningful right to life', so that the right to life includes the right to medical aid to protect the health of workers while in service or post retirement³³. The right to life even encompasses the right to communication with the outside world, which for citizens living in inaccessible hilly areas means the right to a road³⁴. Particularly important has been the Court's intervention in the right to food case, where the Court has required States to implement food distribution schemes, including the provision of cooked mid-day meals at school. This is a facilitative duty par excellence, since cooked school meals draws children to school, diminishes family's needs to send their children out to work, and educates children for a better future. It has proved particularly important in helping girls gain an education. CITE.

Limbuela sees human rights as operating in the heartland of the Welfare State, so that political responsibility interacts closely with legal duties. This makes it essential to have a better understanding of changing notions of political responsibility, and the influences of background political theory. It is for these principles that positive human rights duties must provide a framework of legality. These are the subject of the next section, before turning to potential principles of justiciability.

³⁰ Gosselin [320]

³¹ Gosselin [381]

³² *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545 (Supreme Court of India)

³³ *Consumer Education & Research Centre v Union of India* A.I.R. 1995 Supreme Court 922 (Supreme Court of India) para [26]

³⁴ *State of Himachal Pradesh v Umed Ram Sharma* AIR 1986 SC 847 (Indian Supreme Court)

[In this, it recognises that the commitment to make provision for the basic welfare of everyone within the jurisdiction is just as much part of the unwritten constitution as the common law civil liberties referred to by Dicey. Even during the neo-liberal era of Thatcher and Major, there was no possibility of wholly dismantling this commitment³⁵. With this recognition come complex challenges, first to determine the shape of the rights and duties lurking beneath the policy commitments of the Welfare State, and then to establish justiciability. Each is examined in turn.]

Part II New Deals for Old: Responsibility and the Welfare State

(i) Changing Ideals

Embracing positive duties as a central aspect of human rights raises questions as to the nature of the duty, to whom it should be attributed, and how a focus on duties affects the understanding of the right and the rights bearer. The answers to these questions have been shaped by a complex amalgam of political theories, including liberal individualism, social democracy, communitarianism and civic republicanism. The earliest influence was that of liberal individualism, according to which the individual should be free to pursue his or her rational self interest in the market without State interference. Failure to make provision for oneself was seen as the fault of the individual, and State provision could only be justified if it functioned as an incentive to greater industriousness. Thus nineteenth century Poor Laws attributed unemployment and poverty to individual idleness³⁶, placing responsibility squarely on the shoulders of the individual. State maintenance was both punitive and disciplinarian, requiring destitute able-bodied persons to enter the workhouse and be put to work as a condition of relief. Any other provision of support took the form of charity, rather than entitlement, leaving the recipient in the position of grateful suppliant. Although this approach has clearly been supplanted, the notion that welfare beneficiaries are idle, scroungers and a burden on society is never far from the surface of political rhetoric. Similarly tenacious has been the notion of welfare as charity,

³⁵ A Ware and R Goodin 'Introduction' in A Ware and R Goodin (eds) *Needs and Welfare* (Sage London 1990) p.10

³⁶ Royal Commission Report in 1834, S Webb and B Webb *English Poor Law Policy* (Longmans 1910) p.277

impeding the development of a human rights ideology in the discourse of the British Welfare State.

It was not until the end of the nineteenth century that unemployment came to be seen as a social and economic problem, rather than the responsibility of the individual. This opened the way to the acceptance that the State should be under positive duties to contribute to individual welfare. In his seminal work, T.H. Marshall³⁷ recognised that the market undermines the individual's ability to exercise their civic rights to the full. Thus rights should extend beyond civil and political rights and formal juridical equality, to the granting of social rights. This necessarily enlists the positive contribution of the State, to ensure that citizens enjoy 'the whole range from a modicum of economic welfare and security to the right to share to the full the social heritage and to live the life of a civilised being according to the prevailing standards.'³⁸ Thus rights are no longer merely a fence around the citizen to prevent incursion by the State. Instead social democracy recasts the State's role to include a positive responsibility to intervene to promote individual welfare.

However, in its attempt to counter the liberal view of the individual as responsible for her own misfortune, the social democratic tradition tends to place the responsibility wholly on the State. The individual is cast in the role of passive beneficiary; rights are characterised as a package of goods; and the State's responsibility is primarily redistributive. This is problematic in several respects. Firstly, its redistributive emphasis gives the impression that the rights of the poor can only be achieved at a cost to the wealthy. Secondly, it assumes that the definition of need and benefit is a technical matter, in which beneficiaries do not participate. Yet the definition of need itself is contested,³⁹ as is the assignment of value to social goods. Both require participation and democratic discussion⁴⁰. Thirdly, its primary concern is with redistributing material resources or income, rather than addressing the social

³⁷ TH Marshall "Citizenship and Social Class" in TH Marshall and T Bottomore (eds) *Citizenship and Social Class* (Pluto 1992)

³⁸ TH Marshall "Citizenship and Social Class" in TH Marshall and T Bottomore (eds) *Citizenship and Social Class* (Pluto 1992) p.7

³⁹ P Jones "Universal Principles and Particular Claims: From Welfare Rights to Welfare States" in A Ware and R Goodin (eds) *Needs and Welfare* (Sage London 1990)

⁴⁰ A Sen *Development as Freedom* (OUP Oxford 1999)pp78-81

structures and institutional contexts which underlie these distributive outcomes⁴¹.

