

# Social Rights and Deontological Constraints\*

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## ABSTRACT

Assuming that there is not terminological or conceptual impediment to call social and economic rights “human rights”, this paper argues that social and economic human rights are normatively different from classical civil and political human rights, and that this may have some significant institutional implications. Following mainstream opinion, I presuppose that both classical liberal rights and socioeconomic human rights are bundles of negative and positive “incidents” (concrete rights). My first claim is that in both cases negative incidents can plausibly be constructed as “deontological constraints.” That means that such constraints must be observed even if infringing them could maximize the satisfaction of the interests those rights seek to preserve. My second claim is that, contrary to classical human rights, the fulfillment of the negative incidents of socioeconomic rights, albeit necessary, does not represent a significant contribution to their fulfillment. Since in the case of socioeconomic human rights positive incidents play such crucial role, there is a relevant asymmetry between classical and socioeconomic human rights. The paper concludes by showing some institutional implications of this asymmetry.

**Keywords:** human rights, deontological constraints, social and economic rights.

## 1. INTRODUCTION

There are several arguments for holding that economic and social human rights (which, for simplicity, I will call “social rights”) are not “genuine”

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human rights. In this vein, it could be argued that they are simple goals or aspirations; that they count as principles of social justice rather than rights we enjoy just because we are human persons; that they are not enforceable due to the complexity of their effective implementation; that they are unfeasible; and that, as opposed to other human rights, they cannot be claimed against courts or enforced by them.<sup>1</sup> The contrast is obviously with classical civil and political human rights (which I will stipulatively call “classical rights”). On this view, only *these* amount to genuine (human) rights.

My aim in this paper is not to argue that social rights are not genuine rights as I do not think there is anything like a “true” notion of human rights. There may be different kinds of norms, ideals, and moral or political principles that can be conveyed in the language of human rights, and this can be plausible or defensible, both politically and conceptually. What I want to show instead is that, beyond terminology and political use, social rights are normatively different from classical rights and that this may have some significant institutional implications: while classical rights (or relevant aspects of them) can plausibly be conceived as “deontological constraints” (in a sense to be explained), social rights (or relevant aspects of them) cannot. Although they *can* be conceived in that way (in the sense of there not being any conceptual impossibility), it is not plausible to do so, except (perhaps) in very specific or exceptional cases.

Importantly, the concept of human rights I will use throughout the paper is philosophical. So I will not be speaking about legal human rights such as those enacted at the international body of treaties and declarations. Rather, my concern is how we should conceive human rights from the viewpoint of strict moral analysis. While the way judges and other national or international authorities understand legal human rights may well be relevant to building a philosophical view of human rights, such relevance is only due to the fact that we want our philosophical theories of human rights to keep some reflective equilibrium with the practice, not because we are merely describing the practice.

The paper is structured as follows. In section 2, I elucidate the concept of “deontological constraint” and provide some examples that show how human rights sometimes operate in that way. The key point of a right being a deontological constraint is that, in principle, it cannot be violated even if it doing so would maximize the satisfaction of the interest the right seeks to preserve. Section 3 advances a view about how to understand the relationship between classical and socioeconomic rights on the one hand,

1 For some of these objections, see Cranston (2001); O’Neill (2005).

and negative or positive rights on the other. I reject the traditional identification of classical rights with negative rights and of social rights with positive rights, and endorse instead the widely accepted account that both classical and social rights are bundles of negative and positive “incidents” (concrete rights). Nevertheless, I also claim that in specific way the negative incidents of classical rights are more fundamental than the negative incidents of social rights. Section 4 focuses on the relationship between deontological constraints and classical rights. In this respect, my claim is *not* that only negative rights or classical rights can operate as deontological constraints. The point is more nuanced and complex: while negative incidents of classical rights can plausibly be (and usually are) conceived as deontological constraints, positive incidents of classical rights *may sometimes* function as deontological constraints. In section 5 I sustain that the positive incidents of social rights cannot plausibly be understood as deontological constraints, except for some very specific cases – such as the right to be rescued from imminent death. This completes my main argument: there is a normative asymmetry between classical rights and social rights because relevant incidents of classical rights (which are negative in kind) can plausibly be conceived as deontological constraints, while relevant incidents of social rights (which are positive in kind) cannot be conceived in such way. In section 6 I explain why the alleged asymmetry may have some significant implications in terms of the role judges can play in the enforcement of human rights.

