



# **Social and Economic Rights in the South African Constitution and the Role of a Basic Income Grant**

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## **Contents**

1.	Introduction to the problem .....	1
2.	The nature and status of rights .....	4
3.	The moral foundations .....	4
5.	Homogeneity of rights.....	7
7.	Legal rights and constitutional rights .....	10
8.	Social and economic rights in perspective .....	12
9.	The South African constitution and bill of rights .....	19
10.	Redistribution through rights or through policies? .....	23
11.	The basic homework on basic income grants .....	30
12.	Conclusion.....	37



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*You can no more make a city out of paupers than out of slaves.*  
(Aristotle)\*\*

## 1. Introduction to the problem

Human rights have underlying moral objectives, like autonomy, self-sufficiency and equality. In theories of justice these are also defining principles. But the main point is that their achievement requires investment in resources and human effort. In societies subscribing to such theories, for those in poverty the resources have either to be accumulated by the individual or acquired by transfers from property holders and income recipients higher up the income scale. Viewed in this light, a basic income grant or BIG is one potential instrument of transfer, and the key question for rights fulfilment is whether it will raise the level of investment in physical and human capital by the poor individual. This question is the subject of this paper.

The 1996 South African Constitution is widely admired. Why this is so is not always clear, but one infers it is because the Constitution affirms the liberal-democratic tradition in constitution making,<sup>1</sup> contains provisions in keeping with the evolution of international law, and provides support for the political arrangements identified currently as necessary for a stable democracy. The Bill of Rights in particular is praised for incorporating a comprehensive set of social and economic rights.<sup>2</sup> The debate over the inclusion of these rights has, however, been largely confined to the legal and political spheres in South Africa. Outside these

\*\* *Politics* (Book 3, Part 12).

<sup>1</sup> The predominance of liberal-democratic precedents in the 1996 Constitution is ironic given that historically the term 'liberal' was used negatively on both sides of the conflict and the main ideological divide in South Africa before political change in the 1990s.

<sup>2</sup> Such praise was not universal. Even during the Constitutional Assembly hearings of 1995-96, business organizations, non-governmental bodies and individuals, expressed disquiet about the entrenchment of socio-economic rights, but on quite different grounds to the present paper. See S. Liebenberg, "Socio-economic Rights", in M. Chaskalson et al. (eds.), *Constitutional Law of South Africa* (1998) 41-1-56, and the documents cited there.

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forums, the wisdom of the decision to include social and economic rights in the Bill of Rights remains in doubt.

Accepting that a constitutional right is a contract between the individual and the state that should be enforceable in a court of law in accordance with recognized criteria, a range of key issues must be faced. Two only are the concern of this paper. In the aftermath of constitution making,

§ does a satisfactory rationale exist for retaining the social and economic clauses in the Bill of Rights, and

§ does a basic income grant have a role to play in their realization?

These questions are compelling since South Africa's economic capacity to fulfil these rights is in question, as is uncertainty about the consequences that may follow in the longer term if these rights are promoted and a BIG instituted in the country's present development stage. The climate of discussion is such that proponents of human rights and promoters of a universal grant are seldom troubled by these concerns. Since only minority groups perceived as conservative during the constitutional debates questioned the advisability of including second-generation rights, most commentators now presume that the inclusion issue was aired and was settled, so all enumerated rights in the Bill of Rights are deemed feasible under appropriate policies.<sup>3</sup> Regrettably this is not true.

This paper describes the economic consequences when resources are allocated by privileged criteria to fulfil entrenched rights. Good faith disagreement can exist about the wisdom of turning aspirations into fulfilment, even when these aspirations are shared on moral and political grounds, because this paper subscribes fully to the goals underlying the entrenchment of all human rights.

<sup>3</sup> One of the few exceptions is Darrel Moellendorf, who raises some serious interpretative questions. See Moellendorf, 'Reasoning About Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims', (1998) 14 *South African Journal on Human Rights* 327.

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In outline, the argument is the following:

First, translating abstract legal rights into a form suitable for resource allocation decisions is neither a simple nor unambiguous task. Thus there is considerable scope for conflicting interpretations.

Second, a logical implication of the concept of a human right is that certain kinds of choices are placed beyond the reach of optimizing calculations. If correct, this feature of rights implementation has troubling consequences. Procedures essential for the efficient allocation of resources are ruled out, like the selection and ranking of competing objectives; the recognition of what is an investment use of resources and what is not; identifying complementarity's amongst inputs as well as outputs; and the essential attention to be paid to time-scale and sequence in production decisions.

Third, pursuing rights that are pure consumption entitlements could retard economic growth. Welfare state experience raises the possibility of negative effects on individual productive incentives from the receipt of transfer payments like social security and free services in education, health, housing and child-care; as well as the negative consequences of higher taxation on the resource-raising side. These are contentious because they pose the question whether the future diversion of resources to fulfil the panoply of rights in the 1996 Constitution will undermine the South African economy's capacity to fulfil rights in general. A self-negating outcome, this possibility requires serious consideration. A further troubling generalization concerns the economic precondition for the survival of low-income democracies. "In sum, the secret of democratic durability seems to lie in economic development – not, as the theory dominant in the 1960s had it, under dictatorship, but under democracy based on parliamentary institutions".<sup>4</sup>

Lastly, unanswered research questions about a basic income grant are listed in the end section. Vocal pressure groups are calling for its institution in South Africa, but they have still to reveal the results of their preparatory homework.

<sup>4</sup> A. Przeworski & Others, 'What Makes Democracies Endure?', (1996) 7 *Journal of Democracy* 50.

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## 2. The nature and status of rights

To the beginner, the literature on rights can be bewildering. Its terminology covers human rights, individual rights, moral rights, basic rights, fundamental rights, legal rights, constitutional rights, customary rights, as well as further distinctions depending on the purpose and positioning of discussion on the spectrum from abstract to apply. Because this paper is concerned with social and economic rights mainly, the philosophical and legal dimensions of that sub-set of rights are given most attention.<sup>5</sup> The following sections sketch the minimal features required to understand the economic dimensions of rights, specifically the consequences of all enumerated rights being accorded a common pre-emptive status in the allocation of material resources.

## 3. The moral foundations

All rights have moral dimensions but not everyone agrees on what these are. Theories justifying the existence of rights construct their arguments on the basis of shared human experience. Depending on the particular theory argued, the basis of individual rights is asserted to be: autonomy, liberty, justice as fairness, equality, equal concern and respect, self-realization, self-sufficiency, dignity, inviolability and mutuality. Common to all conceptions of rights is a concern with what it means to be human, with the conditions most conducive to “human flourishing”.<sup>6</sup> Three instances by way of illustration are Thomas Nagel’s assertion that ‘it is most accurate to think of rights as aspects of status - part of what is involved in being a member of the moral community’,<sup>7</sup> Charles Taylor’s view

<sup>5</sup> For the reader knowing little about rights, see, for instance, J. Waldron, *Liberal Rights: Collected Papers* (1993); P. Jones, *Rights* (1994); and J. Shestack, 'The Philosophical Foundations of Human Rights', (1998) 20 *Human Rights Quarterly* 201.

<sup>6</sup> Q. Skinner, “The Paradoxes of Political Liberty” in S. Darwall (ed.), *Equal Freedom* (1995) 15 at 20. Rights discussion in the post-World War II era has been dominated by American contributions that “employed a distinctive moral vocabulary which places a greater stress upon essential or primary human rights than has been usual in European thought about politics”. S. Hampshire, “Liberalism: the New Twist”, in *New York Review of Books* (1993) 43 at 43.

<sup>7</sup> T. Nagel, 'Personal Rights and Public Space', (1995) 24 *Philosophy and Public Affairs* 83 at 85.