Thus Young argues: “Individuals are not primarily receivers of goods or carriers of properties, but actors with meanings and purposes who act with, against, or in relation to one another.”⁴² Instead of conceiving of rights as possessions, she concludes, they should be seen in terms of relationships, ‘institutionally defined rules specifying what people can do in relation to one another.’⁴³ Finally, placing the full responsibility on the State makes it difficult to address broader questions of the role of community and the responsibility of individuals to each other.

This depiction of State responsibility is challenged by various strands of communitarian thinking. On this view, State responsibility is a contribution to the community as a whole not just to the individual recipient,⁴⁴ thus avoiding the divisive discourse of transfer of wealth from rich to poor. Thus Ritchie argued at the end of the nineteenth century that fundamental or natural rights were ‘mutual claims which cannot be ignored without detriment to the well-being and in the last resort to the very being of a community....They represent a minimum of security and advantage which a community must guarantee to its members.’⁴⁵ Modern thinkers take this further, to reshape the understanding of the individual. Thus Young argues that the individual is not an autonomous, self-centred entity, but a ‘relational self’, who is partly constituted by society, although not wholly absorbed into it.

Situating the individual within the community means that responsibility moves beyond the bipolar relationship of State and individual, to include the interaction between individual and community, generating mutual obligations of support and a sharing of available social goods. Those who have access to power, particularly in the form of material wealth, have specific responsibilities to the community to contribute proportionately to their ability. The transfer is not of wealth from the rich to the poor, but from those on whom the State has already endowed property to the community as a whole. Nor is the State’s responsibility simply to each specific individual. Instead, provision of public facilities, such as education, health, child-care and leisure, is a

⁴¹ IM Young *Justice and the Politics of Difference* (Princeton Paperbacks Princeton 1990) p.22

⁴² Young p.28

⁴³ Young p.25

⁴⁴ M Freedon "Rights, Needs and Community: The Emergence of British Welfare Thought" in A Ware and R Goodin (eds) *Needs and Welfare* (Sage London 1990) p.55

⁴⁵ D Ritchie *Natural Rights* (Allen & Unwin London 1894) p.87

central part of State responsibility, building up social capital as well as taking the pressure off income as the chief means of fulfilling individual needs.

Community, on some accounts, also counteracts what is perceived to be the undue power of the social democratic State. Thus community performs a dual function. It is an alternative to the 'lonely individual' in the neo-liberal market, empowering the individual to realise her potential. But it is also a counter to a centralised and bureaucratic state. Thus Gordon Brown argues that it is essential to use the community to achieve many of the ends wrongly left to the State⁴⁶.

The stress on community is an important corrective to both liberal individualism, and the coercive potential of an all powerful Welfare State. However, community is not necessarily democratic or accountable.⁴⁷ While highlighting the richness of inclusion, the language of community is necessarily exclusive too. Furthermore, by subsuming individual identity to the community, communitarianism can embrace an unacceptable level of conformism. It is therefore necessary to address questions of access to community as well as power relationships within the community and between communities⁴⁸. Moreover, the concept of community adapts, chameleon-like to different political ideologies. Thus the rhetoric of community was used under neo-liberal governments to give legitimacy to cuts in State provision, an example being 'community care' for the mentally ill⁴⁹. On the other end of the spectrum, the notion of community can become a 'conception of subjectivity in which the person is simply engulfed or determined by her social and bodily context'⁵⁰.

While communitarianism takes issue with the absence of community in the social democratic matrix of responsibility, civic republicanism challenges its assumption that the rights bearer is a passive recipient. Drawing on the classical Greek idea that a citizen only expresses his or her full potential through political participation, civic republicanism sees participation as a civic virtue, a condition of citizenship⁵¹.

Participation is both a right and a duty, so that it is not only the State, but also the

⁴⁶ Brown pp120 - 122

⁴⁷ Phillips in Milliband p. 124

⁴⁸ Lacey p.138

⁴⁹ N Lacey *Unspeakable Subjects* (Hart, 1998) p. 131

⁵⁰ Lacey . 139

⁵¹ R Lister *Citizenship: Feminist Perspectives* (2nd ed Palgrave 2003) p.13, 15-16

individual, that has responsibilities. Social participation is an end in itself, and an essential part of the development of the self. This means that, unlike liberalism, with its focus on rational self interest, civic republicanism envisages the individual as acting for social ends.. The contribution of wealthier individuals to social welfare is not merely a burdensome distribution from rich to poor, but a part of their civic virtue.

Civic republicanism is valuable in its stress on active citizenship, and particularly the responsibility of the rich or powerful to contribute to welfare. However, there are also some dangerous ambiguities in the shift in responsibility from the State to individual citizen. At what point does the duty to contribute to society become coercive? To what extent should welfare beneficiaries have to reciprocate in return for receiving welfare benefits? This is particularly salient in the context of welfare to work programmes, discussed in detail below.