## 2. THE CONCEPT OF DEONTOLOGICAL CONSTRAINT

The notion of rights as deontological constraints (hereafter DC) I will use is not necessarily the most common one. In my sense, a moral right works as a DC when the fundamental moral reason to fulfill the correlative duty is focused on the individual holding that right. If John has a DC right against me that I do X, then I ought to do X *because* (and, in principle, only because) he has that right. That he has that right is the (in principle, sufficient) *reason* why I should do X. That a right (and its correlative duty) is a DC does not necessarily imply that it is absolute, or a “trump,” or a “side constraint.”<sup>2</sup> But it does imply that it does not follow a strictly consequentialist logic, according to which fulfilling the correlative duty would be purely instrumental in achieving (or optimizing) some valuable social goal, whether aggregative or distributive.

Let me clarify the idea through some examples. Consider the (human)

<sup>2</sup> See Dworkin (1977) for the concept of rights as “trumps,” and Nozick (1974: 29) for the concept of rights as “side-constraints.”

right not to be tortured and the correlative duty of state officers (or the state) to never use torture as a method of obtaining information or confessions from detained or accused persons. Since there is broad agreement on the absolute (or quasi-absolute) character of this right (and of the correlative duty), the example is simple (as we will see, other examples may be more complex). Claiming that *A* has a human right not to be tortured means that no state officer is allowed to torture *A*. This right is a DC because the fundamental reason why a state officer is not allowed to torture *A* is that *A* has a right not to be tortured. Such reason is sufficient to justify the prohibition. This implies that the state officer is not allowed to torture *A*, even if torturing *A* would optimize what we may consider morally valuable goals (such as human life). More importantly (and crucially), the state officer is not allowed to torture *A*, *even if not torturing A would imply that more instances of torture will occur in the future.*

The DC feature of some rights can be noted even more clearly with another example: the right of innocent people not to be convicted and punished. When the judge releases an innocent person, her reasoning is not (or should not be) that acquitting this person is instrumental for the good of society or for some valuable social goal. The reasonable belief that the accused person is innocent is (at least in principle) *sufficient* reason to release her. The innocent *must* be acquitted. This is the only relevant consideration.

As I said, it is not necessary for a right to be absolute to constitute a DC. There could be some threshold of social harm above which the duty not to torture or not to condemn an innocent might yield. Even if consequentialist considerations (for example, about potential social harm) might be thought to be relevant, it may still be correct to say that there is a DC right not to be tortured or not to be wrongly convicted. However, at the point where considerations of consequence alone become relevant, it would start to be doubtful that we are dealing with a *right* not to be tortured or not to be wrongly convicted. Certainly, we might still use the terminology of rights, insofar as, in general, the state would have a duty not to torture or to convict innocent people. But, beyond terminology, we are dealing with a qualitatively different kind of norm, namely: a rule aiming to minimize tortures or wrongful convictions. This, in turn, could only be understood as part of a more general norm aiming to optimize some more basic value, such as the well-being of people or the minimization of suffering (where minimizing instances of torture or wrongful convictions would be instrumental to the optimization of that value).

There is a third more complex example, which nevertheless illustrates the DC feature of some human rights: the right to democratic participation

(to vote and be elected). The state violates the right to be elected by, for instance, proscribing or coercively preventing a candidate or a party from participating in free democratic elections. This is so, even if it were true that *not* proscribing a certain candidate would lead to a deterioration of democracy, or to more people being wrongfully proscribed in the future. As in the previous examples (actually, more so than in the previous examples), this DC character of the right to democratic participation may be subject to certain limitations (such as the duty to tolerate the intolerant). Where to draw such limitation may of course be controversial. Yet, if the human right not to be proscribed is a DC right, the limit must be more demanding than the limit would adopt if we simply wanted to optimize political freedom.