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that “the system of positive rights rests on a set of deep-rooted moral beliefs concerning the human person and the dignity and liberty that we must accord that person”,<sup>8</sup> and Elizabeth Anderson’s characterization of egalitarian justice as “seeking the construction of a community of equals’ by providing individuals with ‘access to the social conditions of their freedom”’.<sup>9</sup>

Certain implications can be noted at once. First, the terms used to express the moral foundations of rights are highly abstract. So translating them into rights recognized in custom, law and policy leaves room for disagreement about what is considered fundamental and must be preserved in any concrete interpretation of a particular right. In other words, we face a range of implications from which to choose and to emphasize, without agreed guidelines on how to make the choices most in keeping with the underlying moral objectives. Any one set of asserted rights therefore may not be explicable by the standards of any one philosophical argument.<sup>10</sup> Second, individual rights signal what is important and deserving of special protection, even as possessing preemptory force: “usually, when talk of rights is in the air, there is an implicit suggestion that the use of force . . . would not be inappropriate to secure what is required.”<sup>11</sup> Third, all conceptions of the moral foundations of rights accord decision-making powers to individuals, a feature dating back to the intellectual innovations of the seventeenth century in Europe, leading up to the Enlightenment in the century following. A person has rights by virtue of being human. Therefore these rights are universal and not confined to citizens, believers or co-religionists, members of an ethnic group or sharers in a common culture. Fourth, human rights are both liberties to act and claims to be treated in certain ways by others. It would be odd to say that Robinson Crusoe had rights when he inhabited his island alone. But he acquired

<sup>8</sup> C. Taylor, “Human Rights: the Legal Culture” in Ricoeur (ed.), *Philosophical Foundations of Human Rights* (1986) 49 at 53.

<sup>9</sup> E. Anderson, “What is the Point of Equality”, in 109 *Ethics* (1999), 287 at 289.

<sup>10</sup> P. Alston, Introduction to Alston (ed.), *Human Rights Law* (1996), xi.

<sup>11</sup> J. Waldron, “A Right-Based Critique of Constitutional Rights”, in 13 *Oxford Journal of Legal Studies* (1993) 18 at 24.

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rights, like the rights to personal security and to fairness, once he began to share his habitat with Man Friday.<sup>12</sup>

#### 4. Logical distinctions and implications

Rights have connections with a range of other concepts, in particular with duties and claims. There are divergent views about these. For instance, does an individual right impose a claim only on political authority, in other words, vertically to the state alone? Or does its claim apply also to other individuals, that is, horizontally? Each position has vocal supporters.<sup>13</sup>

The concept of a right has recognized logical implications. A common starting point is Hohfeld's scheme of "jural relations" or entailments.<sup>14</sup> Colloquially, the single term "right" connotes four distinct senses: right/claim, liberty/privilege, power and immunity. This is a potential source of confusion, so in legal application Hohfeld favoured restricting the word "right" to the first sense of a claim or a "claim-right". A right thus understood is a relationship between two persons, human or juridical, characterized by duty in contrast to convenient action.

For present purposes the details and intricacies of these interpretations are ignored. But note that there are two rival ways of explaining, in the sense of legitimizing, the special relationship between rights and duties. The benefit or

<sup>12</sup> Not everyone views positively the proliferation of different moral bases for rights. "I am sceptical whether there really are any specifically moral rights . . . the rampant use of stipulation, recommendation, intuition, self-evidence, obviousness, and appeals to natural law in order to ground [moral] rights is open to attack". R Frey, "Act-Utilitarianism, Consequentialism, and Moral Rights" in R. Frey (ed.), *Utility and Rights* (1985) 61 at 63.

<sup>13</sup> M. Hunt, "The Right to Rebel", (1998) *Autumn Public Law* 423; D. Davis, "Charting the statutory implementation of the values of the Bill of Rights in the business world: past and future" (1999) in Konrad-Adenauer-Stiftung, *Business and Human Rights in South Africa* 39; and R. Buxton, "The Human Rights Act and Private Law", 116 *Law Quarterly Review* (2000) 48.

<sup>14</sup> See W. Hohfeld, *Fundamental Legal Conceptions* (1919); J. Waldron, Introduction to J. Waldron (ed.), *Theories of Rights* (1984); and M. Kramer, "Rights Without Trimmings" in M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights* (1998).

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interest theory holds that having a right is a matter of the individual receiving a benefit or having an interest satisfied. The right-holder in this conception is essentially a bearer of interests. By contrast, the choice or will theory proposes that to have a right is for the individual to have a free choice in the pursuit of every goal deemed desirable by that individual.

Yet to be accepted as a legitimate right and not just an aspiration, such goals of the right-holder require social recognition. Both theories justify recourse or remedy where a right is unfulfilled or is violated. “If there were (primary) rights without remedies the right-holder would in the last resort be a mere critic: he could properly condemn the violation of his interests but no more. Unless pressure can be brought to bear on violators, so-called rights are naked and unprotected”.<sup>15</sup>

## 5. Homogeneity of rights

Because of their common moral foundation, all enumerated rights claim equal importance. They demand equivalent recognition and weight in political institutions and, it appears logical, in the allocation of resources towards their realization. Individual rights in a system of rights cannot be waived or alienated; they cannot be exchanged because they are not legitimately open to trading-off against other goals desired by the right-holder; they are not subject to ranking or prioritization; and they are not mutually conflicting.

If rights have these properties then a number of questions arise concerning their implementation.

First, are these acceptable logical extensions of the basic concept of a human right? Alternatively, are they contingent associations found in practice, generated by human rights instruments and institutions that have evolved historically for practical reasons, like the need for political stability or effective government? Which is correct?

<sup>15</sup> T. Honoré, “The Right to Rebel” in P. Alston (ed.), *Human Rights Law* (1996) 523 at 524.

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Second, as they are realized over time do rights complement each other in achieving moral values like the autonomy, equality or self-sufficiency of the individual? Put differently, does realization of right Y along with right X add extra weight to right X over and above what it would contribute alone to the moral goal? This presumption is present in some literature, specifically that first-generation political and civil rights confer greater benefit if their fulfilment is accompanied by fulfilment of second-generation rights to social and economic resources.

Third, what implications does the set of rights ascribed to an individual bear for majority interests in a community?

Fourth, is the notion of a right accruing to a group not yet in existence, logically coherent? Such a presumption is widespread in environmentalist advocacy. Yet can environmental rights legitimately apply not to individuals but to groups, in this case to future generations? A second aspect of the difficulty is that the very idea of rights accruing to unborn individuals who cannot be identified is another troubling extension of the concept of a right.

Human rights trump aggregate welfare in political decision-making.

This veto characteristic of rights possesses a lengthy pedigree. In Dworkin's well-known words: "rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole . . . the background justification with which we are concerned is some form of utilitarianism".<sup>16</sup>

<sup>16</sup> Dworkin, *Taking Rights Seriously* (1984) at 153. For the present, utilitarianism is interpreted simply as the contention that overall well being or total utility is morally decisive.

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A first comment is that utilitarianism is a consequentialist way of thinking in a variety of disciplines including economic analysis.<sup>17</sup> Accordingly, the merit of an action depends on its consequences, not on some compelling moral motive or inspiration for its undertaking. By such utilitarian criteria the only rights that warrant recognition are those that can be interpreted convincingly as beneficial to the general welfare. By contrast, in the sphere of rights discussion, the fundamental considerations are deontological in nature, emphasizing duty and obligation. According to this standard, every right whose fulfilment contributes to the self-realization of the individual is legitimate and embodies a claim to recognition. A major problem in the literature on rights is that discussion can wander to and fro between these two conceptions without warning. This is markedly the case at the rhetorical level employed by many rights activists and international organizations, including the United Nations.

Second, while the proposition that the individual's rights take precedence is accepted in all conceptions of rights, there are differing interpretations of what this means for implementation. Such differences are particularly weighty in the case of social and economic rights, with major implications for resource allocation.<sup>18</sup>

Third, optimizing calculations like cost-benefit analyses aimed at estimating the net effect on community welfare of a particular rights-based policy is secondary not decisive. Paradoxically though, in all systems of rights there are circumstances that have to be identified in advance where the public interest must

<sup>17</sup> “[C]onsequentialism [is] understood here as the doctrine that everyone has a duty to perform at each moment the action that will, in his estimation, maximize the total amount of good in the universe”. B. Barry, *Justice as Impartiality* (1995) at 23.