These strands of thought have been re-woven by Third Way thinkers to produce a new pattern of rights and responsibilities within the Welfare State⁵². The Third Way follows social democracy in acknowledging that real freedom of choice requires active State intervention. On the other hand, it resists the social democratic tendency to place total responsibility on the State, portraying the traditional social democratic state as stultifying and bureaucratic. Instead, the architects of the Third Way argue for a 'facilitative' or 'enabling' State⁵³. 'The Welfare State is not a safety net but a springboard,' declares Gordon Brown⁵⁴. State intervention is not based merely on redistribution of material goods to passive recipients, but on a politics of 'empowerment'⁵⁵. Thus Supiot has argued that welfare should not be seen as passive protection, compensating for unavoidable economic damage, but instead as giving individuals the resources to equip themselves with what he calls 'active security to

⁵² T Blair *The Courage of our Convictions* (Fabian Society London, 2002); A Giddens *The Third Way and its Critics* (Polity Press London 2000); S White "The Ambiguities of the Third Way" in S White (ed) *New Labour: The Progressive Future?* (Palgrave, New York, 2001)

⁵³ S Fredman 'The Ideology of New Labour Law' in C Barnard S Deakin and G Morris (eds) *Essays in Honour of Bob Hepple* (Hart Oxford 2004)

⁵⁴ G Brown "The Politics of Potential: A New Agenda for Labour" in D Miliband (ed) *Reinventing the Left* (Polity Press Cambridge 1994) p.114

⁵⁵ D Held 'Inequalities of Power, Problems of Democracy' in D Miliband (ed) *Reinventing the Left* (Polity Press 1994) p 47.

cope with risks'⁵⁶, giving real freedom, backed by the means to make it effective, to take full part in social and economic life,.

Nor are individuals conceived of as atomistic entities in the 'lonely market'. Drawing on the communitarian insight that individual rights are to the benefit of the community as a whole, social rights are portrayed, not as a burdensome cost to society, but a 'productive factor'⁵⁷, an essential contribution to the economy. Thus, according to the EU Social Policy Agenda in 2000, social expenditure on health and education represents 'an investment in human resources with positive economic effects'⁵⁸. Crucial too is the community solidarity which comes from giving everyone a stake in the welfare state. Instead of simply transferring income to the poorest in society, social rights should have a public and universal dimension. Access to public services, such as vocational training, health care, transport, education and child-care, should be considered as collective benefits, giving individuals real rather than formal opportunities.⁵⁹

More complex is the view that State responsibility should be matched by individual responsibility. Resonating with civil republican notions of civic virtue, third way thinkers propose, that 'a prime motto for the new politics [is] no rights without responsibilities'⁶⁰. Thus, declares Gordon Brown, the true role of government is to 'foster personal responsibility, not substitute for it.'⁶¹ This notion needs to be handled carefully, however. At one level, it chimes with the positive momentum towards active citizenship. At another level, it can look backwards towards a liberal view that individuals can only reap the harvest they themselves have sown. Thus Giddens, from the individualist side of the spectrum, focuses primarily on the duty of the individual recipient to reciprocate. Vandenbroucke, by contrast, insists that individual responsibility should not consist only of the 'easy rhetoric about the moral responsibilities of the poor and powerless.'⁶² Instead, the web of interlocking

⁵⁶ A Supiot *Beyond Employment* (Oxford University Press Oxford 2001)pp197-198

⁵⁷ Commission of the European Communities 'Social Policy Agenda' COM (2000) 379 final (henceforth *Social Policy Agenda*) para 1.2; and see Mid term Review para 3.3.

⁵⁸ *Social Policy Agenda*, para 1.2.

⁵⁹ Supiot p. 144

⁶⁰ A Giddens *The Third Way and its Critics* (Polity Press London 2000) p.65

⁶¹ G Brown "The Politics of Potential: A New Agenda for Labour" in D Miliband (ed) *Reinventing the Left* (Polity Press Cambridge 1994) p.114

⁶² Vandenbroucke *ibid* quoting T. Wright, *Socialism, Old and New* (1996) p.147.

responsibilities⁶³ includes that of the State, to intervene where the market is not a true reflection of personal responsibility and effort, and the rich and powerful. This is reinforced by Hutton, who argues that property should not be seen as an absolute right, but a ‘concession, made by the society of which it is part, that has to be continually earned and deserved’.⁶⁴ Those who own property are members of society ‘to which necessarily they must contribute as the quid pro quo for the privilege of exercising property rights.’⁶⁵

(ii) Translating Ideals into Practice: Models of the Welfare State

These strands of thinking have all been influential in the development of notions of responsibility within the Welfare State. Liberal individualism has been reflected from the earliest days of the Welfare State in the principle that individuals should ‘earn’ their welfare entitlements through their contributions to the national insurance system. The insurance principle has retained its central role, although the link between the actual contribution record and the level of payments has weakened, and employers are expected to make complementary contributions. At one level, the insurance principle gives everyone a stake, since everyone faces risks of unemployment, injury, illness and old age. On the other hand, because it stresses the individual’s duty to earn entitlements, the insurance principle favours those in work and particularly those with a continuous and regular working life. It is therefore deliberately biased against women and other non-standard workers. It also tends to entrench inequalities, in that it aims to maintain the beneficiary in his or her previous position, for example, through a link to previous earnings.