In sum, a right to X is a DC right only if we are prepared (at least to some extent) to sacrifice the satisfaction of important values (including, crucially, the fulfillment of more cases of the right to X) to honor the right to X in particular cases. The right not to be tortured or wrongfully convicted and the right to be allowed to participate in free elections are examples of rights that can plausibly be conceived as DC rights.

### 3. POSITIVE AND NEGATIVE INCIDENTS OF HUMAN RIGHTS

The idea that certain rights (typically, classical rights) are DC must not be confused with the idea that classical rights are negative rights (rights that correlate with duties of omission), whereas social rights are positive ones. Let me clarify this point.

In this respect, I follow ideas from Cecile Fabre and David Bilchitz on social rights that capture our common sense intuitions about the relationship between the positive-negative distinction *vis a vis* the classical-social distinction (Fabre 1998: 267-270; Bilchitz 2007: 90-91).<sup>3</sup> The main idea is that human rights are clusters of more specific rights (to which I will refer as “incidents,” or “aspects” of a human right).<sup>4</sup> Some incidents of a human right are negative while others are positive; or, in other words,

3 Although similar, what I am defending is not exactly Henry Shue’s view. He claims that any basic right conceptually involves the existence of negative and positive duties (Shue 1980: 52-53). I just claim that classical rights (such as the right to political participation) usually include positive incidents (such as the right not to be prevented from voting) and that social rights (such as the right to subsistence) usually include negative incidents (such as not to eliminate the only available means of subsistence). For a discussion on Shue’s view, see Cohen 2004.

4 I borrow the use of the term “incident” from Honoré’s classical work on ownership (Honoré 1961).

some require only abstentions from the state, while others require actions and the provision of resources from the state. Even though we may speak of a right to free expression (a typical classical right) as an “abstract” right (to use Bilchitz’s terminology),<sup>5</sup> this abstract human right brings together a set of “concrete” rights or incidents, which in practice make up the right to freedom of expression. Within this set, there are usually negative rights *as well as* positive rights. Similarly, abstract social rights (such as the right to subsistence or to adequate housing) are clusters of incidents that correlate with specific duties, including both positive and negative ones.

Now that the complex nature of rights has been clarified, the next step is determine the role that negative and positive incidents play in classical rights as opposed to social ones. In this respect, I want to highlight an important asymmetry that will be crucial for my overall argument.

I have admitted that both classical and social rights have negative and positive incidents that can be violated both by action and omission (by the state). The operation of both kinds of rights is symmetrical in the case of the violation of a right. For example, the social right to adequate housing is violated both when the state evicts members of a community from a certain territory over which they have a right and when the state does not provide adequate housing to homeless people. In this sense, positive and negative incidents of the social right to adequate housing operate in the same way as positive and negative incidents of classical rights. In both cases, we can safely say that the (abstract) right (be it classical or social) is being violated.

However, such symmetry breaks down when we focus, not on the violation but on the *fulfillment* of the right. So imagine that the state meets a negative incident of a classical right. For example, it abstains from censoring the press. In that case, we can plausibly say that the state fulfills at least one important, relevant or substantial part of the abstract classical right to freedom of speech. And we can plausibly say so even if the state, at the same time, fails to fulfill positive incidents of the same classical right, say, because it does not promote the public expression of minorities or disadvantaged groups. To be sure, we might say that in such case the fulfillment of the right to free speech is deficient or insufficient. Still, if the state does not actively censor or in any way prohibit or restrict public expressions, we would surely conclude that a relevant, substantial, part of the right to free speech is being fulfilled. On the contrary, imagine that the state meets the negative incidents of a social right: the government does not evict persons from their houses or territories. In such case, we may think that this is not enough to fulfill the most important, relevant, or