<sup>18</sup> A prominent example, John Rawls starts his book boldly: “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override .... Therefore . . . the rights secured by justice are not subject to political bargaining or to the calculus of social interests.” See Rawls, *A Theory of Justice* (1971) at 3-4. “For Rawls and those he has influenced, it is not enough to say of such a [well-ordered] society that it is doing well on the whole, in the aggregate, or so far as average per capita income is concerned. A well-ordered society advances the good of each and all of its members, so that there is no one from whose gaze or plight we have to avert our eyes, no one whose complaints can be met only with lies or pious nonsense about following one’s dream.” J. Waldron, “The Plight of the Poor in the Midst of Plenty”, in *London Review of Books* (1999) at 3.

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outweigh one or more human right. A long-standing example is the suspension of rights under war conditions. For instance, Article 15 of the European Convention on Human Rights provides that ‘all except the absolute rights may be suspended “in time of war or other public emergency threatening the life of the nation”.’<sup>19</sup> The problem remains the lack of guiding precedent in distinguishing between relatively uncontentious cases like war and the postponement of meeting, say, particular social and economic rights in order to advance a higher growth rate for a national economy.<sup>20</sup>

## 7. Legal rights and constitutional rights

Discussion thus far has been confined to human rights (in the past termed “natural” rights and currently often “moral” rights), although some implications noted apply also to the categories of legal and constitutional rights. To advance the main argument these less abstract categories need examining too.

“Legal right” has a specific meaning. “To say that [individual] P has a legal right is to indicate the existence of an articulated rule or principal entitling P to X. It indicates that P has standing to claim X and to bring suit for it in a court of law”.<sup>21</sup> An illuminating distinction, following Waldron, is that between two quite different ways of claiming a good or service, both being legal procedures. The first is where P has a right in law, may demand it, and that demand must be met; in the second, “some official has been vested with discretion to determine on a case by case basis how best to distribute a limited stock of resources like X to

<sup>19</sup> A. McHarg, “Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights”, (1999) 62 *Modern Law Review* 671 at 671.

<sup>20</sup> “[The European] Court has stated that its role is to determine whether a fair balance has been struck between the demands of the general interest and the need to protect individual rights. The public interest goals which are pleaded in these cases typically involve the promotion of economic development or social justice . . . [but] they are by their nature vague and contentious, as well as unfamiliar to judges and lawyers”. McHarg, n. 19 above, at 694.

<sup>21</sup> Waldron, n. 11 above, at 24.

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applicants like P”.<sup>22</sup> A legal right exists in the first but not in the second instance.<sup>23</sup>

In every judicial system, legal rights pose unsettled issues of interpretation, discretion and enforceability. For the present these complications are ignored in favour of more general observations. First, to be implemented a legal right requires one or more legal rules that detail that right and specify the penalties for its violation. Questions attaching to such rules concern their precision, and whether they are consistent with the principles in a constitution or by reference to case law and precedent.<sup>24</sup> Second, an entrant to the rights arena soon becomes aware that the philosophical justification for even legal rights remains in dispute, as evidenced by the discussions over the last decade in South Africa about what rights should be legally recognized. “The notion of a legal right has proved in the history of jurisprudence to be very elusive: how elusive may be judged not only from the well-known division of theories into “Will theories” and “Interest theories” but also from some of the interesting though also strange things that jurists and others have said about rights.”<sup>25</sup>

Constitutional rights are a sub-class of legal or statutory rights. Their purpose is two-fold: to underline the special or “fundamental” character of such rights, and to discourage, or even disable, citizens and legislators from changing the status of

<sup>22</sup> Ibid. at 24.

<sup>23</sup> “[A] legal right, on the account I have been offering . . . would be a way of acting or of being treated secured for an individual within a complex public practice, one where government agencies played an essential role. And here we would want to include the ongoing statute and its provisions . . . together with the normatively directed appropriate conduct on the part of other people respecting a specified liberty of action or freedom from injury or provision of welfare . . .” R. Martin, *A System of Rights* (1993) at 60.

<sup>24</sup> B. Almond, “Rights” in P. Singer (ed.), *A Companion to Ethics* (1991) 259 at 261.

<sup>25</sup> H. Hart, *Essays on Bentham* (1982) at 162. “[W]hereas Dworkin’s interpretative legal theory in all its forms rests on the presupposition that the point or purpose of law and legal practice is to justify coercion, it certainly is not and never has been my view that law has this as its point or purpose. Like other forms of positivism my theory makes no claim to identify the point or purpose of law. . . . In fact I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct.” H. Hart, *The Concept of Law*, 2nd edition (1994) at 248-9.

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such rights by making it more difficult for them to do so.<sup>26</sup> This introduces an element of paradox.

To embody a right in an entrenched constitutional document is to adopt a certain attitude towards one's fellow citizens. That attitude is best summed up as a combination of self-assurance and mistrust . . . [but] mistrust of one's fellow citizens does not sit particularly well with the aura of respect for their autonomy and responsibility that is conveyed by the substance of the rights which are being entrenched in this way.<sup>27</sup>

## 8. Social and economic rights in perspective

Even brief acquaintance with the literature is enough to indicate that there is “a deep and enduring disagreement over the proper status of economic, social and cultural rights”.<sup>28</sup> But the main argument of this paper does not hinge on the “rightness” or “wrongness” of the philosophical justification for including second-generation rights in the South African Bill of Rights. Rather, to bring out the efficiency and equity implications of socio-economic rights, issues like the following list need to be engaged because they remain contentious.

[1] Historically, it was Bismarck's Prussia that initiated the statutory recognition of what is now called social insurance or social protection, its first codification going back as early as the *Allgemeines Landrecht* of 1794. Ironically, the first programmes legislated in the 1880s by the conservative majority in the Prussian parliament were motivated by the need to pre-empt proposals made by more radical opponents during a period of social tension that accompanied

<sup>26</sup> “The main point of protecting a right in a constitution is to identify it as fundamental and to put it beyond the depredations of a transient electoral majority”. E. Mureinik, “Beyond a Charter of Luxuries: Economic Rights in the Constitution”, (1992) 8 *South African Journal on Human Rights* 464 at 468.

<sup>27</sup> Waldron, n.11 above, at 27.

<sup>28</sup> H. Steiner and P. Alston (eds.), *International Human Rights in Context* (1996) at 256.

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Germany's state-led industrialization process.<sup>29</sup> Argentina under Peron provides another instance of welfare provisions driven by political motives that were certainly not liberal-democratic. Thus the common assumption today that rights programmes are the logical working out of liberal values in the political arena is not accurate. Welfare state policies giving effect to legal rights to social assistance have not resulted from only the kinds of political decisions that value and pursue individual worth and fulfilment as moral goals.

[2] A contention widespread in the advocacy literature is that the fulfilment of economic and social rights is a necessary precondition for the satisfaction of political and cultural rights (so called "first-generation" rights because in the historical evolution of rights since the Enlightenment they appeared on the agenda first). This interdependence or "indivisible whole" presumption (as in the following quotation) is vague, allowing much leeway in interpretation which causes implementation problems.

Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be realized, the violation of some rights in favour of the realization of others can never be justified.<sup>30</sup>

Taken at face value this contention is vacuous. Meeting the one kind of rights does not require the prior or parallel satisfaction of the other kind. Assertions in this vein are statements about the requirements for human functioning, or the

<sup>29</sup> P. Quint, "The Constitutional Guarantees of Social Welfare in the Process of German Unification", (1999) 47 *The American Journal of Comparative Law* 303 at 303, 324.

<sup>30</sup> American Convention on Human Rights 1988 cited in I. Brownlie (ed.), *Basic Documents on Human Rights* (1992) at 521. Other sources making similar statements are H. Hart, *Essays in Jurisprudence and Philosophy* (1983) at 207-8; J. Rawls, *Political Liberalism* (1993) at 166; Jones, n. 5 above, at 162-3; J. Elster, "The Impact of Constitutions on Economic Performance" (1995) *Proceedings of the World Bank Annual Conference on Development Economics 1994*, 209 at 213; Steiner and Alston, n. 28 above, at 263; Liebenberg, n. 2 above, at 41-2; and Moellendorf, n. 3 above, at 331-2. These writers illustrate the range of such assertions but may not subscribe to this opinion themselves.