The liberalism of the insurance principle is balanced by the social democratic model, which places responsibility on the State rather than the individual, and therefore focuses on demonstrable need rather than employment status or earnings. The needs-based principle has the advantage of targeting those in need unconditionally and regardless of their ability to contribute. However, because it only benefits those who fall below the means test, it militates against solidarity in that the middle classes feel

⁶³ F. Vandenbroucke, ‘European Social Democracy and the Third Way’ in S White (ed) p.170-171.

⁶⁴ Hutton, *ibid*, p.84.

⁶⁵ W. Hutton, *The World We’re In* (Abacus, Great Britain 2002) p.63.

they bear the burden of financing welfare rights which give them no personal benefit. Similarly, flat rate payments, although avoiding the insurance principle's tendency to maintain the status quo, are generally inadequate. Thus while providing a safety net against destitution, they do not positively contribute towards greater equality in society. These disadvantages are particularly apparent in the US, where the Welfare State provides means-tested assistance for the poor; while the middle classes make their own private provision. This is coupled with few genuinely social or public goods, such as a National Health Service. Many middle class Americans therefore feel little commitment to the principle of welfare rights. To avoid the charge of over-taxing those who are ostensibly able to provide for themselves through productive work, benefit levels are kept down. The fact that private provision, such as personal or occupational health insurance, is heavily tax financed does not feature in this arithmetic⁶⁶.

The liberal insurance principle and social-democratic means-tested flat rate benefits are complemented by a communitarian dimension, in the form of public or social goods, such as health care, education and leisure facilities to which all have equal access. These are not differentiated individualised rights but aspects of community life to which all contribute and which all benefit from.

Third Way input adds to these principles. 'No rights without responsibilities' has become a powerful slogan : benefits and entitlements are, it is repeatedly stressed, conditional on correlative responsibilities in the recipient. So benefits under the New Deal can be withdrawn if people do not take up opportunities; Educational Maintenance Allowances are conditional on attendance and performance; Individual Learning Accounts match a contribution from the individual; and new funding for neighbourhoods is conditional on community involvement.⁶⁷ According to the 1998 Welfare Green Paper: 'It is the government's responsibility to promote work

⁶⁶ G Esping-Anderson "Equality and Work in the Post-industrial Life-cycle" in D Miliband (ed) *Reinventing the Left* (Polity Cambridge 1994) p.171

⁶⁷ *Preventing Social Exclusion*, the 2001 report of the Social Exclusion Unit (Cabinet Office, London, 2001) p.8.

opportunities and to help people take advantage of them. It is the responsibility of those who can take them up to do so.’⁶⁸

Central to this approach has been work-fare, which makes the right to benefit conditional on the duty to seek work or undergo training. Sporting glossy labels such as New Deal for Young People, New Deal for those over 25, and New Deal for Lone Parents, workfare programmes have mushroomed since 1997 under New Labour. New Deal programmes manifest many characteristics of Third Way thinking. They represent ‘facilitative’ State, which empowers citizens to find their own pathways out of poverty, and to participate in society in a meaningful way through paid work. Similarly, social rights are characterised, not as a cost to society, but as productive factors which benefit to the community as a whole by moving people off benefit into work and combating social exclusion.⁶⁹ Citizenship is an active concept: individuals have access to public resources to develop their own human capital and thereby to be in a position to reciprocate.

Work-fare schemes, however, have a dark side. Firstly, they include an element of compulsion in the sense that benefits are withdrawn if the recipient does not participate⁷⁰. This ‘tension between compulsion and individual rights in social democratic thinking’⁷¹ raises the question of whether conditionality undermines the status of a right. Secondly, Welfare to Work privileges paid work. Civic virtue is no longer associated, as in classical Greece, with political participation, but with paid work. This sidelines all the other activities that individuals should be valued for, most prominently caring work, but also volunteering and political work⁷².

⁶⁸ Green Paper, *New Ambitions for our Country: a New Contract for Welfare* (Cm 3805 1998) pp.24, 31.

⁶⁹ See for example Department for Work and Pensions and BMRB Social Research *Destination of Leavers from NDYP and ND25 Plus* (3rd Draft Report September 2004) p.6

⁷⁰ Under the New Deals in the UK, participation is mandatory for adults aged 25 to 49 with 18 or more months of unemployment within a 21 month period and for young people (18 – 24 years old) after six months of claiming jobseeker’s allowance

⁷¹ A Glyn and S Wood ‘Social Democracy in Neo-Liberal Times’ in A Glyn (ed) *New Labour’s Economic Policy* (OUP Oxford 2001) p.206