5 Bilchitz (2007: 91).

substantial aspect of the social right to adequate housing, in particular when the state fails to fulfill the positive incidents of that same social right.<sup>6</sup> Consider a further example: imagine that the state simply refrains from actively obstructing people's access to nutritious food. Would we say that the state is fulfilling the social right to subsistence, in the most relevant sense? I think the answer is no. The only way for the state to guarantee the satisfaction of the social right to subsistence or adequate housing is to *actively* guarantee that people who lack access to nutritious food or decent housing enjoy secure access to the objects of their rights. In other words, while in some cases this may turn out to be insufficient, fulfilling just the negative incidents of a classical right makes a substantial contribution to its satisfaction. Contrariwise, in most relevant cases, fulfilling just the negative incidents of a social right makes only a secondary contribution to its full satisfaction. In fact, the point and purpose of social rights is to make sure that everyone enjoys secure access to their objects.

To illustrate the point, let us take a closer look at the negative incidents of social rights. Those incidents are negative rights that can be violated (only) by actions. Imagine a community living from fishing at sea (a common property). At some point, the government grants a private company an exclusive fishing license which deprives the community of its only means of subsistence. In such case we could certainly claim that the state has actively violated the social right to subsistence.<sup>7</sup> The state has violated a negative incident of that right by performing an action that renders community unable to obtain sufficient food.

Now imagine that at some point the government changes its mind and decides to fulfill the community's social right to subsistence. An obvious way of doing so would be to cancel the company's exclusive license so that members of the community can fish again. Since this solution cancels its previous active intervention, it restores the fulfillment of the negative

6 Thomas Pogge would disagree at this point. According to his view, when social rights are not fulfilled, the state is violating negative rights, not (just) positive rights (see Pogge 2002: 203 ff; Pogge 2011). The correlative duty to that (negative) right is the (negative) duty not to impose an unjust institutional scheme that causes social rights to remain unfulfilled. I do not want to discuss this view here, but it seems to me that the discussion is rather terminological. The important point is whether those duties are DC duties or just goals. It seems to me clear that the duty to reduce global poverty is (at least partially) an aggregative goal, and the measures that Pogge suggests to achieve that goal (such as his "Global Resources Dividend") is not a DC duty. Proof of that is that we (and Pogge, I assume) would not be prepared to defend the Global Resources Dividend if it were foreseeable that, while rescuing some people from extreme poverty, it will pull more people into extreme poverty. This implies that the duty (and the correlative right) involved in fighting against extreme poverty is not a DC, in contrast with what happens with (negative incidents of) classical rights. I thank an anonymous reviewer for raising this point.

7 I thank Julio Montero and Mariano Garreta for this example.

incident of the right to subsistence. However, there are other options the state may try. In this vein, it may choose to transfer money to the victims so that they can buy the food they need. Or else, it may directly distribute food among the victims. If so, the state is *not* fulfilling a negative incident of the right to adequate food.<sup>8</sup> Rather, it is fulfilling the right by undertaking a positive action, that is by fulfilling a positive incident of the right. I take this to prove that fulfillment of negative incidents are less relevant in the case of social rights than in the case of classical ones.

This is not to deny that infringing negative incidents of a social right may amount to a very serious wrong. However, my impression is that, in such cases, the incident will also constitute an independent negative right (or a negative incident of a classical right). To see why, consider a perfect and rich libertarian society in which all human needs are satisfied through market transactions. If at some point the state starts confiscating some people's food, we would not (primarily) say that the state is violating the social right to subsistence, or at least not *only* that right. Instead, we would most likely insist that the state is (primarily) infringing the *property* rights of the victims, that is: a classical right. On the other hand, if the state does not intervene and everyone happily satisfies their food needs, we would not say that state fulfills the social rights of citizens by omission (say, because the state does not coercively stop people from satisfying their needs). We would rather say that social rights are *spontaneously* satisfied though not officially *guaranteed*.