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implications of moral personhood at a high level of abstraction, rather than as propositions about actual causal linkages between rights. Consider the following claim: “[I]t is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity.”<sup>31</sup> Is this intentionally put in rhetorical terms for advocacy? Or is it a serious proposition about how rights should be interpreted and thus fulfilled in practice?

At a mundane but vital level, millions of individuals in the contemporary world are housed in shanties, are illiterate and malnourished - i.e. they do not enjoy second-generation rights to shelter, education and adequate subsistence – yet they can exercise their political right to vote, their civil right to fair legal procedures including legal assistance at public expense, their right to free expression of opinion, and so on for the remainder of their first-generation rights. If this is denied, then it must be denied in the same substantive terms, not in alternation between different levels of abstraction.

This general difficulty has been alluded to already. One cannot defend, in a mode of discussion that is both rhetorical and abstract, a set of premises about moral goals as self-evidently true, and then leave completely open further inferences about the political actions and economic policies required to bring such goals about. This way of proceeding invites confusion of categories. It may also explain why national governments too often do not take seriously the agitation of international organizations and human rights activists about the necessity of fulfilling social, economic and environmental rights alongside civil and political ones. Admittedly, violations of political rights are more salient and generate more condemnation than do violations of socio-economic rights, but this is no excuse for neglecting essential distinctions. The death of a child through starvation (the violation of an economic right) is no less reprehensible than the death of a political dissident through torture (the violation of a civil right). Conducting discussion of such matters at an unrelentingly high level of rhetoric is a recipe for confusion and inaction.

<sup>31</sup> “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, (1998) 20 *Human Rights Quarterly* 691 at 692.

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Without repudiating the “all-good-things-go-together” claim, Elster<sup>32</sup> contends that the converse proposition also has merit. Entrenchment of political rights makes policy commitment by the state to other rights more credible, a precondition for development now increasingly recognized. Private decision-takers are led to believe that contractual enforcement and security, for instance of the right to property in productive assets, will endure. With this assurance, their long-term horizons expand, encouraging their commitment to investments having lengthy gestation periods. With economic growth stimulated, the state’s adherence to first-generation rights is reinforced and it is provided with more resources for achieving second-generation rights.

[3] In comparing first and second-generation rights, is it more difficult to specify the latter with precision? For practical implementation, are there greater margins of error attaching to social and economic rights? This question has ramifications not pursued here,<sup>33</sup> but it will assist the main argument to take note of difficulties likely to be unfamiliar. These are empirical not conceptual.

First, there are general questions of rights implementation strategy. Who is responsible in government and at what level; what is the minimum provision required in specific goods and services; how is delivery to be effected most efficiently; what is the best method of funding (kinds of taxes, levies, donor funds, cross-subsidies)? In the absence of answers we are left with only the conscious need for substantial, unspecified, general revenue allocations, but with no indication of how and where these are to be found. In the rights literature such issues are seldom posed and even more seldom engaged.<sup>34</sup>

<sup>32</sup> Elster, n. 30 above.

<sup>33</sup> See S. Skogly, “Human Rights and Economic Efficiency: the Relationship between Social Cost of Adjustment and Human Rights Protection”, in P. Baehr et al. (eds.), *Human Rights in Developing Countries Yearbook* (1994) 43.

<sup>34</sup> “Recent national experience stands as a reminder of the questions that implementation of such a right [to minimum welfare] would entail: What level of medical care . . . How should such care be provided...What level or levels of government should be responsible . . . How should the financial burden of such a programme be distributed . . . All of these decisions of strategy and responsibility

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Second, the allocation of resources to rights fulfilment in monetary terms requires an operational definition of each need identified as right-worthy. Such definitions must be amenable to concrete interpretation in quantities and qualities, so that numerical goals for state expenditure within a specified time frame can be estimated.

Further complications are probable. Differences in the ease of specifying the content of some rights relative to others can lead to distortions. Bureaucrats, all too human, may neglect important rights objectives that have low verifiability because of their quality dimensions, requiring judgement more than measurement. Another problem is that monitoring the extent to which increased living standards result from rights implementation must take into account changes in leisure and life expectancy not easy to identify and to weight.

An issue not pursued here but of considerable pertinence to realizing socio-economic rights is the measurement of poverty itself. The large literature is testimony to the technical difficulties involved.<sup>35</sup> Finally, availability of finance may not be the determining limit on the state's capacity at any moment to meet enunciated rights.

It is important to stress that the constraint at work here [expanded state provision of social services] is not finance, but the limited real resources available to the [South African] economy. Competent teachers, nurses, doctors, and community workers are scarce, as is the capacity to produce books, medical supplies, and building materials. So the growth and improved distribution of social services must be viewed as the growth and improved distribution of the inputs required for delivering these services.<sup>36</sup>

remain on the table even after we have accepted the basic norm of a right to minimum welfare and identified medical care as one of its critical components". L. Sager, "The Domain of Constitutional Justice", in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (1998) 235 at 240.

<sup>35</sup> R. Kanbur and L. Squire, *The Evolution of Thinking About Poverty: Exploring the Interactions*, World Bank (1999) is a recent survey.

<sup>36</sup> A. Donaldson, 'Restructuring Social Services', in R. Schrire (ed.), *Wealth or Poverty? Critical Choices for South Africa* (1992) 143 at 147.

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[4] Certain enunciated rights may be internally inconsistent. The right to work is one such. Although it is not found in the South African Bill of Rights for reasons not wholly clear, the general point is that internal contradictions similar to those in a work-right may attach to other social or economic rights. To illustrate, one key value underlying the right to work is self-esteem or consciousness of self-worth, a value we have seen to be central to the entire set of moral values from which human rights obtain their authenticity. However, as Elster argues,

any right to work that could feasibly be created is not a right to work that is worth having. It would be self-defeating to create work whose main purpose was to enhance self-esteem [because its creation by someone else like the state destroys self-worth] . . . . This is a purely conceptual argument that holds for any level of unemployment. In addition, there is an empirical argument that comes into play in the face of mass unemployment. To provide a large number of the unemployed with stable, meaningful jobs may require resources in excess of the total supply...<sup>37</sup>

[5] As recent commentators have demonstrated,<sup>38</sup> major problems of indeterminacy attach to phrases like the state's commitment to the "progressive realization" of rights within the limit of its "available resources", and provision of "access" to resources rather than to resources themselves. No technical knowledge of state budgeting is required to appreciate that such expressions have a range of valid meanings that provide governments with scope to manipulate their incumbent commitment to rights, in good or in bad faith. Judges of the Constitutional Court face a formidable task and there is not much help that outside expertise can provide, except perhaps from linguists.

<sup>37</sup> J. Elster, "Is There (or Should There Be) a Right to Work?", in A. Gutmann (ed.), *Democracy and the Welfare State* (1988) 53 at 77. "[The] controls over work are in fact much more social than economic...a man works to preserve the respect of his wife, children, friends and neighbours, to fulfil the psychological needs induced by the customs and expectations of a lifetime and to replenish the stock of information, cautionary tales and anecdotes which he requires to maintain his participation in the web of social relations". Townsend (1968), cit. in A. Dilnot and A. Duncan, "Thinking About Labour Supply", (1992) 13 *Journal of Economic Psychology* 687 at 704.

<sup>38</sup> Liebenberg, n. 2 above; and Moellendorf, n. 3 above.

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Article 2 of the International Covenant on Economic, Social and Cultural Rights declares that each state party must devote the “maximum of its available resources” to realizing ICESCR rights. This phrase establishes the tangible response states must make. . . . It is a difficult phrase - two warring adjectives describing an undefined noun. “Maximum” stands for idealism; “available” stands for reality. “Maximum” is the sword of human rights rhetoric; “available” is the wiggle room for the state.<sup>39</sup>

[6] Concern about violation of the doctrine of separation of powers cannot be as readily dismissed, as it tended to be in South Africa over the previous decade of political change. Numerous international commentators remain troubled by this issue. The following passage is a forthright statement with its sceptical stance by no means unique because the “counter-majoritarian difficulty” remains alive and troubling to many.<sup>40</sup>

In drawing limits on how far they will exercise their powers of review and impose limits on what Governments can do, we will see that, like the sceptics, the courts think that it is critical to adhere very strictly to the principle of the separation of powers between themselves and the other two branches of government...So human rights activists have no answer to the judges who insist on respecting a separation of powers between themselves and the other two, elected branches of government. There is, in fact, no precedent for the judiciary fixing the priorities and levels of state support for people’s most basic economic and interpersonal needs. The judiciary has been steadfast in refusing all invitations to assume power over the fiscal and it is difficult to imagine what circumstances could justify changing its view.<sup>41</sup>

<sup>39</sup> R. Robertson, “Measuring State Compliance with the Obligation to Devote the Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights’, (1994) 16 *Human Rights Quarterly* 694 at 694.