⁷² There is a small exception for volunteering CHECK

Thirdly, it runs the risk of paying too little attention to quality of work. While paid work can be liberating, it can also be exploitative. This can be seen in the US, where a large proportion of total service job growth has occurred in jobs without access to decent earnings, fringe benefits, occupational social insurance or employment security. Even in the core workforce, many corporations have reduced or eliminated their provision of occupational health and pension plans in order to cut production costs and gain flexibility⁷³. A subtle transformation of the right to work into the duty to work is therefore highly problematic unless it is accompanied by a properly enforced floor of rights guaranteeing quality of work. Third Way policy-makers have accepted this point in principle, as reflected in the slogans ‘more *and better* jobs’ and ‘making work pay.’ Some attention to quality of jobs is seen as way of legitimating the element of compulsion in welfare to work programmes. Thus welfare to work has been complemented by measures to increase the rewards for working in the form of the minimum wage, in-work benefits⁷⁴, and the national childcare strategy.

Finally welfare to work assumes that increasing the supply of workers will create its own demand for labour in the market. It also means that if workers cannot find work, it appears to be their own fault, resuscitating the old notion that unemployment is a moral failing of the individual. Glyn and Wood demonstrate that workers with low qualifications who live in areas of mass unemployment could find themselves with responsibilities but no prospect of fulfilling them unless jobs are created in these areas and their skills significantly increased.⁷⁵ Nickells and Quintini show that indeed, at least in the early years of its operation, the New Deal had little impact on low-skilled men, where levels of inactivity have been rising very quickly as a result of low levels of demand for the unskilled⁷⁶.

Part III Positive duties and the judiciary

⁷³ G Esping-Anderson "Equality and Work in the Post-industrial Life-cycle" in D Miliband (ed) *Reinventing the Left* (Polity Cambridge 1994) p.176

⁷⁴ Formerly working families tax credit and now child tax credit and working tax credit

⁷⁵ Glyn and Wood p.209

⁷⁶ Nickells and Quintini p.218

The above discussion indicates the complexity of the political notions of positive duties and responsibility in the arena of provision by the State of basic necessities. How then can an appropriate role for the courts be formulated? This section considers first the questions of legitimacy and competence of courts, and then sketches some criteria according to which courts might review the exercise of the duty, drawing on the experience of other relevant jurisdictions.

(i) Legitimacy

Positive duties are often thought to be better suited to the political than the judicial arena, because decision-makers are accountable to the electorate for their decisions as to how to balance competing claims on resources. However, this argument does not apply where those affected by the decision do not have a voice in the political process. Asylum seekers are clearly a paradigm case, and Lord Brown rightly reminded the court that asylum-seekers are entitled to be here to exercise their vital right to claim refugee status. But even those who formally have a vote may not be able to participate as full citizens, as Marshall's insight reveals, without State action to further social rights. Thus the insistence in *Limbuela* on the State's bedrock responsibility for the destitute can be seen as a wholly legitimate judicial intervention to further rather than counter democracy.

This insight is particularly clearly affirmed by the Indian Supreme Court, which emphasises that the State is under a constitutional mandate to create the conditions in which the fundamental civil and political rights guaranteed under the constitution could be enjoyed by all. Notably too the Court sees the duty as extending beyond the provision of a fixed package of goods to a passive beneficiary. Instead it sees rights as including active empowerment, specifically through education: 'The fundamental rights... including the right to freedom of speech and expression... cannot be appreciated and fully enjoyed unless a citizen is educated and conscious of his individualistic dignity'⁷⁷.

⁷⁷ *Mohini Jain v Karnataka* [1992] AIR Supreme Court 1858

Judges are also thought to lack the relevant competence to make decisions on duties with complex polycentric implications, often requiring a wider lens than the bipolar spectacles of the judiciary. This does not, however, mean that judges can have no role at all in supervising positive duties. As Arbour J stated in *Gosselin*, a court can conclude that there is a right to welfare sufficient to meet one's basic needs, without addressing how much expenditure by the State is necessary in order to secure that right. In the case in question, the statute itself had established the basic level of welfare, but the State had deliberately provided the claimant with far less⁷⁸.

(iv) Criteria for adjudication

How then can judges provide a human rights framework of legality, while at the same time respecting both the democratic legitimacy and the expertise of the legislative and executive branches? Three different standards will be examined here: (i) principles; (ii) reasonableness; and (iii) equality.

(a) Principles

Express constitutional values provide a helpful guide to judges, both in terms of legitimacy and because they allow courts to supervise rather than substitute for political decisions. The Irish Directive principles have had little or no impact on either legislative or judicial decision-making. But the Indian Supreme Court has drawn on the directive principles as powerful interpretive devices in order to transform the fundamental rights in the constitution into positive duties. This is a result of its explicit recognition that fundamental rights cannot be enjoyed without a measure of socio-economic equality. The right to life in Article 21, in particular, 'derives its life-breath from the directive principles of State policy'⁷⁹. The Court has also held the State to its duties under the directive principles more directly: provision of education has been held to be an enforceable right,⁸⁰ although only up to the age of 14.⁸¹; and

⁷⁸ *Gosselin* [333]

⁷⁹ *Consumer Education & Research Centre v Union of India* A.I.R. 1995 Supreme Court 922 (Supreme Court of India) para [25]

⁸⁰ *Mohini Jain v Karnataka* [1992] AIR Supreme Court 1858

⁸¹ *Unni Krishnana v State of Andhra Pradesh* AIR 1993 SC 2178 (Indian Supreme Court)

the directive principles make it 'a paramount principle of governance to take steps for the improvement of public health as amongst its primary duties'.⁸².