All this shows that there is an asymmetry between the fulfillment of classical rights and of social rights. To repeat: the fulfillment of the negative incidents of classical rights is a substantial part of their satisfaction, whereas the fulfillment of the negative incidents of social rights is much less substantial (unless that negative incident has an independent justification, for example, as negative incident of a classical right).

#### 4. DC AND CLASSICAL RIGHTS

The claim that rights are DC, or that at least some rights work as DC, is admittedly controversial. I do not want to defend that claim here, or the associated claim that to qualify as a right (or as a "true" right), any interest or claim must have this feature. I want to argue instead that classical rights (or, as we will see, at least certain aspects of classical rights) seem to have the feature of being DC as defined in the previous section. So let us explore more

<sup>8</sup> Except in the trivial sense that the state is not actively impeding to use the money or the food that the very state has provided.



carefully how the negative and positive incidents of abstract classical human rights behave with respect to their having or not having a DC character.

Negative incidents of classical rights can plausibly be conceived as DC rights. The correlative duties of abstention held by state officers not to kill or torture, censor the press, persecute religious minorities or specific associations, imprison people without trial, or proscribe candidates, are duties that the state must (at least in principle) strictly honor irrespective of the consequences of honoring them, including the consequences in terms of the satisfaction of the very same rights.

It is important to emphasize that what distinguishes classical from social rights is not that the former are negative. For as I have explained, both classical and social rights involve negative and positive incidents. Rather, my point is just that the negative incidents of classical rights can plausibly be regarded as DC. This means, again, that the state is not allowed to violate the negative incidents of classical rights (in this case, actively) to optimize some valuable social goal, *including the social goal of optimizing the satisfaction of the very classical right in question*.

Classical rights, I have assumed, also have positive incidents which call for active state policies or allocation of the relevant resources. So the right to due process requires that the state spends resources to establish impartial courts, jurors, and prosecutors, and to guarantee a public lawyer to the defendant. Likewise, the right to democratic participation implies that the state must provide resources to organize free elections and guarantee polling stations across its territory or jurisdiction, among other things.

Assuming that the negative incidents of classical rights are DC rights, we can wonder whether the positive incidents of classical rights are DC rights as well. The question is not directly relevant to my argument, but it merits some attention. Although I have no conclusive views about this issue, I am inclined to think that whether the positive incidents of classical rights are in fact DC depends on the particularities of the case we consider.

So let us consider the example of the classical right to a fair trial. This abstract human right involves clear negative incidents: the state must refrain from actively influencing judges, organizing summary trials that violate the right of defense, or coercively preventing the defendant from hiring a lawyer. All these negative duties are plausibly DC, which implies that the state must respect them even if refusing to do so would bring about social benefits, such as that future trials would be more impartial or that terrorism would decrease significantly.

On the other hand, the right to a fair trial also involves some obvious

positive incidents: it requires that the state takes over the defense if the accused lacks the resources to pay for a lawyer. May this incident count as a DC right? Even though the answer is not completely clear to me, it is not unreasonable to think that its satisfaction may legitimately factor in consequentialist considerations. In such case, the state might be allowed refuse to guarantee an official defender if some alternative allocation of (scarce) resources (say, redirecting official defenders to some other jurisdiction) would optimize this specific aspect of the right to a fair trial. Alternatively, it could also be argued that this positive incident (the right to a lawyer) is in fact a DC right: if the state is unable to provide the service, then the trial should be suspended until it can do so.<sup>9</sup> In any case, no definitive answer to this controversial issue is necessary for my argument; all I need to claim is that *negative* incidents of classical rights can plausibly be conceived as DC rights, whatever we believe about their positive incidents.<sup>10</sup>

In sum: classical rights have both negative and positive incidents. While the negative incidents may be plausibly regarded as DC rights, it is unclear whether their positive incidents are DC too.

## 5. DC AND SOCIAL RIGHTS

What about social rights? As in the case of the right to a lawyer in a criminal trial, there is no conceptual obstacle for a positive right to be a DC. In that sense, there is no conceptual impediment for both negative and positive incidents of social rights to be DC rights. But conceptual possibility is not the same as philosophical plausibility. The key question here is whether social rights (as conceived by international human rights conventions) can plausibly be considered DC rights equivalent to the negative incidents (and perhaps some positive incidents) that classical rights involve.