<sup>40</sup> See also Waldron, n. 11 above; Barry, n. 17 above; Steiner and Alston, n. 28 above; and Sager, n. 34 above.

<sup>41</sup> D. Beatty, “The Last Generation: When Rights Lose Their Meaning” in D. Beatty (ed.), *Human Rights and Judicial Review* (1994) at 326, 355.

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[7] Residual issues to be noted include:

- § the vexed question of cultural relativism and therefore potentially conflicting interpretations of human rights in a nation-state of heterogeneous groups like South Africa;
- § the decision whether constitutional rights can be claimed only by citizens or by all residents in a national territory at any time, including foreigners legally or illegally present;
- § whether a bill of rights applies both horizontally and vertically, with claims enforceable against other individuals as well as the state;<sup>42</sup>
- § the difficult philosophical questions raised by the commensurability of all human rights, for instance, whether every enunciated right adds to human dignity substantively in itself or instrumentally as a means; and
- § the tempting assumption that socio-economic rights impose exclusively positive duties on authority, and therefore usually entail a net expenditure of resources in their implementation in contrast to first generation “negative” rights. This is a misleading characterization, likely to obscure already complex questions.

## **9. The South African constitution and bill of rights**

§ The rights clauses that are the main interest of this paper are the following:

environmental rights, land rights, the right to housing,  
health care, food, water, and social security, children’s

<sup>42</sup> If horizontality applies, the consequences will be far-reaching indeed. “The horizontality question is to be found in Section 8 of the [South African 1996] Constitution [and applies] to all organs of the state. It is equally clear that all persons are bound by the Bill [of Rights]...The provision is radical because it does something profound; indeed, no other constitution in the world has gone this far”. Davis, n.13 above, at 40. See also Hunt, n. 13 above; and Buxton, n. 13, above on the UK.

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socio-economic rights, educational rights, and the socio-economic rights of detained persons, including sentenced prisoners.<sup>43</sup>

§ Nothing in the present argument turns on the completeness of this list, but the task of interpreting particular rights according to the operational definitions needed for their implementation is indeed important, as already noted. The right to social security in Section 27 of the 1996 Constitution is a clear example. It is one instance of ambiguity out of a number, but it illustrates the difficulty well because of its high budgetary cost and because in the international literature in English the term “social security” has more than one meaning:

In the United States, it refers to retirement pensions; in the United Kingdom, it refers to the entire system of cash benefits; and in mainland Europe (in accordance with the usage of the International Labour Organization), it refers to all cash benefits plus health care. The term cash benefits are therefore used [here] throughout.<sup>44</sup>

§ Opposition to entrenching socio-economic rights in the explicit and extensive way provided in South Africa’s 1996 Constitution continues in the international literature. Debates remain lively, and other legal traditions taking alternative and more cautious stances show little sign of changing.

Rights in the United States remain in essence eighteenth-century freedoms. Europe has seen the steady development of a contemporary jurisprudence encouraged and influenced perhaps by the international human rights movement. . . .

<sup>43</sup> Liebenberg, n. 2 above, at 41-2.

<sup>44</sup> N. Barr, 'Income Transfers: Social Insurance' in N. Barr (ed.), *Labour Markets and Social Policy in Central and Eastern Europe* (1994) 192 at 223-4.

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The Universal Declaration of Human Rights recognizes the right to own and not to be arbitrarily deprived of property . . . but autonomy - in economic as in other matters - is not an articulated value. In the United States welfare rights are legislative, not constitutional, and are subject to political, ideological and budgetary constraints.<sup>45</sup>

Even in Germany at the present time there is considerable caution about the wisdom of entrenching second-generation rights in the constitution, exemplified in the divide between proponents of a “preachers” constitution’ and proponents of a “jurists’ constitution” in determining the form of the Basic Law.<sup>46</sup>

§ Similarly, lack of agreement persists at the philosophical level about rights. While this is a cautious judgement because there are exceptions,<sup>47</sup> to appreciate the width and depth of division in the rights community one has to read about the new constitutions of Eastern Europe and the arguments for and against a Bill of Rights for the United Kingdom.<sup>48</sup> This would matter less if authoritative local

<sup>45</sup> L. Henkin, “Economic Rights Under the United States Constitution”, (1994) 32 *Columbia Journal of Transnational Law* 97 at 128.

<sup>46</sup> Quint, n. 29 above, at 315. “[The German] Constitutional Court’s actions to date . . . caution that it is not realistic to expect that the judiciary will effect a social revolution through the imposition of social welfare ideas. Rather, regardless of whether the constitutional language is general or detailed, it seems most likely that any judicial enforcement of social welfare measures will remain in the interstices of existing *legislative* welfare provisions. The courts are most unlikely to require extensive new programmes of social welfare under these constitutional provisions . . .” Quint, at 325.

<sup>47</sup> See P. De Vos, “Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa’s 1996 Constitution?”, (1996) 13 *South African Journal of Human Rights* 67; E. De Wet, *The Constitutional Enforceability of Economic and Social Rights* (1996); and Liebenberg, n. 2 above, for example.

<sup>48</sup> See M. Glendon, “Rights in Twentieth-Century Constitutions”, (1992) in G. Stone et. al. (eds.) *The Bill of Rights in the Modern State* 519; Waldron, n. 11 above; J. Waldron, “Rights” in R. Gordon and P. Pettit, (eds.), *A Companion to Contemporary Political Philosophy* (1993) 575; Barry, n. 17 above; J. Allan “Bill of Rights and Judicial Power - A Liberal’s Quandry”, (1996) 16 *Oxford Journal of Legal Studies* 337; Steiner and Alston, n. 28 above; and C. Fabre, “A Philosophical Argument for a Bill of

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pronouncements were uncontroversial against the background of international discussion, but they are not. The following passages illustrate this point. The first is an extract from the South African Constitutional Court's *First Certification Judgment* on the justiciability of socio-economic rights, long a contentious matter. The second, by Waldron, explains the enduring lack of unanimity on rights.

It is clear, as we have stated above, that the socio-economic rights entrenched in NT [new text] 26-29 are not universally accepted fundamental rights. For that reason, therefore, it cannot be said that their "justifiability" is required by CP [constitutional principle] II. Nevertheless, we are of the view that these rights are, at least to some extent, justifiable. . . [M]any of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justifiability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justifiability.<sup>49</sup>

[In] the constitutional case we are almost always dealing with a society whose members disagree in principle and in detail, even in their "calm" or "lucid" moments, about what rights they have, how these rights are to be conceived of, and what weight they are to be given in relation to other values. They need not appeal to aberrations in rationality to explain or characterize these disagreements; disagreements about rights are sufficiently explained by the difficulty of the subject matter and what John Rawls refers to as 'the

Rights", (2000) 30 *British Journal of Political Science* 70; F. Klug, *Values for a Godless Age: the Story of the UK's New Bill of Rights* (2000).

<sup>49</sup> *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 at 800. Moellendorf, n. 3 above, describes some complications inherent in this view.