It is impossible here fully to evaluate the Indian Court's record. Three points should, however, be noted. Firstly, the Court has adapted its procedure to enable it to adjudicate polycentric issues more appropriately. Wide standing rules require the court to conduct some of its own fact-finding, sometimes through establishing its own commissions. It has also fashioned its own remedial orders to permit it to provide ongoing management. For example, in the 'Right to Food' case, it has issued a continuing mandamus to require States to fully implement specific schemes including mid-day meals at school. Secondly, despite the width of the right, the duty on the State has been frequently limited: to provide procedural protections, such as to consult with pavement dwellers before removing them⁸³; to enforce anti-pollution statutes⁸⁴, or to fulfil existing projects, such as a road for which funds had already been provided⁸⁵. In the right to food case too, a primary cause of the problem was maladministration: the court found that about half of the food subsidy was being spent on holding excess stocks; reducing stocks would free up large fiscal resources to distribute food and provide hot mid-day meals for all children at school⁸⁶. Finally, the Court's role has been highly controversial, particularly when it has been thought to favour environmental concerns over its traditional constituency, such the workers made unemployed when a polluting industry is shut down; pavement dwellers evicted as part of an urban 'clean up', or people displaced by dam construction.⁸⁷

The Indian approach nevertheless remains relevant to the domestic scene in that there are clear signs that the principles in the EU Charter of Fundamental Rights will be used as interpretive aids by the ECJ, and thereby have a direct influence on domestic

⁸² *Ratlam v Vardhichand* AIR [1980] Supreme Court 1622 (Supreme Court of India)

⁸³ *Olga Tellis* above.

⁸⁴ A Desai; and S Muralidhar "Public Interest Litigation: Potential and Problems" in B Kirpal (ed) *Supreme but not Infallible: Essays in honour of the Supreme Court of India* (OUP New Delhi 2000) pp172 - 3

⁸⁵ *State of Himachal Pradesh v Umed Ram Sharma* AIR 1986 SC 847 (Indian Supreme Court)

⁸⁶ *Peoples' Union of Civil Liberties v Union of India* Supreme Court of India Record of Proceedings Writ Petition (Civil) No. 196 of 2001 (Supreme Court of India)

⁸⁷ A Desai; and S Muralidhar "Public Interest Litigation: Potential and Problems" in B Kirpal (ed) *Supreme but not Infallible: Essays in honour of the Supreme Court of India* (OUP New Delhi 2000) pp172 - 3

law.⁸⁸ More importantly, it is submitted that our unwritten constitution also contains unwritten principles, which the court in *Limbuela* partly articulates. This is boldly signalled in the unequivocal acceptance that it is a fundamental value of our society that the degradation of destitution must be prevented, whether it arises from direct State violence, or is a result of circumstances for which the State can be said to be responsible. It is against this bedrock principle that positive duties need to be considered. This issue is dealt with in more detail below.

(b) Reasonableness

The South African court, by contrast, has shaped reasonableness as its primary adjudicative tool.⁸⁹ In doing so, it has been careful to stress that reasonableness goes beyond the bare ‘rationality’ review as understood in US Supreme Court jurisprudence⁹⁰. Instead, it has a substantive content, based on dignity, equality and freedom, which constitute the unifying values of the SA Constitution. This means that, while the State is given a degree of flexibility in its implementation of the duty, there are some bedrock principles which it must fulfil. The result is strikingly similar to that in *Limbuela*. Thus, Yacoob J declared in the famous *Grootboom* case: ‘A society must seek to ensure that the *basic necessities of life* are provided to all if it is to be a society based on human dignity, freedom and equality.’⁹¹ Even closer to *Limbuela* is Makgoro J’s statement in *Khosa*: ‘A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational’.⁹²

Reasonableness review is therefore shot through with the basic constitutional values. Makgoro J’s decision reflects a perspective on the nature of State responsibility resonates with the communitarian values identified above. Thus, she emphasised, ‘sharing responsibility for the problems and consequences of poverty equally as a

⁸⁸ C-173/99 *R v Secretary of State for Trade and Industry ex p BECTU* [2001] ECR I - 4881 (ECR) Opinion para 28 cf C-133/00 *Bowden v Tuffnells Parcels* [2001] ECR I-7031 (ECJ)

⁸⁹ *Grootboom* para 41

⁹⁰ *Khosa* para 67

⁹¹ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) (South African Constitutional Court)

⁹² *Khosa* [52]

community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.’ Similarly, she rejected the State’s argument, reflecting the liberal individualist argument above, that exclusion from benefits was an incentive to this group to become self sufficient rather than a burden on the State. Instead, she declared, even if permanent residents become a burden on the State, ‘that may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who make their homes here’⁹³

Under the reasonableness review, the Court will not inquire whether there are other more desirable measures which could have been adopted.⁹⁴ However, reasonableness demands a high level of scrutiny of the State’s justifications. Even the cost justification was subject to scrutiny: since extension to permanent residents would amount to an increase of less than 2% on the present cost of social grants, the Court rejected the State’s justification in this regard.