There is at least one important positive right that can plausibly be conceived as a DC right: the right to be rescued from imminent death. In fact, it seems reasonable to claim that we have a moral duty to aid someone at dire straits, even if this means that fewer people in a similar situation will be rescued. These kinds of normative scenarios are familiar during health emergencies: in order to save a child who requires a heart transplant, we may need to invest a large amount of money which we will render unable to invest in saving many children at risk. *If* we assume that concrete

9 I thank Marcelo Alegre for discussion on this point.

10 In fact, the claim that positive incidents of classical rights are DC would support my (main) thesis that there is a normative asymmetry between classical and social rights, since, as we will see, it is not plausible to take positive incidents of social rights as DC rights.

lives take priority over statistical ones (and I am not saying that this is necessarily the case), then it is plausible to conclude that the right to be rescued (and the corresponding positive duty to rescue) is a DC.<sup>11</sup>

Having conceded that positive rights can well be DC, the next question is whether positive incidents of social rights (which, if my argument in section II is correct, constitute a crucial aspect of social rights) should be understood as DC. This is, I insist once more, not a conceptual question, but normative one. In other words, the relevant question is whether we are prepared to consider all (or most) social rights in the same way as (DC) rescue rights (and, of course, as negative incidents of classical rights), namely: in a way that implies that we have the obligation to fulfill the social right to X in one particular case, even if doing so would reduce the overall satisfaction of the social right to X. To anticipate my view: I think this is not plausible because social rights are better constructed as mandates to optimize certain goals.

Social rights are optimizing mandates in two senses. First, they allow for intra-subjective trade-offs. They form an interrelated set of interests, the joint satisfaction of which enables the individual to lead a minimally satisfactory life. Take the rights to decent housing and to health. It is clear that most persons will rationally seek to optimize the joint satisfaction of both rights; or else they may decide to give up some degree of satisfaction of one of them to increase the satisfaction of the other one. The same is true for all social rights. In essence, the substantial normative claim that underlies them is the enjoyment the set of goods we need to lead a minimally autonomous or dignifying life (let us call this set “basic needs”). The state’s correlative duty is an optimization mandate as well, in the sense that it requires the provision of that set of goods that allows the optimal satisfaction of basic needs. Furthermore, each of the individual duties correlative to specific rights (to housing, health, nutritious food and so on) stands in some sort of tension or trade-off with the rest. Note that this is not the case with classical rights. Even if individuals may rationally want to sacrifice a certain degree of freedom of speech or vote in exchange for an improved satisfaction of her basic needs (better housing or health care), we would not accept that the authorities engage in these kinds of trade-offs.

Social rights are also inter-subjectively optimizing. The aim of social rights public policies is to satisfy social rights for an entire population and in the long run. This means trying to achieve something like a state of affairs in which the satisfaction of basic needs is given to as many people as possible, or a state of affairs in which the satisfaction of basic needs of

11 On the controversy between saving identified versus statistical lives, see Cohen, Daniels and Eyal (2015).

those who are worse off increases to the greatest extent possible, or some other optimal state of affairs in terms of justice.

These two optimizing features of social rights do not necessarily imply that social rights are not genuine rights. Insofar they can be legitimately constructed as priority goals which take care of essential interests, rights language is not inadequate. Still, whatever preeminence or importance we are willing to give to social rights, it is important to stress that they operate as social goals, that is: goals the state must promote according to some criterion of justice or efficiency to be optimized through an adequate set of public policies. Such policies may be constrained by classical rights, but not by the same social rights.