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burdens of judgement'. A constitutional "precommitment" . . . is rather the artificially sustained ascendancy of one view in the polity over other views while the complex moral issues between them remain unresolved.<sup>50</sup>

## 10. Redistribution through rights or through policies?

Perhaps the oddest feature of the decision to entrench human rights in the 1996 Constitution was that no attempt was made to estimate their cost. A set of ambitious rights was enshrined in the most important legal document governing South Africans' lives along with the lives of succeeding generations, and yet no one computed what goods and services that South Africa now produces and consumes will have to be foregone in their implementation. To the mind of the economist - and probably to other professionals dealing with material costs as counterparts to moral values - this is the strangest aspect of the whole exercise.<sup>51</sup>

There are a number of basic ideas teachers expect students of economics to understand when they graduate in the discipline. One of these is the concept of opportunity cost. This invokes "the road not taken", meaning that the underlying cost of any given use of resources is the next best use foregone, best in welfare terms, of those same resources. If the price system provides us with that information with reasonable accuracy, then economic agents (individual, company, state agency, NGO) can do confidently whatever they like with any resource because they know the cost in the alternative goods and services that are not produced. To non-economists this may seem an excessively simple notion. Perhaps so, but we then have to explain why large numbers of politicians, civil

<sup>50</sup> J. Waldron, "Precommitment and Disagreement", in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (1998) 271 at 283-4.

<sup>51</sup> There may be documents containing such calculations of which I am not aware. The comprehensive surveys in Chaskalson et. al. (eds.), *Constitutional Law of South Africa* (1998), and, in particular, that of Liebenberg, n. 2 above, however, have no such information, and neither does the Constitutional Court Library contain material which addresses this question.

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servants and professionals trained in disciplines like constitutional law behave as if they have never heard or heeded the concept of opportunity cost.

In a nutshell, South Africans require an estimate, even if rough, of the opportunity cost of implementing their Bill of Rights before they can decide whether it is sensible to do so. A future research effort may come up with plausible figures. But for the present, this section raises the economic considerations research-workers need to bear in mind when deciding the desirability of fulfilling every right in the Constitution.

First, the indeterminacy of the economic consequences of redistribution pursued in welfare states is not a comfort to South Africans. Major industrial economies are markedly different in structure. It would be naïve as well as foolish to assume that similar policies on similar scales will have similar results in South Africa. This caution is clear enough, but popular discussion in the media has proceeded on the presumption that it is not true, that the apparently neutral effects of such policy actions in other economies over the past half-century will be the case in South Africa too.<sup>52</sup>

One obvious difference is that South Africa's mean per capita income (in constant 1995 US\$) was \$3,376 in 1997, whereas in the industrial countries of Western Europe it was between six and nine times higher; for instance, in the UK \$19,946, France \$27,437, and Germany \$30,132.<sup>53</sup> A second reminder concerns the structure of South Africa's labour force. In 1997, out of total employment of nine million, 1.38 million or 15 per cent of workers were classified as in "informal" employment. The size of the total labour force varies with the definition of "unemployment", so that another 2.54 million to 5.29 million

<sup>52</sup> See *Mail & Guardian* 6 October 1994; and *Business Day* 27 July 1995, 7 August 1995, 24 February 1998, for example.

<sup>53</sup> World Bank 1999 *Development Indicators*.

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workers were unemployed depending on the strictness or narrowness of the test of a not-working person's commitment to active work-seeking.<sup>54</sup>

Thus high levels of informality mark the structure of the South African economy, and by a direct tax base reflecting progressivity in the tax rates levied but that is exceptionally narrow, covering only a small proportion of the economically active population by comparison with industrial countries. Absolutely as well as relatively therefore, there are few individuals and companies to pay income and wealth taxes, the heart of the tax-transfer process.

It is useful to remember about all tax systems, that they presume voluntary compliance by the majority of payers; that all real-world taxes distort allocation because they change behaviour while imposing dead-weight costs; and thus that there are definite limits to the state's mobilization of resources from the private sector. Such a perspective is more sensible than treating the state's budget as like the biblical widow's cruse, from which all the resources necessary to meet the moral objectives of human rights can be drawn without emptying it if enough political will is applied to the task. Too much public debate by constituencies like organized labour, the NGO sector, and proponents of a basic income grant starts with this presumption. We should also note that the administrative costs of raising a unit of tax revenue in South Africa could be higher than in the average welfare state. Though no local estimates exist, the costs in other developing economies are sobering. "In most industrial countries it costs between 0.3 and 0.5 to raise 1 unit of public funds. In developing countries the costs can run much higher: between 1.19 and 1.54 in Thailand, 1.20 in Malaysia, and 2.48 in the Philippines".<sup>55</sup>

Second, as currently drafted South Africa's constitutional rights do not fit uniformly into categories that provide an understanding of their potential effect on efficiency and growth. If we set on one side the proposition examined earlier, that

<sup>54</sup> H. Borat, "Explaining Employment Trends in South Africa", University of Cape Town, *DPRU Working Paper* (2000).

<sup>55</sup> J. Laffont, "Competition, Information, and Development" in *Annual World Bank Conference on Development Economics 1998* (1999) 237 at 239.

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all enunciated rights are of equal moral worth and by presumption have claims of equal weight on resources, what distinctions between rights will contribute economic insight? The most important is that between an investment purpose and a consumption entitlement. If personal autonomy and self-sufficiency are high-level goals for all human rights, then raising the individual's productivity must be the over-riding economic objective. Rights to education and training, health care, environmental protection and rehabilitation, basic nutrition for children, and knowledge provision in a wider sense than education alone, all serve an investment function. By contrast, rights entailing consumption include pensions, social security payments, housing, legal aid, and a range of civil rights like access to legal representation. Conceptually, investment and consumption are mutually exclusive, but for serious assessment of rights fulfilment, classifications in practice must be precise and not based on casual intuitions.

Merit goods provide the closest fit to certain enunciated rights because of the accepted motivation for their supply by the state, a form of paternalism. The underlying moral conviction is similar to that couched in the language of rights. Although contested by libertarians and fiscal conservatives, in the mainstream view “[m]erit goods are those to which citizens are widely believed to have some right, irrespective of their financial situation, or those to which it is thought that access should be more equal than is appropriate for goods in general”.<sup>56</sup>

Third, it is no surprise that human capital is one major causal determinant in the latest “endogenous” theories that mark the revival of intellectual interest in the explanation of economic growth. Conceiving investment to include new knowledge and skills as well as physical capital, the current endeavour is to explain all investment decisions within the model of a growing economy. Under older theories, progress in technology was taken as determined exogenously, by variables like pure and applied scientific research and development activities determined outside the model (by largely non-economic causes). Currently, in the case of relatively backward economies, in the new theories growth is projected as

<sup>56</sup>G. Holtham and J. Kay, “The Assessment: Institutions of Policy” (1994) 10 *Oxford Review of Economic Policy* 5.

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driven by “catch-up” strategies, which exploit the large backlog of knowledge available on the technology shelf of the leading countries.

From a rights perspective, of the greatest importance is knowledge creation of the correct kind embedded in individuals through education and skills training.

Wealth creates the ability to create the knowledge that can be used to create further wealth. But, without adequate means to distribute the benefits accruing from such knowledge, social disparities, and the jealousies they invoke, will only increase. The key lies in combining commitments to two concepts that are far easier to define than to achieve: scientific excellence and social equity.<sup>57</sup>

This passage says (1) that modern society requires all individuals to be taught how to teach themselves, and (2) that equalising such knowledge accumulation between people is integral to the fulfilment of their human rights.

In economic terms, to satisfy in every person such a claim-right, or capability<sup>58</sup> in Sen’s terminology, is to build up generic human capital. In South Africa, policy interventions have yet to do this effectively. Already, at 24 per cent of discretionary state expenditure (excluding interest on national debt) a share higher than the international mean is spent on education.<sup>59</sup> A plausible decision could be less policy attention devoted to raising the rate of fixed capital formation and more to raising human capital accumulation through universal formal schooling, higher educational quality, training in occupational skills and in self-

<sup>57</sup> Editorial, *Nature* Issue 6714, 7 January 1999, at 1.

<sup>58</sup> “A person’s *capabilities* consist of the sets of functionings she can achieve, given the personal, material, and social resources available to her. Capabilities measure not actually achieved functionings, but a person’s freedom to achieve valued functionings”. E. Anderson, n. 9 above at 316.

<sup>59</sup> South Africa, *National Budget Review* (2002). A high proportion of increased state expenditure in the education and health sectors after political change in the past decade is alleged to have gone into salaries and improved conditions of service. This may be the legacy of having to reverse apartheid allocation, but the key question is whether such adjustments have been matched by improved performance and productivity. Widely believed, this judgement has yet to be substantiated. *Business Day*, 25 July 2000.