It would be risky to transplant reasonableness review into the domestic context, where principles of review have only just emerged from the formless standard of *Wednesbury* unreasonableness to begin to develop more certain standards. Even in the South African context, the ease with which reasonableness can descend into a highly deferent standard of review has frequently been noted. On the other hand, However, the South African understanding of reasonableness encapsulates the core values which the House of Lords articulates in *Limbuela*.

(c) Equality

Courts in several jurisdictions have been impelled towards equality as a standard of review of the duty to provide. This is because it permits the court to adjudicate on the ways in which the State has chosen to provide benefits, rather than insisting on

⁹³ Khosa para [65]

⁹⁴ Khosa para [48]

provision in the first place. Scrutiny of the criteria for irrationality or discrimination seems to fit into the court's sphere of competence and legitimacy.

This has been the approach of the ECHR, largely as a result of the structure of the Convention. Article 14 is not a self-standing provision, but only provides there shall be no discrimination *in the enjoyment of Convention rights*. Nevertheless, there is no need to prove breach of another right to trigger Article 14, only that it is 'engaged'. For example a State has no duty to make provision for parental leave. But if it does, the right to respect for family is engaged, and leave must be provided without discrimination on grounds of gender⁹⁵. The result has been replicated in domestic law. As Baroness Hale put it in *Ghaidan*: "Everyone has the right to respect for their home. This does not mean that the state--or anyone else--has to supply everyone with a home. Nor does it mean that the state has to grant everyone a secure right to live in their home. But if it does grant that right to some, it must not withhold it from others in the same or an analogous situation. It must grant that right equally, unless the difference in treatment can be objectively justified".⁹⁶ Since welfare inevitably targets benefits at particular groups according to need or capacity, this potentially gives the Court a wide-ranging role in policing the State's duty to make positive provision.

Limbuella resembles an equality claim in that it was the withdrawal of support from a particular group of destitute individuals which the court classified as 'treatment' for the purposes of Article 3. Thus Lord Scott, echoing *Ghaidan*, reiterated there is no ECHR right to be provided with a minimum standard of living. However, where a statutory regime does make provision for destitute asylum seekers, the exclusion of late applicants constitutes treatment under Art 3. Similarly, there is no duty to have a health service, but given that there is a health service to which all have access, the removal of the right from asylum seekers would be treatment for the purposes of Article 3⁹⁷. This parallels cases in both SA and Canada: in *Khosa*, the SA Court struck down a scheme which excluded permanent residents from access to child support grants and old age pensions which were available to South African citizens. In

⁹⁵(2001) 33 EHRR 14.

⁹⁶ *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557 at [135].

⁹⁷ *Limbuella* para 66 - 69

Gosselin, the issue concerned exclusion of under 30s from the base-line benefits provided for those over 30.

However, if equality merely means consistent treatment, it would easily be met by providing benefits for no-one, leaving destitute people to their fate. Lord Scott's analysis implies exactly this: 'If individuals find themselves destitute to a degree apt to be described as degrading, the state's failure to give them the minimum support necessary to avoid that degradation may well be a shameful reproach to the humanity of the state and its institutions but, in my opinion, does not without more engage article 3.' This result can only be avoided if equality is tied closely to a substantive right. Thus in *Gosselin*, Arbour J stressed that the claim of under-inclusion was more than just an equality claim: the exclusion from the statutory regime violated their self-standing rights to life and security of the person. Similarly, Lord Brown in *Limbuela* recognises the danger of transforming Article 3 into a mere standard of consistency and emphatically reinstates the substantive core of Article 3. 'It seems to me one thing to say, as the ECtHR did in *Chapman*, that within the contracting states there are unfortunately many homeless people and whether to provide funds for them is a political, not judicial, issue; quite another for a comparatively rich (not to say northerly) country like the UK to single out a particular group to be left utterly destitute on the streets as a matter of policy.' This is supported by the Prime Minister's own statement that 'people sleeping rough on our streets ... is not a situation that we can continue to tolerate in a modern and civilised society.'

The role of the equality standard then is not to substitute for the substantive right, but to provide a yardstick by which the State's criteria for exclusion can be judged. Thus Makgoro J in *Khosa* acknowledged that it was necessary for the State to differentiate between groups in order to allocate benefits and provide efficient delivery of social services. However this classification had to satisfy the constitutional requirement of reasonableness, in that it 'there must be a rational connection between that differentiating law and the legitimate government purpose it is designed to achieve.'⁹⁸

⁹⁸ *Khosa* para [53]

(ii) Reconciling the judicial with the political

It is impossible for courts to reflect or constrain changing ideologies of political responsibility. But human rights discourse requires that these notions operate within a clear framework of legality. The House of Lords in *Limbuela* marked out the beginnings of such a framework. There is an unequivocal acceptance that the prevention of the degradation of destitution is a fundamental value of our society, whether it arises from direct State violence, or is a result of circumstances for which the State can be said to be responsible. There is no room for justification on the grounds of State policy, and certainly no room for justifications based on cost. Hence the significance of their Lordship's rejection of the 'spectrum' analysis constructed by Laws LJ in the Court of Appeal, according to which degrading treatment which is not direct violence on the part of the state could be justified if it were part of lawful state policy⁹⁹.