To determine to what extent social rights can be DC, let us briefly consider Henry Shue's discussion of a thesis sustained by Garret Hardin. According to Hardin, humanitarian aid to the global poor is self-defeating because, given the limited carrying capacity of the planet, it will only produce more global poverty in the future (Shue 1980: 97-104). Although Hardin's theory has lost its appeal because it has proven empirically false, it is nevertheless interesting as it helps us to test if we are willing to consider the human right to subsistence as a DC it has proven empirically false (see Drèze and Sen 1989).

If the social right to subsistence generates a DC duty, then we should take action to satisfy it, even if this would undermine its satisfaction for a greater number of people in the future. On the other hand, if the social right to subsistence only expresses a principle of justice that seeks to minimize (or eradicate) extreme poverty, then we should refrain from helping the poor now to avoid more poverty in the future – provided Hardin's thesis were true. Of course this is a false dilemma, but it is remarkable that Shue's discussion focuses primarily on showing that the empirical basis of the theory is false, not that we should satisfy the right to subsistence regardless of what may happen in the future.<sup>12</sup> This does not prove that Shue was thinking of social rights as optimizing goals, but it suggests he was. And plausibly so. When we think of extreme poverty, our concern is to reduce or eradicate poverty, and we are willing to appeal to any means to achieve that goal (compatible with the fulfillment of some fundamental classical rights). We would not be willing to advance policies that, in the name of helping the poor (or satisfying their social rights), increase

12 "The dilemma suggested by the population objections dissolves entirely, provided that in fact poor countries have, or can obtain, means of controlling population growth that are compatible with the protection of subsistence rights" (Shue 1980: 101).

the number of poor people (or the non-satisfaction of their social rights).<sup>13</sup>

These arguments do not show, as I said at the beginning, that social rights cannot be considered human rights. What they show is that social rights have a different normative structure vis à vis classical rights. The latter have a relevant DC component: we are willing to sacrifice valuable social goals (including the satisfaction of classical rights; including the satisfaction of that very classical right) to fulfill classical rights in each relevant occasion. Social rights, on the other hand, cannot be plausibly conceived in this way. I repeat: we would not be willing to allow more people to remain in poverty if this were the consequence of actively bringing fewer people out of poverty.

## 6. SOME INSITUTIONAL IMPLICATIONS

The conceptual distinction between liberal and social rights that I explored may have significant practical implications in terms of the judicialization of social rights, which I will now try to sketch though maintaining a considerable level of abstraction. Schematically, there are three kinds of procedures judges may use to make a decision in the field of social rights.

The first kind of decision takes the claim of the right holder as a DC right. In the case of classical rights, this is obviously the rule. For example, when a judge declares that an act of censorship is unconstitutional and cancels the closure of a newspaper, she does so to satisfy the right to free speech. Importantly, the judge's duty correlates to a DC right, since she is not allowed to consider the social consequences of reopening the newspaper. Similarly, in the realm of social rights, a judge can order the executive to grant a specific indigent family adequate housing or a specific patient an expensive medicine.<sup>14</sup> In these cases, she follows the same kind of reasoning: she is not calculating the burdens and benefits her decision may entail for society as a whole.

A second kind of intervention is familiar in the realm of social rights and should not be confused with the first one.<sup>15</sup> Suppose there is a governmental policy that provides some service to the population, say

<sup>13</sup> In the terminology coined by Guido Pincione and Fernando Tesón, publicly defending that kind of policy would be a case of "discourse failure" (Pincione and Tesón 2006: 142 ff.).

<sup>14</sup> For example, in *Q. C., S. Y. v. Gobierno de la Ciudad Autónoma de Buenos Aires*, a judge ordered the government of Buenos Aires to provide adequate housing to an indigent family with a disabled child. The decision was reversed by the Superior Court of Buenos Aires.

<sup>15</sup> Leticia Morales has made me aware of this kind of intervention.

basic education for every child. Imagine now that one specific child (or set of children) is denied the service (for reasons of scarcity or for any other reason). In such case, the judge might order the executive to provide the service to that particular child (or set of children). In one sense, the intervention works as if the child had a DC right to basic education, because her claim is taken as a sufficient reason (for the judge) to deliver that order. Still, I do not think a DC right to education is necessary involved, but rather a DC right to equal treatment. *Given that* there is a policy providing some service, it must be provided to all. Similar examples can be provided for the case of health-care services.