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management. For the present, the strategic emphasis should be on the positive reinforcements between rights implementation and human resource strategies.

Fourth, surprisingly absent from rights discussion is the interpretative question whether the implementation of legal rights aims at permanent and irreversible attainment of the high-level objectives for every individual? If it is, and the moral goals are autonomy, self-sufficiency, meeting the social conditions of individual freedom, or whatever the preferred formulation, it is a structural change in the conditions of the deprived person's life that is sought. Ideally, once attained no further action and no additional resources need be devoted to that individual.

Rights protagonists are not explicit about this. Yet rights that are consumption entitlements will not achieve permanent dignity or self-sufficiency because they will raise the individual's productivity only marginally. In addition, they fail to achieve the defining objective of rights for the logical reason Elster proposes,<sup>60</sup> namely that an individual's implemented right to a job or subsistence or child support can contain incoherence. When provided by government or private charity throughout the person's lifetime, its ultimate support remains the fruit of someone else's labour. So the self-esteem requirement is not met in a consumption entitlement. What is required in rights fulfilment is investment in education, particularly in quality, in productive skills, and via new rights to productive assets not to income transfers alone. Institutionally and organizationally this is a much more formidable task than the granting of purchasing power to needy individuals.

Fifth, it is prudent to recognize the necessity of ranking and therefore conflict between rights claims in implementation. Decisions about sequencing and strategy can lead to "counter-finality", in which an action or policy thwarts its own aim. This is known from games of strategic behaviour like the prisoner's dilemma, in which pure self-seeking leads to sub-optimal outcomes in a loss of welfare to the

<sup>60</sup> Elster, n. 37 above.

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individual.<sup>61</sup> The extent this is likely to occur in rights fulfilment is unpredictable, but the experience of welfare states illustrates the possibility. Meeting a legal right to income support can lead to moral hazard or free-riding behaviour by individuals that imposes additional financing burdens and therefore extra constraints on other state spending objectives, including meeting other rights. Budgetary allocations have to be larger overall because of the attempt to meet human rights obligations.

Alternatively, positive outcomes arise too from the realization of rights. A concrete example is willingness to adapt to globalization. Efficiency gains from opening to international trade are matched by costs on interest groups like displaced workers, but the prediction is they will resist less if safety nets created by fulfilled rights are in place. Similarly, a government's resolve to resist calls for subsidies to declining industries is stiffened by its prior commitment on rights grounds to social security and re-training programmes for workers losing jobs: "the European welfare state is the flip side of the open economy".<sup>62</sup>

Finally the utility of rights legislation for achieving distribution objectives is questionable on conceptual grounds.

It seems to me that to express these positive demands [second-generation rights] in the language of absolute distributive principles is to use the wrong conceptual apparatus. Why, for example, an adequate standard of living [UN Declaration]? Surely, other things being equal, the object should be the highest possible average income, properly distributed. Setting up arbitrary minimum standards to which each person must come up is an attempt to avoid having to deal in both distributive and aggregative values, but I do not see that it can work unless these "rights" are claimed only as rules of thumb derived from ultimate principles. The traditional civil liberties [first-generation rights] on the other hand can be aptly put into an absolute

<sup>61</sup> R. Scruton, *A Dictionary of Political Thought*, 2<sup>nd</sup> ed. (1996) at 113.

<sup>62</sup> D. Roderik, *The New Global Economy and Developing Countries: Making Openness Work* (1999) at 98.

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distributive form, since they do not require any reference to *amounts*. An analogy to “an adequate standard of living” would be ‘a moderate amount of free speech’ but the latter is not what is called for in a declaration of rights.<sup>63</sup>

## 11. The basic homework on basic income grants

A wide range of South African organizations and policy proponents favour the payment of a monthly grant to all individuals out of state revenue. By design it would be unconditional, available as of right without any test of means or requirement of productive contribution to the community. Simple and appealing, the question is whether this idea meets certain minimal tests. This section lists a number of factual as well as conceptual matters to be thoroughly researched before any policy commitment is warranted.

§ The potentially contentious issue is not whether we should be putting increased resources into the hands of more people identified as ‘poor’. Many people in the top deciles of the income scale accept in the aftermath of apartheid that this is a moral imperative. Rather, the question is how to do so in the most efficient and cost-effective manner; that is, are the benefits of an instrument like a basic income grant worth its costs? Will a universal BIG provide the means for poor people to escape from their poverty status? This is not an issue of morality but one of efficiency. Rhetoric tends to obscure the difference.

<sup>63</sup> B. Barry, *Political Argument: Re-Issue With a New Introduction* (1990) at 149-150. '[W]e might think of the entirety of a society's resources as a good to be distributed fairly amongst the members of that society. In that case we require a principle of fairness or justice to instruct us in how we should distribute available resources amongst people. A fixed catalogue of rights detailing entitlements to specific goods seems the wrong instrument for that purpose...In other words, rather than trying to stipulate fixed quantities of cake to which everyone can be said to have a right, we should think in terms of distributive principles which can determine how the whole cake, big or small, should be sliced.', Jones, n. 5 above, at 170.

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§ As argued at length already, the most important question concerns the receiving individual's own acts of self-investment. What effect will a BIG have in the longer run on the poor person's self-sufficiency or capability? Will the institution of a BIG provide the means for a large number of people to escape their poverty status permanently? Or will it be mainly amelioration; a consumption entitlement that eases the burden of what will remain for most poor a state of permanent poverty? A great deal hinges on which of these outcomes will dominate for the majority of recipients of the basic grant. Certainly an income grant is not designed, and is not likely, to overcome a major obstacle faced by the poor, who are the credit constraints on loan finance that block their aspirations to invest in physical and human capital. These are caused by market and institutional failures that have to be addressed by other policy interventions.

Put in different terms, will the institution of a BIG be productivity enhancing, and thereby create the conditions that eventually undermine the need for it? Will it raise the volume of wealth-maximising decisions – on schooling, training, learning-by-doing and asset acquisition – that sacrifice present consumption in order to raise future productivity and income? In the long run will such a grant become redundant? Or will it become a permanent feature of our welfare state in the making? This question relates centrally to the fulfilment of the social and economic clauses in our Bill of Rights.

§ Is a basic grant the form of transfer that all poor people want (R100 per month is the figure usually punted, but why this is preferable to R50 or R200 or some other amount is not made explicit)? To the poorest 40 per cent of individuals the answer is probably affirmative. Traditionally economists also have accepted that cash transfers and the exercise of recipient choice that they make possible are superior in welfare terms to transfers in kind. Yet it is significant to know how many of the poor might choose differently if the choice could be put clearly as R100 per month in cash or R100 per month in free goods

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and services like health-care, education and training facilities, housing materials, nutritional supplements or travel subsidies supplied directly by the state?

The powerful attractions of a BIG, besides the individual's free choice to use cash benefits any way deemed desirable, are the administrative simplicity of its universal character, which is its availability to everyone without screening or means testing or bureaucratic judgements. But are these advantages valued highly by a complete majority of potential recipients? Some may well judge that state provision in kind will bring them more welfare. A simple majority choice in favour of a BIG is a plausible presumption, but we still need to identify the number and range of alternatives that recipients might go for if faced with an understood choice.

- § What is to be foregone by some poor individuals in accepting a BIG? Is it to be an “add-on” or “top-up” of their present welfare receipts? Or instead is it intended as a substitute for such grants and, if so, which existing payments will disappear?
- § What incentive effects can be projected (1) for poor recipients and (2) for taxpayers? For the poor, what behaviour changes will occur in job search, household production for subsistence and for the market, entrepreneurial activity, school-going, training commitment, and fertility? For the taxpayer faced with a higher net burden, will there be greater efforts at tax avoidance and illegal evasion, more inhibition on investment, less work effort, shortened production hours, and more capital flight abroad?
- § How will a basic grant be funded, and what will be the macro-economic effects, above all on saving behaviour and aggregate investment levels? As a matter of simple arithmetic, a transfer from a group with a higher propensity to save to one with a lower propensity must lower aggregate savings. Cost estimates of the spending increment needed range between R25 and R50 billion per annum

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(give or take a few billion, with the Taylor Committee opting for R46 billion). This is 10 to 19 per cent of current state expenditure (R263 billion). The total required by a grant depends, amongst other variables, on the proportion of the population likely to take it up. In round figures, the maximum is 44 million individuals receiving R1200 per year, to which must be added the cost per grant made, currently R19 on average.<sup>64</sup> What every projection is based on has to be explicit, and clearly the plausibility and realism of such judgements are crucial.