It is against this bedrock right that evolving notions of political responsibility must be tested. A central example concerns recent notions of the 'facilitative state' and 'active citizen'. While the court can play no part in determining the value of these notions as compared with others, it does have a clear role in ensuring that they do not become coercive. In *Limbuela*, their Lordships placed great weight on the fact that the legislative regime not only denies support but also prohibits asylum seekers from working. The State can certainly expect those who can work to do so. But when paid work is not a real alternative, the court will still enforce the State's positive duty towards the destitute. As Lord Brown put it: 'Assume the ban on working were to be lifted and a complaint then made by someone obviously unemployable', he argues, 'Surely the approach would not be fundamentally different.'¹⁰⁰

Similarly, the Court should be in a position to test whether the conditions imposed on the exercise of the right are so onerous as to amount to effective deprivation. This question arose in the Canadian case of *Gosselin*¹⁰¹, in which Quebec's workfare scheme provided claimants under 30 with only one third of the base amount payable

⁹⁹ [2004] QB 1440, para 59, 70. Jacob and Carnwarth LJ agreed with the spectrum analysis but disagreed on the facts.

¹⁰⁰ *Limbuela* para 91

¹⁰¹ *Gosselin v Quebec* 2002 [S.C. R.] 84

to older claimants, who in turn received only 55 percent of the poverty level for a single person. In order to increase their base amount, those under 30 were required to participate in training or work programmes. In practice, however, 88.8 percent of such claimants were unable to increase their benefits to the 30-and-over level. This was because of eligibility conditions, waiting times between programmes, lower supplementary subsidies for some programmes, and shortage of places. Claimants living on the reduced amount found themselves in extreme poverty.

In the Supreme Court of Canada, McLachlan CJ, for the majority, saw the workfare provisions as sufficiently compensatory¹⁰². She did not, however, rule out the possibility of a different approach on evidence which she would regard as more robust. The dissenting judgments gave greater credence to the evidence and therefore provide a useful guide as to the court's role in testing positive duties against human rights. Arbour J found a breach of the State's duty under the right to life, liberty and security of the person. For her the test was whether the statutory regime 'substantially impeded [the claimants'] ability to exercise their right to personal security'¹⁰³. Bastarache J found a breach of the claimants' equality rights¹⁰⁴. He recognised that a degree of deference to the State was required, given the complex balancing of interests and the expenditure of large sums of public money. However, he stressed that 'the government does not have *carte blanche* to limit rights in the area of social policy'¹⁰⁵. Instead, the State had to show that the 'provision in question constituted a means of achieving the legislative objective that was reasonably minimally impairing in respect of the appellant's equality rights'¹⁰⁶. Even according a high degree of deference, and taking into account that other reasonable alternatives to achieve the objective were available, he concluded that the government had not satisfied the standard.¹⁰⁷

¹⁰² Gosselin [83]

¹⁰³ Gosselin [385]

¹⁰⁴ Gosselin [258]

¹⁰⁵ Gosselin [261]

¹⁰⁶ Gosselin [285]

¹⁰⁷ Gosselin [285]

Conclusion

Evolving notions of political responsibility bring a valuable perspective to bear on positive duties in the human rights field. The recognition of structural constraints on individual autonomy has led to a well-established acknowledgment of State responsibility to provide for the welfare of individuals. At the same time, as newer ideas of active citizenship suggest,¹⁰⁸ freedom consists in people being actively involved in promoting and shaping their own destiny rather than being passive recipients. Thus, as Sen argues, the State's role is to safeguard and strengthen human capability through supportive and facilitative measures, rather than through a ready made delivery¹⁰⁹. Similarly, poverty should not just seen as low income, but should include other sources of deprivation of basic capabilities¹¹⁰. Thus the right is not only a transfer of income or package of goods. It also includes a facilitative dimension, enhancing individuals' capability to achieve their desired functioning. This is partly what current rhetoric calls investment in human capital: making it possible for people to acquire the skills necessary for upward mobility within the labour market. But it extends to valued functioning outside of the labour market, including caring, participating in community and political activity, environmental, health and leisure concerns, and artistic endeavours.

At the same time, the State cannot expect active citizenship without making the appropriate provision. This can then draw on the communitarian insight that welfare rights are to the benefit of the community as a whole as well as the individual. Rights which do more than redistribute income, but also develop individuals facilities through education, better health etc are of benefit to the community as a whole at the same time as they benefit the individual. The State also has the responsibility to ensure that paid work is itself not oppressive, through insisting on decent standards of working conditions and the right to participate collectively in decision-making.

¹⁰⁸ Lister p.6

¹⁰⁹ Sen p.53

¹¹⁰ Sen p.87