Finally, there is a third kind of judicial intervention which is qualitatively different in nature. In this kind of case, the judge orders the executive simply to deal with housing shortage, or to clean a polluted river, or to provide education, or to have some kind of social security plan, etc. So she is intervening in public policy in order to promote some valuable social goal, such as the goal that no one lacks housing, food or education, or that the river is clean. This is the intervention path followed, for instance, by the South African Supreme Court in the well-known “Grootboom” and “T.A.C.” cases, which required that the government implemented a “reasonable” policy to provide adequate housing and essential HIV drugs to its population.<sup>16</sup> Along the same lines, in the case “Mendoza” the Argentine Supreme Court urged the executive to issue an “integrated plan” to improve the environmental situation of the polluted river “Riachuelo”.<sup>17</sup> Naturally, I am not claiming that this type of intervention is not justified or that the judiciary should not make this kind of decisions; my sole claim is rather that this is an essentially different sort of intervention.

From a strictly normative point of view, the relevant question is whether the judiciary should intervene only in the first (and the second) way, or we want it to intervene in the third way as well. For only the first kind of intervention implies granting social rights a DC status. Instead, the second one is not essentially about social rights, while third one does not deliver on a DC right.

One relevant conclusion we may draw from the above argument is that when courts behave in the third way, they are doing something conceptually and normatively different from what they do when they behave in the first one. We can of course say that they are enforcing social rights in both cases; but they are not doing the exactly same in the most fundamental

<sup>16</sup> See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

<sup>17</sup> See *Mendoza, Beatriz Silvia y otros c/Estado Nacional y otros s/daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza-Riachuelo)* (M.1569.XL).

conceptual sense: whereas in the first case the court is treating the social right as a DC right, in the third one, it is treating the social right as a normatively prioritarian policy goal (based on considerations of justice).

This being so, we may wonder whether it is normatively acceptable or plausible that judges make the first kind of decision, taking (positive incidents of) social rights as DC rights (assuming, of course, that we find acceptable that they treat negative incidents of classical rights as DC rights). I cannot pursue this question here, but I think there are reasons to be skeptical. As I mentioned before, taking social rights as DC rights seems plausible only in exceptional cases, such as those which involve rescuing people from imminent, serious and irreparable harm (typically death). Beyond this, judicial intervention to provide specific solutions to specific problems (lack of housing, lack of medical care, lack of adequate education, etc.) is highly problematic. This is so because fulfilling a certain right (to adequate housing or health care, for example) in a particular case fails to factor in relevant social consequences; and when these kinds of measures are not taken in truly exceptional cases they may end up being detrimental to the satisfaction of the very right involved (they result, for instance in less people having adequate housing or health services).<sup>18</sup> Even though we are prepared to face such paradoxical result in the case of classical rights, it is much less clear that we want to do so with social ones.

## 7. CONCLUDING REMARKS

I conclude briefly. I wanted to bring to light a feature that at least some essential aspects of classical rights have. My question was whether that feature (which I called DC) also operates plausibly in the case of social rights. My response was cautiously negative. Conceiving of social rights as DC rights might be reasonable in extreme situations or catastrophes, in which we have a very strong intuition in favor of saving concrete people with partial or total independence of the subsequent consequences of that decision. But this conceptual framework is inadequate to think about social rights in general, which are rather mandates to satisfy certain minimum in the satisfaction of basic needs of the whole population. This seems rather a mandate for optimization and, therefore, is qualitatively different from what happens with classical rights.

<sup>18</sup> This is not just a speculation. See Wang 2015, where Wang describes how courts decisions to provide medical treatments to specific persons have become an important factor of the health policy in Brazil. Wang very plausibly claims that this has negative consequences in terms of distributive justice of the access to health services. The reason is, following my terminology, that judges enforce the right to medical treatment as DC rights, without looking at the consequences.

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