All BIG suggestions include the proviso that few upper-income individuals will exercise their right to the basic grant, and those who do will have it reclaimed by suitably progressive income tax rates (or a rise in VAT despite its regressivity). Whether take-up by the rich will be minor, and whether taxing it away to the extent that grant payments are claimed by them will be administratively cheap, are empirical questions waiting to be tested.

But there is a lingering paradox to the proposal. A basic income grant by design is universal, but proponents - BIG advocates in civil society for the most part - are postulating that individuals in the upper reaches of the income scale will not take it up, despite the intended absence of a stigma, the ease and low-cost of access by the whole population. "It is available to everyone but it is really intended only for the poor", is a proposition that suggests inconsistency.

§ Some assert that a BIG is "meant for people not receiving social assistance already", but that introduces immediate administrative complexity. There are also claims that it "reduces inequality",<sup>65</sup> but

<sup>64</sup> South Africa, *Intergovernmental Fiscal Review 2001*, Pretoria, National Treasury, 70.

<sup>65</sup> C. Haarmann, "Social Assistance Programmes: Options and Impact on Poverty and Economic Development in South Africa", (2001) University of Cape Town, *AFREC Research Monograph 22*, 8.

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on what evidence given that no universal grant exists anywhere in the world yet?<sup>66</sup>

- § In much grant advocacy there is a presumption of aggregate demand deficiency, as well as specific under-utilized capacity in the industries and activities producing the goods and services that the poor will buy with their annual R1,200 in increased purchasing power. The actual capacity situation will determine the inflationary consequences, amongst other macro-economic effects on the budget, foreign accounts and capital movements. Also, the extent of import leakages in the increased expenditure, like clothing purchased by the poor obtainable from East Asia cheaper than from local production, will pose policy dilemmas. These presumptions and their effects must be modelled with care and in detail.
- § Conventional tax-transfer mechanisms have two sides: (1) tax the rich progressively, being higher rates levied the higher the income, and (2) transfer to the poor progressively, being higher benefits paid the lower the income. By not testing individual means, a BIG weakens achievement of any targeting objective in the transfer process. So, rather paradoxically given the resultant expansion of state expenditure, a basic income grant decreases the scope for a steering role by government, specifically in its redistributive and poverty relief functions. This potential outcome might please free market protagonists and libertarians but not political movements that favour centralized decision-making and control like the ANC and its allies.
- § What effects will the institution of a BIG have on the existing volume of private philanthropy in the form of charitable donations by individuals, welfare organizations, domestic and foreign donors,

<sup>66</sup> R. Goodin and M. Rein, "Regimes on Pillars: Alternative Welfare State Logics and Dynamics", (2001) 79 *Public Administration* 777.

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churches and the business sector? This will govern the *net* volume of welfare resources available to the poor after a grant comes in.

- § Similarly, what effects can be anticipated on the incidence of crime, drug abuse and social destitution? Is BIG going in the opposite direction to the “making work pay” policies vigorously pursued by industrial countries over the last decade? This links with the human resource investment and capability outcome posed as the main question in the paper.
- § The biblical injunction is that the poor will always be with us. But we should aim at altering the composition of that poor, so that different individuals and households are poor from one year, one decade, and one generation to the next. Paradoxical as that sounds, we have to break the perpetuation mechanism by policies that increase the capability of the individual, given that the vicissitudes of a market economy will always throw up new poor in a cycle. Locally we witness, for example, structural declines in gold mining, in manufacturing industries subject to new import competition, and in branches of agriculture, as well as the fall of mismanaged companies, like Saambou Bank in South Africa and corporate failures like Enron in the US.
- § Basic grant proposals are similar to those that advocated South Africa’s Reconstruction and Development Programme during the early 1990s. They postulate a set of redistributive institutions and policy actions as an adjunct to the real economy. These will take resources from it as and when necessary for reconstruction objectives, but without paying much heed to the economy’s responses and adaptations to such takings in the longer term. In effect, the state budget is treated as a *widow’s cruse* already mentioned, a receptacle that cannot be emptied of resources no matter how much is drawn from it.

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- § Does the micro-lending industry in South Africa provide a pointer to what recipients will spend grants on, if a large measure of overlap with the current spending pattern of loan proceeds by the poor can be predicted? This warrants close investigation.
- § Basic income grant proposals currently rest on soft evidence for hypotheses about which there can be wholly legitimate differences of opinion, but much advocacy presumes otherwise. BIG initiatives must come at the end of a process of research as the identified best option for redistribution purposes it must not start off as the favoured vehicle for a moral imperative that has to look *ex-post* for justifications in terms of its likely effectiveness. This is to put the cart in front of the proverbial horse.
- § There are major logistical problems, and therefore high costs, in moving large sums of cash around the country on a monthly basis. With many of the recipient population in rural areas this will be unavoidable. The commercial banks, police and private security industry have invested millions in safeguarding and streamlining procedures for dispersing cash. Success has been at best partial. Certain commentators judge that in South Africa this practical problem is difficult enough to sink the BIG proposal.
- § Similarly, political need must not overwhelm a substantial programme of research in resources and time. This is what the BIG proposals cannot do without. Unless and until the above range of questions can be answered, the institution of a basic grant will be a high-risk act of social engineering involving an exceptionally large volume of resources. Answers cannot be only intuitively plausible because the political dangers are substantial. After the institution of a grant, if experience should evolve to show it imposing heavy economic costs - fiscal instability, low investment, poor growth performance - its withdrawal would be politically highly fraught.

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This list of unanswered questions suggests it is perfectly possible to be forcefully committed to social justice, and therefore to far-reaching actions of redistribution, and yet to doubt that a basic income grant is the best way to achieve it. At this stage of national discussion a universal grant appears neither efficient nor effective in raising individual autonomy, self-sufficiency and equality. Concern for rights goals is consistent with adopting a sceptical stance on rights outcomes, on feasibility and on cost.

## 12. Conclusion

Under the leadership of its politicians and lawyers, the production of human rights rhetoric in South Africa has risen by a thousand percent.<sup>67</sup> This is an ironic yet also complimentary summing-up of the current state of rights discussion in the country. A rights culture reflecting active awareness has been achieved in a short period of time. This is a foundation for reaching agreement on the normative objectives underlying human rights, accepted as integral to democracy.

That said, this paper has raised a set of troubling possibilities concerning the realization of those objectives through the implementation of rights, one potential means being a basic income grant. That there are no hard and fast conclusions to be drawn here is inescapable, although the outcome of future research work is likely to be different.

One function of a constitution is pre-commitment or self-binding. Putting in place a constitution has been likened to Peter sober, for his own protection, placing constraints on the future actions of Peter drunk.<sup>68</sup> But the South African constitution is perhaps more aptly characterized as Peter drunk on democratic euphoria binding Peter sober to a series of later economic commitments highly problematic to realize. The South African Bill of Rights may place the state,

<sup>67</sup> The Italian satirist, Gaetano Salvemini, remarked solemnly of Mussolini's ambitions to centralize power and decision-taking in Italy: 'Under the leadership of Il Duce, the production of kisses has risen by a thousand per cent'.

<sup>68</sup> Elster, n. 30 above; and Waldron, n. 50 above.

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private philanthropy and other social institutions liable for rights fulfilment in the position of Mr Micawber in Dickens's novel *David Copperfield*. When he is "broke" this character has to 'wait for something to turn up'. Sometimes he does so hopefully, sometimes not.

But can South Africa afford a high-risk gambit like Mr Micawber's in the spheres of human rights and welfare policies? This paper has argued that there is a fundamental dilemma, perhaps even a contradiction, between provision of unconditional benefits to the poor through an instrument like a basic income grant and the high-level goals of human rights, notably individual autonomy, self-sufficiency and equality.